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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1986 to December 31, 1986

VOLUME 1

PAGES 1-774

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Commissioner of Education

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212 N.J. Super. 624

Penns Grove-Carneys Pt. Education v. Board of Education
209 N.J. Super. 115

Board of Education of City of Plainfield v. Cooperman.
209 N.J. Super. 174

Polaha v. Buena Regional School District.
212 N.J. Super. 638

Stockton v. Board of Education of the City of Trenton.
210 N.J. Super. 150

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7907-84
AGENCY DKT. NO. 378-8/84

FREDERICK J. NANGLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,
Respondent.

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

William C. Davis, Esq., for the respondent (Davis, Reberkenny & Abramowitz, attorneys)

Steven R. Cohen, Esq., for the intervenor, John Karaska (Selikoff & Cohen, attorneys)

Record Closed: October 10, 1985 Decided: November 22, 1985

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the termination of the petitioner's employment with the Board of Education of Cherry Hill Township (Board) due to a reduction in force. The petitioner requested a hearing and the matter was transmitted 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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PROCEDURAL HISTORY

At the prehearing conference held on December 11, 1984, the parties agreed that there were two issues in this matter. The first issue is whether the petitioner's employment between March 7, 1973 and October 1976 is countable toward tenure and seniority and, if so, what is the appropriate remedy. Thereafter, the Board admitted that the petitioner is entitled to tenure and seniority credit for the period between October 6, 1975 and October 1976. The second issue is whether the petitioner was entitled to a sixty-day salary payment after his termination by the Board. During the hearing, it was agreed that there was a third issue in this matter, namely, whether the provisions of the new law regarding military service credit, Chapter 217 of the Laws of 1985 (approved and effective as of June 29, 1985) was applicable in this matter and if so, what effect did this statute have on the petitioner's tenure and seniority rights.

During the prehearing conference, I ordered the Board to notify all persons who may be affected by a favorable decision for the petitioner as to their right to intervene and participate in this matter. Such notices were sent to John P. Karaska, William P. Gannone, Alexander M. Kupczyn and John N. O'Neill on January 8, 1985 (J-10).

On the first day of the hearing, Steven R. Cohen, Esq. moved to intervene in the matter on behalf of John Karaska. The parties being in agreement, I permitted Mr. Cohen to make an appearance on behalf of Mr. Karaska.

Also, during the prehearing conference and the first day of the hearing, Mr. Friedman indicated that he was having difficulty finding an expert witness to testify as to whether Mr. Nangle was entitled to tenure and seniority credit for the period of time he was employed as an Industrial Arts teacher without proper certification but during which time he was allegedly eligible for an emergency or provisional certification.

Prior to the second day of the hearing, scheduled for April 18, 1985, Mr. Friedman subpoenaed Dr. Celeste Rorro, Director of the Office of Teacher Certification and Academic Credentials, Department of Education. On April 18, 1985, Deputy Attorney General Susan Kanter appeared on behalf of Dr. Rorro and argued that the subpoena should be quashed because a state employee should not be required to testify

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as an expert witness. I heard oral arguments on this motion and adjourned the hearing to give the parties an opportunity to file legal memoranda. Thereafter by order dated May 23, 1985, I quashed the subpoena issued to Dr. Rorro; however, I stated that Mr. Friedman had the right to subpoena Dr. Rorro to testify as a factual witness.

The hearing in this matter took place on February 28, 1985, April 18, 1985 and August 13, 1985. After receipt of additional stipulations and briefs from the petitioner and the intervenor, the record in the matter closed on October 10, 1985.

Factual Findings

I **FIND** that the pertinent facts in this matter are not in dispute. The following facts were stipulated by the parties:

(1) Mr. Nangle applied for a teaching position with the Cherry Hill Public Schools on March 9, 1972 (J-2), and he was hired as an electronics/electricity teacher as of March 7, 1973 (J-1).

(2) Electronics/electricity is an industrial arts course and not a vocational technical course.

(3) At the time he was hired, Mr. Nangle had a provisional certificate as a vocational technical related subject teacher.

(4) In April 1974, Mr. Nangle received a certification as a teacher of electrical construction trades, teacher of electronic technology and teacher of vocational technical related subjects (R-3).

(5) Mr. Nangle received a Master of Arts Degree in Industrial Education from Glassboro State College on October 6, 1975 (J-5), and he received a B.E.E. degree from the College of Engineering, New York University, on June 11, 1952 (J-6).

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(6) In October 1976, Mr. Nangle received a certification as a teacher of industrial arts (J-7), and it was established that he was eligible for this certification on October 6, 1975 (J-4).

(7) Mr. Nangle received a coordinator cooperative industrial education certification in February 1979 (J-1).

(8) The Board's record for Mr. Nangle reflects the following:

SCHOOL YEAR	TEACHING POSITION
March 7, 1973 - June 30, 1973 1973-74 through 1979-80	Electronics Electricity, Industrial Arts Teacher
1980-81 and September and November 1981	Industrial Arts Teacher
November 1981 through June 1982	CIE Coordinator and Industrial Arts Teacher
1982-83 through 1983-84	Industrial Arts Teacher

(9) By letter issued in the spring of 1975, Mr. Nangle was informed that he would receive tenure status as of March 8, 1976 (J-3).

(10) By letter dated June 12, 1984, Mr. Nangle was advised that because of a need for a reduction in force, his contract as an Industrial Arts teacher would not be renewed for the 1984-85 school year and that his name would be placed on the preferred eligibility list for reemployment (J-9).

(11) As of June 30, 1984, exclusive of any military service credit, if Mr. Nangle was entitled to tenure and seniority credit from the initiation of his employment on March 7, 1973, he would have 11 years, 3 months and 24 days; if the credit were to start from October 6, 1975, Mr. Nangle would have 8 years, 8 months and 24 days; and if the credit were to start from October 1976, Mr. Nangle would have 7 years and 8 months (J-1).

(12) Mr. Nangle's salary payments were made based on a ten-month pay period.

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(13) Mr. Nangle's employment was terminated as of June 30, 1984 because of a reduction in force (J-9).

(14) As of June 30, 1984, exclusive of any military service credit, John N. O'Neill and William P. Gannone had 10 years of tenure and seniority credit, and Alexander A. Kupczyn and John P. Karaska had 8 years of tenure and seniority credit.

(15) Only Mr. O'Neill is currently employed by the Board. Mr. Gannone, Mr. Kupczyn and Mr. Karaska were terminated on June 30, 1984 due to a reduction in force.

(16) John Karaska was hired by the Board on September 1, 1974 as a teacher of industrial arts for the 1974-75 school year. At the time he was hired, Mr. Karaska possessed a standard New Jersey teaching certificate as a teacher of industrial arts, which was issued in June 1970.

(17) While employed by the Board, Mr. Karaska acquired a New Jersey certificate as coordinator, industrial education in July 1978 and principal/supervisor in May 1980. Mr. Karaska also has a certification as a teacher of carpentry, issued in August 1984; a certification as a teacher of electronic products servicing, issued in August 1984; and a certification as a coordinator of apprentice programs issued in October 1984.

(18) The Board's record for Mr. Karaska reflects the following:

SCHOOL YEAR	TEACHING POSITION
1974-75 through 1976-77	Industrial Arts
1977-78 through 1981-82	Cooperative Industrial Education
1982-83	Approved leave of absence without pay
1983-84 through 1984-85	Tenure preferred eligibility list after termination due to reduction in force.

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(19) Mr. Nangle enlisted in the U.S. Navy on June 25, 1945, reported for duty on July 6, 1945, and he was discharged on January 12, 1949 (J-11, J-12).

(20) The active military service for the persons who may be affected by this decision is as follows:

John N. O'Neill	3 years, 19 days
John P. Karaska	3 years, 11 months, 29 days
William P. Gannone	none
Alexander M. Kupczyn	none
Frederick J. Nangle	3 years, 6 months, 9 days[1]

William Laub, Administrative Assistant for Personnel for the Board, testified that it was his practice to notify teachers in April of their employment status for the following school year. According to Mr. Laub, he orally notified Mr. Nangle in April 1984 that he might not be reemployed for the 1984-85 school year because of a possible reduction in staff. Mr. Nangle did not receive a formal letter regarding the reduction in force until June 12, 1984 (J-9).

On the last day of the hearing, August 13, 1985, Dr. Rorro testified that she had not been employed by the Department of Education during the period in issue, March 1973 through October 6, 1975; however, she was aware that the department had established procedures for the issuance of emergency and provisional certifications during the period in issue (P-1, P-2, P-3). Also, based on the information available in her office, Dr. Rorro stated that there was a shortage of industrial arts teachers in the southern part of New Jersey for the entire period in issue. According to Dr. Rorro, an emergency certificate is issued upon the recommendation of a committee and a provisional

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[1] Excludes the period from June 25, 1945 through July 6, 1945. The parties have not agreed as to whether or not this period should be included for military credit. The dispute as to these 11 days is not significant since pursuant to the decisions in Lavin v. Bd. of Ed. of Hackensack Borough, 178 N.J. Super. 221 (App. Div. 1981), aff'd, 90 N.J. 145 (1982); Union Tp. Teachers Ass'n v. Bd. of Ed. of Union Tp. (N.J. App. Div., March 9, 1981 A-3065-79) (unreported); Schmidt and Laib v. Bd. of Ed. of New Providence Borough, OAL DKT. EDU 1305-82 (Aug. 4, 1982), rejected, Comm. of Ed. (Sept. 20, 1982), rev'd, State Bd. of Ed. (Dec. 3, 1982), aff'd (N.J. App. Div., July 30, 1984, A-1955-82T3) (unreported), cert. den., 99 N.J. 1961 (1984), the amount of military credit that Mr. Nangle is entitled to is to be rounded off to 4 years.

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certificate is issued based on a review of the applicant's education record and a determination of whether or not there was a teacher shortage in the subject. Based on her review of the procedures for the period in issue (P-1, P-2, P-3) and the information she had regarding Mr. Nangle's education, Dr. Rorro stated that the petitioner had been eligible for a provisional certification for the 1972-73 through 1975-76 school years; however, according to the records in her office, the Board did not apply for the issuance of such a certification to Mr. Nangle during the period in issue.

CONCLUSIONS OF LAW

The first issue in this matter relates to the date from which Mr. Nangle is entitled to tenure and seniority credit, and the following three dates were discussed during the hearing:

March 7, 1973	initiation of Mr. Nangle's employment with the Board
October 6, 1975	notification of Mr. Nangle's eligibility for standard certification as an industrial arts teacher
October 1976	issuance of standard certificate as an industrial arts teacher to Mr. Nangle

Mr. Friedman argued that Mr. Nangle is entitled to tenure and seniority credit from the date of his employment, March 7, 1973. The Board admitted, with the concurrence of Mr. Cohen, that Mr. Nangle is entitled to tenure and seniority credit from October 6, 1985, the date of the notification of eligibility for certification. See, Saad v. Bd. of Ed. of Dumont Borough, OAL DKT. EDU 4126-81 (March 25, 1982), adopted, Comm. of Ed. (May 10, 1982); Hausser v. Bd. of Ed. of Ewing Twp., OAL DKT. EDU 7715-82 (May 16, 1982), adopted, Comm. of Ed. (June 30, 1983); Vexler v. Bd. of Ed. of Red Bank Borough, 1980 S.L.D. 272, Kane v. Bd. of Ed. of the City of Hoboken, 1975 S.L.D. 12.

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Mr. Davis argued that Mr. Nangle is not entitled to credit for the period from March 7, 1973 through October 6, 1975 and represented that the letter that had been sent to Mr. Nangle stating that he had acquired tenure as of March 8, 1976 (J-3) was based on an incorrect interpretation of the law and no longer reflects the position of the Board. Mr. Cohen took no position as to the petitioner's eligibility for credit for this period. Mr. Friedman's position that the petitioner is entitled to credit for this period is based on the fact that Mr. Nangle was eligible for a provisional certification from March 7, 1973 till October 6, 1975, and in support of his position, Mr. Friedman cited the Commissioner's decision in Amato v. Bd. of Ed. of the Hudson Cty. Area Vocational and Technical Schools, OAL DKT. EDU 10125-83 (Sept. 20, 1984), rejected, Comm. of Ed. (Nov. 8, 1984). In that case, Mr. Amato was initially employed as a job placement coordinator and was informed that a certificate was not necessary for the position. Later it was determined that a certificate was necessary. Mr. Amato was eligible for an emergency certificate from the date of his employment and thereafter he received such a certificate prior to obtaining a standard certificate. In his decision, the Commissioner stated that he is

> constrained to observe that had the Board complied with the above-cited regulations petitioner would have possessed an appropriate teaching certificate throughout the course of his employment with the Board. The Commissioner cannot condone the Board's action in this regard inasmuch as it would not have been forced to terminate petitioner on November 17, 1982 and reemploy him thereafter as of February 1983. As a matter of fundamental fairness the Commissioner finds that the Board's failure to act under these specific circumstances should not deprive petitioner of tenure protection pursuant to provisions of N.J.S.A. 18A:28-5(c) which would have attached from the commencement of his initial employment as of October 1, 1980 through March 1984 when he obtained his permanent teacher's certificate. Accordingly, the Commissioner finds and determines that the petitioner was eligible for an emergency certificate as of the date of his initial employment which must be considered without interruption for the purpose of construing his total employment service and the acquisition of tenure pursuant to N.J.S.A. 18A:28-5(c). [Slip opinion, 3-4].

Mr. Friedman argued that when Mr. Nangle became eligible for the standard certificate, all of his prior service became creditable for tenure and seniority purposes and cited the decision in Proebstle v. Bd. of Ed. of Burlington Cty. Vo-Tech. High School, OAL DKT. EDU 771-82 (Sept. 20, 1982), adopted with modifications, Comm. of Ed. (Oct. 29, 1982).

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Also, Mr. Friedman argued that since Mr. Nangle taught industrial arts, there is a presumption that he was certified or eligible for a substandard certification to teach that subject. See, Proebstle.

After reviewing the facts and the legal arguments of the parties, I CONCLUDE that the facts in this matter are similar to those in Amato, and based on the decision in that case, Mr. Nangle is entitled to tenure and seniority credit from the initiation of his employment. The Board's records should be amended to reflect that as of June 30, 1984, Mr. Nangle had tenure and seniority credit of 11 years, 3 months and 24 days, exclusive of any military service credit. Further, I CONCLUDE that the Board incorrectly terminated the employment of Mr. Nangle since he had more seniority than the other persons notified regarding this matter.

The next issue in this matter relates to whether or not the petitioner was entitled to a 60-day salary payment after he was terminated by the Board. This issue is moot in view of my conclusion that Mr. Nangle was improperly terminated.

The last issue in this matter relates to the question of credit for military service. The petitioner, Mr. O'Neill and Mr. Karaska were in the military but were not given any military service credit as of June 30, 1984, since they were not employed by the Board prior to their military service, and this decision by the Board was consistent with the prevailing interpretation of the law at the time, Corrado v. Bd. of Ed. of Newfield Borough, OAL DKT. EDU 6197-83 (March 7, 1984), rejected, Comm. of Ed. (May 24, 1984), aff'd, State Bd. of Ed. (April 3, 1985), remanded on other grounds by Appellate Division (N.J. App. Div., Oct. 18, 1985, A-3663-84).

As of June 29, 1985, the law relating to military service credit was amended by Chapter 217 of the Laws of 1985 (Act), and these three individuals would now be entitled to military service credit. Since there is no language in the Act providing for retroactive application and since the Board acted in good faith in making its seniority determinations as of June 30, 1984, I CONCLUDE that the petitioner, Mr. O'Neill and Mr. Karaska are not entitled to military service credit retroactive to June 30, 1984. It has been well recognized in this state that statutes should not be given retroactive application unless such application is clearly provided for or unless the intent of the Legislature cannot be satisfied without such application, Lavin, Kopczynski v. Camden County, 2 N.J.

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419 (1949), Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), Rutherford Ed. Ass'n. v. Rutherford Bd. of Ed., 99 N.J. 8, (1985). Most certainly to give retroactive application to the Act regarding persons involved in a reduction in force decision which took place prior to the effective date of the Act would cause havoc and disruption throughout the state by upsetting settled staff assignments as well as creating potentially substantial financial impacts.

However, I **CONCLUDE** that the Act does effect the current seniority status of the petitioner, Mr. O'Neill and Mr. Karaska and that they are entitled to rounded off equivalent credit for their military service, Lavin, Union Township, and Schmidt and Laib, which can affect their seniority as to other teachers employed by the Board or their placement on the preferred eligibility list. Specifically, I **CONCLUDE** that both the petitioner and Mr. Karaska are entitled to 4 years of military service credit (I have not made any conclusion as to Mr. O'Neill's credit since he was not a party in this matter).

Further, it should be noted that even if the Act were applied retroactively, it would not affect the outcome in this matter since with military service credit, Mr. Nangle would still have more seniority than Mr. O'Neill, Mr. Karaska, Mr. Gannone or Mr. Kupczyn.

CONCLUSION

I **ORDER** that Mr. Nangle be reinstated by the Board as a full time industrial arts teacher as of the date of the final decision in this matter and that he be given back pay for the period from September 1984 to the date of his reinstatement less mitigation. Also, I **ORDER** that Mr. Nangle be provided, as of the date of the final decision in this matter, with all benefits and emoluments to which he would have been entitled if he were not terminated as of June 30, 1984.

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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 22, 1985
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 27 1985
DATE

Ronald J. Parker/x.s
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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FREDERICK J. NANGLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner concurs with the recommended decision of the Office of Administrative Law but suggests a modification if the Commissioner disagrees with the conclusion that his seniority credit for military service should be rounded off to four years. He believes that even if the Commissioner rejects rounding off, he is still entitled to over 15 years seniority because his service in Cherry Hill was 11 years, 3 months and 24 days and his military service was 3 years, 6 months, and 9 days. Thus, based on Schmidt and Laib, supra, his combined teaching and military service totals 14 years, plus a period 3 days in excess of 10 months, which equals 15 years, 3 days seniority.

Intervenor Karaska concurs with the above calculation advanced by petitioner and states that on the basis of Schmidt and Laib, supra, his own seniority calculation for military service credit would remain 4 years even if not rounded off.

Upon examination of the record in this matter, the Commissioner concurs with and adopts as his own the judge's conclusion that petitioner is entitled to tenure and seniority credit from the date of his initial employment, such that as of June 30, 1984 seniority credit for service in Cherry Hill equals 11 years, 3 months and 24 days for the reasons expressed in the initial decision.

The Commissioner also concurs with and adopts as his own the judge's determination that military service credit may not be applied retroactively to June 30, 1984 since the law relating to military service was amended as of June 29, 1985. See State Board decision on remand in Corrado, supra, December 4, 1985. He also accepts as his own the determination that prospective relief is to be accorded petitioner, Intervenor Karaska and Mr. O'Neill. However, clarification is needed with respect to how this prospective relief is to be applied.

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Military service credit does not impact on the June 30, 1984 reduction in force. As stated by the State Board in its December 4, 1985 Corrado decision, military seniority credit as granted by the amended N.J.S.A. 18A:28-12 applies only to reductions in force which occur after the effective date of June 29, 1985. Mr. O'Neill remained in the employ of the Board after June 29, 1985. Thus, should his employment be affected by way of a reduction in force after that date or by virtue of the holding in this matter with respect to petitioner's erroneous seniority calculation for service rendered in Cherry Hill, his seniority calculation would include military service credit.

The current reading of N.J.S.A. 18A:28-12, as well as the prior reading, states that recognition of teaching and military service be given "...in determining seniority, and in computing length of service for reemployment...." (Emphasis supplied). Thus, as regards Intervenor Karaska, military service credit would be applied for reemployment purposes, although it does not apply to the June 30, 1984 reduction in force. What this means is that the calculations used by the Board, as modified herein with respect to petitioner, remain undisturbed with regard to which teachers were entitled to remain in the employ of the Board as of June 30, 1984. However, if or when a vacancy occurs, the computation of length of service for reemployment purposes would include military service credit. See April 3, 1985 State Board decision in Corrado, supra.

Petitioner was erroneously terminated as a result of the June 30, 1984 reduction in force in the Cherry Hill District. His entitlement to reinstatement is based strictly on service rendered in that district. Military service credit would be applied to him prospectively, only if or when his employment were to be affected by a reduction in force occurring after June 29, 1985. In addition, he is entitled to seniority credit as though he had actually served in the district after June 30, 1984 since he had been improperly denied employment as of that date.

The Commissioner does not concur with the judge's determination that military service credit for seniority purposes is to be rounded off. Lavin, supra; Union Township, supra; Kopczynski, et al., supra; and Camden County Vocational-Technical Education Association, decided September 30, 1983, wherein rounding off was applicable, dealt only with military service credit for salary purposes, not for seniority purposes. N.J.S.A. 18A:28-12 requires that military service "...shall be credited to him as though he had been regularly employed in [a teaching] position within the district during the time of military or naval service, except that the period of that service shall not be credited toward more than four years of employment or seniority credit." [Emphasis supplied). That seniority credit is always based on actual time served is well established in case law. However, in Schmidt and Laib, supra, the New Jersey Superior Court, Appellate Division, established that "...a full calendar year of employment is the equal of a full academic year of employment." (Slip Opinion, at p. 3)

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On the basis of the above factors, it is herein determined that if or when military service credit may come into play for petitioner (by virtue of a reduction in force subsequent to June 29, 1985) and for Intervenor Karaska (upon a recall situation), said individuals are entitled to the following amounts of credit. Intervenor Karaska would receive four years of military service credit because in addition to 3 full years of service, the remaining 11 months and 29 days count as one academic year. Schmidt and Laib, supra Petitioner would receive credit for 3 years, 6 months and 18 days, the total net naval service completed. (J-12)

Accordingly, the Commissioner accepts and adopts as his own the recommended decision of the Office of Administrative Law as modified herein, ordering petitioner's reinstatement with all back pay (less mitigation), benefits and emoluments owing to him.

COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SHORE CONFERENCE AND NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

This matter was opened before the Commissioner through the filing of a Petition of Appeal on November 1, 1985 by the Rumson-Fair Haven Regional High School Board of Education (Board) in accordance with N.J.A.C. 6:24.

Pursuant to the advisory opinion rendered by the Attorney General of New Jersey on May 15, 1985, the Commissioner will rule on the appeal on the basis of the record made before the New Jersey State Interscholastic Athletic Association (NJSIAA). The record of the proceedings before NJSIAA, as well as information submitted by the parties upon the filing of the Petition of Appeal, comprise a record sufficient to enable the Commissioner to render a determination with respect to the controversy. On November 6, 1985 the parties were notified that the Commissioner would assume immediate jurisdiction to render a decision in the matter and they were invited to submit any briefs or additional arguments not already part of the record.

The Board challenges the re-alignment of the Shore Conference, particularly the "C" Division of which it would be part, alleging that respondent's action in said re-alignment is arbitrary, capricious and unreasonable. The "C" Division established for 1986-88 includes:

	School	Approximate Mileage From Rumson-Fair Haven	Approximate Travel Time
1.	Monsignor Donovan	37	60 Min.
2.	Rumson-Fair Haven	--	--
3.	Freehold Borough	19	40 Min.
4.	St. Rose	21	40 Min.
5.	Manchester Township	35	55 Min.
6.	Shore Regional	6	10 Min.
7.	Pinelands Regional	63	90 Min.

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The Board believes Respondent Shore Conference's action to be arbitrary, capricious and unreasonable because it is based strictly on enrollment, without consideration to geographics, which creates undue hardship for the various school districts involved, particularly its own district. More specifically, it contends that except for Shore Regional, none of the other school districts are geographically near Rumson-Fair Haven and three will require travel of approximately one hour or more. Further, the Board opposes the re-alignment because, inter alia:

1. It reduces the number of traditional rivals in several divisions of the conference.

2. The unusually long distances and elimination of traditional rivals will adversely affect parent and student support.

3. The travel schedules for teams may have a deleterious impact on the educational program by necessitating early dismissals from school.

4. Travel costs and reduced revenues would likely occur.

5. Gifted athletes will pursue their educational programs elsewhere due to the adverse impact of the proposed re-alignment.

The background of the Petition reveals that it was previously filed before the Commissioner in May 1985 but was dismissed in July 1985 due to lack of primary jurisdiction of the Commissioner and failure to exhaust appropriate administrative remedies through NJSIAA. The Board sought relief from that entity through a hearing in September 1985, whereupon, in October 1985, the Executive Committee of NJSIAA rendered its decision dismissing the appeal and determining not to interfere with the divisional alignments made by the Shore Conference for 1986-88.

The instant Petition of Appeal challenges the final decision of NJSIAA and the re-alignment action of the Shore Conference. The Board requests, inter alia, that the Commissioner order rescinding of the re-alignment plan and compelling the Shore Conference to prepare a revised re-alignment plan for 1986-88 that will properly and fairly take into consideration enrollment and geographics and that will establish divisions that are appropriate for all school districts.

Respondent Shore Conference contends, inter alia, that:

1. The Re-alignment Committee report was submitted to, reviewed and accepted by the Conference's Executive Committee and that

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all decisions with respect to re-alignment were made as required by its Constitution.

2. All schools in the re-alignment of Division "C" are geographically close to Rumson-Fair Haven with the exception of Pinelands Regional.

3. One of the primary educational requirements with respect to athletic activities is to acquire equality and fairness of competition among all schools, large or small, but also particularly among smaller schools where smaller enrollments may have a greater effect on competition.

4. In major sports such as football, petitioner would only have to travel to division schools once every other year and for sports such as basketball, soccer and baseball only once a season.

5. The Conference acted in a reasonable and proper manner in following its Constitution and adopting a re-alignment policy to comply with such and for the well-being of its membership schools.

6. As regards lack of traditional rivals, petitioner has the opportunity to schedule events against such rivals and the Conference has not affected this opportunity nor has it done anything improper or unfair.

Respondent NJSIAA conducted a hearing on September 11, 1985 regarding the controverted matter herein. The Findings of Fact reached by its Executive Committee are as follows:

1. Rumson is a voluntary member of the Shore Conference, which itself consists of 47 member schools in Monmouth and Ocean Counties. (See attachment A to Exhibit S-3)

2. The Constitution of the Shore Conference allows the Realignment Committee to realign divisions on enrollment basis, as well as on other factors.

3. Of the six divisions, the 14 schools with the lowest enrollment were placed in the "C" and "D" divisions. The C Division [is comprised of] Rumson and three other schools

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in reasonable geographic proximity, as well as Manchester and Monsignor Donovan approximately 30 miles distance, and Pinelands, approximately 50 miles distance.

4. It appears that given the unique location of Pinelands, in a rural area of Southwest Ocean County that this school's placement in any division, would require many other schools in the Shore Conference, with similar enrollments to travel comparable distances as Rumson.

5. It was determined by the Shore Conference to arrange the smaller divisions according to enrollment since it believed that there was closer correlation between safety and competitiveness factors and schools with a smaller enrollment.

6. The placement of schools in any division would cover only 12 major sports, even though 21 sports are played by various Shore Conference schools. In addition, even in the major sports covered by divisional alignments, Rumson would be playing a number of their contests outside of their division in areas in closer geographic proximity. (Final Decision of Executive Committee, NJSIAA, at pp. 2-3)

Upon consideration of the facts in the matter, the Executive Committee reached the following conclusions:

1. On April 11, 1983, the NJSIAA Executive Committee adopted a "League and Conference Position Statement" which was thereafter published in the June 1983 NJSIAA Bulletin (Volume XLI, #6). That position statement set forth in great detail, the relationship that would be maintained between the NJSIAA and some 30 athletic leagues and conferences, including the Shore Conference. In pertinent part, Section 4B, 1 and 2, of that Statement provided as follows:

   B. Responsibilities of Leagues of Conferences Which are Appealable to the NJSIAA

   The following responsibilities will be vested in conferences, with a limited right to appeal by member schools who are

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challenging league or conference determinations:

1. The Association will continue to exercise its supervisory role to assure membership by applicant schools in appropriate conferences and leagues. However, unless it can be shown that there has been a violation of the order of the Commissioner of Education that there be an opportunity for a full schedule of interscholastic sports, there will be no appeals from conference and league scheduling.

2. Many of their larger conferences and leagues have segmented their membership into "divisions", usually on the basis of geography or size. Unless it can be shown that such divisional breakdowns are violative of the order of the Commissioner of Education or at variance with the "Conference Criteria" established in May, 1981, no appeal from such internal divisional alignments will be considered by the NJSIAA.

[Emphasis in text].

2. There has been no contention by Rumson that the realignment has in any way involved the Commissioner's mandate of November 1979, to assure the integration of urban schools with heavy minority enrollment in appropriate leagues and conferences.

3. Enrollment is an accepted factor in the "Conference Criteria", contained in the League and Conference Position Statement.

4. The 1983 Position Statement was transmitted to the Commissioner of Education and was approved by that Office.

5. There has been no contention that there has been a violation of the Commissioner's mandate or that the enrollment basis for the divisional alignment was inconsistent with NJSIAA Conference Criteria.

6. The Executive Committee concludes that the decision of the Shore Conference to arrange for the placement of its small schools in divisions on strictly an enrollment basis,

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is directly related to a concern for health and safety and competitive fairness and is totally consistent with the 1983 Conference Statement.

7. The realignment of the Shore Conference has a rational basis to the proper Association policies of assuring safety and competitive fairness among member schools. (at pp. 3-4)

A thorough examination of the record, the positions of the parties contained in the materials submitted to the Commissioner, and the exhibits convinces him that the action of the Shore Conference to re-align its divisions was within the purview of its Constitution (Exhibit S-4, Article VII) and that such action was consistent with the criteria stated therein which reads, "Enrollment shall be considered as well as the number of divisions, schedules and/or geographic locations and such other items as the Shore Conference Executive Committee may deem to be material." (at pp. 8-9) That enrollment was the primary, controlling factor for re-alignment does not make the Shore Conference's action arbitrary, capricious or unreasonable. Absent a showing that respondents acted outside of or abused their authority in an arbitrary, capricious or unreasonable manner, the Commissioner cannot and will not interfere with their decision-making.

Accordingly, the Commissioner affirms the actions of the Shore Conference to re-align its divisions and NJSIAA's Executive Committee's determination not to interfere with the Shore Conference's judgment in this matter. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 2, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3412-85
AGENCY DKT. NO. 105-4/85

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF PASSAIC TOWNSHIP, MORRIS COUNTY

David W. Carroll, Esq., for petitioner, John C. Connor

Donald Malehorn, Esq., for respondent, Board of Education, School District of Passaic Township, Morris County
(Wiley, Malehorn & Sirota, attorneys)

Sue Dapkins, respondent, pro se

Record Closed: October 28, 1985 Decided: November 27, 1985

BEFORE **SYBIL R. MOSES**, ALJ:

I
Procedural History

The annual school election for the school district of Passaic Township, Morris County, was held on April 2, 1985. The election included balloting for three members of the Board of Education for full terms of three years each and balloting for one unexpired two-year term on the Board of Education. It is the unexpired two-year term which is the subject of the instant matter. John C. Connor was nominated by petition and Sue Dapkins

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was a write-in candidate for that term. The announced result of the vote for the unexpired two-year term was that Sue Dapkins had won the seat.

Pursuant to a letter-request from John C. Connor (J. Chris Connor) filed on April 10, 1985, an authorized representative of the Commissioner of Education from the Office of the Morris County Superintendent of Schools conducted a recount of the ballots cast on April 24, 1985, at the Morris County voting machine warehouse. At the conclusion of the recount, it was determined that there had been an error in reporting results affecting the tally of votes originally reported, which tally was revised (see page three of Commissioner's decision), but which did not affect the result. The Commissioner's report determined that Sue Dapkins had been elected to the unexpired two-year term on the Board of Education of the School District of Passaic Township, Morris County. I hereby take judicial notice of the May 31, 1985 decision of the Commissioner of Education which incorporated the report of the Commissioner's representative, and in which the Commissioner observed that there were three specific procedural violations prescribed by statute which required further inquiry before a final determination can be rendered with regard to the outcome of the recheck of the votes cast for the unexpired two-year term on the Board. See, Commissioner's Decision of May 31, 1985, pages 5 and 6.

The matter was transmitted to the Office of Administrative Law on June 5, 1985 for further findings of fact pertaining to the specifically delineated violations of statutory procedures. A prehearing conference took place, via telephone conference call, on August 7, 1985. On that date, counsel agreed that the Commissioner's decision had mandated the issues into which inquiry would be made, as follows:

1. The poll list at the Gillette polling place does not contain the stated addresses of the voters as prescribed by N.J.S.A. 18A:14-50 and N.J.S.A. 18A:14-51 as amended.

2. At the Gillette polling place, the poll list contains one more signature (128) than the number of voting authority slips issued (127), in violation of N.J.S.A. 18A:14-51, N.J.S.A. 18A:14-42 and N.J.S.A. 19:31A-8.

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3. The apparent illegal use of stickers or tape affixed to voting machines number 14981 (Millington polling place) and number 14983 (Gillette polling place) used in the Passaic Township annual school election. The placement of said stickers or tape on these voting machines constitutes violations of N.J.S.A. 19:48-6 and N.J.S.A. 19:52-2, and are subject to possible penalties which may be imposed under N.J.S.A. 19:53-1.

On August 7, 1985 the parties stipulated to the facts asserted in Issue No. 1; that the poll list at the Gillette polling place does not contain the stated addresses of the voters, as prescribed by N.J.S.A. 18A:14-50 and N.J.S.A. 18A:14-51 as amended. It was further stipulated that the foregoing fact did not affect the outcome of the election. The parties stipulated to the fact asserted in Issue No. 2; that at the Gillette polling place the poll list contains one more signature, 128, than the number of voting authority slips issued, 127, in violation of N.J.S.A. 18A:14-51, 18A:14-52 and N.J.S.A. 19:31A-8. The parties did not stipulate to the legal ramifications of that fact. The Board of Education does not contest the facts asserted in Issue No. 3 concerning the use of stickers or tapes affixed to voting machines number 14981, Millington polling place, and number 14983, Gillette polling place, used in the Passaic Township annual school election. No stipulations were made in regard to any legal conclusions to be drawn from those facts regarding actual illegality, statutory violations and/or penalties.

Subsequent to the prehearing conference, extensive settlement negotiations were conducted between counsel, which resulted in the parameters of a settlement being reached. That settlement was rejected by the Board of Education at its meeting on September 10, 1985. A conference call was held on September 19, 1985 for the purpose of scheduling a hearing. The hearing took place on September 30, 1985 at the Morris Township Municipal Building and at the Morris County voting machine warehouse, Cedar Knolls. Initial briefs were filed by October 21, 1985, and respondent, Board of Education, filed a response brief on October 28, 1985. The record closed on that date.

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II

List of Witnesses and Evidence

See, Appendices A and B.

III

Uncontroverted Facts

A review of the prehearing order and stipulated facts therein and a review of the testimony indicates that the following facts are uncontroverted:

1. The annual school election was held in Passaic Township, Morris County, on April 2, 1985, for the purpose of filling three seats on the Board for terms of three years each, one seat for an unexpired two-year term, and approval of the district's current expense and capital appropriations budgets.

2. Petitioner, John C. Connor, was the only candidate nominated by a petition for the unexpired two-year term. Suzanne (Sue) Dapkins sought the same two-year seat as a write-in candidate. Mr. Stefany, the secretary of the Board of Education, had no knowledge of her write-in campaign until just a few minutes before the polls opened.

3. There were three polling places, Millington School, Gillette School and Central School, and the polls were open from 4:00 p.m. until 9:00 p.m.

4. Voting machines were used at each polling place. The official ballot was properly reproduced on the voting machines. Approximately one inch to the left of the ballot, there was a column of write-in slots. The top write-in slot was approximately twice as high (measured vertically) as the other write-in slots, all of which were the same size. The top was one and one-half inches in vertical dimension and the remaining write-in slots were approximately three-eights of an inch vertically.

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5. Mr. Stefany called Mr. Ruggiero at the voting machine warehouse about one hour into the election in regard to the procedure for casting write-in votes.

6. After the call, the Board secretary directed election workers at each polling place to place a piece of tape or a sticker next to each write-in slot, designating each slot as three years, three years, three years and two years, respectively, referring to terms of office.

7. Four one-inch-square stickers marked "3," "3," "3" and "2" were affixed to the face of the voting machine at the Millington polling place. This action was taken by one of the workers at the Millington polling place on instructions from the Board secretary, Mr. Stefany. The tapes or stickers remained on the machine at the time of the hearing.

8. The election judge at the Gillette polling place, acting on instructions from the Board secretary, affixed one piece of tape marked " 3, 3, 3 and 2" to the face of the voting machine at the Gillette polling place. The tape was removed sometime prior to the recount held on April 24, 1985. It is not known who removed the tape.

9. At the conclusion of the election, the results were announced, as set forth in P-5, that Ms. Dapkins had been elected to the unexpired two-year term.

10. As a result of the recount requested by petitioner, conducted on April 24, 1985, the tally for the two-year seat was determined by the Commissioner on May 31, 1985 to be John C. Connor 142, Sue Dapkins 150. The Commissioner determined that all other write-in ballots were not ascertainable or legally not countable.

11. The poll list at the Gillette polling place does not contain the addresses of any of the voters who signed it. The fact that the poll list at the Gillette polling

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place did not contain the stated addresses of the voters did not affect the outcome of this election.

12. At the Gillette polling place, the poll list contains one more signature (128) than the number of voting authority slips issued on that date (127).

IV

Analysis of Testimony Concerning Facts in Dispute

Mr. Stefany testified that on election day, he visited the Gillette School right after the polls opened, at about 4:15. He then went to Millington at 4:30 and Central at 4:45. As a result of his visits, he realized there was a great deal of confusion among the voters because there were more write-in votes than in previous years. The questions that arose came from the election workers and judges, and concerned where a voter should put in his or her write-in vote. The most specific questions related to where to write in the name of the write-in candidate since the top slot was bigger than the other slots and since there appeared to be some difficulty in lining up slots across from names. The sample ballot was not available in the booth, but only on the table.

Mr. Stefany called the voting machine warehouse and spoke to the supervisor, Mr. Ruggiero, who explained to Stefany why the top slot had to be wider (to hold the names of both president and vice president) than the other slots, which were 50 percent narrower. R-1, the sample ballot, is condensed to half its size, and put on a machine for explanatory purposes. It does not show the write-in positions. The write-in slots are quite a distance to the left of the printed names, and a lever has to be pushed to release the slot to allow a write-in of a name. According to Stefany, Ruggiero said that a tape or a piece of paper could be put on the machine next to the slots for write-in candidates to distinguish between the candidates for three-year terms and the candidates for the two-year term. Mr. Stefany then called the workers at Millington and Gillette to give them that information, and passed it along in person at Central. Everything then seemed to be working out fine.

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Mr. Ruggiero agreed that he had a conversation with Mr. Stefany and that Stefany was concerned with the procedure for write-in votes because of the write-in slots and their correspondence with the positions of the candidates. Ruggiero said he told Stefany the procedures for writing in votes and the reason line one is larger; in order to write in a vote for both president and vice president. Ruggiero denied telling Stefany to put anything on the machine, as it would be against policy to put a foreign object or writing on the voting machine. Ruggiero testified that once the write-in lever is released, all 50 unnumbered write-in slots are open. Once a vote is made for a printed candidate, a voter cannot write in the name for that office. There is an indication in the machine which tells what position the write-in is for. Ruggiero said that the machines were back at the warehouse within three days after the election and the Millington and Gillette machines were impounded. They were not opened until the April 24 recount, after which time they were locked again.

Some of the workers at the Millington School heard that there were questions concerning write-in procedures, while others did not.

Ms. Becker, the judge at the Gillette School, an extremely credible and honest witness, testified that voters asked questions concerning both how and where to vote for a write-in candidate. Responses were given orally or from the sample that was on the table. She personally spoke to Mr. Stefany, as did other workers, early in the voting day to determine what to do. When Stefany called, around 5:00 p. m., Ms. Becker specifically told him that the lines on the right in brackets did not line up with the names on the machine. He told her that she could put pieces of paper to the far left of the slots, indicating the terms or years of office, 3, 3, 3 and 2. Ms. Becker testified that the write-in slot for the two-year seat was either slightly up or down from Mr. Connor's name, but not directly across or to the left of it. In her opinion, before the tape was put on, voters were not able to tell, when writing in a vote, whether they were voting for a three- or two-year seat. She personally put a single piece of tape with the numbers 3, 3, 3 and 2, from top to bottom, on the machine. She periodically checked the face of the machine and did not see any penciled-in writing. The only item ever put on the machine was that tape to the left side of the machine.

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Ms. Becker testified that at the Gillette polling place, both voter registration books are at one table, and in front of the books are two green notebooks. After the voter identifies him or herself to the worker, the worker looks up the name in the voter registration book. The voter is then asked to give his/her address. If the address given orally is correct, the voter signs the green notebook without entering the address.

Ms. Schmidt, Ms. Headley and Ms. Sharp corroborated Ms. Becker's testimony in regard to questions being asked by voters as to how to vote for a write-in candidate.

V

Findings of Fact re Facts in Controversy

1. There was a great deal of confusion among the voters at all three polling places on April 2, 1985 in regard to how to cast a write-in ballot for a candidate who was not nominated by petition.

2. The questions that arose included (a) where a voter should put in his or her write-in vote because the write-in slots were not directly to the left or across from the candidate for the two-year term of office and candidates for the three-year terms of office, and the voters were unclear as to where to put in the write-in candidate's name; and (b) why the top write-in slot was bigger than the others.

3. Mr. Stefany had a conversation with Mr. Ruggiero, the supervisor at the voting machine warehouse. Ruggiero explained the reason why the top slot had to be bigger (in order to hold the names of the candidates for both president and vice president) and explained the procedures for write-in votes. Mr. Ruggiero told Mr. Stefany that some kind of tape or piece of paper could be put on the voting machine to the left of the write-in slots merely to indicate which slot was the write-in slot for the two-year term and which slots were the write-in slots for the three-year terms.

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4. The write-in slot for the two-year term was not exactly on line with the name of the candidate by petition for that position.

5. Both the Gillette School and Millington School voting machines had pieces of paper indicating which slots were for three-year terms and which slot was for the two-year term. There were no other writings, pencil markings, instructions, etc., on either voting machine.

6. Ms. Becker personally put a single piece of tape with the numbers 3, 3, 3 and 2, going from top to bottom, on the voting machine. It is unknown who put the four approximately one-inch-square stickers, with the numbers 3, 3, 3 and 2, next to the appropriate slots on the Millington machine. It is unknown who removed the single piece of tape from the Gillette machine.

7. Election officials inspected the faces of the voting machines during the course of the election. They did not inspect the faces of the voting machines after each voter concluded his or her time in the voting booth.

8. Neither voting machine in question here was mutilated, defaced, damaged or tampered with. There were no markings or notations on either machine except the stickers and tape containing the numbers 3, 3, 3 and 2.

VI

Conclusions of Law

This action is brought purusant to N.J.A.C. 6:24-6.1 and N.J.S.A. 18A:14-63.12, which states:

> Upon written request within five days of the announcement of the result of an election by any defeated candidate, . . . the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election [emphasis added].

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There are certain rules of law which are applicable to all school board elections. One clear principle is that all voting machines are to be prepared for use and used in school board elections in the same manner as required by Title 19 elections. See, N.J.S.A. 18A:14-42, N.J.S.A. 18:14-56 and 19:14-1, et seq.

It is also well settled that the Commissioner of Education will not set aside the results of a contested election unless the petitioner or protester can show that the irregularities charged affected the outcome of the election. In re Wene, 26 N.J. Super. 363 (Law Div. 1953), aff'd sub nom. Wene v. Meyner, 13 N.J. 185 (1953). See also, In the Matter of the Election Inquiry in the School District of the Borough of South River, Middlesex County, 1974 S.L.D. 1040.

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted had the irregularity not taken place, and to an extent to challenge or change the results of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. In re Wene, 26 N.J. Super. at 383.

Generally, mere irregularities do not render a vote illegal. Wene v. Meyner, 13 N.J. at 197. A judge should be extremely cautious in setting aside an election, and it is only where irregularities occur which, in the judge's mind, are of such significance, that the will of the people has been thwarted, that a judge should set aside an election.

It is within the framework of the general, settled law that each of petitioner's arguments will be considered. Counsel for petitioner urges that there were repeated violations of N.J.S.A. 18A:14-51 in that the majority of election workers failed to compare the signatures made in the poll list with the voters' permanent signatures in the signature copy register. He asserts that because of the way the registration tables were

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set up, particularly at the Millington polling place, it was impossible for any comparison of signatures to be made. He also asserts that the violation committed at the Gillette School consisted of the fact that the addresses of the people who came to vote were not listed. He asserts there was an irregularity in that the Gillette poll list contains one more signature than the number of voting authority slips issued. He asserts that the placement of the four one-inch-square tapes with the designations 3, 3, 3 and 2, as well as the placement and then removal of the tape on the Gillette machine violated N.J.S.A. 19:18-6, N.J.S.A. 19:52 and N.J.S.A. 18A:14-72, and should negate the election.

A. Failure to compare signatures in poll list with voters' permanent signatures in violation of N.J.S.A. 18A:14-51.

I note first that this issue was not transmitted to the Office of Administrative Law by the Commissioner of Education in his decision of May 31, 1985 (see Commissioner's decision, pages 6 and 7). Notwithstanding that, certain testimony was given concerning the method of registration. It is not in controversy that the person who handled the poll list at the Millington polling place did not have the signature copy register at hand and that a different worker used the register. Yet there is no testimony before me that any ineligible voter was allowed to vote as a result of a failure of one of the workers to compare signatures. Since there is no testimony that ineligible voters were allowed to vote, any irregularity resulting from a lack of comparison would not, and did not, affect the outcome of the election, the watershed test, and therefore the election will not be set aside based on this irregularity.

B. Because the poll list at the Gillette School does not contain the addresses of any of the persons who voted at that polling place, there is a violation of N.J.S.A. 18A:14-50.

This issue is moot. In the prehearing order of August 7, 1985, both counsel stipulated that the poll list at the Gillette School did not contain the stated addresses of the voters, as prescribed by N.J.S.A. 18A:14-50 and N.J.S.A. 18A:14-51 as amended. However, both counsel also stipulated, as set forth in the Prehearing Order, which Order

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has not been appealed in a timely fashion, that this fact did not affect the outcome of the election. Therefore, although the voters did not state their addresses in writing on the poll list, it did not affect the outcome of the election, and is not in issue here.

C. Petitioner urges that the election be invalidated because the poll list at the Gillette School contains one more signature than the number of voting authority slips issued in violation of N.J.S.A. 18A:14-51, 52 and N.J.S.A. 19:31A-8.

This fact is not in dispute. Yet there is no assertion that the discrepancy between the number of signatures and the number of voting authority slips had any effect on the outcome of the election. The statutes cited are inapposite. N.J.S.A. 18A:14-51 is entitled "Comparison of Signatures," and had not been violated by the conceded discrepancy. N.J.S.A. 18A:14-52 is entitled "Procedure for obtaining ballot when duplicate permanent registration form cannot be found." On its face, it is not applicable to the asserted irregularity. N.J.S.A. 19:31A-8 is entitled "Comparison of signature; voting; statements; form of statement; disability certificate; certification of signature comparison record." Petitioner has not asserted that any person voted whose name did not appear in the signature copy register of this election district. Rather, if anything occurred, someone signed the register and did not vote or did not give the voting authority slip to the worker. The asserted irregularity does not violate any of the statutes cited by petitioner in his brief. Furthermore, it is obvious that this discrepancy could not have affected the outcome of the election because there was an eight-vote difference between Connor and Dapkins and at most, only one vote could have been changed. There is no assertion of any misconduct on the part of election workers. I conclude that this discrepancy did not violate the asserted statutes, and did not affect the outcome of the election.

D. Petitioner asserts that the placement of four one-inch-square pieces of tape with the designation "3," "3," "3" and "2" on the Millington machine and the placement of the long tape with the numbers, "3, 3, 3, 2" from top to bottom

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on the Gillette machine violated N.J.S.A. 19:18-6, N.J.S.A. 19:52 and N.J.S.A. 18A:14-72.

I reject the assertion of N.J.S.A. 19:18-6, as it is not on point at all. It is entitled "Ballot box keys deposited with county clerk." N.J.S.A. 19:52 is the general statute dealing with elections, and it is not clear which specific portion of that statute has been violated by the placement of the squares of tape and long tape. N.J.S.A. 18A:14-72 is the school election statute which deals with "[o]bstructing elections; electioneering near polling place prohibited." There is no evidence in this matter which can support a conclusion that the placement of the tapes obstructed this election or was electioneering near the polling place, since the facts indicate that no names of any candidates were on the pieces of tape.

In the case at bar, there was confusion at the polling places, which was made apparent to Mr. Stefany. Mr. Stefany had a conversation with Mr. Ruggiero describing the confusion and receiving a suggestion from Mr. Ruggiero, which Mr. Stefany implemented forthwith. There is no mystery about the purpose of the numbers "3, 3, 3 and 2" on the left-hand side of the voting machines. They were placed there merely to avoid confusion and to clarify the appropriate slots so that the will and intention of each individual voter could be carried out. There is no testimony before me from any voter that the numbers encouraged a particular voter to write in the name of Dapkins in the write-in slot, as opposed to voting for Connor, the candidate by petition. It is uncontroverted that there were no other markings or notations on the voting machines, and it is further uncontroverted that the workers did not voluntarily offer advice to any voter in regard to the write-in procedure. The opposite is true; the voters asked for advice from the workers. The only purpose of the pieces of tape was to enlighten a voter as to how to cast a write-in vote, and thus express his/her will and intention. Neither Title 18A nor Title 19 prohibit election workers from providing some degree of instruction to voters with respect to how to cast a write-in vote. This degree of aid and assistance must be contrasted with assistance in instructing the voters regarding whom to vote for. See, In the Matter of the Annual School Election Held in the Township of Green Brook, Somerset County, OAL DKT. NOS. EDU 2688-84 and EDU 2689-84 (consolidated) (June 12, 1984), rev'd, Comm. of

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Education (July 30, 1984), aff'd State Board (Jan. 2, 1985) In the case at bar, the tapes or stickers bearing the numbers 3, 3, 3 and 2 are relevant only to the question of how to cast a write-in vote and are not relevant to the issue of who to vote for.

It is thus clear that the will of the people of the school district of Passaic Township has been clearly expressed by the votes that were tabulated. (There were votes cast out by the Commissioner.) It would be unjust and inappropriate to void this election because of the conceded irregularities in light of the expressed will of the people of this school district. In re Livingston, 83 N.J. Super. 98 (App. Div. 1964). The standard to be applied in a school election is set forth in In the Matter of Annual School Election held in the Henry Hudson Regional School District, OAL DKT. NO. EDU 3952-82 (June 14, 1982), aff'd, Comm. of Education (July 27, 1982), which held that any irregularity or deviation from the election law must be connected to the result of the election and must be the cause of illegal votes which would not have been cast and which have defeated legal votes. Otherwise, the election should not be voided because to do so would repress the free will of the people. This has not been shown here by petitioner.

The Board concedes that there were pieces of tape on both the Gillette and Millington polling machines indicating the years of the term next to the names of those persons running for the described terms. This, in and of itself, may be an irregularity because adding anything, even if it is not specifically electioneering on behalf of one candidate or another, to the face of a machine, is not specifically permitted by statute. However, there is no evidence whatsoever that the irregularity affected the outcome of the election. To the contrary, the evidence goes the other way. Many votes for Sue Dapkins were vitiated because of the Commissioner's conclusion that they were not in the proper slot or did not reflect the proper name. Therefore, the only votes that were counted for Dapkins were those that were quite specific as to their intent.

There is no evidence whatsoever here of a fraud or misconduct. Not by any stretch of the imagination, nor supported by even a scintilla of evidence, could a conclusion be reached that Mr. Stefany, secretary of the Board of Education, who did not even know of the write-in campaign until just before polls opened, went out of his way to assist the

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write-in candidate by directing the placing of the aforedescribed numbers on one side of the voting machine. It is axiomatic that irregularities not amounting to fraud do not vitiate an election. Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968).

The statutes cited at page 17 of petitioner's brief are inapposite to the case at bar. N.J.S.A. 19:48-6 deals with the requirement of police protection of the machines in order to prevent molestation, tampering or damage, and N.J.S.A. 19:52-2 requires election officials to inspect the machines to ensure that ballots have not been mutilated or defaced or the machines damaged. The voting machines here were neither mutilated, nor defaced, nor tampered with, nor damaged. There were no markings or notations except the stickers and tape containing the numbers three, three, three and two. There was nothing surreptitious about the placement of the stickers, and there is nothing on those stickers which would do anything but enable a person to see which slot was appropriate for each particular term of office if that voter cared to write in a candidate.

This entire case cannot be controlled by Green Brook. In that case, the Board disqualified many votes, which, in turn, affected the outcome of election and, therefore, the election was set aside. The irregularities occuring in that election were so pervasive and of such significance as that the will of the electorate of that school district had been thwarted. That is not the situation at the case at bar. Only if I were to reverse the election in Passaic Township would there be a thwarting of the will of the electorate. I refuse to raise the minimal irregularities in this matter to the level of those which change or affect the outcome of an election, a conclusion which is required before the results of a contested election can be set aside. In the Matter of the Election Inquiry in the School District of the Borough of South River, Middlesex County, 1974 S.L.D. 1040. Any irregularities during the election process on April 2, 1985, did not affect the outcome of that election for the expired two-year term.

The Commissioner has held it improper to display the name of a write-in candidate at the polls in full view of the voters, a circumstance not nearly reached in the case at bar. Yet, even this irregularity was not deemed sufficient to thwart the expressed will of the voters, and the results of that particular election were affirmed. In the Matter

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of the Annual School Election Held in the School District of the Borough of Maywood, Bergen County, 1978 S.L.D. 543. Elections have only been voided in cases in which election officials gave improper instructions to the voters regarding the use of write-ins and, therefore, the will of the people could not be discerned with respect to their choice of write-in candidates. In the Matter of the Annual School Elections Held in the School District of the Borough of Helmetta, Middlesex County, 1977 S.L.D. 695. That situation is the exact opposite of the set of facts here, in which proper instructions were given to the voters in Passaic Township School District. Cf., In the Matter of the Annual School Election Held in the School District of the Borough of Pompton Lakes, Passaic County, 1977 S.L.D. 586, in which case the voting machines were incorrectly prepared for write-ins, and therefore the election was set aside.

Generally, the Commissioner has tried to validate irregular or write-in votes if it can be ascertained that the votes properly represent the will or intent of the voters. See, In the Matter of the Annual School Election Held in the School District of the Borough of Haddonfield, Camden County, Commissioner's Decision (June 17, 1981), Cf., In the Matter of the Annual School Election Held in the School District of South Orange-Maplewood, Essex County, 1974 S.L.D. 1049. The purpose of the taped numbers was to allow write-in votes to be made for the two-year term. The votes that were counted were intended for Sue Dapkins for a two-year term. Since it was clear for whom the votes were intended and for what office, these facts should validate, not void this election. In re Clayman, 97 N.J. Super. 295 (Law Div. 1956).

Petitioner also asserts that the election workers consistently failed to inspect the face of the machine after each voter had cast his vote to see whether the ballot and face had been altered and N.J.S.A. 19:52-2 violated. The workers did check the faces of the machines as often as possible, but did not do it after each voter had cast his vote. Election workers should be instructed in the future to inspect the face of each machine after each voter has finished to make sure that the machine has not been mutilated or defaced and the machine has not been damaged. But this irregularity did not, and cannot, change the outcome of this election since I have found as fact that the machines were not mutilated, defaced or damaged.

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Accordingly, I conclude that affixing stickers or tape with the numbers "3, 3, 3 and 2," to the Millington and Gillette voting machines was an irregularity, but I further conclude that the use of stickers or tape designating the years of terms of office for the contested positions on the Board of Education did not affect the outcome of the 1985 election. In sum, any errors made by the election workers in regard to the addresses of the voters in the poll list at Gillette which has one more signature than the number of voting slips, and in regard to the use of stickers or tapes affixed to voting machines are harmless as they did not affect the outcome of the election. This is especially true in view of the Commissioner's decision on recount, which did not change the outcome of the initial count of the election, and which indicated that all votes which were disqualified could very well have been interpreted to be votes for Dapkins, the winning candidate.

Efforts should be made to avoid irregularities in the future. The election manual for workers could be clarified in regard to whether the poll list has to have the written addresses of the voters in addition to their signatures. See, Issue No. 1 in the prehearing order, as well as In the Matter of the Annual School Election Held in the School District of South Orange-Maplewood, Essex County, 1974 S.L.D. 1049, in which the Commissioner held that all local boards should provide written instructions for election board officers, in that case regarding write-ins. However, in the matter before me, I conclude that the will of the voters in the school district of Passaic Township, Morris County, was to elect Sue Dapkins to the two-year unexpired term.

Accordingly, it is hereby **ORDERED** that the petition of John C. Connor 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** this Initial Decision with **SAUL COOPERMAN** for consideration.

November 7 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

DEC 03 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 4 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF PASSAIC	:	DECISION
TOWNSHIP, MORRIS COUNTY.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. No exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Upon review of those findings and conclusions in the initial decision, the Commissioner affirms and adopts them as supplemented and modified below.

The Commissioner is constrained to comment on what he determines to be the additional underlying causes giving rise to this election inquiry. It is apparent from the testimony given by the Board Secretary that certain statutory requirements pertaining to the use of voting machines were procedurally defective.

Initially, the provisions of N.J.S.A. 18A:14-63 place the primary responsibility upon the Board Secretary for the proper conduct of a school election as follows:

> It shall be the duty of the secretary of the board of education to perform any such duties, not in conflict with those imposed upon any other officer by this law, as may be necessary for the proper conduct of a school election.

Two of the specific duties spelled out in the law regarding the responsibility vested in the Board Secretary read in pertinent part as follows:

> 18A:14-41. Official ballots for machines
>
> The secretary of the board of education of the district shall furnish to said officer or officers of the county, at least seven days before the election, official ballots, of the type and in the number required by law for use in voting machines, for such election, and shall make such other arrangements as are necessary to hold such election by the use of voting machines in all polling districts of the school district.

And,

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18A:14-42. Manner of use of machines

> The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes, except that --
>
> ***
>
> b. Written notice of the time and place when the machines will be prepared for use at the elections shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election***.

The specific requirement set forth in N.J.S.A. 18A:14-42(b) may not be construed to relieve the Board Secretary of the responsibility to inspect the voting machines in order to determine that they are in proper condition for use in the school election.

In the Commissioner's judgment had this been done by the Board Secretary those questions held up to inquiry with respect to the designation of columns in use for the write-in votes would have become apparent and could have been remedied prior to the annual school election in Passaic Township. In prior decisional school law the Commissioner has cautioned against the use of slot #1 on the voting machines used in school elections specifically for the reasons which led to the confusion registered by the voters herein. See In the Matter of the Annual School Election Held in the School District of Mount Arlington, 1975 S.L.D. 231.

The failure of certain school election officials to require that the names and addresses of the voters be placed in the poll list at the time the right to vote is claimed violates the provisions of N.J.S.A. 18A:14-50:

> The voter shall, previous to the receipt of an official ballot, sign his name without assistance and state his address in an appropriate column of the poll list and the election officer in charge of the poll list shall record therein opposite the voter's name, the number of the official ballot furnished to the voter for voting

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N.J.S.A. 18A:14-50 requires the voter to sign his or her name and state his or her address in an appropriate column of the poll list. Since it is impossible to verbally state a name in an appropriate column in a poll list, it therefore must be in writing. The verb to "state" as it appears in Black's Law Dictionary, Revised Fourth Edition, supports the interpretation of the statutory intent of N.J.S.A. 18A:14-50 as construed by the Commissioner herein.

> STATE, v. To express the particulars of a thing in writing or in words; to set down or set forth in detail; to aver, allege, or declare. People v. Mercado, 59 Cal. App. 69, 209 P. 1035, 1037. (Emphasis added)(at p. 1578)

Contrary to those conclusions reached by the ALJ, ante, the school election manual specifically requires voters to sign their names and state their addresses in the appropriate column on the poll list. The pertinent section of the election manual reads as follows:

> USE OF SIGNATURE COPY REGISTER AND POLL LIST
>
> ***
>
> Each voter must, previous to being given an official ballot, sign his/her name, without assistance and state his/her address in an appropriate column of the poll list. The election officer in charge of the poll list must record on the poll list, opposite the voter's name, the number of the official ballot furnished to the voter after comparing the poll list signature to the signature in the Signature Copy Register.
>
> (School Election Manual, at p. 11)

Finally, the Board is required by law to instruct and qualify its school election officers. (N.J.S.A. 18A:14-6.1) While it cannot be determined herein whether the Board was in compliance with statutory prescription, it is apparent given the specific findings of fact in the instant matter that further detailed instruction of the school election officials is warranted prior to the upcoming annual school election to be held on April 2, 1986.

Accordingly, the Board is directed to comply with the specific findings and conclusions set forth in this initial decision as supplemented and modified above by the Commissioner. In all other respects, the instant Petition of John C. Connor is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 15, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7910-84
AGENCY DKT. NO. 393-9/84

BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,
Petitioner,
v.
M. WILLIAM COWAN,
Respondent.

Lawrence S. Schwartz, Esq. and **Anthony P. Sciarrillo**, Esq., for petitioner (Schwartz, Pisano and Simon, attorneys)

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

Record Closed: October 15, 1985 Decided: November 28, 1985

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

The Board of Education of the Borough of Bernardsville (Board) certified eleven charges of unbecoming conduct on September 15, 1984, to the Commissioner of Education for adjudication against respondent, a teacher with a tenure status. Respondent denies the allegations, setting forth ten separate defenses, and seeks reinstatement to his position from which he has been suspended.

On October 25, 1984, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 10, 1985. Eight days of hearings were conducted on April 30, 1985, May 1, 1985,

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July 1, 2, 3, 8, 9 and 10, 1985. The parties requested and were granted leave to submit posthearing briefs. The last submission was received by the undersigned on October 15, 1985, which date constituted the closing of the record.

THE CHARGES

The charges as certified and specified by the Board against respondent are set forth hereinbelow as follows:

CHARGE ONE

Approximately during the month of November 1974, William Cowan did verbally abuse women bus drivers employed to transport Bernardsville Public School pupils, and did use obscenities in addressing said bus drivers, said conduct constituting conduct unbecoming a teacher.

CHARGE TWO

On or about October 24, 1974, while proctoring an eighth grade examination William Cowan did address pupil [H.J.] with obscenities, said conduct constituting conduct unbecoming a teacher.

CHARGE THREE

Abandoned by the Board at hearing.

CHARGE FOUR

On or about December 3, 1974, William Cowan did use undue force in physically removing pupil [D.T.] from his classroom, and subsequent to leaving [D.T.] in the school office did utter threats and obscenities in regard to said pupil and did strike the wall with his fist, said conduct constituting conduct unbecoming a teacher.

CHARGE FIVE

On or about November 25, 1975, in his music class William Cowan did:

a. Shove pupil [S.N.'s] horn and case into a storage bin, breaking both the horn and the case, said conduct constituting conduct unbecoming a teacher.

b. Direct pupil [S.N.] to leave the classroom using obscenities, said conduct constituting conduct unbecoming a teacher.

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c. Did grab pupil [S.N.] by the shirt, ripping his shirt and scraping his neck, said conduct constituting conduct unbecoming a teacher.

CHARGE SIX

On or about November 26, 1975, William Cowan did use undue force in handling pupil [D.G.] and did use obscenities in addressing said pupil, said conduct constituting conduct unbecoming a teacher.

CHARGE SEVEN

On or about November 6, 1980, William Cowan did reprimand pupil [D.W.] in the school office, using obscenities and threats, said conduct constituting conduct unbecoming a teacher.

CHARGE EIGHT

On or about November 1, 1982, William Cowan did throw a chair to the front of his classroom while class was in session, knocking over his music stand, said conduct constituting conduct unbecoming a teacher.

CHARGE NINE

On or about October 23, 1982, at an away football game at the Mountain Lakes school district, William Cowan did use undue force in physically handling pupil [G.S.], and did verbally abuse said pupil using obscenities and threats, said conduct constituting conduct unbecoming a teacher.

CHARGE TEN

On or about June 6, 1984, during band class William Cowan did:

a. Threaten pupil [A.F.] with physical harm, said conduct constituting conduct unbecoming a teacher.

b. Use undue force in physically handling pupil [A.F.], said conduct constituting conduct unbecoming a teacher.

c. Verbally abuse pupil [A.F.] and did use obscenities constituting conduct unbecoming a teacher.

CHARGE ELEVEN

On or about June 20, 1984, William Cowan did falsify a Board of Education contract sent to his wife in order to attempt to fraudulently secure extra-curricular employment, said conduct constituting conduct unbecoming a teacher.

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PRELIMINARY FINDINGS OF FACT

Having reviewed the herein record, including the testimony and exhibits offered into evidence and having given fair weight thereto; and having observed the demeanor of the witnesses and having assessed their credibility, I **FIND** the following **FACTS:**

Respondent has been in the Board's employ for approximately 16 years as a teacher of music with emphasis on the instrumental program in grades 7 through 12. Respondent had previously taught for 10 years in two different New Hampshire school districts, for a total of 26 years as a classroom teacher.

Respondent's responsibilities while in petitioner Board's employ have included: classroom, supervisory and director responsibilities for the junior high school instrumental program; teaching courses in music theory, harmony and music appreciation on a yearly rotating basis, at the high school level; marching band during the fall semester; concert band for the remainder of the school year; stage band; and band camp once per year during the summer months. The marching band required two evening rehearsals per week for one semester while the concert band required one evening rehearsal per week; all such rehearsals were for approximately 2 hours each.

Mrs. Barbara J. Cowan, respondent's wife of 26 years, has been in the Board's employ as a special aide for 3 years. Mrs. Cowan has been associated with the Board's marching band as a band front advisor for 7 years.

Charges one, two and four, as certified by the Board against respondent, were the subject of a prior disciplinary proceeding wherein the Board withheld respondent's salary and adjustment increment for the 1975-76 school year. Respondent did not challenge nor appeal the Board's action to withhold his 1975-76 salary and adjustment increment, pursuant to N.J.S.A. 18A:29-14.

As a consequence of the allegations as set forth in Charge Nine, together with other reported and alleged incidents (Charges Five, Six, Seven and Eight), a series of meetings and conferences was held between respondent, the high school principal and the superintendent of schools, among others, where it was agreed that respondent's 1982-83 salary increment was to be withheld. Respondent's adjustment increment was not

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withheld and, therefore, was awarded to him for the 1982-83 school year (P-14B). It was further agreed that the Board would underwrite the costs and expenditures for respondent's initial psychiatric evaluation and subsequent counseling. The Board took all appropriate actions to withhold respondent's 1982-83 salary increment and to pay for respondent's psychiatric evaluation and counseling. It was also agreed that respondent would meet with the principal on a weekly basis to review and discuss respondent's progress and behavior (P-14, 14A, 14B, 14C). Respondent did not challenge nor appeal the Board's action to withhold his salary increment for the 1982-83 school year.

Respondent's psychotherapy continued for the entire 1982-83 school year. On June 11, 1983, P.M. Romeo, M.D., the treating psychiatrist, asserted, among other things, that respondent had made significant progress to control his behavior toward his students and recommended that the psychotherapy could be suspended (P-14E, attachment). Thereafter, the Board, upon the recommendation of the principal and superintendent, determined to grant respondent's salary and adjustment increment for the 1983-84 school year.

In 1980 or 1981, an incident occurred at band camp which involved pupils' use of alcoholic beverages to the extent that two pupil members of the band had passed out on a Saturday evening as a consequence of drinking the intoxicants. The band camp was conducted off school premises. Respondent ordered members of the band council to confiscate and collect all the containers of alcohol and place the containers on a table in the camp's cafeteria. Respondent counted 87 bottles of hard liquor and approximately 20 cans of beer. Thereafter, respondent placed a telephone call to the high school principal to report the incident. The principal advised respondent to telephone the parents of the two comatose male pupils in order to have them removed from the band camp. Respondent was unable to make contact with the parents of one of the pupils. Subsequent to being telephoned by respondent, the mother of the second male pupil arrived at the camp to take her son home; however, because of the pupil's comatose condition, it was agreed to leave the pupil at camp until the next morning. On the following day, Sunday, respondent consulted with a number of school officials, including the principal on several occasions, and the president of the Board. The two male pupils who were intoxicated the evening before were sent home while the band remained at band camp.

Respondent's teaching ability and performance is not at issue in this matter. The parties, therefore, stipulated as to respondent's Record of Classroom Observation and

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Annual Evaluation from September 26, 1969 through and including March 2, 1984 (R-1). Said observation and evaluation reports indicate that respondent's performance was predominately "good," with several ratings as "commendable" and few "acceptable," which is on the lower end of the scale, with regard to the identified area under observation and subject to the supervisor's evaluation.

Gregg Shaffer, who was 19 years of age at the time of hearing and is no longer a pupil enrolled in the Board's schools, testified that he had been convicted on two counts of possession of under 25 grams of marijuana. The dates of the convictions were unspecified; however, Shaffer asserted he served a 30-day sentence in the Somerset County Jail as a consequence of the second offense. Subsequent to his arrest, conviction and sentence, Shaffer was enrolled in a drug abuse rehabilitation program conducted by Somerset County.

Shaffer testified that subsequent to the incident which forms the basis of Charge Nine, he had been convicted of the criminal offense of breaking and entering the Bernards High School in 1984. The record shows that on or about June 8, 1984, the Somerset County Grand Jury indicted Shaffer on two counts of third degree burglary, N.J.S.A. 2C:18-2; and on one count of theft in the third degree, N.J.S.A. 2C:20-3. Prior to the trial, Shaffer retracted his plea of not guilty to the charges and entered a plea of guilty to all counts. On October 26, 1984, the Superior Court of Somerset County, Law Division-Criminal, sentenced Shaffer to three years' probation, concurrent with each offense. The court imposed additional conditions that Shaffer was to submit to: (1) psychological evaluation and, if recommended, treatment and care was needed, it became an additional condition of his probation; (2) he was to submit to drug abuse evaluation with treatment and care an additional condition, if recommended; and (3) he was ordered to perform 100 hours of community service under the direction of the Somerset County Probation Department. A penalty of $75.00 was also imposed (R-2).

TESTIMONIAL AND DOCUMENTARY EVIDENCE

CHARGE ONE

The Board offered the testimony of Dr. Torry Froisland, high school principal, in support of Charge One. Dr. Froisland relied, in part, upon a document, dated January 6, 1975, transmitted to respondent from the principal (P-8, p. 2, item No. 7; p. 10,

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Appendix B. See also: P-10, Exhibits LL, MM, II and KK). Therein, the principal asserted and alleged the following:

> On November 18, 1974 a call was received by the high school principal from Mr. Bill Conover, owner of the Conover Buses regarding Mr. Cowan's reaction to the women bus drivers when they asked that there be no smoking on the bus. Apparently, it is their legal obligation to warn those within their buses there is to be no smoking on said buses. The women bus drivers complained to Mr. Conover over Mr. Cowan's language when he (Mr. Cowan) was informed of these conditions. Mr. Cowan allegedly called the women 'sons of bitches.' He further questioned the women drivers why the Board of Education still does business with Conover Buses. [P-8, p. 10, App. B]

Respondent acknowledged receipt of P-8 and the allegations set forth therein (P-8, p. 19). On February 25, 1975, respondent submitted a written statement to the principal with regard to his doing business with the Conover Bus Company, alleging a series of incidents and problems which had occurred with both the drivers of the buses and the management of the Company (P-10). Respondent submitted a written rebuttal to the allegations with respect to the "no smoking" rule of the Conover Bus Company, contending that two male bus drivers were present, neither of whom objected to pupils smoking on their buses. Respondent alleged that one of the female bus drivers involved in the dispute smoked (P-9). Respondent failed, however, to specifically address the allegation as set forth by the principal with regard to respondent's use of abusive language toward the female bus drivers. Respondent neither denied nor rebutted the principal's allegations that he used abusive language toward the female bus drivers (P-10, P-9).

At hearing, respondent rested with respect to the allegations contained in Charge One and, therefore, offered no proofs by way of denial or rebuttal in regards thereto.

Notwithstanding, I **FIND** that the Board has failed to establish by a preponderance of the reliable and credible evidence, the truth of Charge One. Accordingly, Charge One is hereby dismissed.

CHARGE TWO

The principal testified, again relying on Exhibit P-8, to an incident which allegedly occurred in fall 1974 at which time respondent was assigned to proctor eighth

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grade pupils taking the Iowa Test of Basic Skills. The principal testified he was informed by the parent of one of the female pupils, "H.J.", that respondent had admonished H.J. for being disruptive during the examination session and had exclaimed to H.J., "get your ass out of here and if I were your parents I would take care of you." Subsequent to receiving this information, the principal discussed the incident and allegations with respondent. Respondent denied using the words and language to H.J. as reported to the principal by H.J.'s mother. Thereafter, on November 26, 1974, a conference was conducted with the principal, H.J.'s mother and respondent where H.J.'s mother advanced the same allegations and respondent denied them. The principal asserted that there was really no resolution to the dispute.

Respondent set forth a written rebuttal to the allegation and denied making the statements to pupil H.J. as reported to the principal by H.J.'s mother (P-9, pp. 1, 6).

From the proofs advanced by the Board with respect to Charge Two, I **FIND** such proofs to be insufficient to establish the truth of the charge. There is nothing in the record to demonstrate that the principal conducted an independent investigation of the allegation set forth by the parent of H.J. that respondent used inappropriate, vulgar or profane language as reported and alleged. The record is devoid of any indication that the principal interviewed staff members or other pupils, presumably present during the examination and alleged incident, who were in the position to corroborate the allegation or respondent's denial. All that is before this administrative tribunal is the bare allegation of the pupil's parent followed by a conference conducted with respondent by the principal and a subsequent meeting with the principal, respondent and H.J.'s mother, coupled with the principal's testimony that there was no real resolution to the matter.

Given these limited facts, I **FIND** that the Board has failed to prove the allegations as set forth in Charge Two. Accordingly, Charge Two is hereby **DISMISSED.**

CHARGE FOUR

The basis for this charge is also found in P-8, the principal's memorandum directed to respondent, dated January 6, 1975, and was supplemented by way of the principal's testimony at hearing. The alleged incident occurred on December 3, 1974, which involved respondent and a pupil hereinafter identified as "D.T." In his memorandum to respondent, the principal asserted and alleged that:

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> During the 7th and 8th grade band rehearsal, a student [D.T.] hit [C.C.] [respondent's son] over the head with an object. Mr. Cowan brought [D.T.] to Mr. Wildgen's office. He was physically taking [D.] to the office where, at one time [D's] feet were not even on the ground. The student was suspended by Mr. Wildgen.
>
> As Mr. Cowan was leaving and going down the stairs to the band room, Mr. Cowan was observed and heard to hit his fist against the wall and say 'that fucking kid I'll kill him.'

The principal testified that Mr. Wildgen was, at that time, an administrative assistant at the high school who reported the incident to the principal. It was Mr. Wildgen who witnessed and then reported to the principal that respondent had said, "That fucking kid, I'll kill him." Mr. Wildgen was unavailable and, therefore, did not testify at hearing.

Subsequent to the alleged incident between respondent and D.T., the principal interviewed both principals to the incident separately. The principal asserted, on cross-examination, that respondent did not deny the use of vulgarities upon leaving Mr. Wildgen's office.

Respondent, by way of rebuttal to the alleged incident, stated in writing that D.T. had hit his son C. on the head with a metal stool, causing personal injury to C. Respondent asserted, among other things, that he took D.T. to [Mr. Wildgen's] office and that D.T.'s feet were on the ground at all times. Respondent denied that he had struck the cement wall with his hand (P-9). Respondent did not deny using the words or language alleged by the administrative assistant.

To the extent that the administrative assistant witnessed and heard respondent utter the profane and vulgar exclamations and thereafter reported his observations to the principal, I **FIND** that portion of Charge Four to be true in fact. This finding is supported by respondent's failure to deny or successfully rebut the assertion.

With regard to that portion of the charge which alleges that respondent grabbed D.T. and physically lifted the pupil where D.T.'s feet did not touch the floor while respondent took D.T. from the classroom to the administrative assistant's office, a strong inference as to the truth of the allegation can be made out under the circumstances of the incident. D.T. had been disruptive and was "fooling around" in the classroom which subsequently resulted in D.T.'s striking respondent's son C. on the head with a metal

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instrument. Respondent, having observed D.T. inflict injury upon his son, grabbed D.T. and physically ejected D.T. from the classroom to take him to the administrative assistant's office. Respondent does not deny that he used such physical force upon D.T. but, rather, denies that D.T.'s feet left the floor while respondent transported D.T. to the office (P-9).

Based upon these facts, I **FIND** that respondent did commit and use physical force upon D.T. on December 3, 1974, while escorting the pupil from the classroom to the office of the high school administrative assistant.

CHARGE FIVE

Steven Nanfelt, a former pupil of Bernards High School and now a student attending Nyack College, Upper Nyack, New York, testified he was a pupil in respondent's seventh and eighth grade band on November 25, 1975. Nanfelt testified that he and another pupil, Jerry Negri, were disruptive in respondent's classroom on that date, whereupon respondent directed that Nanfelt pack up his instrument and music and leave the classroom. Nanfelt placed his trumpet in its carrying case and proceeded to place it in a storage cubicle located in the classroom when, he asserted, respondent came up behind Nanfelt and shoved the trumpet case into the cubicle. The force of respondent's thrust caused the case to suddenly pop open and Nanfelt's trumpet to pop out, damaging both the instrument and the carrying case.

Nanfelt testified that respondent then grabbed Nanfelt's shirt by his neck, causing scrape marks on the skin of his neck and tearing the shirt at its seam. Respondent proceeded to pick Nanfelt up to drag him to the classroom door and threw Nanfelt out of the classroom while shouting, "Get the hell out of here."

Nanfelt did not report the alleged incident to the school authorities but, rather, informed his mother who, subsequently, informed the high school administrative assistant. On November 26, 1975, the day following the incident, the high school principal confronted respondent with the allegations in a personal conference with respondent. The principal's notes of the conference were later recorded in a report with a request that respondent submit his responses to the allegations to the principal in writing (P-5).

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The principal's report (P-5) asserts that respondent denied touching Nanfelt's trumpet or carrying case; denied that he shouted at Nanfelt to "get the hell out of here;" and denied that respondent had either torn Nanfelt's shirt or scraped the skin on Nanfelt's neck. The principal's report (P-5) does assert, however, that respondent confirmed to the principal he had grabbed Nanfelt by the shirt, although respondent was unaware whether he had ripped Nanfelt's shirt or had scraped the skin on Nanfelt's neck (P-5). The principal's report indicated that respondent had grabbed Nanfelt because Nanfelt was slow in following respondent's directives to leave the classroom after being ordered to do so by respondent (P-5).

Pursuant to the principal's request (P-5), respondent forwarded a written memorandum, dated December 11, 1975 (P-5A). Respondent asserted, among other things, that the alleged incident with Nanfelt occurred on November 20, 1975, rather than November 25, 1975, as alleged in the principal's memorandum (P-5). Respondent continued in his memorandum by admitting that he had asked Nanfelt to leave the classroom for ". . . continued disruptive class behavior after repeated warnings" (P-5A). Respondent denied shoving Nanfelt's instrument case containing Nanfelt's trumpet into the instrument cubicle and denied causing any damage to either of the items. Respondent contended that the instrument and carrying case had both been previously damaged and were in disrepair. Respondent denied swearing at Nanfelt; however, respondent admitted that he put his hand on Nanfelt's shoulder to quickly escort Nanfelt from the classroom. Respondent asserted in his memorandum that "at no time did my hand come in contact with his [Nanfelt's] skin or grasp his shirt causing a tear" (P-5A).

Respondent's oral testimony at hearing closely followed and coincided with his written memorandum in regard to his admissions and denials with respect to the Nanfelt incident.

There is no doubt that respondent did, in fact, make physical contact with Steven Nanfelt for the purpose of bodily removing the pupil from respondent's classroom on November 25, 1975 (a date respondent disputes without more by way of evidence to support his contention). Respondent admitted, in oral testimony and by way of written memorandum, that he had grabbed the pupil and escorted him from the classroom. Whether respondent placed his hand on Nanfelt's shirt and neck (which respondent denies), or whether respondent placed his hand on Nanfelt's shoulder (which respondent admits), the facts demonstrate that respondent violated Nanfelt's person without justification.

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Accordingly, I **FIND** that on November 25, 1975, respondent committed the offense of corporal punishment upon Steven Nanfelt, a seventh grade pupil in respondent's music class.

Respondent denies shouting at Nanfelt to "get the hell out of here," asserting that at no time did he swear at Nanfelt (P-5A). It is evident from the record that respondent had a penchant for the use of abusive and offensive language (P-5, P-8, P-9, P-11, P-12) where, subsequent to the Nanfelt incident, the principal ". . . once again reminded [respondent] that vulgarities or obscenities are not to be used in the school or in any school-related activity" (P-5).

I **FIND**, therefore, that respondent did use the abusive and offensive language alleged in addressing Steven Nanfelt on November 25, 1975.

With regard to the issue in Charge Five alleging that respondent damaged Nanfelt's instrument and the instrument's carrying case, it is noted here that the principal failed to conduct an independent investigation with respect to the allegation. The principal neither inspected the alleged damaged items nor did he interview pupils who were in attendance when the incident occurred to corroborate Nanfelt's assertion or respondent's denial. The principal failed to investigate and ascertain the extent of the damage or whether the items had been abused by Nanfelt prior to the incident as alleged by respondent. Lacking such independent investigation or inspection, I **FIND** the Board has failed to carry its burden with respect to that portion of Charge Five.

CHARGE SIX

The Board's proofs with respect to this charge is grounded upon hearsay without a residuum of competent evidence to support its allegations. Consequently, I **FIND** the Board has failed to carry its burden, by a preponderance of the reliable and credible evidence, in support of the charge and, therefore, it is hereby **DISMISSED.**

CHARGE SEVEN

The high school assistant principal, Richard Palazzi, testified concerning this charge. On November 6, 1980, Palazzi served as the administrative assistant to the high school principal, in charge of discipline for grades seven and eight. On November 6, 1980,

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Palazzi was away from his office at the beginning of the school's third period. Upon his return and entry to his office, Palazzi encountered respondent and then-pupil Dan Wadley in a heated verbal exchange. Wadley was sitting in a chair in Palazzi's office while respondent was standing in front and over Wadley and was shouting profane language at Wadley. Palazzi, concerned that physical violence might ensue as a consequence of the heated verbal exchange, attempted to calm down both respondent and the pupil. Palazzi thereupon directed respondent to return to his assigned classroom while retaining Wadley in his office where Palazzi interviewed the pupil.

The principal was not available on November 6, 1980; therefore, Palazzi was unable to make a report of the incident until the following day, November 7, 1980. The principal advised Palazzi to interview pupils in respondent's classroom who were present prior to respondent and Wadley's appearing in Palazzi's office. The principal advised Palazzi that the principal would conduct his own independent investigation. On November 20, 1980, Palazzi submitted his report to the principal (P-11). On November 25, 1980, the principal submitted a memorandum to respondent with regard to the Wadley incident and other events between pupils and respondent, which came to the principal's attention as the result of his independent investigation of the Wadley incident (P-12).

Wadley, a 1985 graduate of Bernards High School, and his mother, testified at hearing with respect to incidents which were alleged to have occurred between Wadley and respondent on November 6, 1980. Those allegations, to which both testified, were not contained in nor made a part of the Board's charges against respondent; therefore, they are not considered here.

Wadley's father also testified before this administrative tribunal with respect to requested meetings and conferences he had with certain school officials concerning the November 6, 1980 incident between Wadley and respondent. His testimony was not relevant to the charge and, therefore, is not summarized here.

Respondent testified on his own behalf with respect to Charge Seven, admitting he had removed Wadley from his classroom while the class was in session and escorted Wadley to Palazzi's office. Respondent asserted he closed the office door, in Palazzi's absence, to conduct a conversation with Wadley concerning the behavior of the drum section of the seventh and eighth grade band, of which Wadley was a member.

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Respondent denied touching or causing physical injury to Wadley. Respondent denied the use of any obscenities directed at Wadley or the use of threats toward the pupil.

Having carefully considered the record with respect to the allegations pursuant to Charge Seven, I **FIND** Richard Palazzi's testimony to be reliable and credible. Close v. Kordulak, 44 N.J. 589 (1965); Garden State Farms v. Mathis, 61 N.J. 406 (1972).

Palazzi testified in an open and candid manner that upon entering his office on November 6, 1980, he did observe respondent standing over Wadley (then an eighth grade pupil) as Wadley was seated in a chair in Palazzi's office and that he did hear respondent shout threats and obscenities at Wadley. Palazzi subsequently reduced his personal observations of the events on November 6, 1980 to writing, among other things, and presented the report to the principal (P-11). Palazzi's testimonial recollection of respondent's conduct and demeanor on November 6, 1980, comports with his written report submitted to the principal and, therefore, is to be believed.

Accordingly, I **FIND** the Board has met its burden of proof as to the truth of the charge and, therefore, it is hereby **SUSTAINED.**

CHARGE EIGHT

The Board has failed to prove the truth of this charge. Its chief witness with respect thereto was its former high school vice principal, Mary Elizabeth Metzger, now retired. She testified from her handwritten notes that on November 1, 1982, an unidentified pupil reported to her that during the eighth period stage band class, the pupils were playing poorly, whereupon respondent appeared to become angry. The unidentified pupil reported, among other things, that respondent allegedly picked up a chair in the classroom and threw the chair toward the front of the classroom, striking a music stand, sending the sheet music thereon flying about the room. Thereafter, respondent calmed down to continue conducting the class.

The then vice principal delivered her handwritten notes of the pupil's report to the principal (P-13A). Subsequently, on November 11, 1982, the principal submitted a memorandum (P-13) to respondent, setting forth the pupil's allegations.

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The principal's memorandum (P-13) asserts the vice principal questioned and interviewed pupils who were present in respondent's eighth period stage band class on November 1, 1982. The vice principal made no such assertion in her testimony at hearing. In fact, the vice principal testified she did not speak with any pupils subsequent to the unidentified pupil's report to her concerning the alleged incident. There is nothing in the record to show that the principal and/or vice principal conducted an independent inquiry or investigation to assess or determine the truth or falsity of the unidentified pupil's allegations.

Accordingly, I **FIND** that Charge Eight is based upon hearsay without a residuum of competent evidence in support of the allegations. The Board, therefore, has failed to prove the charge and it must, in fairness, be **DISMISSED.**

CHARGE NINE

The basis for this charge arose first, by way of an oral complaint by the affected pupil to the then high school vice principal who subsequently made an oral report to the principal and, second, by way of an investigation into the pupil's allegations by the high school principal. The Board's proofs, by way of testimony and documents, are as follows:

On October 23, 1982, the Bernards High School football team scheduled an afternoon interscholastic football game to be played against Mountain Lakes High School football team at Mountain Lakes. In connection thereto, the Bernards High School marching band was to perform in the pre-game activities. It was the standing rule of the band that subsequent to the Bernards pre-game band performance, all band members were required to retire to the spectator stands and remain therein until after the half-time of the football game and the home team (Mountain Lakes) band's performance. The purpose of the rule was for the Bernards band to observe and pay its respects to the home team band and its performance. Subsequent to the home team band's completion of its half-time performance, the Bernards band members were then permitted to leave the spectator stands to get refreshments or to return to the buses which had transported the band to the game. The rule was strictly enforced.

On October 23, 1982, Gregg Shaffer, then an eleventh grade pupil and member of respondent's marching band, together with several band member pupils, violated the

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standing rule. Subsequent to the Bernards band pre-game performance, Shaffer and six to eight other band members went to the refreshment stand, located adjacent to the playing field, rather than remaining in the spectator stands. Shaffer testified that after he had purchased food at the refreshment stand, he and another pupil proceeded to walk back to the spectator stands when he noticed respondent walking toward them. Shaffer spoke to respondent whereupon, Shaffer asserted, respondent grabbed Shaffer by the shoulder and led Shaffer away from the other pupils. Shaffer stated that:

> He [respondent] started shaking me and then he said he was going to fuckin' kill me, and then he shook me, I'm going to fuckin' kill you you little bastard. And I was scared, and I didn't know what to do, you know, I was young, I was just scared. [TR., July 2, 1985, at 179]

During the encounter between Shaffer and respondent, Special Police Officer Dilmour C. Barton appeared upon the scene. Officer Barton testified that prior to his arrival on the scene between respondent and Shaffer, he was standing by the entrance to the spectator stands and the playing field talking with the ticket taker (George Wilson). The ticket taker alerted the officer about the incident between respondent and the pupil and advised the officer to investigate. Officer Barton asserted that he observed a tall man holding a young boy by the lapels of his band uniform; the boy was on his toes and the man and boy were nose-to-nose. As the officer drew nearer to the encounter, he heard the man state, "You fucking little bastard, you better do what I tell you from now on." The officer ordered respondent to release the boy and it was not until after the officer repeated the order did respondent do so. The officer testified that respondent's voice was abusive. The officer asked Shaffer if the adult (respondent) was a relative of Shaffer's. Shaffer responded that the adult was not a relative but, rather, the band director. Respondent was moving away from the scene whereupon the officer stated that "He [respondent] wouldn't be a band director long if you keep acting like that there."

Officer Barton opined that respondent's conduct constituted a simple assault with no battery involved. The officer filed an investigation report (P-14D) on October 23, 1982, with the Borough of Mountain Lakes Police Department concerning the incident, alleging respondent to have committed simple assault, pursuant to N.J.S.A. 2C:12-1(a)3 (P-14D).

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The principal testified, among other things, that subsequent to his receipt of the oral report of the alleged incident as related to the vice principal by Shaffer, the principal met and spoke with Shaffer. The principal requested Shaffer to reduce to writing his best recollection of the incident of October 23, 1982 (P-14F). Thereafter, the principal met with respondent to discuss the allegations advanced by Shaffer. The discussion between the principal and respondent included, among other things, the alleged use of alcohol and/or drugs by some pupil band members as well as the alleged incident reported by Shaffer. Subsequently, respondent addressed a memorandum to the principal, dated October 26, 1982, setting forth respondent's recollection and his reactions to the allegations (P-14G).

In respondent's memorandum to the principal (P-14G), respondent asserted, among other things, the policy prohibiting band members from leaving their assigned positions until the third quarter of the football game. Respondent related that upon observing six-to-eight band members gathered at the refreshment stand, respondent walked to the refreshment stand to remind the band members of the policy and directed that they all return to their assigned bus for the remainder of the football game. He asserted that Shaffer refused to leave and that he was making obscene and derogatory comments expressed by use of profanities and threats. Respondent asserted that since he had reason to believe that band members were reporting to band activities while they were under the influence of alcohol, drugs or both, respondent became suspicious of Shaffer's out-of-control behavior. Respondent stated that he reacted to what respondent believed to be a threat to strike respondent by restraining Shaffer with respondent's hands on Shaffer's shoulders as Shaffer struggled to get away from respondent. Respondent asserted that under the emotionalism of the moment, there were negative comments issued by Shaffer with respondent's responding in the same strong language in an effort to shock Shaffer back to reality. Respondent contends that Shaffer had extreme difficulty in responding to a very clear and direct request, while the other band member pupils returned to the buses as ordered and without incident (P-14G).

On his direct examination respondent testified as to the incident on October 26, 1982, asserting, among other things, that subsequent to the Bernards High School band's pre-game performance, respondent, his wife and son were standing on the visitors' sideline when respondent observed several band members walking toward the refreshment concession stand. Respondent left his wife and son at the visitors' sideline and walked to the pupils at which time he reminded the pupils that they had broken the

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rule. Respondent ordered the offending band members to gather up their respective musical instruments, to go to the buses and to remain on the buses until after the completion of the football game. Respondent then walked to the spectator's section of the stand where the Bernards band members were seated to watch the game. Subsequently, respondent turned around and observed Shaffer standing alone near the refreshment stand. Respondent returned to the refreshment stand and confronted Shaffer and inquired as to why Shaffer had not followed respondent's directive. Respondent contended that Shaffer's immediate reaction was one of hostility. When respondent's attorney asked respondent, "What does that mean?", respondent answered, "It means that he [Shaffer] said, 'I'll do any fucking thing I want to do.' " Respondent thereupon asked Shaffer to move away with him from the refreshment stand. The two of them moved approximately 20 feet from the refreshment stand, whereupon respondent asked Shaffer, "What's the matter with you? Are you on drugs?" Shaffer responded that respondent had constantly been on Shaffer's case and that Shaffer had had enough of respondent and, therefore, Shaffer was going to do what Shaffer wanted to do without any interference from respondent.

Respondent testified that at some point the exchange became quite heated during which respondent grabbed Shaffer by the shoulders and shouted to Shaffer to "snap out of it," ordering Shaffer to the bus. Respondent asserted that Shaffer raised his arm in a manner which led respondent to believe that Shaffer was going to strike him with the drumsticks that Shaffer was holding in one hand. Respondent testified that he shook Shaffer in order to snap Shaffer back into reality so as to discontinue the confrontation. Respondent contended that he did not voice any obscenities during his confrontation with Shaffer.

Respondent further testified that while he had Shaffer in his grasp, respondent heard the special police officer (Barton) twice shout to respondent for respondent to take his hands off the boy. Respondent answered the police officer by asserting that the officer did not understand the situation of the confrontation; that respondent was the band director and that he had the situation under control. The police officer responded, "You won't be the band director as of Monday morning if you don't take your hands off that boy." Respondent released Shaffer from his grasp and retired to the visitors' stand.

Respondent's wife testified that she was present at the Bernards-Mountain Lake football game on October 23, 1982, and that she had an unobstructed view of the

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incident between respondent and then pupil bandmember Shaffer. She asserted, among other things, that she was standing approximately 20 to 25 feet from the confrontation and that she heard Shaffer and respondent talking in loud voices. She testified she saw Shaffer raise his right hand, in which he was holding drumsticks, to commence to swing at respondent. She then observed respondent grab Shaffer's hand with the drumsticks in it and grab Shaffer's shoulder with his other hand.

Craig W. Cowan, respondent's son, testified, among other things, that he had been a member of the Bernards High School Marching Band from 1975 through 1979. Thereafter, Craig Cowan assisted respondent with the band's percussion section and was present at the Bernards-Mountain Lakes football games on October 23, 1982. Craig Cowan asserted that he observed the Bernards band pre-game performance during which he noticed confusion with its percussion section; specifically with Shaffer, who appeared not to know the marching routine for the percussion section. Cowan testified that Shaffer had to look around to determine when Shaffer's marching line had to turn during the routine.

Craig Cowan testified, among other things, that he observed Shaffer go to the refreshment stand following the band's pre-game performance. Cowan testified he was standing 20 feet from the refreshment stand and observed respondent approach Shaffer. Respondent asked Shaffer why Shaffer was there and admonished Shaffer for breaking the rules. Cowan testified he heard Shaffer state to respondent, "I could do whatever the fuck I want to do." Respondent asked Shaffer to move away from the concession stand, and Shaffer and respondent moved approximately ten feet. Respondent and Shaffer became involved in a verbal exchange, which alternated between loud and quiet. Cowan did not specifically hear the words exchanged between the two individuals at this point in time. Craig Cowan asserted, however, that respondent did not use any obscenities during the verbal exchange with Shaffer.

Craig Cowan asserted that he saw Shaffer raise his hand in which Shaffer held drumsticks whereupon respondent grabbed the drumsticks. Thereafter, the special police officer (Barton) appeared upon the scene.

On cross-examination, Craig Cowan testified, among other things, that he was positive there were no other Bernards High School pupils nor Bernards band members at the refreshment stand when respondent approached Shaffer.

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The testimony as to this charge, both conflicting and inconsistent, must be measured as to its credibility. There is no question respondent grabbed and placed his hands on then pupil Shaffer during the course of a heated verbal exchange. Respondent would have this administrative tribunal believe he: (1) grabbed Shaffer to protect himself from being struck by drumsticks, which Shaffer was carrying, and (2) placed his hands on Shaffer's shoulders and shook Shaffer to "snap Shaffer back into reality enough to discontinue the confrontation." Respondent's wife and son corroborated, in part, respondent's assertions on this point.

In his written rebuttal to the allegations (P-14G), respondent asserted that he reacted to what he thought was a threat to strike respondent, ". . . by restraining him [Shaffer] with my hands on his shoulders as he [Shaffer] struggled to get away" (P-14G, item No. 4). Shaffer, on the other hand, denied he attempted to strike or in any manner resist respondent during the confrontation. Shaffer asserted he was frightened by respondent's actions and kept his hands to his sides or behind him during respondent's verbal and physical attack. Similarly, Special Officer Barton observed no move by Shaffer to strike or otherwise resist respondent during the encounter.

In his written rebuttal, respondent attempts to justify his actions toward Shaffer by reason of respondent's belief that band members had been reporting to band activities while under the influence of alcohol, drugs or both (P-14G, item No. 3). Shaffer denied he was under the influence of drugs on October 23, 1982. Respondent was unable to demonstrate to this tribunal that Shaffer was, in fact, inpaired or diminished in mental capacity by the use of alcohol or drugs on the date in issue.

Respondent denied using obscene language during the verbal confrontation with Shaffer. In his written rebuttal, respondent alleged that Shaffer made "obscene and derogatory comments, using a number of profanities and threats" (P-14G, item No. 2). Respondent continued by stating, "Under the circumstances of the moment there were negative comments issued by [Shaffer] and I responded with the same strong language in an effort to shock him back to reality" (P-14G, item No. 5) (emphasis added). Respondent did not deny using obscene or profane language in his encounter with Shaffer in respondent's written rebuttal to the allegations (P-14G).

Accordingly, I **FIND** the testimony of Gregg Shaffer and Special Officer Barton to be more credible as to the "reasonable probability of [the] truth" of the matter

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than that of respondent and respondent's witnesses. Jackson v. D.L. & W.R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933); Close v. Kordulak, 44 N.J. 589 (1965); Garden State Farms v. Mathis, 61 N.J. 406 (1972).

Consequently, I **FIND** Charge Nine to be true, in fact, and it is hereby **SUSTAINED.**

As a consequence of the Shaffer incident, the superintendent recommended to the Board, among other things, that respondent be provided, at the Board's expense, psychiatric evaluation and counseling (P-14B). Respondent agreed with the superintendent's recommendation. The superintendent further recommended, and the Board so adopted, a resolution that respondent's salary increment be withheld from respondent for the 1983-84 school year; however, respondent would be provided his adjustment increment (P-14B). Respondent did not challenge the superintendent's recommendation, nor did he challenge the Board's action.

CHARGE TEN

The Board offered two witnesses directly involved with this charge; Andrew Fuls, the then pupil who was the subject of respondent's alleged verbal and physical attack, and Janet Gallaway, a pupil witness to the incident. Fuls, a June 1985 graduate of Bernards High School, testified he was in the eleventh grade on June 6, 1984, and a member of respondent's band. On that date, during the fifth period, he and approximately one-half of the members of the band were practicing under respondent's direction the recessional music for the high school graduation exercises. Fuls, who played trombone, asserted that there was a change of key in the music at which time a trombone player sitting next to Fuls purposely played the wrong notes. The pupil who played the wrong notes ducked down below his music stand and Fuls smiled. Fuls testified that respondent immediately moved toward the trombone section shouting, "I'll wrap that damn horn around your neck." Fuls responded, "Don't touch me." Whereupon respondent picked up a music stand and threw it against the classroom door, breaking the music stand. Respondent then grabbed Fuls by his shirt and skin shouting, "I'll touch you when I want to." In a loud and angry voice, respondent shouted at Fuls, "Get the fuck out."

Fuls testified that at this juncture he got up from his chair and moved to place his trombone in the storage room. As Fuls did so, respondent shouted at Fuls, "I'll tear

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your ass in half. Get the hell out of here." Fuls responded by stating, "Don't touch me. I'll get the best damn lawyer and get you out of here." Fuls placed his trombone in the storage room and when he came out of the storage room, respondent ordered Fuls to come to where respondent was standing. Janet Gallaway, the student president of Band Council, asked Fuls if he wanted her to go with Fuls and respondent, to which Fuls answered that he did. Respondent and Fuls left the classroom with Gallaway following. After walking through several doors located in the corridor, respondent turned toward Fuls and yelled, "I want you the hell out of my band." Fuls responded that he wished to remain in the band. Fuls asserted that respondent then shouted, "If you stay in the band, so help me God, I'll kill you." At this point the fire bell rang for a fire drill after which, Fuls testified, respondent stated, "I can't take these fucking kids anymore." Respondent and Fuls parted, Fuls subsequently reported the incident to the assistant principal and, thereafter, Fuls attended his assigned classes for the remainder of the day. Fuls testified that he was in fear that respondent would do physical harm to him during the course of this incident. He asserted he had never been disciplined while he had been a pupil in the schools and that he had never had any problems with respondent prior to this date.

On the same day, during the eighth period, Fuls returned to respondent's classroom for stage band practice. Fuls testified, among other things, that respondent continued the confrontation from the fifth period. Fuls left the classroom and reported both incidents to the principal and, thereafter, signed a statement setting forth his allegations (P-15A).

Janet Gallaway corroborated Fuls testimony as to the events of June 6, 1984, between respondent and Fuls. During the fifth period, Gallaway was working in respondent's office preparing band member awards which were to be given to pupils that evening at the annual band awards dinner. There is a window in respondent's office which provides a view of the band room. Gallaway heard screaming in the band classroom and left the office to enter the classroom at which time she observed respondent pick up a music stand and throw it toward the classroom door. Gallaway observed respondent grab Fuls and shout profanities and obscenities at Fuls. Gallaway followed respondent and Fuls out of the classroom after Fuls had asked her to accompany him and she heard respondent shout at Fuls: "I'll kill you," and "Get the fuck out of my band."

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On the following day, June 7, 1984, Gallaway reported the incident to the principal and subsequently signed a statement of her recollections (P-15B). Gallaway testified that she had had no prior problems with respondent.

The principal was advised of the incident by the vice principal later in the day. The principal telephoned the superintendent, who instructed the principal to keep respondent out of school until the matter could be presented to the Board. The principal telephoned respondent at approximately 5:30 p.m. and requested respondent to meet the principal at school immediately. Respondent arrived at the principal's office prior to 6:00 p.m., whereupon the principal asked for an explanation of the alleged events involving Fuls. Respondent indicated, "I flipped out; I grabbed the kid and threatened him" (P-15). Thereafter, the principal submitted a report of the incident to the superintendent (P-15).

Respondent testified on his own behalf with regard to Charge Ten. Respondent did not deny he had a confrontation with Fuls, but denied: (1) throwing a music stand; (2) placing his hands on or touching Fuls in any manner; (3) using profane words and/or obscenities as alleged by Fuls and Gallaway; or (4) admitting to the principal that respondent had "flipped out" and/or "grabbed the kid and threatened him" as reported by the principal (P-15). Respondent conceded he might have said to Fuls, "I'll wrap that horn around your neck," a phrase respondent asserted he repeatedly used with band members to get their attention or to admonish them for not performing up to his expectations. Respondent further conceded that he might have used the words "damn" and/or "hell" during his confrontation with Fuls.

Respondent testified that on June 6, 1984, the band was rehearsing for the high school graduation exercise with only the underclass members of the band because the senior pupils were not scheduled to participate. The annual band banquet was to be held that evening. Janet Gallaway was in respondent's office counting ballots to determine which pupil would serve as student president of band council, which was to be announced that evening at the band banquet. Respondent testified he went into his office to ask Gallaway the results of the vote and Gallaway refused to divulge the outcome of the election. Respondent contended he had a right to know who would serve as student president; however, Gallaway disagreed (presumably, the results were to be kept confidential until the pupil's name was announced at the annual banquet). Respondent thereupon told Gallaway that they would have to go to the principal's office for the

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principal to resolve the dispute, to which Gallaway replied, "O.K." Respondent asserted that instead of taking Gallaway to the principal's office he decided to remain and conduct the band.

Respondent asserted that while he was conducting the band he heard wrong notes being played to the music coming from the trombone section. Respondent testified that Fuls was not playing the wrong notes; however, respondent looked toward the trombone section. Fuls stated to respondent, "I'm not making the wrong notes, get off my case -- you're always on my case." Respondent asserted he then moved toward the trombone section, moving a music stand to one side in the process, and admonished the pupils to play the correct notes. Respondent entered into the trombone section and confronted Fuls, face-to-face, exclaiming that Fuls had been a problem to respondent and the band during the years and that the problem should be resolved now. Respondent testified the confrontation became so serious that respondent ordered Fuls out of the classroom. Respondent did not recall what he said to Fuls.

While Fuls was placing his trombone in the storage room, respondent followed him and told Fuls to get out of the band. Fuls responded that he wished to remain in the band. Respondent thereupon ordered Fuls to the principal's office and the two left the classroom with Gallaway following them. Respondent stopped in the corridor stairs and continued the confrontation and verbal exchange with Fuls. At this juncture, the fire alarm sounded and respondent returned to his classroom office while Fuls and Gallaway left the scene.

Respondent proffered other testimony which did not directly address the herein charge, therefore, it will not be recited here.

Having considered the testimony and exhibits offered in support of this charge and having carefully considered respondent's testimony in defense and rebuttal thereto; and having given fair weight to all the evidence, I **FIND** the Board has carried its burden of proof, by a preponderance of the credible evidence, that the charge is true. Accordingly, Charge Ten is hereby **SUSTAINED.**

CHARGE ELEVEN

I **FIND** that the Board has failed to prove the truth of this charge. This finding is grounded upon the evidence proffered at hearing which is summarized as follows:

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On June 6, 1984, subsequent to the Fuls incident (Charge Ten), the principal telephoned the superintendent who, in turn, instructed the principal that respondent should be kept out of school until the Fuls incident and allegations could be presented to the Board. The principal met with respondent after 5:30 p.m. on June 6, 1984, the evening of the annual band banquet, to inform respondent of the superintendent's instruction. As a consequence, respondent was precluded from attending the band banquet at which the principal appeared and substituted for respondent.

On June 7, 1984, the superintendent informed respondent that he was suspended from duty with pay through and including June 12, 1984. The superintendent had acquired the prior approval of the board president to so suspend respondent, pursuant to N.J.S.A. 18A:25-6 (P-15C).

On or about June 15, 1984, the Board, through its agents, sent to respondent's wife an Intention to Return form for her extracurricular assignment for the 1984-85 academic year (P-16A). The Intention to Return form was received by respondent's wife on or about June 20, 1984, and provided, in part, as follows:

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

June 15, 1984

Dear Staff Member,

As you know, the Board of Education and the BEA have not yet come to agreement on a new contract for the 1984/85 school year. Hopefully, they will reach a settlement before everyone returns in the fall. However, if this is not the case, your salary, effective September 1, 1984, will be as follows:

Name Cowan, Barbara
Extracurricular Assignment Color Guard Advisor
Salary $675.00

I intend to return to employment for the 1984/85 school yr.

_____
Signature

This Intention to Return form must be submitted to the Office of the Superintendent of Schools before June 21, 1984. Absence of this form will be considered a resignation. [P-16A]

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Respondent, who had held four extracurricular assignments through the 1983-84 academic year, was not in receipt of an Intention to Return form, nor had he been advised that he was not to be considered or recommended for the positions. Consequently, respondent attempted to telephone both the principal and the superintendent to inquire as to his status and the reasons he was not offered the extracurricular assignments for the 1984-85 academic year. Neither the principal nor superintendent returned respondent's telephone calls. Subsequently, respondent's wife telephoned respondent's attorney. Upon advice of counsel, respondent's wife duplicated four copies of the Intention to Return form for respondent's use. Respondent's wife completed the form sent to her and returned it to the superintendent within the time constraints set forth thereon. Respondent took the four copies supplied to him by his wife. He then crossed out his wife's first name and inserted his name and crossed out "Color Guard Advisor" and inserted the extracurricular positions that he had previously held. Respondent also crossed out the salary amount of "$675.00" but did not indicate any salary amount to be ascribed to the positions. Respondent placed a check mark after the statement, "I intend to return to employment for the 1984/85 school yr." Respondent signed each of the four copies and returned them to the superintendent (P-16).

On June 20, 1984, the superintendent addressed a letter to respondent advising respondent, among other things, that the Board was to meet on July 25, 1984, to consider the superintendent's recommendation to withhold respondent's 1984/85 increment "for conduct unbecoming a professional teaching staff member" (P-15D). There was no indication in the superintendent's letter to respondent that the superintendent intended to withhold his recommendation for respondent's continuance in the extracurricular positions then held by respondent (P-15D).

Respondent testified, without contradiction or rebuttal, that the Intention to Return form, issued on or about June 15, 1984 (P-16), was the first time he had seen such a form. In prior years, the Board had made its appointments to extracurricular activities in April of each year without the use of form P-16. Respondent contended that because of his wife's receipt of form P-16, the short time constraints set forth thereon, and the failure of the principal or superintendent to return his telephone calls as to his status, respondent completed the copied forms in order to protect his interests and to assure the schools' administration of his intention to return to his extracurricular positions for the 1984-85 school year.

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While the facts in support of this charge appear to include all the indicia of fraud by definition (See: Black's Law Dictionary, 5th Ed. at 594), I **FIND** and characterize the event, however, as a misunderstanding between the parties. The Board's failure to advise respondent of his future employment status compelled respondent to submit his Intention to Return form concerning the extracurricular positions then and formally held by him and for which he was qualified to hold. Respondent acted under the misapprehension that the school's administration had inadvertently failed to forward his Intention to Return form. Observing the explicit language on his wife's Intention to Return form that, "Absence of this form will be considered a resignation" (P-16) and, also, noting he had only one day in which to express his intention to return to his extra-curricular activities, respondent completed the copies of the form for submission to the superintendent by June 21, 1984.

While this administrative tribunal in no manner condones respondent's action, neither can it find that respondent knowingly or intentionally attempted to pervert the truth, conceal facts, misrepresent facts or deceive the Board. I **FIND**, moreover, that no mutual agreement was reached between the parties. Consequently, there was no contract because none was ever made.

Accordingly, Charge Eleven is hereby **DISMISSED.**

FINDINGS OF FACT

The factual findings in this matter are found within those uncontested facts set forth hereinbefore and at the conclusion of the summaries of the relevant testimony of each of the enumerated charges. To summarize further, the findings of fact show the Board failed to prove, by a preponderance of the credible evidence, Charge One, Charge Two, part of Charge Five, Charge Six and Charge Eight, all of which are dismissed. The Board carried its burden of proof, however, with respect to Charge Four, parts of Charge Five, Charge Seven, Charge Nine and Charge Ten.

Accordingly, those uncontested facts, together with those findings at the conclusion of the testimony for each charge are hereby adopted, by reference, as **FINDINGS OF FACT** and need not be repeated here.

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DISCUSSION

Respondent seeks to dismiss the herein action against him by advancement of a ten-point motion in his brief. (1) Respondent, by way of reference, renews his motion to dismiss on the grounds the Board violated the 45-day rule, pursuant to N.J.S.A. 18A:6-13. (2) Respondent seeks dismissal and challenges the affidavits of Elizabeth Metzger and Torry Froisland as improper statements of evidence as prescribed by N.J.S.A. 18A:6-11. (3) Respondent moves to strike Charges One, Two, Four, Six and Eight, grounded upon his assertion that the charges are not supported by legally competent evidence. (4) Respondent argues that the Board is estopped from bringing Charges One, Two, Four, Five, Six, Seven, Eight and Nine under the equitable defense of laches. (5) Respondent seeks to dismiss the herein charges, or to mitigate the circumstances of his behavior, through the defense that the Board failed to provide respondent with a safe and healthy environment in which to perform his teaching functions and duties. (6) Respondent challenges the validity of the Board Certification of Determination arguing that it fails to satisfy the statutory mandate, pursuant to N.J.S.A. 18A:6-11. (7) Respondent contends that this administrative tribunal violated his constitutional due process rights to a fair and impartial hearing by (a) foreclosing testimony on the issue of the 45-day rule and by (b) denying respondent's motion to visit Bernards High School and the Mountain Lakes High School athletic field. (8) Respondent seeks to dismiss Charge Eleven by arguing that the document in question was not a contract nor did respondent attempt to fraudulently secure reemployment. (9) Respondent seeks to dismiss Charges One, Two, Four, Five, Six, Seven, Eight and Nine contending that the Board failed to act in a timely manner in certifying the charges to the commissioner, thereby denying respondent his constitutional right of due process. (10) Respondent contends the Board has failed to meet its burden of proof by a preponderance of the evidence, therefore, necessitating dismissal of the charges.

At Point I, respondent renews his motion to dismiss the herein charges grounded upon his allegation that the Board failed to comply with the procedural and substantive provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.; more specifically, N.J.S.A. 18A:6-13, the 45-day rule. This motion having previously been denied by the undersigned and subsequently adopted by the commissioner, coupled with respondent's assertion that he raises the motion again for the sole purpose of preserving the argument for appeal; I **FIND** and **CONCLUDE** that further discussion with respect to that issue is not warranted here.

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Respondent, at Point II, challenges the statements of Elizabeth Metzger, the assistant principal, and principal Torry Froisland, as improper statements of evidence in support of the charges certified against him relying, in part, upon Union County Savings Bank v. Kolpenitsky, 125 N.J. Eq. 125 (E. & A. 1939); Whiteman Food Products Co. v. G. Arrigoni & Co., 27 N.J. Super. 359 (App. Div. 1953); Ashe v. Frazee, 37 N.J. Super. 542 (App. Div. 1955).

A closer examination of respondent's citations in support of his argument reveals that the court in Union County Savings Bank relied, in part, upon a holding in Maplewood Twp. v. Margolis, 102 N.J. Eq. 467 (Chan. 1928) which cited Kocher & Trier's New Jersey Chancery Practice, p. 1141 § 1590, stating, in part, that:

> allegations of fact on information and belief without giving the source of the information and the grounds of the belief . . . are ordinarily insufficient. . . . [Maplewood at 468.]

In the instant matter, both Metzger and Froisland set forth in their respective affidavits, the source of the information and the grounds of the belief in support of the allegations for consideration by the Board. Under these circumstances, the affidavits of Metzger and Froisland were permissible and sufficient to meet the cited Union Co. Savings Bank standards. Similarly, the court in Whiteman stated that "[a] prima facie case is all that is required to be made out by the affidavits; plenary proof is neither required nor practical . . ." Id. at 366. Even given the higher standard of an affiant's personal knowledge of an alleged event (rather than supported by hearsay) as found in Ashe, the affiants' information here indicated the nature and sources of their knowledge. Id. at 547.

I **CONCLUDE** that the affidavits of Metzger and Froisland contained information, testimony and evidence admissible at hearing and, therefore, admissible and proper for consideration by the Board in its determination as to whether to certify charges against respondent or not to so certify. Accordingly, respondent's motion to dismiss at Point III is hereby **DENIED.**

Respondent's motion to dismiss at Point III, based upon the residuum rule, N.J.A.C. 1:1-15.8, is granted, in part, and denied, in part. This determination is made on a clear reading of the regulation which provides that:

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(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact of appearance of arbitrariness.

The undersigned dismissed Charges One, Two, Six and Eight grounded, in part, upon the Board's failure to prove the charges either by the preponderance of credible evidence standard or the residuum rule. Charge Four, however, is sustained upon the legally competent evidence proffered by the Board's high school principal and official records maintained with respect to the charge. One such official record is respondent's rebuttal to the alleged incident which, in part, formed the basis of the Board's Charge Four (P-9). Notwithstanding the hearsay element of the administrative assistant's report to the principal, the principal's subsequent independent investigation of the principals involved, together with the principal's memorandum with respect to the incident, satisfies the admissibility of the hearsay evidence and the rule.

Respondent moves to dismiss Charges One through Nine grounded upon the equitable defense of laches. Respondent relies upon the dicta set forth by the New Jersey Supreme Court in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 151-153 (1982). The Court therein articulated several definitions of the doctrine, two of which were quoted with approval by the Appellate Division in Atlantic City v. Civil Service Comm., 3 N.J. Super. 57, 60 (App. Div. 1949) as:

> Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right***. 30 C.J.S. section 112, pp. 520, 521.
>
> Long lapse of time, if unexplained, may create or justify a presumption against the existence of validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that, if plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that

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> plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim. 30 C.J.S. section 116b, p. 538.

Respondent argues, among other things, that the Board delayed in bringing these enumerated charges from three to ten years and such length of delay is unreasonable. Respondent contends, under the circumstances, that it is inequitable to permit a claim of the charges to be enforced.

The Commissioner has held that the defense of laches is inapplicable in a teacher tenure matter. In the Matter of the Tenure Hearing of Joseph A. Maratea, Tp. of Riverside, Burlington Co., 1966 S.L.D. 77, 104. In the instant matter, as in Maratea, the Board ". . . could have dismissed respondent at the time the facts of [the charges] became known. [It] decided not to do so and to continue his employment with the hope . . . that such . . . mistake[s] would not be repeated and that he would measure up to his responsibilities." Id. at 105. Here, the Board acted under the same misapprehension that respondent would improve and correct his errant behavior after repeated warnings and disciplinary actions. To suggest that the Board has been lenient with respondent's past behavior is to understate the obvious. The herein record is replete with warnings and admonitions advanced by the principal with regard to respondent's use of inappropriate, profane and obscene language in the classroom and elsewhere. In addition, the Board exercised extreme restraint when, on two occasions, it merely withheld respondent's salary increment, rather than certify tenure charges, grounded upon allegations that respondent had committed physical and verbal abuse to pupils. Subsequent to the second offense of pupil abuse, which has been found to be true here, the Board even went to the extent of providing respondent with a psychiatric evaluation and follow-up counseling to cure his aberrant behavior and, further, protecting respondent from dismissal from his tenured position. The Board, in reliance upon the psychiatric assessment and recommendation that respondent could function in an appropriate and reasonable manner toward his pupils, reinstated his withheld salary increment. It was only after respondent's third offense of physical and verbal abuse toward a pupil, subsequent to the psychiatrist's recommendation, that the Board brought the herein action. It cannot be said by respondent that the Board's charges concerned with his prior behavior was a surprise to him nor unanticipated. Respondent was, at all times, fully aware of his own conduct both past and present. Respondent was also fully aware of the Board's concerns about his

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behavior towards certain pupils under respondent's direction and control, coupled with the Board's efforts to provide respondent ample opportunity to remedy that conduct the Board deemed to be unbecoming.

The courts of this state and the Commissioner have consistently held that fitness of a teaching staff member may be measured by a single isolated incident or by a series of related or unrelated incidents. In Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sp. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), our then-highest state court said:

> . . . Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. . . . [Id. at 371]

While the Board has determined it had sufficient grounds to certify tenure charges against respondent based upon the single latest incident (Charge Ten) involving pupil Andrew Fuls, it chose to enumerate those series of prior incidents to demonstrate respondent's alleged continuous unbecoming conduct. Under the Commissioner's holding in Maratea, those prior incidents may be considered and weighed in a tenure matter and do not provide the shield of the defense of laches to respondent.

Accordingly, I **CONCLUDE** that respondent's motion to dismiss the herein enumerated charges based upon the equitable doctrine of laches is hereby **DENIED.**

At Point V, respondent contends the Board is barred from prosecuting Charge Ten by virtue of the Board's failure to provide respondent with a safe and healthy environment in which to work. Respondent alleges that the music room to which he was assigned was "unventilated, uncooled, non-windowed, poorly sound proofed" and "crowded"; the consequence of which must be suffered by the Board. Respondent relies upon N.J.S.A. 34:6A-26 and N.J.S.A. 34:6A-33 in support of his contention the Board failed to afford him a safe and healthy work environment, alleging that on the day of the Andrew Fuls incident (Charge Ten), the classroom "was at best a horror chamber" (Respondent's Brief at 104).

In further support of his allegations with respect to the workplace, respondent offered into evidence the contents of an evaluation and report of the Middle States Association of Colleges and Schools Commission on Secondary Schools, dated October 18-20, 1977, which stated, in pertinent part: "Immediate attention be given to

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music facilities regarding ventilation and soundproofing so that rooms may be used fully for intended purposes" (R-3). Respondent asserts the Board failed to heed the recommendation; therefore, and by implication, respondent should be excused for his conduct toward Fuls on June 6, 1984.

Notwithstanding respondent's assertions, he has failed to demonstrate the truth of his allegation that his assigned music room was or is in violation of statute, rule or regulation with respect to health and safety requirements. Accordingly, I **CONCLUDE** the Board is not barred from prosecuting Charge Ten as alleged and certified against respondent.

Respondent asserts at Point VI that the Board's certification of its charges against him to the Commissioner constituted intentional falsification and, therefore, mandates the dismissal of all the charges. Respondent clearly demonstrated that the Board's certification was, in fact, notarized prior to its formal execution and signature being affixed by the Board's Secretary. Respondent is unable to demonstrate, however, that the Board's certification to the commissioner contains willful false statements. The Board herein complied with the intent of the statutory prescription as found at N.J.S.A. 18A:6-11.

As the court said in State v. Angelo's Motor Sales, 125 N.J. Super. 200 (App. Div. 1973), aff'd sub nom State v. Parmigiani, 65 N.J. 154 (1974), analogous to the herein contention:

> . . . Certification is only another way of swearing or affirming. It is nothing in itself except as a perceptible manifestation of the intent to verify the statement certified. [125 N.J. Super. at 207]

The Board's certification in the instant matter manifested its intent to verify the statements certified to the Commissioner.

I **CONCLUDE**, therefore, that respondent's assertions with regards to Point VI are without merit. Consequently, his motion to dismiss the charges is hereby **DENIED**.

Respondent contends at Point VII that the undersigned violated his constitutional right to a fair and impartial hearing and seeks to either reopen the record or to reverse this tribunal's rulings by way of appellate review. Respondent argues that this

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court's violation of his constitutional rights occurred when it (1) foreclosed oral testimony on the issue of the 45-day rule, which was the subject of oral argument and extensive legal memoranda; and (2) denied respondent's motion to visit Bernards High School and the Mountain Lakes High School athletic field.

As to respondent's first contention, the legal issues were addressed by the parties with a determination rendered by the undersigned. Subsequent interlocutory appeals were taken before the Commissioner and the State Board by respondent, both of which were denied. Respondent failed to assert his rights and perfect his interlocutory appeal before the Appellate Division of Superior Court.

As to respondent's second contention, this administrative tribunal may, in its discretion, exclude evidence where its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create a substantial danger of undue prejudice or confusion as to the issues. Evid. R. 4. Administrative tribunals may exclude evidence on Evid. R. 4 grounds. Stoelting v. Hauck, 32 N.J. 87 (1960). In applying Evid. R. 4, the trial judge in performing the weighing process called for has broad discretion. State v. Sands, 76 N.J. 127 (1978). A clear abuse of that "wide" discretion must be found by the reviewing tribunal before the trier's decision will be overturned. Hill v. Newman, 126 N.J. Super. 557 (App. Div. 1973), cert. den. 64 N.J. 508 (1974); State v. Boratto, 80 N.J. 506 (1979). The decision of the trial court must stand unless it can be clearly demonstrated that it palpably abused its discretion where a manifest denial of justice resulted. State v. Carter, 91 N.J. 86, 106 (1982).

Here, there was ample testimonial and documentary evidence proffered by both parties to provide the trier of fact with a scheme of the physical locations at issue. The necessity for an on-site visitation was not warranted; therefore, judicial discretion was exercised in denying respondent's motion.

In as much as respondent has set forth this motion to preserve his arguments on appellate review, no further discussion is necessary here.

Respondent's Point VIII has been determined in this decision with Charge Eleven having been dismissed. Consequently, the issue need not be addressed.

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Respondent's arguments at Point IX are essentially variations of his laches argument set forth at Point IV. There is no question nor doubt the Board acted in a timely fashion with respect to Charges Ten and Eleven.

CONCLUSIONS

The major thrust of the Board's charges against respondent concerns his behavior and conduct towards pupils; more specifically, respondent's verbal and physical abuse which allegedly rises to corporal punishment. Corporal punishment of pupils has been declared proscribed conduct by employees in New Jersey public schools by statute since 1867. The present law extends the protection of pupils from corporal punishment to private and parochial schools of this state with specific enumerated exceptions, as found at N.J.S.A. 18A:6-1 which provides as follows:

> No person employed or engaged in a school or education 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 amounts 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 constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

In the instant matter, respondent has failed to demonstrate that his conduct towards certain pupils under his direction and control, on at least three separate occasions, falls within the ambit of any of the above-cited exceptions. Although respondent disputes the events surrounding the Board's allegations of his verbal and physical abuse to pupils, he failed to present a credible defense to those charges. Respondent's admission to the principal that respondent lost control ("I flipped out; I grabbed the kid and threatened him" [P-15]), demonstrates a lack of self-discipline and

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self-control demanded of teaching staff members even under the most extreme cases of pupil errant behavior. As was said In the Matter of the Tenure Hearing of Thomas Appleby, School Dist. of Vineland, Cumberland Co., 1969 S.L.D. 159, aff'd State Bd. of Ed. 1970 S.L.D. 448, aff'd Docket No. A-539-70, New Jersey Superior Court, Appellate Division, March 14, 1972 (1972 S.L.D. 662):

> ***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 only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.*** (Emphasis supplied.) (1969 S.L.D. at 172-173)

That "underlying philosophy" to "freedom from bodily harm" and also "to freedom from offensive bodily touching" set forth in Appleby, supra, was articulated by the commissioner In the Matter of the Tenure Hearing of David Fulcomer, 1961-62 S.L.D. 160, remanded State Board of Education 1963 S.L.D. 251, decision on remand 1964 S.L.D. 142, aff'd State Board of Education 1966 S.L.D. 225, remand 93 N.J. Super. 404 (App. Div. 1967), decision on remand 1967 S.L.D. 215, aff'd Appellate Division, Superior Court, December 13, 1967 (unpublished), where he said:

> ***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 discipline 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 happened***.' *** While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control*** (1961-62 S.L.D. at 162)

In view of the above-stated philosophy and public policy, the Commissioner has addressed the prohibition of pupil corporal punishment in a line of cases involving teaching

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staff members. Appleby, supra; In the Matter of the Tenure Hearing of Frederick L. Ostergren, School Dist. of Franklin Tp., Somerset Co., 1966 S.L.D. 185; In the Matter of the Tenure Hearing of Inez McRae, School Dist. of the City of Trenton, Mercer Co., 1977 S.L.D. 572; In the Matter of the Tenure Hearing of John I. Gavlick, School Dist of the City of Burlington, Burlington Co., 1977 S.L.D. 524.

In addressing the degree of self-control required of a teaching staff member, the Commissioner said In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden Co., 1972 S.L.D. 302, 321, that:

> ***teachers***are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. ***Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.*** [Emphasis added.]

In the instant matter, it is the undersigned's finding that respondent used unnecessary and inappropriate physical force and verbal abuse in a series of incidents towards pupils under his direction and control. The Board, in an attempt to correct respondent's behavior, withheld respondent's salary increment on two occasions and provided respondent with psychiatric counseling at its expense. While respondent appeared to remedy and correct his prior abusive conduct and behavior, such was short-lived with a subsequent demonstration of loss of self-control on June 6, 1984, with then-pupil Fuls. In that instance, as with the other alleged incidents, there was no convincing evidence that it was necessary to resort to physical force.

Having found that respondent disregarded prior warnings and disciplinary actions by the Board and continued to inflict corporal punishment on certain pupils, I can only **CONCLUDE** that respondent's behavior was demonstrative of conduct unbecoming a teaching staff member.

Accordingly, it is hereby **ORDERED** that respondent be and is hereby **DISMISSED** from his employment position with the Board of Education of the Borough of Bernardsville, effective as of the date the Board certified the herein tenure charges to

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the Commissioner. Fulcomer, supra; Redcay v. St. Bd. of Ed., 130 N.J.L. 369 (Sp. Ct. 1943) aff'd 131 N.J.L. 326 (E. & A. 1944).

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.

27 November 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DEC 2 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 4 1985
DATE

Ronald L. Parker, Jr. S.
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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IN THE MATTER OF THE TENURE :
HEARING OF M. WILLIAM COWAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF BERNARDSVILLE, SOMERSET COUNTY. :
:

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that the parties' exceptions to the initial decision, as well as their reply exceptions, were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b, and c. Each of these submissions is at least 50 pages in length and relies heavily upon the seven days of hearing transcripts. The Commissioner has reviewed all the exceptions in addition to making a thorough review of the transcripts of these proceedings.

Essentially, respondent contests those findings of fact and conclusions of law reached in the initial decision which sustained Charges Four, part of Five, Seven, Nine and Ten. Further, respondent excepts to the ALJ's foreclosing the issue concerning respondent's contention that the Board of Education violated the procedural requirements of N.J.S.A. 18A:6-10 et seq. and decisions interpreting the same by not certifying the charges within 45 days from the time respondent filed his answer, or, as respondent avers in the instant matter, from the time that "[r]espondent advised the Board that he would not file an answer." (Respondent's Primary Exceptions, at p. 2)

In addition to his preliminary exception concerning the 45-day rule, respondent cites eight other exceptions regarding Charges Four, Five, Seven, Nine and Ten which are summarized below:

2. The conduct of the Board in delaying the institution of the proceedings against respondent warrants the dismissal of Charges Four, Five, Seven and Nine.

3. No residuum of competent evidence exists to sustain Charge Four.

4. Charges Four, Five, Seven and Nine must be dismissed as stale. Laches applies to Charges Four and Nine.

5. All charges must be dismissed on the basis of the improper statement of evidence submitted by Elizabeth Metzger and Torry Froisland because the evidence was not based on personal knowledge of either.

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6. The Board's falsification of the certification of charges mandates dismissal, in that the certification was notarized four days before the Board actually voted to certify the charges of unbecoming conduct.

7. The Board, by failing to provide respondent with a safe, healthy environment in which to work, is barred from prosecuting Charge Ten.

8. The ALJ by his rulings violated respondent's constitutional right to a fair and impartial hearing because:

   a. The ALJ foreclosed respondent from examining anyone under the Board's control regarding whether the Board violated the Feitel rule.

   b. The ALJ denied respondent's motion to visit locations where events allegedly happened pertinent to the charges.

9. The Board failed to meet its burden of proof on Charges Five, Seven, Nine and Ten.

The Board's primary exceptions to the initial decision cite six points:

1. Contrary to the ALJ's finding, Charges One, Two, Six and Eight are supported by legally competent evidence and should not be barred by the residuum rule.

2. Regarding Charge One, and contrary to the ALJ's finding, during the month of November 1974, respondent did verbally abuse women bus drivers employed to transport Bernardsville public school pupils and did use obscenities in addressing said bus drivers, which constituted conduct unbecoming a teacher.

3. Regarding Charge Two, and contrary to the ALJ's finding, on or about October 24, 1974, while proctoring an eighth grade examination, respondent did address pupil H.J. with obscenities, said conduct constituting conduct unbecoming a teacher.

4. Regarding the first portion of Charge Five and contrary to the ALJ's conclusion therein, the Board has proven respondent's action in damaging pupil S.N.'s trumpet and

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trumpet case by a preponderance of legally competent evidence, said conduct constituting conduct unbecoming a teacher.

5. Regarding Charge Eight, and contrary to the ALJ's conclusion, on or about November 1982, respondent did throw a chair to the front of his classroom while class was in session, knocking over his music stand, said conduct constituting conduct unbecoming a teacher.

6. Regarding Charge Eleven, and contrary to the ALJ's conclusion, on or about June 20, 1984, respondent did falsify a Board of Education contract sent to his wife in order to attempt to fraudulently secure extracurricular employment, said conduct constituting conduct unbecoming a teacher.

Respondent also filed reply exceptions to the Board's primary exceptions to the initial decision. Therein, respondent addresses three points:

1. Respondent replied first to the Board's argument that Charges One, Two and Eight were supported by legally competent evidence and should not be barred by the residuum rule. Respondent avers that a review of the record discloses that "factually and legally this is simply not true." (Reply Exceptions, at p. 1) Respondent argues that the Board "produced no one with any knowledge of the events." (Id., at p. 1) Respondent also notes that his legal arguments relative to the residuum rule have been fully briefed at pages 90-96 of his exceptions. Those arguments are incorporated herein by reference.

2. Secondly, respondent argues in reply exceptions that the Board has not proven that he damaged former pupil S.N.'s trumpet. Respondent cites his own testimony (Tr. VIII-60-61) as well as that of witness Negri (Tr. VI-28-44) as evidence that the trumpet and its case were already broken at the time of the incident in question.

3. Respondent contends in Point III of his reply exceptions that the Board has not proven that he falsified a contract in order to fraudulently secure employment. He avows that the document in question is not a contract offer from the Board but rather is

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a questionnaire from the Superintendent, since "[i]t is axiomatic that the superintendent would not have the power to bind the Board to a contractual relationship." (Id. at p. 10) Lastly, respondent contends that the record does not reveal an intention to defraud.

Finally, the Board also filed reply exceptions in opposition to the exceptions to the initial decision filed on behalf of respondent and to supplement the Board's exceptions to the initial decision. The Board's reply exceptions address Charges Four, part of Five, Seven, Nine and Ten and, particularly in regard to the 45-day rule issue, incorporate by reference its brief filed in opposition to respondent's Motion to Dismiss, its letter of opposition and exceptions to the Commissioner dated February 4, 1985, and its arguments as set forth in its reply brief of October 10, 1985.

In summary, the Board's reply exceptions aver as follows:

1. Respondent's Motions to Dismiss the tenure charges certified against him are without merit and therefore must be dismissed.

2. The Board acted expeditiously and in a timely fashion in certifying Charges Four, Five, Seven and Nine against respondent.

3. Charge Four is supported by legally competent evidence.

4. The principle of laches is not applicable to tenure charges filed herein.

5. The affidavits of Elizabeth Metzger and Torry Froisland are proper statements of evidence as mandated by N.J.S.A. 18A:6-11.

6. The certification of determination filed by the Board is valid and satisfies the statutory mandate of N.J.S.A. 18A:6-11.

7. The Board provided respondent with a safe, healthy environment in which to teach.

8. Allegations that the Court violated respondent's constitutional right to a fair and impartial hearing are without merit and therefore must fail.

9. The Board has proven respondent's unbecoming conduct by a preponderance of credible evidence. In support of this point, the Board cites to Charge Four and avers that

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> ***the contemporaneous incident report and memo of Dr. Froisland combined with his testimony at the time of trial and the admissions of Cowan in his rebuttal memo prove by a preponderance of credible evidence that the incident as alleged in Charge Four did occur. The facts indicate Cowan acted in a manner unbecoming a teaching staff member, and therefore, justify his dismissal as an employee of the Bernardsville Board of Education. (Board's Reply Exceptions, at p. 44)

Upon review of the lengthy transcripts, exhibits and papers filed by the parties, the Commissioner notes initially that contrary to the ALJ'S statement at page 28 of the initial decision, the denial of respondent's Motion to Dismiss has not been "subsequently adopted by the commissioner." Rather, as is his prerogative, the Commissioner has chosen to review the Motion for Interlocutory Review "after the judge renders the initial decision in the contested case, even if an application for interlocutory review *** [w]as made but the agency head declined to review the order or ruling***." (N.J.A.C. 1:1-9.7(i)(2))

The subject matter of the Motion to Dismiss advanced by respondent concerned whether the Board certified the charges against him within 45 days of the time he filed his statement in answer to the charges certified by the Board. For the record, the Commissioner notes the following chronology:

July 18, 1984	--	Secretary to the Board served a copy of tenure charges upon respondent.
July 25, 1984	--	Respondent's counsel advised the then Board attorney that no response other than the letter dated July 25, 1984 would be submitted in answer to the charges.
July 30, 1984	--	Board received correspondence from respondent dated July 25, 1984.
August 2, 1984	--	The fifteenth day following respondent's receipt of the charges.
August 10, 1984	--	Date Board avers was the last day of the extension provided respondent in order for him to answer the charges.
September 14, 1984	--	Board adopted resolution certifying 11 charges of conduct unbecoming a teaching staff member to the Commissioner and suspended respondent from his teaching position without pay, pursuant to N.J.S.A. 18A:6-14.

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Respondent avers that pursuant to N.J.S.A. 18A:6-13, the 45-day period runs from the date the Board received the July 25, 1984 correspondence, which respondent alleged served as his answer to the charges. The number of days that lapsed between July 30 and September 14, 1984 was 46, thus rendering the petition untimely, respondent argues.

It is the position of the Board that by certifying tenure charges to the Commissioner on September 14, 1984, the thirty-fifth day after August 10, 1984, which was the final day of the extension, the Board avers it granted respondent in order that he might answer the charges, it has met the statutory requirement set forth in N.J.S.A. 18A:6-13. Respondent denies that any such extension was provided or accepted.

As the ALJ notes in the initial decision, the issue of the 45-day timeline was examined at length by the Commissioner in In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, 1977 S.L.D. 451, aff'd State Board of Education 458. More recently, however, in In the Matter of the Tenure Hearing of Eddie Harrell, School District of the City of Paterson, Passaic County, decided by the Commissioner August 30, 1985, the Commissioner expounded on the relationship between N.J.S.A. 18A:6-11 and 6-13 in determining at what point the 45-day period begins to run. Therein the Commissioner stated:

> [Feitel] unambiguously directs that N.J.S.A. 18A:6-13 must be read in concert with N.J.S.A. 18A:6-11 as amended by c. 304, L. 1975. Specifically, Feitel states:
>
> > The New Jersey Supreme Court has held with respect to ascertaining the meaning of a statute that every effort should be made to harmonize the law relating to the same subject matter. State v. Green, 62 N.J. 547 (1973). Because the forty-five day time requirement in N.J.S.A. 18A:6-13 is affected by the provisions of N.J.S.A. 18A:6-11, both statutes shall be considered together. The pertinent requirements of N.J.S.A. 18A:6-14 must also be considered.*** (at p. 454)
>
> It is necessary to read 18A:6-13 in pari materia because N.J.S.A. 18A:6-11 and 6-14 were amended, and 6-12 repealed, whereas the language of 18A:6-13 remained unchanged. Prior to the amending of 18A:6-11, there was no requirement to notify the employee of the filing of a tenure charge nor was it necessary to allow time for him or her to respond to the charge before the Board certified the charge to the Commissioner.

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> In Feitel, supra, the Commissioner determined that the forty-five day period designated in 18A:6-13 does not begin to toll from the date the Board receives the charges as claimed by respondent and determined by the judge. Rather, "the forty-five day period provided the board in N.J.S.A. 18A:6-13 to determine whether to certify to the Commissioner begins to toll when the employee files his statement or when the allotted time for the employee to file the statement expires." (Emphasis supplied.)(at 455-456)
>
> (Slip Opinion, at p. 10)

As the ALJ notes at page 11 of his Decision on Motion, the critical date for triggering the 45-day period referred to in N.J.S.A. 18A:6-13 is at the end of the period which the Board provides the employee to submit a written statement of position and a written statement of evidence under oath in reply to the charges filed. The letter submitted by respondent's attorney on July 25, 1984 to the Board secretary was not an answer to the charges. N.J.S.A. 18A:6-11 requires that such a response shall include "a written statement of position and a written statement of evidence under oath with respect thereto." The July 25, 1984 letter contained neither. Upon receipt of the letter, the Board prudently waited until the expiration of the requisite fifteen days within which respondent might properly respond to the charges before it certified the charges to the Commissioner. Thus, the running of the 45-day period began on August 2, 1984, the fifteenth day following receipt of the charges by respondent, and ended on the forty-third day thereafter, or September 14 1984, the date when the Board certified them to the Commissioner. The Commissioner finds, therefore, that the charges were timely filed by the Board. Respondent's Motion to Dismiss the herein tenure charges is found to be without merit and is hereby denied and dismissed.

Point II of respondent's primary exceptions avers that the Board failed to act in a timely fashion in certifying Charges Four, Five, Seven and Nine, thereby denying respondent his constitutional right to due process. Respondent cites State v. One Ford Van Econoline, 154 N.J. Super. 326 (App. Div. 1977) and N.J.S.A. 24:21-35(c)(4) for the proposition that prompt administrative action is required in forfeiture actions, drunk driving arrests and in other criminal actions. Respondent also argues that all charges except Charge Ten are untimely, and that the ALJ's addressing the timeliness of only Charge Ten means that

> [b]y his silence, the A.L.J. agrees with Cowan. Cowan is not claiming that Charge 10 is untimely. Rather, he asserts that the other charges are untimely.
>
> (Respondent's Primary Exceptions, at p. 89)

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Respondent's analogy between the forfeiture statute and the tenure statute is misplaced. The intent of the Legislature as expressed in the tenure statute and the penalty to be imposed at the conclusion of a tenure hearing are substantially different from the offenses and penalties imposed in criminal matters. Neither is the issue in the instant matter one of delay. Rather, Charges Four, Five, Seven and Nine are offered as corroboration of the fact that respondent has demonstrated over many years a pattern of behavior unbecoming a teacher. As the Board states in its reply exceptions:

> The Board has taken the appropriate steps over the past ten years to reprimand and discipline the Respondent for his actions. The Board has sought to discipline Respondent in proportion to his conduct, blending the penalty with a constructive program of counselling, improvement plans and administrative support. The Board and the administration has (sic) embarked on a progressive plan of discipline in order to preserve the integrity of the education offered Bernardsville students and to assist the growth and development of a tenured employee. The Board has exercised its statutory right to correct inappropriate behavior by addressing each behavioral incident with an approved plan of discipline and recommendations for improvement. At this point in time, the Board should not be penalized for the compassion, time, effort, and money expended during the past ten years in order to assist Respondent with the correction and control of his behavioral problems.
>
> (Board's Reply Exceptions, at pp. 13-14)

The Commissioner approves of the steps the Board has taken over the course of the past ten years in an effort to effect appropriate change in respondent's deportment and attitude toward his pupils. Furthermore, there is nothing in the statutes or rules that precludes the Board from raising, nor the Commissioner from considering, such evidence as establishing that such pattern of inappropriate outbursts exists and has continued to affect the education provided the students at Bernards High School. For the same reasons, it is the Commissioner's view that Charges Four, Five, Seven and Nine are not stale, as respondent avers in Point IV of his exceptions. The Commissioner further concurs with the ALJ's discussion of the doctrine of laches and its inapplicability in a tenure hearing. Thus, the Commissioner rejects the arguments contained in Point IV of respondent's memorandum of exceptions.

As to Point III of respondent's exceptions, which avers that there is no residuum of competent evidence to sustain Charge Four since the memo written by the principal after the episode in question is predicated on hearsay, the Commissioner agrees with respondent's point that in conformity with Michael Colavita v. Hillsborough Township School District, Middlesex County, decided by the Commissioner November 3, 1983, State Board aff'd May 2, 1984,

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New Jersey Superior Court, Appellate Division, rev'd/rem'd March 28, 1984, State Board aff'd October 2, 1985, a residuum of competent evidence must exist in order to sustain the admission of hearsay during an administrative hearing. The Commissioner is of the opinion that the residuum rule has been met in the ALJ's findings as to Charge Four. In P-9 at pp. 1 and 9, written by respondent, it is stated:

> ***
>
> Item A-#2 - page 1: The emotional reaction occurring with this student is the direct result of a father over-reacting to personal injury to his son.
>
> ***
>
> Appendix F - page 14: [D.T.] hit my son, Craig, on the head with a metal stool causing personal injury. I took him to the office and his feet were on the ground at all times. On returning, I spoke privately to the principal who was standing in the corrider (sic) at the time. I also did not strike the cement wall as it would have broken my hand.

Based on the Commissioner's recent decision in In the Matter of the Tenure Hearing of Charles Apkarian, School District of West New York, Hudson County, decided by the Commissioner September 27, 1985 discussion of which follows, there can be no question but that the principal's reliance on an eyewitness' testimony as to respondent's having uttered profane and vulgar language immediately following this incident meets the residuum rule expressed in Colavita. As to whether respondent "grabbed D.T. and physically lifted the pupil where D.T.'s feet did not touch the floor while respondent took D.T. from the classroom to the administrative assistant's office" (Initial Decision, ante), the Commissioner's review of the record concurs with the ALJ's analysis of the circumstances. It is clear that respondent does not deny that he used physical force upon D.T. but, rather, denies that D.T.'s feet left the floor while respondent transported him to the office. Further, respondent admits that he overreacted in this situation, which leads the Commissioner to the conclusion that respondent's behavior in the given situation was inappropriate and unseemly for a teaching staff member. Based upon these facts, the Commissioner finds that respondent did use physical force upon D.T. on December 3, 1974, while escorting the pupil from the classroom to the office of the high school administrative assistant and, further, that there is sufficient documentation in the record to sustain admission of the hearsay evidence regarding this incident. Point III of respondent's exceptions is therefore dismissed.

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Respondent, at Point V, challenges the statements of Elizabeth Metzger, the assistant principal, and Principal Torry Froisland, as improper statements of evidence in support of the charges certified against him, citing the case law and arguments advanced before the ALJ at the hearing. In addition to the ALJ's discussion, with which the Commissioner concurs, In re Apkarian, supra, elaborates on the sufficiency of the statement of evidence submitted under oath by the superintendent in certifying tenure charges. Therein, the Commissioner stated:

> Long before an ALJ makes a determination regarding the admissibility or non-admissibility of evidence submitted in a tenure hearing, an administrator of the district, usually the superintendent, must establish, in presenting the tenure charges for the Board's consideration, that the charges are predicated on actual reported information brought to his or her attention. Nowhere in the statute does it require, however, that each piece of evidence presented to the Board for its consideration need be taken under oath nor that the person bringing the charge must have personal knowledge of the facts. Neither is it the Board's duty to pass judgment on the weight or sufficiency to be accorded the evidence. That responsibility is the Commissioner's alone. It is the Board's duty to consider whether the evidence, if credited later, following a full hearing, would be sufficient to warrant dismissal or reduction in salary. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). See also, Manalapan-Englishtown Education Association v. Board of Education of the Manalapan-Englishtown Regional School District, 1979 S.L.D. 505.
>
> ***That the facts upon which the Board relies in certifying the charges may be predicated on hearsay is irrelevant at this juncture. Judgment as to the admissibility of the evidence occurs during the plenary hearing. Those who address their concerns in letters and reports will presumably be available at the hearing to testify and to be cross-examined or may be deposed as to the truth of the facts contained therein.
>
> ***[T]he Commissioner does not agree with the ALJ in Loria or herein that a written statement of evidence under oath must be predicated on the personal knowledge of the individual who is bringing the charge to the Board's attention for certifying tenure charges. Were such personal knowledge of the facts a prerequisite for preferring tenure charges, the burden placed upon a school district would be insurmountable since

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> the actions providing the bases of the charges often occur outside the personal knowledge or purview of the individual bringing such charges to the Board's attention.*** (Emphasis in text)
> (Slip Opinion, at pp. 12-14)

In the instant matter, the ALJ determined, after direct and cross-examination of both Dr. Froisland and Ms. Metzger, that

> ***both Metzger and Froisland set forth in their respective affidavits, the source of the information and the grounds of the belief in support of the allegations for consideration by the Board. Under these circumstances, the affidavits of Metzger and Froisland were permissible and sufficient to meet the cited Union Co. Savings Bank standards.***
>
> I CONCLUDE that the affidavits of Metzger and Froisland contained information, testimony and evidence admissible at hearing and, therefore, admissible and proper for consideration by the Board in its determination as to whether to certify charges against respondent or not to so certify. Accordingly, respondent's motion to dismiss at Point III is hereby DENIED.
> (Initial Decision, ante)

The Commissioner concurs in the ALJ's analysis of respondent's arguments contained in Point V of his primary exceptions, and thus rejects the arguments contained therein.

At Point VI, respondent asserts the Board's charges must be dismissed as a result of the improper certification of Phillip Miller, Board Secretary/School Business Administrator. The Commissioner agrees with the ALJ that respondent has failed to demonstrate that the Board's certification contains willful false statements. Without such proof, the certification, albeit with a jurat affixed with a date that preceded the actual certification vote by the Board, represents nothing more than a ministerial defect. As the Board notes in its reply exceptions, "A certification of determination is not an affidavit but a declaration in writing designed to serve notice on the Commissioner that certain events have occurred in the certification process. People v. Foster, 27 Misc. Rep. 576, 58 N.Y. Supp. 574; U.S. v. Ambrose, 108 U.S. 336, 2 Sup. Ct. 682; Nowell v. Mayor and Council of Monroe, 177 Ga. 648, 171 S.E. 136, 141." (Board's Reply Exceptions, at p. 32) Since the Board's certification in the instant matter manifested its intent to verify the statements certified to the Commissioner, the Commissioner finds respondent's argument at Point VI to be without merit, and is therefore dismissed.

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Just as respondent has failed to prove that the Board's certification to the Commissioner contains willful false statements, respondent has failed to prove the allegations set forth in his exceptions at Point VII, that the Board failed to provide a safe, healthy environment in which to work. Respondent asserts that the Board failed to heed the recommendation of the Middle States Association of Colleges and Schools Commission on Secondary Schools, dated October 18-20, 1977 that suggested "Immediate attention be given to music facilities regarding ventilation and soundproofing so that rooms may be used fully for intended purposes.***" (R-3) The intent of respondent in raising the issue of the physical qualities of the band room were to mitigate or excuse his behavior on June 6, 1984. The Commissioner concurs with the ALJ that respondent "failed to demonstrate the truth of his allegation, that his assigned music room was or is in violation of statute, rule or regulation with respect to health and safety requirements." (Initial Decision, ante) Furthermore, as the Board notes in its reply exceptions, "The factual circumstances, the repetative (sic) nature of the conduct and the specific behavior involved refute any notion of mitigation," and cites In the Matter of the Tenure Hearing of Abraham Altschuler, 1978 S.L.D. 419, aff'd by State Board with clarification 427 and In the Matter of the Tenure Hearing of Ralph Guma, 1982 S.L.D. 1100, aff'd State Board May 4, 1983. For the reasons stated above, the Commissioner rejects the arguments contained in Point VII of respondent's Memorandum of Exceptions.

Respondent alleges in Point VIII of his primary exceptions that the determinations of the ALJ violated his rights on two occasions: 1) foreclosing testimony on the issue of the 45-day rule and 2) denying his motion to visit Bernards High School and the Mountain Lakes High School football field. The Commissioner, having reviewed all papers filed with the Court, agrees with the ALJ that respondent's constitutional rights have not been abridged. The consideration of oral testimony in opposition to a motion is within the discretion of the Court. N.J.A.C. 1:1-9.3 Respondent chose not to propound interrogatories nor question witnesses with respect to this procedural issue and discovery was completed. The Commissioner agrees with the Board's comment in its reply exceptions that

> [t]o permit testimonial evidence on the issue of the 45-day rule at the time of trial would involve an undue consumption of time in light of the numerous documents filed on this issue during the pretrial motion process. Each party has been provided with the opportunity to address the issue and present his position.
> (Board's Reply Exceptions, at p. 39)

As to respondent's citing the Court's refusal to visit the Bernards High School and the Mountain Lakes football field as denial of respondent's rights to produce evidence, the Commissioner wholeheartedly agrees with the ALJ that

> ***there was ample testimonial and documentary evidence proffered by both parties to provide the

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> trier of fact with a scheme of the physical locations at issue. The necessity for an on-site visitation was not warranted; therefore, judicial discretion was exercised in denying respondent's motion. (Initial Decision, ante)

Since respondent has failed to demonstrate an abuse of discretion resulting in a denial of justice under the standard articulated in State v. Carter, 91 N.J. 86, 106 (1982), the Commissioner dismisses the allegations contained in Point VIII of respondent's exceptions.

Finally, in Point IX, respondent avers that the Board has failed to meet its burden of proving the tenure charges against him. The Commissioner is satisfied, having carefully reviewed the hundreds of pages of briefs, motions, and hearing transcripts, that the facts and law relative to the instant matter provide ample support and justification for dismissal of respondent from his tenured position. He agrees with the Board's assertion that the repeated episodes of excessive force, the nature and gravity of the offenses, the injurious effect of respondent's conduct on the discipline and proper administration of the school system and the unlikelihood of respondent's continued effective performance in the Bernardsville school system. It is the determination and finding of the Commissioner that respondent should be terminated from his employment. The Commissioner concurs with the ALJ's determination that respondent failed to demonstrate that his conduct toward certain pupils under his direction and control, on at least three separate occasions, falls within the ambit of the exceptions cited in N.J.S.A. 18A:6-1. The Commissioner's review of the facts comports with the ALJ's that respondent "***used unnecessary and inappropriate physical force and verbal abuse in a series of incidents towards pupils under his direction and control." (Initial Decision, ante) It is also evident from the record that, despite disciplinary action and counseling by the Board and a psychologist, respondent repeatedly and remorselessly failed to exhibit the self-control and patience required in working among public school pupils.

Having found, as did the ALJ, that respondent disregarded prior warnings and actions by the Board and continued to inflict corporal punishment on certain pupils, the Commissioner likewise concludes that respondent's behavior has been demonstrative of conduct unbecoming a teaching staff member. Accordingly, it is hereby ordered that respondent be and is dismissed from his employment with the Board of Education of the Borough of Bernardsville, effective as of the date of the Commissioner's decision. It is further ordered that this matter be forwarded to the State Board of Examiners for consideration pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 15,1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF M. WILLIAM COWAN,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
BERNARDSVILLE, SOMERSET COUNTY.	:	
	:	

Decided by the Commissioner of Education, January 15, 1986

For the Petitioner-Respondent, Schwartz, Pisano and Simon
(Lawrence S. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Klausner and Hunter,
(Stephen E. Klausner, Esq., of Counsel)

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

September 3, 1986

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION AND CROSS-MOTION
FOR SUMMARY DECISION
OAL DKT. NO. EDU 3904-85
AGENCY DKT. NO. 137-5/85

MATTHEW J. AMATO, JR.
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL, HUDSON COUNTY
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch and Porwich, attorneys)

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

Record Closed: November 8, 1985 Decided: December 5, 1985

BEFORE SYBIL R. MOSES, ALJ:

This matter comes before the Office of Administrative Law (OAL) as the result of a petition filed by Matthew Amato with the Commissioner of Education on May 22, 1985, asking to be compensated for one month of a three-month period during which he was unable to teach as a result of the Board's lack of action. The matter was forwarded to the OAL for determination as a contested case on June 25, 1985, without any answer having

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been filed by the Board. When the matter was forwarded, it was noted that the Commissioner had decided a prior case on November 9, 1984, between the same two parties concerning the same set of facts.

A prehearing conference was held on September 9, 1985. On that date, both attorneys agreed that this case should be decided as a matter of law. Petitioner asserts that the decision of the Commissioner in Matthew J. Amato, Jr. v. Board of Ed. of the Hudson County Area Vocational and Technical Schools, OAL DKT. NO. EDU 10125-83 (Sept. 20, 1984), rev'd, Commisioner of Education (Nov. 8, 1984), entitles him to backpay for the entire three months that he was excluded from his job!

Respondent denies that Amato is entitled to backpay, asserting res judicata, relying on the aforementioned Commissioner's decision and a 1982 arbitration decision. Respondent also asserts laches and/or the 90-day statute of limitations, stating that petitioner never raised this specific request in his initial pleadings.

Counsel filed their briefs in support of the motion and cross-motion for summary judgment in a timely fashion. Responses thereto were also filed in a timely fashion after one extension of time was granted. The record closed on November 8, 1985.

The parties agreed that no facts were in dispute and they executed a stipulation of facts, which is attached to this decision and fully incorporated herein as if set forth at length. The stipulation of facts refers to the decision of Arbitrator Jack D. Tillem, American Arbitration Case No. 18 39 0676 82D, and to the decision of the Commissioner of Education, issued on November 9, 1984, both of which are attached to this decision.

In his decision, the Commissioner held that petitioner was eligible for an emergency teaching certificate as of the date of his initial employment, October 1, 1980, and therefore his service must be considered continuous for purposes of construing the applicable provisions of N.J.S.A. 18A:28-5(c). Therefore, he acquired tenure in March 1984 at the time he received a permanent teacher's certificate. The Commissioner went out of his way to find ". . . that the Board failed to take the above-cited procedural steps

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at any time prior to or at the commencement of petitioner's initial employment. Had the Board fulfilled its responsibility, it would have been in a position to inform petitioner of such requirements . . . . had the Board complied with the above-cited regulations, petitioner would have possessed an appropriate teaching certificate throughout the course of his employment with the Board . . . . As a matter of fundamental fairness, the Commissioner finds that the Board's failure to act under these specific circumstances should not deprive petitioner of tenure protection, pursuant to the provisions of N.J.S.A. 18A:28-5(c), which would have attached from the commencement from his initial employment as of October 1, 1980 through March 1984 when he obtained his permanent teacher's certificate . . ." Commissioner's Decision at 16-17. The Commissioner's decision did not specifically address the issues of backpay and other emoluments of employment.

The arbitration decision awarded Mr. Amato two months' pay on another ground altogether. The arbitrator found that the Board had a contractual obligation to give an employee 60 days' notice of termination, which it had not fulfilled in Mr. Amato's case. Therefore 60 days' pay was due and owing to Amato.

In the matter before me, Mr. Amato's attorney argues that the Commissioner's decision made it clear that petitioner's period of service with the Board should be construed as not having been broken. If the Board had done what it should have done in regard to petitioner's emergency certificate, Mr. Amato would not have been without work for three months. Therefore, on the basis of simple equity, petitioner argues that he should not suffer loss of pay because of the Board's lack of action.

The Board argues that the previous petition for declaratory judgment never raised the issue of backpay, although it did ask the Commissioner to find that Mr. Amato had both seniority and tenure in his position as job placement coordinator, which relief was granted. Respondent argues that the entire controversy doctrine, as enunciated in William Blanchard Co. v. Beach Concrete Company, Inc., 150 N.J. Super. 277, 292 (App. Div. 1977), should apply in this matter because Mr. Amato is attempting to try this case piecemeal before the Commissioner, as well as in different forums. All that the

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Commissioner granted him was tenure and then only on equitable grounds. Respondent also argues that petitioner has not complied within the 90-day rule prescribed by N.J.A.C. 6:24-1.2, as he did not include the request for backpay in his initial petition for declaratory judgment.

Petitioner responded to the res judicata argument in two ways. He asserts that the Commissioner tacitly considered the backpay issue when he ruled that since petitioner was eligible for an emergency certificate as of the date of his initial employment, that employment must be considered without interruption for the purpose of construing his total service in acquisition of tenure. In the alternative, he posits that if the Commissioner did not address the backpay and other emoluments issue, then res judicata cannot apply. Petitioner argues that the 90-day rule has clearly been met because he had every reasonable expectation that the issue of backpay would be disposed of in his previous case before the Commissioner, which was clearly filed in a timely fashion. Immediately upon learning that the Commissioner did not decide the issues of backpay, vacation, sick time, etc., petitioner instituted the within action.

After reviewing the briefs in this matter, and after reading the Commissioner's Decision closely, I conclude that petitioner should be awarded the one month's pay which he has not yet received, for the three months he was out of work as a result of the Board's lack of action. It is clear to me that if the Board had complied with all procedural requirements, petitioner Amato would not have lost three-months' pay in the first place. The fact that he was awarded 60 days' pay on another issue altogether (lack of 60 days' notice), is of no moment to my conclusion that fundamental fairness requires the Board to make petitioner whole.

Respondent's legal contentions are inapposite to the case at bar. Petitioner has not run afoul of the 90-day rule. When he filed his petition for declaratory judgment, no reasonable person could presume that he did not intend to have the entire matter disposed of as a result of his request to have the Commissioner find that he was eligible for tenure and should have received tenure despite the Board's lack of action. Should the 90-day rule be construed strictly and held to apply to the issue of backpay, because it was not

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specifically listed in petitioner's 1983 prayer for declaratory judgment, then this is clearly a case where the rule should be relaxed, pursuant to N.J.A.C. 6:24-1.19. The reason for relaxation is clearly stated in the last sentence of that rule.

> They [these rules] may be relaxed or dispensed with by the Commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice [emphasis added].

See also, N.J.A.C. 1:1-1.3(a), Uniform Administrative Rules of Practice, applicable to cases heard before the Office of Administrative Law. The Commissioner's Decision clearly established that the Board of Education in this matter did not fulfill its responsibilities to petitioner and, furthermore, had the Board fulfilled its responsibilities, Mr. Amato would have possessed an appropriate teaching certificate and the Board would not have been forced to terminate him on November 17, 1982 and only reemploy him thereafter on February 1983. The Commissioner clearly held that:

> As a matter of fundamental fairness the Commissioner finds that the Board's failure to act under these specific circumstances should not deprive petitioner of tenure protection pursuant to the provisions of N.J.S.A. 18A:28-5(c) . . [emphasis added].

His total employment service, for the purpose of the acquisition of tenure, had to be construed from the date of his initial employment, without the three-month break in service.

Given the foregoing conclusion by the Commissioner of Education, which is the law of the case, that it was fundamentally unfair not to consider his employment as unbroken from the date of his initial employment, I conclude that it would be unfair for him not to receive pay for the three months he was out of work, which lack of work was entirely due to the Board's inaction. However, in the case at bar, only one month's pay, etc. is in dispute, since the arbitrator awarded two months' back pay to Mr. Amato, based on an entirely separate issue, that is, where the Board did not do what it was supposed to do; give 60 days' notice.

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Respondent urges the applicability of the entire single-controversy doctrine, as discussed in William Blanchard, 150 N.J. Super. at 292. The effect of the operation of the single-controversy has been to bar claims in subsequent proceedings which were related to the prior proceeding if the plaintiff did not seek complete relief for the vindication of the wrongful charges. See, Applestein v. United Board and Carton Corp., 35 N.J. 343, 356 (1961). A case-by-case approach has been formulated to assess whether claims fall under this doctrine. Blanchard, 150 N.J. Super. at 293-294. The elements which must be found in order to have the doctrine apply were set forth in Gareeb v. Weinstein, 161 N.J. Super. 1, 9 (App. Div. 1978), citing Falcone v. Middlesex County Medical Society, 87 N.J. Super. 486, 490 (App. Div. 1965), aff'd in part, rev'd in part on other grounds, 47 N.J. 92 (1966). In order for the "entire controversy doctrine" to apply here, there must be (a) the identical parties; (b) advancing separate claims; (c) in separate actions or proceedings; (d) on the same underlying wrong. I conclude that the doctrine does not apply to Amato's present claim. Respondent has not shown that the instant petition is a separate claim. It is clear to me from the original petition for declaratory judgment, from the arbitration opinion and award, from the stipulation of facts and from the Commissioner's Decision, that the claim here is identical to that which was advanced after Mr. Amato was terminated in November 1982.

The claim in 1982 and the current claim all revolve around the Board's inaction and failure to meet its responsibilities in obtaining an emergency teaching certificate for Mr. Amato. Had such a certificate been obtained, there would not have been a time when he was out of work, from November 1982 through February 17, 1983. The Board took no action to secure such a certificate, although petitioner was eligible for emergency certification throughout the entire period of time. It was based on this lack of action by the Board of Education that the Commissioner of Education concluded that petitioner's employment had to be considered without interruption for the purpose of construing his total employment service and the acquisition of tenure. Commissioner's Decision at 17. Further, Mr. Amato did not hold back a related component of the controversy, as discussed in Blanchard, 150 N.J. Super. at 292-293. Rather, it was reasonable for him to assume that all the emoluments of tenure, including backpay, would be decided by the Commissioner as the result of a decision on his petition for declaratory judgment.

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Further, the instant matter is not truly a separate proceeding. It is more clearly a continuation of the original petition, made necessary by the fact that the Commissioner did not decide all the issues pertaining to his tenure rights and arising out of the Board's lack of action.

Accordingly, I conclude that the motion for summary decision filed by petitioner, Matthew F. Amato, Jr., asking that the Board be liable for backpay for the three-month period he was not employed as a result of its failure to seek emergency certification for him, should be **GRANTED**. I further conclude that the practical result of this decision will be to grant pay for the period of one month, and other appropriate emoluments, because Amato has received 60 days' pay as a result of the arbitration decision.

Accordingly, it is hereby **ORDERED** that the Board of Education of the Hudson County Area Vocational-Technical School is to pay petitioner, Matthew F. Amato, Jr., for the one month of the three months that he was out of work between November 17, 1983 and February 1984 for which he has not been compensated; and

It is further **ORDERED** that the Board issue him accrued sick leave time and vacation time for the entire three-month period, if it has not already done so, or at least for the one-month period for which compensation had not been paid.

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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.

December 5, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

DEC 9 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 10 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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MATTHEW J. AMATO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

In its exceptions the Board contends that, contrary to the conclusion of the ALJ, it was not reasonable for petitioner to assume that the issue of his back pay would be decided without making any mention of it in his Petition of Appeal. Further, the Board again raises the point made in its posthearing brief that petitioner should have asked for back pay in his prayer for relief if he did so intend to have such issue decided. It is the Board's position that it is not in the interest of justice to find for petitioner in the instant matter since to do so would not only be unfair to the Board because it has been forced to defend on three separate occasions -- at arbitration, in front of the Commissioner, and finally, before the Office of Administrative Law -- solely due to petitioner's not asking for proper relief, but it would also be impractical insofar as future standards of pleading could be guided by such a decision. Moreover, the Board argues, the cost to the judicial system would be unwarranted since ultimately petitioner is given three chances to refine his pleadings in the same matter.

Having carefully reviewed the record before him, as well as the initial decision, the Commissioner is convinced of the merits of the Board's position. Petitioner's original complaint, filed November 1, 1983, solely sought declaratory judgment concerning his tenure status with Respondent Board of Education. Since such a determination can be made without consideration of seniority or monetary factors, the Commissioner resolved the matter in petitioner's favor and declared that he was indeed tenured as of March 1984. That decision was issued on November 8, 1984.

On February 7, 1985, the Commissioner received correspondence from petitioner's counsel requesting that the Commissioner amend his determination of 91 days earlier directing the Board to compensate petitioner one month's pay ($1,700) for salary to which he would otherwise be "entitled had the Board of Education not broken his service." (at p. 2) In his reply to that correspondence, dated March 7, 1985, the Director of the Bureau of Controversies and Disputes said:

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***

> Please be advised that upon review of the original pleadings in the record of this matter, it is noted that your Petition for Declaratory Judgment did not contain the request you are now making as a cause of action upon which such relief was requested of the Commissioner.
>
> Please be informed that your request to have the Commissioner amend his decision in the above-captioned matter must necessarily be denied.
>
> (at p. 1)

Thereafter on May 23, 1985, the instant Petition of Appeal was filed on behalf of petitioner, requesting an "amount equal to what his monthly compensation was at the time he was foreclosed from teaching by the [Board], plus interim [sic: interest] and attorney's fees." (Petition of Appeal, at p. 2) The Board failed to answer the petition within the time allotted by N.J.A.C. 6:24-1.4. The matter was then transmitted without an answer to the Office of Administrative Law pursuant to N.J.A.C. 1:1-5.1(c) which states:

> Agencies may transmit contested cases to the Office of Administrative Law prior to issue being joined only with the consent of the Director of the Office of Administrative Law. In those cases, if a party unreasonably delays joining issue, the administrative law judge may enter summary decision against the delaying party either sua sponte or upon motion of the aggrieved party. This summary decision shall be treated as an initial decision under N.J.A.C. 1:1-16.3.

Following pre-hearing conference and the submission of post-hearing briefs, the matter was decided by the ALJ on Motion and Cross-Motion for Summary Decision.

Further, case law has consistently held that issues to be resolved in a proceeding before the Commissioner must be properly framed in the petition of appeal. See Andrew Guerriero v. Board of Education of the Borough of Glen Rock, Bergen County, decided by the Commissioner March 4, 1985. (Commissioner affirmed the findings and determination in initial decision, noting petitioner may not litigate new allegations not in his original petition.) See also Genevieve Peterson v. Board of Education of the Township of Lakewood, Ocean County, 1982 S.L.D. 1411, aff'd State Board July 6, 1983. (Commissioner affirmed the findings and determination in initial decision with modification, noting that the determination of seniority was not framed as one of the issues in the controversy and therefore exceeded the scope of the proceedings.)

Furthermore, the 90-day rule now precludes petitioner from asserting his claim for back pay. Res judicata applies. The entire

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controversy doctrine as enunciated in William Blanchard Co. v. Beach Concrete Company, Inc., 150 N.J. Super. 277 (App. Div. 1977) is controlling in this regard. It requires

> ***that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding.***
>
> (at 292-293)

Therein the Court held:

> While motions to amend pleadings are required by the express terms of the rule to be liberally granted, there remains nevertheless a necessary area of judicial discretion in denying such motions where the interests of justice require.***
>
> (at 299)

Certainly, the Commissioner cannot be "obligated to look at all possible contingencies not brought to light in a petitioner's prayer.***" (Board's Exceptions, at p. 2) Neither is it in the interest of justice to permit petitions of appeal or initial decisions to be amended ad infinitum in an ongoing attempt to perfect the pleadings.

For the reasons expressed herein, the initial decision in this matter is hereby reversed and summary judgment is granted in favor of the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 17,1986

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MATTHEW J. AMATO, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 17, 1986

For the Petitioner-Appellant, Feintuch and Porwich
(Philip Feintuch, Esq., of Counsel)

For the Respondent-Respondent, Moore, Scarpa and Kealy
(Robert M. Kealy, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. However, although we find that the Commissioner correctly emphasized that the issues to be resolved in a proceeding before the Commissioner must be properly framed in the Petition of Appeal, we note that, as we held in Guerriero v. Board of Education of the Borough of Glen Rock, decided by the State Board, February 7, 1986, in determining whether summary judgment should be granted, the question of whether there is an issue of material fact is to be resolved by consideration of depositions and admissions as well as of the pleadings.

June 4, 1986

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INITIAL DECISION
OAL DKT. NO. EDU 1477-85
AGENCY DKT. NO. 35-2/85

HUDSON COUNTY AREA VOCATIONAL - TECHNICAL EDUCATION ASSOCIATION and JENNIE TERLIZZI,

Petitioners

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL TECHNICAL SCHOOLS,

Respondent

Bruce D. Leder, Esq., for petitioner
(Schneider, Cohen & Solomon, attorneys)

Robert M. Kealy, Esq., for respondent

Record Closed: November 21, 1985 Decided: December 11, 1985

BEFORE WARD R. YOUNG, ALJ:

Jennie Terlizzi, a teaching staff member, alleged the action of the Board of Education of the Hudson County Area Vocational — Technical Schools in terminating her employment, effective March 31, 1985, was illegal due to a violation of her seniority rights.

The Board denies its action was improper, and further asserts that Terlizzi is not tenured and therefore has no seniority rights.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq, on March 18, 1985. Numerous procedural delays were due to real difficulties encountered by the parties in their efforts to seek discovery (employment records) deemed essential to a full and fair adjudication of the dispute. The good faith efforts of counsel to amicably resolve the dispute were demonstrated when they jointly met with representatives of the Bureau of Teacher Certification to ascertain required certifications for various teaching responsibilities, albeit without success. Further delay resulted from a change of counsel by respondent and the need for a supplemental prehearing conference on November 19, 1985, at which the parties executed a stipulation of facts and submitted the matter for summary decision. Briefs were waived and the record closed on November 21, 1985 with the filing of final discovery as directed by the undersigned.

A corollary issue arose which triggered the entry of an Order to Show Cause by the undersigned as to why sanctions should not be imposed on either or both parties for the delays encountered in the adjudicatory process. Oral argument was held on August 2, 1985, which concluded with the exercise of discretionary authority pursuant to N.J.A.C. 1:1-3.9 to incorporate a determination on sanctions in this Initial Decision. After careful consideration of the arguments of counsel, I **FIND** the primary cause of delay to rest with poor record-keeping by respondent, and **CONCLUDE**, therefore that no sanctions shall be imposed.

The following facts are adopted herein as **FINDINGS OF FACT** from the stipulation filed by the parties as well as admissions in the pleadings and joint exhibits:

1. Terlizzi was initially employed by respondent as a teaching staff member on October 15, 1977 and taught Fashion Design until June 1985.

2. Terlizzi was issued the certificate of Teacher of Production, Personal or Service Occupations — Fashion Design in January 1981.

3. Prior to January 1981, Terlizzi was issued emergency certification.

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4. Wilson was initially employed by respondent on February 1, 1977 as a clerk and on October 15, 1977 as a permanent substitute.

5. Wilson was assigned as a teacher of Commercial Clothing during the 1977-78 school year.

6. Since 1978-79 Wilson has been assigned as a teacher of Employment Orientation - Sewing.

7. Wilson possesses the certificate of Teacher of Dressmaking and Tailoring.

8. Corbin was initially employed by respondent on September 1, 1980 and has been assigned as a Teacher of Employer Orientation — Power Sewing, and possesses the certificate of Teacher of Production, Personal or Service Occupations with no special field endorsement.

The gravamen of this dispute is the claim of Terlizzi that she has greater seniority than Wilson or Corbin.

The separate defenses of respondent, incorporated in its answer, which allege that Terlizzi is not tenured and therefore has no seniority, are dismissed. The stipulation of facts (#1 and #2) as well as J-1 and J-2 clearly establishes the fact that Terlizzi was employed by respondent in a position for which a certificate is required; possessed the required certificate; and worked the requisite number of years to acquire tenure pursuant to N.J.S.A. 18A:28-5. Spiewak v. Board of Education of Rutherford, 90 N.J. 63.

The standards for determining seniority are incorporated in N.J.A.C. 6:3-1.10 as amended, R. 1983 d.255, effective June 20, 1983, operative September 1, 1983. The applicability of the amended regulation is determined by the date of the cause of action, which in this instance occurred in 1985. The amended regulations are deemed to be applicable.

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The intention of the regulatory amendment was clearly stated by the Commissioner of Education in the "Overview" to the Revision of Seniority Regulations: A Position Statement of the New Jersey State Department of Education, June 1983, wherein he said:

> The Commissioner's recommended revision of seniority regulations provides that teachers in the secondary category . . . may earn seniority only in the subject matter field or fields in which they have actually taught. Previous to the Commissioner's recommendation, a teacher holding a science and math endorsement at the time of initial employment acquired seniority in both areas even though he or she had only taught in one of them.

N.J.A.C. 6:3-1.10(1)15 states:

> Secondary . . . . Any person holding an instructional certificate with subject area endorsement 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 . . . a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such . . . special field endorsement . . . .

A dilemma is created upon review of evidentiary documents in this matter and endorsements and authorizations as codified under N.J.A.C. 6:11-6.2. Although I do not find it critical to a fair adjudication of this dispute, I do find it worthy of mention for departmental review.

The Terlizzi certificate states "Teacher of Production, Personal or Service Occupations — Fashion Design." See J-2.

The Wilson certificate states "Teacher of Dressmaking and Tailoring." See J-6.

The Corbin certificate states "Teacher of Production, Personal or Service Occupations" without any specific designated occupation indicated. See J-7.

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N.J.A.C. 6:11-6.2(a)27 states: "Teacher of production, personal or service occupations: this endorsement authorizes the holder to teach designated occupations in all public schools. See listing of production, personal or service occupations below: . . ." A thorough review of the entire regulatory scheme does reveal "clothing, apparel and textile management, production, and services" listed at N.J.A.C. 6:11-6.2(a) 27 iii, but fails to reveal any specific listing for Fashion Design, Dressmaking and Tailoring, or Employer Orientation — Power Sewing.

Nothwithstanding the above, the teaching assignments of Terlizzi, Wilson, and Corbin cannot be disputed. Terlizzi has taught Fashion Design from October 15, 1977 until June 1985. See Stipulation #1. Wilson taught Commercial Clothing in 1977-78 and Sewing in the Employment Orientation Program since 1978-79. See Stipulations #5 and #6. Corbin has taught Power Sewing in the Employment Orientation Program since her employment in 1980. See Stipulation #8.

The reduction in force action of the Board was clearly in Fashion Design and Patternmaking. See J-13. Separate courses of study in Fashion Design and Pattern Making, Commercial Clothing, and Sewing also creates a clear distinction between the teaching assignments of Terlizzi, Wilson, and Corbin. See J-10, J-11 and J-12. Terlizzi, therefore, has no valid claim to the teaching positions held by Wilson or Corbin, nothwithstanding the fact that she does have longer service as a teaching staff member. N.J.A.C. 6:3-1.10(1)15.

I **FIND** no cause of action to sustain the instant Petition of Appeal, and **CONCLUDE**, therefore that same shall be and is hereby **DISMISSED**. The Board is, however, **ORDERED** to place Jennie Terlizzi on a preferred eligibility list as a teacher of Fashion Design with a seniority accumulation of seven years and nine months. N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(e).

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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.

11 December 1985
DATE

WARD R. YOUNG, ALJ

DEC 12 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 16 1985
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

Evidentiary Documents

J-1: Initial 1977 appointment resolutions for Terlizzi and Ruth Wilson

J-2: Terlizzi certification as Teacher of Production, Personal or Service Occupations — Fashion Design

J-3: Terlizzi emergency certificate credentials

J-4: Terlizzi and Wilson 1978-79 reemployment resolution

J-5: Wilson 1979-80 reappointment resolution

J-6: Wilson certification as Teacher of Dressmaking and Tailoring

J-7: Corbin certification as Teacher of Production, Personal or Service Occupations (with no specific special field endorsement)

J-8: Corbin certification as Teacher — Coord of Coop Voc-Tech Ed Prog: WECEP (Work Experience-Career Exploration Program)

J-9: Corbin Cooperative Industrial Education Development Certificate

J-10: Fashion Design and Pattern Making I, II Course of Study

J-11: Commercial Clothing I, II Course of Study

J-12: Employment Orientation Program objectives and Course of Study

J-13: February 1, 1985 letter, Byrd to Terlizzi incorporating January 31, 1985 Board reduction in force resolution

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HUDSON COUNTY AREA VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION AND JENNIE TERLIZZI,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS,	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by Petitioner Terlizzi pursuant to N.J.A.C. 1:1-16.4a and b.

In these exceptions petitioner concurs with the judge's conclusion that she has tenure but disagrees with the conclusion that she had no claim for the teaching positions held by Wilson and Corbin. Petitioner Terlizzi avows that since she "has longer service and since all three individuals are teaching within the ambit of the certificate of 'Teacher of Production, Personal or Service Occupations', Petitioner must be granted her seniority rights including the right to bump Wilson or Corbin." (Exceptions, at p. 2)

Regarding the above, petitioner contends that it is generally accepted that seniority rights extend to the broadest reach of the endorsement qualifying one for service in that category which in the matter herein would entitle her to the teaching positions held by Corbin and Wilson.

Petitioner cites Camilli v. Bd. of Ed. of Northern Highlands Regional High School District, decided by the Commissioner January 3, 1985, aff'd State Board May 1, 1985 wherein it was determined that N.J.A.C. 6:3-1.10(1)15 grants seniority accrual to a teaching staff member under the endorsement actually served. She argues that the judge in the instant matter "found that all three individuals could only be certified under the endorsement of clothing apparel and textile management, production and services pursuant to N.J.A.C. 6:11-6.2(a)(27)iii (see p. 5 of Initial Decision)." (Exceptions, at p. 2) With respect to this, petitioner avows that the conclusion must therefore be that all three individuals had identical seniority rights in the same teaching positions.

Upon review of the record in this matter and thorough consideration of the legal arguments raised by petitioner in her

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exceptions, the Commissioner concurs with the judge's determination that petitioner does not have seniority entitlement to the positions held by Corbin or Wilson for the reasons expressed below.

Camilli, supra, is inapposite because the factual circumstances in this matter differ markedly. In Camilli it was determined that, because the endorsement was one which specifically authorized petitioner to teach chemistry and physics, he had seniority entitlement to the physics position although he had only actually taught chemistry inasmuch as N.J.A.C. 6:3-1.10(1)15 grants seniority accrual to a teaching staff member under the endorsement actually served, not merely the particular course(s) actually taught. In other words, one accrues seniority entitlement to positions within the stated authorization of the endorsement, not just those in the particular subjects/courses taught.

In the instant matter, the endorsement held by petitioner, teacher of production, personal or service occupations, authorized at the time of its issuance a holder of such endorsement "to teach a designated occupation and related subjects in all public schools." (New Jersey Regulations and Standards for Certification, 1976, emphasis supplied)

The listing of occupations reads as follows:

Beauty Culture
Commercial Food Preparation
Commercial Food Serving
Dressmaking and Tailoring
Laundering, Cleaning, and Pressing
Machine Operators
Medico-Dental Assisting
Nurses Aides
Power Sewing Machine Operation

It is noted that fashion design is not listed above; however, the endorsement on petitioner's emergency and permanent certificates (J-3) clearly and unambiguously authorized her to teach only one designated occupation, namely fashion design, not fashion design and power sewing maching operation and dressmaking and tailoring. Stated another way, the endorsement authorizes her to teach only fashion design and related subjects. Power sewing and dressmaking and tailoring cannot be seen as related subjects in that each is listed as a separate occupation. Further, consultation with the Department of Education's Director of Teacher Certification indicated that petitioner's authorization on her endorsement was limited to fashion design and that it did not include either power sewing or dressmaking and tailoring.

In October 1984, N.J.A.C. 6:11-6.2(a)(27)iii became effective; thus, the judge erred in relying on this provision to render any finding or conclusion in the initial decision. What is controlling is not that provision but what was in effect in 1977 when petitioner's certificate/endorsement was granted.

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Accordingly, the Commissioner determines that petitioner's seniority entitlement is limited strictly to the designated occupation her endorsement authorizes her to teach, fashion design. Consequently, she has no bumping rights to the positions held bv Corbin and Wilson since her endorsement does not authorize the teaching of any occupation other than fashion design.

Therefore, the judge's recommended decision dismissing the Petition of Appeal is adopted as the Commissioner's final decision in the matter for the reasons expressed herein.

Because Ms. Corbin's certificate/endorsement does not state a designated occupation she is authorized to teach, the Commissioner directs that the county superintendent review the certificate information on file in his office to insure that it clearly specifies what designated occupation she is authorized to teach by virtue of her endorsement.

COMMISSIONER OF EDUCATION

January 27, 1986

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HUDSON COUNTY AREA VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION AND JENNIE TERLIZZI,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUNTERDON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 27, 1986

For the Petitioner-Appellant, Schneider, Cohen and Solomon
(Bruce D. Leder, Esq., of Counsel)

For the Respondent-Respondent, Moore, Scarpa and Kealy
(Robert M. Kealy, Esq., of Counsel)

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

June 4, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3312-85
AGENCY DKT. NO. 91-4/85

SHIRLEY MC KNIGHT,
Petitioner,
v.
MERCER VOCATIONAL-TECHNICAL SCHOOLS, BOARD OF EDUCATION,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

David W. Carroll, Esq., for respondent

Record Closed: October 31, 1985 Decided: December 12, 1985

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

Shirley McKnight (petitioner) alleges and the Mercer County Vocational-Technical Schools Board of Education (Board) denies that she suffered a work-related injury. The petitioner further claims she has improperly been denied a leave of absence as provided by N.J.S.A. 18A:30-2.1 and that the Board has charged her absences to her accumulated sick leave which is now exhausted. She seeks compensation under the statute for absences due to the injury and restoration of sick leave days improperly charged.

The matter was filed before the Commissioner of Education and transmitted to the Office of Administrative Law on May 31, 1985, as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 15, 1985, at which the following issues were agreed upon:

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(a) Did the petitioner suffer a work-related injury?

(b) If so, has the Board improperly failed to compensate her pursuant to N.J.S.A. 18A:30-2.1 and has the Board improperly charged her work-related absences against her accrued sick leave?

(c) To what relief is the petitioner entitled?

On September 25, 1985, the parties submitted the following stipulation of facts:

1. Petitioner, Shirley McKnight, was employed by the respondent, the Board of Education of Mercer County Vocational-Technical Schools, as a maintenance person since on or about March 12, 1984.

2. Respondent is a body corporate and politic of the State of New Jersey empowered by law to administer the Mercer County Vocational-Technical Schools.

3. Petitioner was disabled and unable to work during the period January 7, 1985 through March 8, 1985.

4. Petitioner returned to work March 12, 1985 for the balance of the school year, but her contract for the 1985-86 school year was not renewed.

5. Petitioner had no annual nor accumulated sick leave days available as of January 7, 1985.

6. Petitioner received no compensation for 46 days between January 7, 1985 and March 12, 1985: 19 days in January, 20 days in February and 7 days in March.

7. Petitioner has filed a claim petition with the Division of Worker's Compensation.

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The matter was heard on October 1, 1985, at the Office of Administrative Law, Quakerbridge Plaza, Trenton. Posthearing submissions were timely made and the record closed on October 31.

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The petitioner testified that on January 4, 1985, she worked a 6:30 a.m. to 3:00 p.m. shift. At approximately 2:30 p.m. on that day, she walked behind another employee while entering the maintenance building. The other employee had under her control a maintenance cart carrying, among other things, a bucket and wringer. As the other employee entered the maintenance building, the wringer fell from the cart.

The petitioner testified that she jumped three times to avoid being hit by the ringer. She came down on her right foot. She felt no injury or pain.

The petitioner testified that her fellow employee then said that she (McKnight) should pretend to be hurt. Both laughed at this remark. The petitioner did not report the injury at that time because it did not bother her.

The witness went to a shopping center, by bus, following her shift. While shopping, she felt what she described as a tingle in her right ankle. She returned home at approximately 6:00 p.m. Upon returning home, she soaked the ankle in Epsom salts and rubbed it with alcohol. She stayed in on that evening.

The next day, a Saturday, the petitioner noticed the ankle was swollen. She again soaked it and rubbed it with alcohol. She stayed in all day which was not her ordinary routine. The ankle hurt her throughout the day.

On Saturday evening she again soaked the ankle, rubbed it and stayed in bed. She followed the same routine on Sunday and put on an elastic bandage.

On Monday, she went to work at her regular time. The pain became too much to bear at approximately 10:15 or 10:30 a.m. She saw the custodian-maintenance supervisor. He asked her what the problem was and she recited the events of the previous Friday. The witness stated that the supervisor said nothing.

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The petitioner went to the nurse on her own at approximately 11:30 a.m. She asked for an elastic bandage. She told the nurse what had happened. The nurse did apply an elastic bandage and told the respondent to see a physician. The nurse also told her to see the principal.

She went to the principal's office and told him of the events of the previous Friday including jumping out of the way of the wringer. The principal sent her back to the maintenance shop while he secured an insurance card. Another custodian then took her to a nearby hospital. An X-ray was taken and the petitioner was informed that there was a chipped bone and hairline fracture in the right ankle (P-1).

The petitioner recalls answering questions at the hospital. She related jumping out of the way of the wringer and how the symptoms progressed. She also recalls waiting several hours for an orthopedist. He arrived at approximately 7:00 p.m. and advised her that she needed a cast. The physician casted her. He advised her that she was not to work for six to eight weeks.

The petitioner continued to see this physician until March 11. She returned to work on March 12.

On January 8, the day after the cast was applied, the petitioner's fellow worker telephoned her at home. The witness testified that her fellow worker stated, "They're hiring someone else," "If you'd told me what you were planning, I'd have stuck by you," and "You're not going to get paid because it didn't happen here."

The witness was clear that her fellow worker had expressed the opinion that the petitioner had not hurt herself "then and there." The petitioner received no pay for time off the job. While she was absent, she received no contacts from the administration. At one point during her absence, the petitioner called the superintendent's secretary. The secretary stated that the petitioner would not be "getting anything" for the period of her absence. The petitioner has filed a Workmen's Compensation claim.

The petitioner further testified that she and her coworker entered the maintenance building through a side door near the front of the building. The witness said, "Judy, your wringer's falling." The maintenance cart was between the petitioner and her coworker. The cart is approximately three feet long. The petitioner was approximately

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six feet into the building and her coworker approximately three feet ahead of her at the time of the incident. A photograph (R-4) was introduced showing the side door entrance into the building. Other photographs (R-5, R-6, R-7) show other views of the entrance and of a maintenance cart, mop and wringer as used by maintenance personnel at the school.

Early on the following Monday, the ankle still tingled. The petitioner removed the elastic bandage and stated that it felt a little better at that time. She got a ride to work from a friend, arriving at approximately 6:30 a.m. She did not see the supervisor at that time. She did see him at break time which was approximately 8:30 a.m.

As is her routine, the petitioner reported to the A Building some distance from the maintenance building. She punched in, went to the rear of the building and got her scrub water and other materials ready for the day. She was assigned to the A Building and the B Building. She went to coffee break in the maintenance building about 8:30 a.m. and spoke to her coworker about the ankle.

The petitioner testified that in the period January - March 1985, she worked for a local custodial service from 5:00 p.m. to 9:00 p.m., five days per week. In January she received a letter from the superintendent (R-8) stating that it had been determined the accident was not work related and she would receive no pay because her sick leave entitlement was exhausted.

The petitioner's landlady also testified. She stated she was at home on January 4 when the petitioner arrived. The petitioner said something about an incident. That weekend, the petitioner did not go out as usual. The witness stated she talked to the petitioner about not going out, but could not recall any response. She gave the petitioner Epsom salts and alcohol when the petitioner said her foot or ankle was hurt.

The witness saw the petitioner in bed and heard the petitioner complain about her foot. It looked somewhat swollen. The witness told the petitioner on Sunday, January 6, to see a physician. The petitioner replied that she would not see a physician, as it was "only a twinge."

The landlady took juice and food to the petitioner on Sunday. She asked the petitioner if the petitioner had hurt her ankle at home. The petitioner responded that she had hurt it at work. The witness recalled the petitioner saying something, perhaps a mop,

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fell and she (the petitioner) jumped out of the way. The witness also stated that she saw the petitioner for the first time on January 4 at approximately 7:00 p.m. This was approximately four hours after the end of her shift.

The petitioner's godson also testified. He stated he saw the petitioner on Saturday, January 5, at approximately 11:00 a.m. at her home. The petitioner was in bed. The petitioner stated she had hurt her foot on the job. The witness could recall being told no other details. He does recall that the petitioner's foot appeared swollen.

Thomas Urbaniak, M.D., testified on behalf of the petitioner. He stated he first saw the petitioner on January 7 in the emergency room of Helene Fuld Hospital. Swelling in the right foot and ankle area was apparent.

The petitioner stated she twisted her ankle avoiding a falling bucket and wringer on Friday (P-1). The witness stated that twisting injuries often do not subside so that persons who suffer them are inclined to wait for a while and then seek help. Rest over the weekend would alleviate the petitioner's condition.

The physician stated that the petitioner had an avulsion fracture of the talus, right side. A ligament was pulled and a fragment of bone was loose. He placed the foot and ankle in a "short-leg walking cast." He also prescribed pain medications and crutches.

The doctor's report of May 28, 1985, was introduced in evidence (P-2). It sets forth the full course of treatment of the petitioner. He saw the petitioner on January 16 and February 6 in his office. During the latter visit, the cast was removed. He saw the petitioner again on March 7 in Helene Fuld Hospital. The physician testified that he anticipated a March 4 return to work date (P-3). He later revised that to March 11, 1985 (P-4). The physician stated he saw nothing unusual about the case, the patient or her oral report.

The physician could not say when the injury occurred but he could be reasonably certain that it did not occur on January 7, the day he first saw her in the emergency room. The physician further stated that his recollection of the case came namely from reviewing exhibit P-1. The injury could have occurred on the Friday, Saturday or Sunday preceding the day on which he saw her. The witness could venture no opinion as to which day was most probable.

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II.

Julia Redden, the petitioner's coworker, testified. She has been a custodian in the district for seven years and was working the 6:30 a.m. - 3:00 p.m. shift on the day in question. This is her regular shift.

On July 4, 1985 at approximately 11:30 a.m., she was preparing to begin her lunch hour. The witness identified a diagram of the maintenance building. The witness further identified the photographs (R-4, R-5, R-6) previously introduced.

The petitioner was nearly at the door as Redden approached. The cart was in the doorway when the wringer fell off. The witness had to lift the cart over the door sill (see R-4). The witness was on the side curb outside the door as shown in R-4. Redden went before the cart, but was facing back to lift the cart in. Therefore, she had a clear view of the petitioner.

The witness stated she was coming in with her cart for lunch. Petitioner held open the door so that the witness could pass through. After the cart was in the building, the wringer fell off. The witness stated, "Good thing that didn't hit your foot - you'd be out for days." The witness stated that both she and the petitioner laughed. They then had lunch.

This witness stated clearly that the petitioner said nothing about the wringer falling. This witness did not see the wringer hit the petitioner. The petitioner was in her full view at all times. The witness also stated that she made no comment to the petitioner about pretending to be hurt.

The petitioner made no complaint the rest of the day concerning her leg, foot or ankle. The witness rode the bus with the petitioner that afternoon. The petitioner exited the bus at State and Hanover Streets.

Redden saw the petitioner again on Monday morning. She heard no complaints or comments and observed no limp. Both women worked in the A Building in the morning. They wet-mopped areas in the morning only. In the afternoon they cleaned tables and chairs in classrooms.

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Her supervisor spoke to her on Monday before lunch and asked why she did not tell him her wringer had fallen on the petitioner. The witness replied that it had not. The supervisor then told the witness that the petitioner was in the nurse's office recording the accident at that moment. When the witness later saw the petitioner, the petitioner denied that she had recorded the accident in the way the supervisor described it to this witness.

The witness had no contact with the petitioner over the weekend. On Monday morning, the two women worked together until about 8:30 a.m. They went on break and did not see each other again. The witness iterated that the supervisor had come to the C Building and asked her why she had not reported the accident. Her reply was that no accident had occurred.

The witness saw the petitioner again at lunch time. The supervisor said that one of the maintenance men would take the petitioner to the hospital after the lunch. The witness believed the petitioner was on school premises all of Monday morning.

The head custodian also testified. He was McKnight's supervisor in January 1985. On Monday, January 7, after the morning break, he made a general check. Going through the B Building, he saw the petitioner sitting in a teacher's chair. She called to him and stated, "My foot's swelling up. I hurt my ankle. Judy's mop wringer fell on my foot."

The witness stated he then asked the petitioner when the accident had happened. She replied that it had occurred on Friday. He asked her why she did not tell him about the accident at the time. The petitioner made no response. The witness directed the petitioner to go to the front office and fill out an accident report. It is the policy of the district to encourage reporting of accidents.

The witness was clear that on the morning of January 7 he was in the A Building between 6:30 and 7:00 a.m. He made his usual rounds, saw the petitioner and she said nothing to him. All custodians, as is their custom, took their morning break together. McKnight said nothing to the supervisor at that time.

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After the petitioner complained to him, he sent her to the office. He then sought out Redden and asked her why she had not reported the accident. Redden stated that her wringer did not fall on the petitioner.

The supervisor saw both Redden and McKnight at lunch. Redden asked McKnight why she said the wringer hit her foot. When Redden confronted her, the petitioner said, "It didn't hit my foot, I must have jumped out of the way."

The witness had no contacts with the petitioner over the weekend. This is the first instance of delayed reporting of an accident since he was made head custodian. The witness saw the petitioner leave for the hospital.

Mary Louise Testa, a registered nurse who is also certified as a teacher, testified. Her position is as an instructor but she functions also as school nurse as necessary.

The witness saw the petitioner on Monday, January 7, at approximately 11:15 a.m. The petitioner entered her office and asked Testa to look at her foot. The foot was swollen. Testa asked what had happened. The petitioner responded that Julia had stepped on her foot on Friday.

The witness then advised the principal that the petitioner should be X-rayed. She completed an accident report (R-1) that the principal signed. The witness also produced an excerpt of the nurse's log (R-2) that she keeps in the ordinary course of business. The entries are consistent with the witness's testimony.

Employees usually are specific about how an accident occurred. After the petitioner made the statement to Testa concerning her foot being stepped on, the witness recalls no further questions or information, except that the petitioner did say she had soaked her foot over the weekend.

The nurse took the petitioner to the principal's office and advised the principal that the petitioner should be X-rayed. The petitioner limped slightly. Her foot did not appear very swollen at this time. The principal took over from there and made arrangements for the petitioner to be taken to a local hospital.

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III.

The petitioner argues that the testimony shows no dispute that a wringer fell from a work cart. She has established that she jumped to avoid being hit by the wringer. In doing so, she landed with her weight on her right foot. This caused the accident complained of and, because it occurred during the scope of the work day, she should be afforded the protections provided by N.J.S.A. 18A:30-2.1.

Although the Board's defense seems to rest on the notion that the petitioner could not have sustained her injury during the wringer incident, it presented no evidence in support of its case. The Board points to minor differences in the statements of the petitioner, yet it is clear that there is no real dispute as to when or how her injury occurred. Petitioner told both her landlord and her godson over the weekend that she sustained her injury on Friday at work. The statements the petitioner gave to her coworkers were basically consistent as was the history she gave to the emergency room personnel.

The petitioner cites Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 415 (App. Div. 1982). Referring to the phrase "accident arising out of or in the the course of his employment," Judge Pressler states:

> [W]e are persuaded that the phrase as used in N.J.S.A. 18A:30-2.1 was intended to have precisely the same meaning as it does in the context of the Workers' Compensation Act. This is made clear by the Statement accompanying the 1967 amendment of N.J.S.A. 18A:30-2.1, which notes that its purpose is "to provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workman's Compensation Act." The pertinent provision of the Workers' Compensation Act, N.J.S.A. 34:15-7, provides for benefits to an employee for injuries or death sustained "by accident arising out of and in the course of employment," the same formulation as used in N.J.S.A. 18A:30-2.1. In the workers' compensation context, except in the so-called heart cases, the term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury, and indeed all unexpected injuries whether or not unusual strain or exertion was involved and whether or not there was a direct impact. (Citations omitted).

The petitioner argues that thus, regardless of the fact that nothing actually struck her foot or ankle, the injury she sustained does fit within N.J.S.A. 18A:30-2.1. The

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petitioner has filed for Workmen's Compensation benefits and any temporary disability benefits which she may be awarded will be subject to the set-off contained in the latter part of N.J.S.A. 18A:30-2.1.

Finally, the petitioner urges that the minor inconsistencies in her statements show only that she was not anticipating litigation of any type so she merely offered a simple explanation of the incident to those who asked what happened. At the emergency room, when a more detailed history was elicited, she provided a statement identical to that which she testified to in this hearing. She made statements throughout the weekend following the incident consistent with what she has asserted here. Sensing that something was wrong with her ankle, she rested it over the weekend. She did this as a precaution, not as a reaction to pain. It was not until she reported to work on Monday and went about her duties that she began to experience severe pain and swelling. The attending physician testified that this is entirely consistent with the type of injury sustained by the petitioner. The petitioner did not mention her injury to anyone in the school until it was clear that it was so serious as to interfere with her ability to perform her duties.

IV.

The Board maintains that the sole issue in this case is factual. If the petitioner's acknowledged ankle injury was work-related, she is entitled to be paid for the period of disability in accordance with the statute. N.J.S.A. 18A:30-2.1. The law is also clear that the legal standard for determining whether an injury is work-related is the same under N.J.S.A. 18A:30-2.1 as under the Workmen's Compensation statute. N.J.S.A. 34:15-7. Theodore v. Dover Bd. of Ed., above.

Also, in proceedings under both the education laws and the Workmen's Compensation law, the burden of proof is identical. The petitioner must establish by a preponderance of the believable evidence that the injury was work-related. Pellegrino v. Monahan McCann Stone Co., 61 N.J. Super. 561, 564, 572 (App. Div. 1959) aff'd 33 N.J. 73 (1960) (Workmen's Compensation statute); In re Polk License Revocation, 95 N.J. 550, 560-561 (1982) (standard in administrative law proceedings).

Thus, the Board is not required to prove that the petitioner was injured elsewhere and on her own time. It is the petitioner's burden to prove, by a preponderance

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of the credible evidence, that her story of causality is true. The testimony of the witnesses on both sides cannot be reconciled; there are too many inconsistencies.

The petitioner testified that the injury occurred on Friday, January 4, 1985, at approximately 2:30 in the afternoon. She stated at hearing that the injury occurred when the wringer on Julia Redden's bucket fell off her cart onto the floor of the maintenance building. She (the petitioner) hurt her foot by jumping straight up in the air three times in reaction of the fall of the wringer.

The Board notes that this account is not her first version of how the alleged accident occurred. Her first story was given to the custodial supervisor on Monday, January 7, at about 10:15 a.m. She told him at that time that "Julia Redden's mop and bucket fell off the cart onto my foot." The petitioner's second version came an hour later when she told the nurse a different story, namely, that her foot was stepped on by Redden. A third version of the story, the present version, came only after Redden questioned her at the lunch table an hour later about what the petitioner had told the supervisor. Both the supervisor and Redden testified to this conversation. The petitioner gave the same version of the incident to the hospital and physician.

In order to credit the petitioner's testimony, one would have to discredit the testimony of the supervisor, nurse and coworker about what happened and what was said on January 4 and January 7. One would also have to conclude that Julia Redden suggested to the petitioner on Friday that the petitioner falsify a claim against the Board.

The Board challenges the petitioner's testimony as to what happened over the weekend and why she did not report the injury or see a physician earlier. On the one hand, she stated the ankle was not that bad and really did not bother her until Monday morning. She also testified that over the weekend she stayed in bed because her ankle hurt. The attending physician acknowledged that the medical evidence and his own observations are insufficient for him to determine on what day the injury occurred. It could have been Saturday or Sunday as easily as Friday.

In this case, the delay in reporting the injury not just from Friday to Monday but also some four hours into the workday on Monday, despite two contacts with her supervisors that morning and despite an allegation of pain all weekend, is enough to raise some questions about the credibility of the claim. When coupled with all other

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circumstances, including the prior inconsistent statements of the petitioner to her supervisor and the nurse, the inconsistencies between Redden's and th petitioner's accounts of the incident, the directness, demeanor and absence of partiality on the part of her coworker's testimony and the unconvincing nature of the testimony of her landlady and godson, the only logical conclusion is that the petitioner has failed to establish her claim by a preponderance of the believable evidence.

V.

As is demonstrated above, the parties do not dispute that an incident occurred on January 4, 1985. Nor do the parties dispute that the petitioner suffered an injury at some time prior to January 7, 1985. What must be determined in this hearing is whether the petitioner has shown, by a preponderance of the evidence, that the incident was the cause of her injury.

The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the credible evidence in the record. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." Jackson v. D. L. and W. R. R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is found to preponderate if it establishes the reasonable probability that a fact is true. Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940). If the evidence is such as to raise legitimate doubt as to the existence of essential facts, it is the duty of the agency in an administrative proceeding to rule against the claim. Appeal of Darcy, 114 N.J. Super. 454 (App. Div. 1971).

Standing alone, the petitioner's testimony is credible. The respondent's witnesses' testimony, however, tends to cast some doubt on the matter. Her supervisor testified that the petitioner stated, "Judy's mop wringer fell on my foot." The school nurse testified that approximately one hour later the petitioner stated a coworker had stepped on her foot. Still later, the supervisor saw both Redden and the petitioner at lunch. Redden asked the petitioner why she had said the wringer hit her foot. Petitioner then stated, "It didn't hit my foot, I must have jumped out of the way."

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it

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is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of the landlady and godson lend little to this consideration. Even if the petitioner uttered the words they say she did, it would be of no probative value.

It is possible that the injury occurred in the manner described by the petitioner. In consideration of the various versions of the incident given by the petitioner to other persons, which are inconsistent with other credible testimony, I **FIND** that the petitioner has not carried her burden of proof. I cannot find in this record that the evidence establishes the reasonable probability of the fact. Jaeger, above.

Where the standard is reasonable probability, the evidence must be such as to "generate the belief that the tendered hypothesis is in all human likelihood that fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, 36 N.J. 487 (1962). On the record before me, I cannot say that the tendered hypothesis is likely.

Therefore, I **CONCLUDE** that the petitioner has failed to carry the burden of proof and I further **CONCLUDE** that the petition of appeal must be 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.

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

12 DECEMBER 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

DEC 12 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 17 1985
DATE

Ronald J. Parker/K.S.
OFFICE OF ADMINISTRATIVE LAW

ml/E

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SHIRLEY MC KNIGHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY VOCATIONAL-TECHNICAL SCHOOLS, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner argues that the judge totally ignored her testimony as well as that of those witnesses who appeared on her behalf. More specifically, petitioner maintains that the standard to be applied under N.J.S.A. 18A:30-2.1 is the same as under Workers' Compensation Act. Ciuba v. Irvington Varnish and Insulator Co., 27 N.J. 127 (1958); Marshall v. Force Machinery Co., 123 N.J. Super. 497 (Law Div. 1973)

Moreover, petitioner claims the judge failed to consider that

> ***there must be thrown into the scales the general tendency of the law to apply the Compensation Act in the employee's favor when in doubt.
>
> (Aromando v. Rubin Bros. Drug Sales Co., 47 N.J. Super. 286, 293 (App. Div. 1957))

Finally, petitioner in excepting to the initial decision argues as follows:

> ***The Judge noted that he considered Petitioner's "delay" in reporting the injury until four hours into the workday on Monday as "enough to raise some questions about the credibility of the claim." That is patently absurd. The Petitioner testified that on Friday she did not even realize that she was injured. Dr. Urbaniak testified that it is quite common that someone with this type of an injury would not realize it for several days. Not only did

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> Petitioner stay off the foot most of the weekend, but it is unrealistic to expect that she would have reported the injury over the weekend. On Monday, she testified that she tried to work until she could no longer function. It was then that she reported the accident. In acknowledgement of the myriad of reasons why accidents may not always be reported promptly, the Worker's Compensation Act provides for notice within fourteen days or even longer. N.J.S.A. 34:15-17.
>
> It is clear that Petitioner met her burden of proof in that she proved her case by a preponderance of the credible evidence in the record. It has been noted in worker's compensation cases that "the quality of the evidence required is probability rather than certainty." Celeste v. Progressive Silk Finishing Co., 72 N.J. Super. 125, 142 (App. Div. 1962). It was also stated in Celeste, supra, that "the burden is sustained if the tendered hypothesis is based upon the preponderance of probabilities." Id. at 142.*** (Petitioner's Exceptions, at pp. 2-3)

The Board rejects those arguments advanced by petitioner in her exceptions to the initial decision. The Board maintains that the findings of fact reached by the judge in rejecting Petitioner's testimony on the grounds that it lacked credibility are clearly supported in the record.

More specifically, the Board argues that there was nothing "minor" in the many contradictions between Petitioner's testimony and that of its own witnesses. In this regard the Board in its reply exceptions points out the following:

> There is an attempt to explain away Petitioner's [three] inconsistent versions of the Friday afternoon incident. The first explanation is that the statements made to the other people were all "basically consistent." This is absurd. See prior letter memorandum pp. 5-6, and ALJ decision pp. 3-9. The statements are irreconcilably different accounts. To one person she said that the wringer and mop fell on her foot; she later changed this, saying to another person, "Julie Reddon stepped on my foot"; and lastly, she arrived at her present version: she hurt her foot jumping out of the way.***
> (Board's Exceptions, at pp. 2-3)

Finally, the Board refutes Petitioner's argument that the judge erred in rejecting the expert testimony of Petitioner's physician which supports her contention that her injury was work-related. In support of its position the Board relies on those findings in the initial decision that clearly establish from the testimony of Petitioner's physician that he could venture no opinion as to whether Petitioner's injury was sustained on Friday, Saturday or Sunday of the period of time in question.

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The Commissioner has reviewed the respective arguments of the parties in the instant matter. In the Commissioner's judgment the pivotal issue in this matter turns upon the findings of fact as they relate to the credibility of the witnesses who testified at the hearing. The Court has previously laid down the standard of judicial review with regard to such factual determinations in Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976), wherein it held in pertinent part as follows:

> ***We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. See, e.g., Jackson v. Concord Co., 54 N.J. 113, 117-118 (1969).*** (emphasis in text) (at 188)

Upon applying the above-cited standard of judicial review to the instant matter, the Commissioner is not persuaded by the arguments advanced by petitioner in her exceptions that the judge's findings of fact warrant a different conclusion or reversal of the initial decision.

Accordingly, the Commissioner finds and determines that petitioner has failed to carry her burden of proof with regard to the relief she is seeking herein. This determination is based upon those findings and conclusions reached by the judge in the initial decision and supported in the record of this matter. In view of the above, the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2279-85
AGENCY DKT. NO. 61-3/85

MARY ANNE FUCETOLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Green and Dzwilewski, attorneys)

Record Closed: November 1, 1985 Decided: December 12, 1985

BEFORE SYBIL R. MOSES, ALJ:

This matter comes before the Office of Administrative Law (OAL) as the result of a verified petition filed by Mary Anne Fucetola with the Commissioner of Education on March 25, 1985. Ms. Fucetola alleges that she is entitled, inter alia, to salary and benefits equal to that of other teaching staff members with similar qualifications and experience employed by respondent and asks that she be granted pro rata salary guide placement and benefits equal to those teaching staff members. At the time of her petition, she also asked for a finding that her employment was tenurable and that she had tenure, pursuant to N.J.S.A. 18A:28-5. The Board of Education of the Borough of Totowa

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(Board) filed its answer on April 16, 1985 asking that the petition be dismissed and setting forth various affirmative defenses. The matter was forwarded to the OAL on April 22, 1985 for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on May 30, 1985. The only legal issue presented by petitioner was whether she is entitled to salary and benefits based on the Totowa Education Association teachers' salary guide, and, if so, whether she is presently being properly compensated.

Respondent raised the following legal issues:

1. Estoppel and waiver based on Ms. Fucetola's conduct in participating in negotiations for a separate salary guide for the Totowa part-time (supplemental, compensatory education and Title I) teachers.

2. The terms and conditions of employment are mandatory issues of negotiation over which the Commissioner lacks jurisdiction.

Respondent withdrew the affirmative defense of laches based on a stipulation by both counsel that if Ms. Fucetola prevails and relief is granted, said relief would date from March 25, 1985, the date of filing of the petition with the Commissioner of Education. Counsel stipulated that Ms. Fucetola's employment is tenurable and that she is, in fact, tenured.

Pursuant to the Prehearing Order, the parties provided this judge with a stipulation of most of the pertinent facts and documents, C-1 in evidence. That stipulation of facts, as well as the exhibits (J-1 through J-7, P-1 and P-2 and R-1 through R-6) are incorporated by reference herein and constitute this judge's findings of fact. The stipulation of facts is attached to this decision as Appendix 1. The list of items marked into evidence is attached to this decision as Appendix 2.

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The stipulation of facts did not determine whether petitioner was employed in 1975-76, February 1, 1977-June 1977, and September 1977-June 1978, nor did it stipulate to Ms. Fucetola's graduate level credits. The hearing was held on September 19, 1985 with the evidence directed to those issues only.

Ms. Fucetola testified that she was first employed as a compensatory education (comp. ed.) teacher by the Totowa Board on February 1, 1977 working 25 hours a week. She tested and taught students in the comp. ed. program and gave extra help in reading. She next worked from the end of September 1977 to June 1978, with similar responsibilities. From January to June 1976, Ms. Fucetola did supplemental, substitution and bedside work. In September 1984 Ms. Fucetola started work after the first full week of school and worked 19 hours a week, which is what she had done for the last few years. She stopped work around the 13th of June, a few days before the end of the school year. Her first day in 1985 was September 13, but as of September 19, she had not yet received a formalized schedule. In 1984-85 her 19 hours a week were spread over four days. She has one to four students per class period. Her 1985-86 schedule will probably be the same.

Ms. Fucetola received an M.A. in reading specialization from Newark State College on February 1, 1969, but has taken courses beyond the M.A. She did not get Board approval because it was not necessary to do so for her post-graduate courses. She was not reimbursed.

Nat Giancola, chief school administrator for the Board, and Joseph Trione, its director of pupil personnel services, testified. In January/February 1985, Mr. Giancola recommended that the Board of Education adopt a policy concerning comp. ed., supplemental and Title I teachers because of new case law regarding part-time teachers and because the part-time employees were interested in negotiating. Some weeks before the policy was presented to the Board, several part-time teachers asked Mr. Giancola about the recent case law and its effect on them; i.e., did they have a right to negotiate? The spokesperson for these people was Betty Bruzzichesi. On February 13, 1985, the Board adopted a policy concerning comp. ed. and supplemental teachers, as detailed in the minutes of that meeting (R-3).

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Negotiations then took place between the Board and the part-time, Title I, supplemental and comp. ed. teachers in February and March. Mr. Giancola personally conducted the negotiations. He said Ms. Fucetola participated, at least partially, in the negotiations at the first meeting on February 28, 1985. She attended the next meeting on March 12, 1985 and asked for a proposal in writing. When he said he had no specific proposal in writing, she said she would seek legal means, other than negotiations, and left the meeting.

On March 21, Giancola met again with the supplemental teachers. Ms. Fucetola was not present. These teachers sought Board recognition as a bargaining unit, which the Board granted. An agreement was reached with the teachers and accepted by both parties. The March 27, 1985 Board minutes indicate that the teachers were recognized as a negotiating and bargaining unit. On the same day, the Board ratified the memorandum of agreement of negotiations. That agreement became effective April 1, 1985 through June 1986. R-4 in evidence shows the salary guide for part-time teachers. Ms. Fucetola was placed on the guide for 1984-85 and 1985-86 as a comp. ed. teacher in the M.A. column.

Mr. Giancola said the work year of supplemental, compensatory education and Title I teachers starts about eight to ten school days after the regular teachers work year starts and ends about one week before school ends. For example, in September 1984, the regular staff began work on September 5 and the supplemental teachers began work around September 17. In June 1985 the work year ended for comp. ed. teachers on June 13 and 14; the regular teachers ended their year on June 21.

Mr. Trione corroborated Mr. Giancola's testimony about the work year for comp. ed. teachers. He said that in 1984, Ms. Fucetola had an average of 36 students assigned to her, spread out over the week. She gives remedial instruction in reading and math through a "pull-out" program. Comp. ed. teachers are not involved in report cards, but do prepare a narrative report either at the end of the year or at the end of the child's involvement in the program. They do not participate in back-to-school night, although they do have parent conferences at the request of the parents.

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Mr. Trione testified that Ms. Blake, the part-time classroom teacher, has the same obligations as a full-time regular teacher in regard to the start of her day, teaching four subjects and meeting 65 students everyday.

After reviewing the testimony concerning the facts still in dispute, I make the following findings of fact:

1. Ms. Fucetola first began working for the Totowa Board of Education as a compensatory education teacher on February 7, 1977. She worked from February 1, 1977 through June 1977, and began work again in September 1977 until June 1978, working 25 hours a week.

2. Any monies Ms. Fucetola earned in 1976 from the Totowa Board of Education were for work as a substitute or bedside teacher.

3. Ms. Fucetola took 27 credits between 1976 and the summer of 1978 at William Paterson College of New Jersey. These courses were taken subsequent to her receiving her M.A. degree. There is no indication on the transcript (P-2) if they are undergraduate or graduate courses.

4. The part-time, compensatory or supplemental teachers begin their work year approximately eight to ten school days after the regular teachers begin and end their work year approximately one week before school ends for regular teachers. They do not have the same classroom responsibilities as regular teachers.

5. Ms. Fucetola is covered by the contract negotiated between the Board and the Title I, part-time, supplemental and compensatory education teachers (R-1). Ms. Fucetola participated in at least two negotiations meetings.

6. The Board recognized these teachers as a bargaining unit and came to agreement with the unit, as seen in the Board minutes on March 27, 1985 (R-4)

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and in the contract between the part-time teachers and the Totowa Board of Education (R-1).

7. R-4 establishes salary guides for part-time teachers. Ms. Fucetola has been placed on the guide for 1984-85 as a comp. ed. teacher in the M.A. column. The salary guide for the 1984-85 and 1985-86 school years has three columns, teachers with a B.A., teachers with an M.A. and teachers with an M.A. + 30. Ms. Fucetola properly fits in the M.A. column, on step five, because she does not yet have 30 post-M.A. credits.

The issue posited by petitioner at the prehearing conference was modified on September 20, 1985 to be "whether or not it is permissible to establish a separate salary guide for a group of part-time teachers?" (Subsumed in this question is the issue of whether Ms. Fucetola is presently being properly compensated.) Petitioner asserts, in a lengthy brief and attachments, that as a teaching staff member, she is entitled to the same salary and benefits, on a prorated basis, as full-time teaching staff members employed by respondent. Petitioner contends that since she is a teaching staff member within the meaning of N.J.S.A. 18A:1-1 and is entitled to tenure, pursuant to N.J.S.A. 18A:28-5, the case of Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982) mandates that she be placed on the same salary guide as all other teaching staff members entitled to tenure. Petitioner argues that the Spiewak case mandates that all teaching staff members as defined by N.J.S.A. 18A:1-1 must be treated equally in terms of eligibility for salary guide placement and benefits. Petitioner acknowledges that Spiewak does not per se preclude a board of education from negotiating differences in salary compensation between supplemental or auxiliary and regular teachers, and petitioner is aware of Hyman, et al. v. Board of Ed. of the Township of Teaneck, OAL DKT. NO. EDU 7719-82 (May 18, 1983), Commissioner's decision August 15, 1983, rev'd State Board of Education 1985 S.L.D. ____ (March 6, 1985).

Petitioner's counsel urges this judge to ignore the State Board's decision in Hyman as one that is tainted by an "irrational and unsubstantiated bias against part-time teachers and teachers involved in nontraditional instructional setting," Petitioner's brief at 11.

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Counsel argues that the Supreme Court has determined that the creation of a separate tenure and seniority system for all types of part-time teaching staff members has no basis in law. Lichtman v. Ridgewood Board of Ed., 93 N.J. 362 (1983).

The thrust of petitioner's argument is a collateral attack on the Hyman decision, which decision is now on appeal before the Appellate Division, A-3508-84T7. Counsel argues that the rationale used in Hyman concerning flexibility in establishing salaries is identical to that in Point Pleasant Beach Teachers Association v. Callan, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980), which decision was reversed by Spiewak and is now discredited. Not only does petitioner assert that Hyman is tainted by bias against part-time teachers, but she also asserts that it seriously misinterpreted the rights of teachers when the State Board has ruled that remedial teachers do not deserve to be paid on the regular teachers' salary guide as other part-time teachers are paid. Counsel argues the compensation statutes do not provide for a differentiation among teachers and do not permit the categorization system created by the State Board.

Counsel contends that N.J.S.A. 18A:16-11 entitles Ms. Fucetola to be considered a public employee who is performing the duties of an office and is entitled to payment as a full-time teaching staff member on a prorated basis. Petitioner is arguing that the Board considers her as less than a true teacher and that it does not recognize and accept that the part-time teachers are, by law, teaching staff members eligible to attain tenure. She argues that she is performing all the duties of a teaching staff member and therefore should be paid on the teachers' guide. Counsel argues the focus should be not on the title of her position, part-time compensatory teacher, but on the actual job performed.

Finally, petitioner argues that, based on her M.A. degree plus 27 credits, she should be placed on the M.A. + 15 level of the regular teachers' salary guide at step seven. Therefore her prorated salary should have been $13,221 for the 1984-85 school year. For the 1985-86 school year she should be at step eight, earning $14,730.

The Board argues that Ms. Fucetola's compensation is legal and proper because it was established by negotiated salary guides. Counsel urges that compensation is clearly a

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mandatory term and condition of employment and that the Commissioner has no jurisdiction to interfere with the agreement between the Totowa part-time teachers and the Board of Education (R-1). Counsel relies on Hyman, et al. v. Board of Education of the Township of Teaneck (both the Commissioner's decision and the State Board's decision) to support its position that neither the tenure statutes nor Spiewak mandate Fucetola's placement on any particular salary guide.

The Board argues that petitioner's salary claims are inapposite when one views the conversion chart in J-1 and when one considers petitioner's employment at 19 hours per week, not 19 hours 20 minutes. Counsel argues that petitioner should be estopped from making a claim for the period between March 25 and April 1 because the Board negotiated in good faith with the part-time teachers and petitioner's direct participation precludes her from getting any financial remedy for those days.

Petitioner responded to the Board's arguments saying that there should be no distinction between employees in the district just because responsibilities are different. Petitioner also reiterated the argument that remedial teachers are prejudiced by the attitudes of boards of education, in general, and the State Board of Education, in particular.

After considering the arguments and cases posited by petitioner and respondent, as well as the general law on the subject, I conclude that I agree with the Board's argument. This conclusion results from a review of the famous footnote in Spiewak, which states:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties, for the most part, did not brief this question, and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion. Spiewak, 90 N.J. at 84, Footnote 3.

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I find it is clear that the Supreme Court envisioned that boards of education would be free to negotiate differences in compensation between supplemental, remedial or auxiliary teachers and regular classroom teachers. In so holding, the Court was cognizant of the fact that employment benefits are properly subjects for negotiation.

However, in order for salary or compensation to be negotiated, the equality of teaching staff member status required by Spiewak must be carried into the negotiating process, in terms of a clear recognition and acceptance by both sides that the auxiliary or supplemental or remedial teachers are, by law, teaching staff members eligible to attain tenure. As the Commissioner stated in Hyman:

> In the Commissioner's judgment, the above determination is not intended to preclude the Board from negotiating differences in salary compensation between supplemental or auxiliary teachers and regular teachers. However, the Board is free to do so when there is a clear recognition and acceptance on both sides in the negotiating process that auxiliary teachers are by law teaching staff members eligible to attain tenure. Hyman, et al. v. Board of Ed. of the Township of Teaneck, 1983 S.L.D. ___ (Commissioner's decision August 15, 1983, slip opinion at 27).

Further, the State Board's decision in Hyman, March 6, 1985, is even more supportive of respondent's position herein. The State Board stated:

> In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. . . .
>
> [N]either the tenure statutes nor those governing compensation confer on teaching staff members the right to placement on any particular salary guide. Nor does the decision in Spiewak create such right. We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.
>
> Further, we emphasize that compensation is a term and condition of employment within the contemplation of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-5.3. As stated by the New Jersey Supreme Court in Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973):

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> [Hours and compensation] along with physical arrangements and facilities and customary fringe benefits would appear to be the items most evidently in the legislative mind. It is undisputed that the Board could not agree on hours or compensation in violation of specific departmental rules or regulations;.... Where the Legislature sets forth minimum schedules of compensation (N.J.S.A. 18A:29-7; N.J.S.A. 18A:29-12) and minimum increments (N.J.S.A. 18A:29-8; N.J.S.A. 18A:29-12), the board may not go below but may go above. Similarly it may not depart from any statutes or regulations which fix hours though it may go above prescribed minimums. Cf. N.J.A.C. 6:3-1.13. Id., at 7.
>
> Thus, boards and teachers are free to negotiate terms of compensation within the parameters set by the education laws and specific department rules or regulations [at pp. 10 and 11].

In the case at bar, I have found as fact and it has been stipulated by both counsel that not only was petitioner employed in a tenure-eligible position, but she did, in fact, have tenure. The Board clearly understood and recognized that petitioner's position was tenurable and that she had tenure. It was the Board's understanding of Spiewak that led to the adoption of a policy concerning the part-time teachers on February 27, 1985. That policy was the result of Mr. Giancola's recommendation to the Board concerning the tenure-eligible positions of part-time supplemental teachers and the permissibility of negotiations between the Board and part-time, supplemental and compensatory education teachers. The facts in this case are thus distinguishable from those presented for resolution in Hyman. Those auxiliary teachers were not recognized as tenure eligible prior to or at the time the negotiated agreement became effective. In the case at bar, the Board of Education formally adopted a policy of recognition of tenure eligibility prior to the onset of negotiations, which policy is set forth in R-3, at page 2017. It is uncontroverted that the Board understood, as did the part-time teachers, that all would be bound by the law, whatever it would become. Under the Hyman test, both petitioner and respondent had to be charged with a clear recognition and acceptance of the Spiewak principles prior to the time the contract was negotiated and signed, which is, in fact, the case here.

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There is no testimony before me to show that the Totowa Part-time Teachers' Association requested salary and benefit parity with regular teachers. It is Ms. Fucetola's position that unless the regular TEA guide was agreed to, she would utilize legal channels available to her to seek such placement. She is now utilizing those legal channels, but cannot prevail. There is no doubt that petitioner must be bound by the contract (R-1) between the Totowa part-time teachers and the Totowa Board of Education. The facts in this case clearly satisfy both the State Board's and Commissioner's condition that boards of education remain free to negotiate separate compensation levels for supplemental teachers and to establish a separate contract and salary guide for those teachers when the parties who engage in such negotiation have the knowledge and accept and recognize that the supplementals are tenure eligible.

I have considered petitioner's argument that the Hyman logic is misplaced, tainted, biased and without merit, and therefore, should not be followed. However, under the circumstances here, and under circumstances generally, administrative law judges should be bound by the doctrine of stare decisis when faced with a case factually similar to a case previously decided by the reviewing agency. It is well settled that a grant of authority to an administrative agency is to be liberally construed so as to enable an agency to discharge its statutory responsibilities. Board of Education of Plainfield v. Plainfield Education Association, 144 N.J. Super. 521, 524 (App. Div. 1976), citing In re Promulgation of Rules of Practice, 132 N.J. Super. 45, 48-49 (App. Div. 1974). Pursuant to N.J.S.A. 52:14B-10(c), N.J.S.A. 52:14F-7(a) and N.J.S.A. 52:14F-8(b), an agency head, and not an administrative law judge, has the exclusive authority to make final decisions in contested cases. The administrative law judge's decision is always subject to the review of the head of the administrative agency.

It is conceded that in administrative law the doctrine of stare decisis has not had the same forceful impact as it has had in the common law. In re Masiello, 25 N.J. 590, 598 (1958). Neither the head of an agency nor appellate courts are always bound by the doctrine of stare decisis. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 382 (1956); Plainfield Board of Ed. v. Plainfield Education Association, 144 N.J. Super. at 521. However, as the realization has grown that constancy of decision is

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desirable, administrative adjudications have been acquiring more decided precedential force, both within agencies and the courts. In re Masiello, 25 N.J. at 599. As explained by that court, individuals in similar circumstances should receive equal treatment by an agency and previous rulings should not be departed from unless the need becomes manifest through experience. Ibid.

Given the foregoing analysis, I conclude that unless and until the Appellate Division reverses the decision of the State Board of Education in Hyman, I am bound to follow the law and policy set down by the final reviewing body of the Department of Education. I conclude that petitioner was a member of the negotiating unit represented by the Totowa Part-time Teachers' Association and is covered by the negotiated contract. I further conclude that the negotiations held between the part-time teachers and the Board of Education were held with the knowledge and recognition on both sides of the tenure eligibility of the positions held by these teachers. I further conclude that the state of the law permits said negotiations to take place. There is NO statutory right or case law to support a conclusion that this petitioner, or any other part-time teacher similarly situated, has a right to be placed on the same salary guide as full-time teachers. See, Watchung Hills Regional High School Education Association v. Board of Ed. of Watchung Hills Regional High School District, OAL DKT. NO. EDU 165-85 (July 3, 1985), 1985 S.L.D. (Aug. 19, 1985) at page 11. In reaching the foregoing conclusions, it is unnecessary to make specific findings of fact about differences between the responsibilities and workloads of supplemental teachers and those of regular classroom teachers. Suffice it to say that negotiations between the Board and the part-time teachers were at arms length and satisfied the Hyman criteria and the criteria set forth in Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973).

Based on the foregoing analysis, I conclude that it was permissible for the Totowa Board of Education to establish a separate salary guide for the part-time teachers, and I further conclude that Ms. Fucetola is presently being properly compensated at step eight, M.A. level, of that guide. She is bound by the contract in effect between the Board of Education of Totowa and the Totowa part-time (supplemental, compensatory education

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and Title I teachers. Based upon this, petitioner's claim for placement on the regular teachers' salary guide is without merit.

It is therefore unnecessary to determine whether petitioner's salary calculations were proper for placement on the regular guide given the foregoing determination that the petition must be dismissed. However, should it be determined that petitioner is entitled to be placed on the Totowa Education Association regular teachers' salary guide, I adopt the calculations set forth at pages 6 and 7 of respondent's brief as fact in this case. The calculation is reproduced as Appendix 3 to this decision and incorporated herein as if set forth at length.

Accordingly, it is hereby **ORDERED** that the verified petition in this matter be, and is, hereby **DISMISSED** with prejudice.

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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.

Dec. 12, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

DEC 16 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 17 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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MARY ANNE FUCETOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner contends in her exceptions that the principal error in the initial decision is the acceptance of a separate salary guide for part-time (supplemental, compensatory education and Title I) teachers. The remainder of her exceptions concerns her disagreement with the judge's acceptance of the pro rata salary calculations submitted by the Board should it be determined she is entitled to be placed on the Totowa Education Association regular teachers' salary guide (Initial Decision, ante).

Upon review and consideration of the record in this matter and the arguments advanced by the parties in their exceptions, the Commissioner determines the conclusions reached by the judge with respect to the disputed issue to be consistent with the State Board's Decision in Hyman, supra. Regardless of petitioner's beliefs regarding the State Board's decision in Hyman, supra, that decision constitutes the controlling case law on the disputed issue herein. See also John Trucillo v. Bd. of Ed. of the Town of Kearny decided November 25, 1985.

The record in the instant matter is clear that petitioner is covered by the collective bargaining agreement between the Board and the bargaining unit recognized to represent part-time supplemental, compensatory education and Title I teachers. The salary schedule under which she falls was entered into by the unit and the Board, and the terms negotiated for her fall within the four corners of that agreement. As pointed out in Hyman, supra, and Trucillo, supra, negotiated agreements that include salary guides, as well as the negotiation process that results in such agreements, are within the scope of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq.

If petitioner believes that her interests were inappropriately or inadequately represented by the recognized bargaining unit or that violations existed with respect to the negotiations process, PERC is the agency to which such allegations must be addressed.

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Having found that the judge was correct in determining that petitioner has no statutory right to placement on the full-time teacher salary guide, there is no need to address the exceptions related to pro rata calculation of salary based on that guide.

Accordingly, the Commissioner adopts as the final decision in this matter the recommendation of the Office of Administrative Law dismissing the Petition of Appeal for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

January 28, 1986

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MARY ANNE FUCETOLA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 28, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Green and Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We note that, in adopting the determination of the Administrative Law Judge (ALJ), the Commissioner referred to the salary guide on which Petitioner-Appellant sought pro rata placement as the "full-time teacher salary guide." Commissioner's Decision, at 16. As recognized by the Commissioner, as well as by the ALJ, the guide in question is applicable to regular classroom teachers, both full-time and part-time. Id. at 15. However, we emphasize that, regardless of this distinction, Petitioner-Appellant, as a part-time compensatory and supplemental teacher, is not entitled under the school laws to salary guide placement by virtue of her tenure status. Hyman v. Bd. of Ed. of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-3508-84T7 (App. Div. Feb. 25, 1986).

June 4, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3902-85
AGENCY DKT. NO. 163-6/85

GRACIELA LOPEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND PUBLIC SCHOOLS, CUMBERLAND COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, P.A., attorneys)

Francis G. Reuss, Esq., for respondent (Reuss, Cavagnaro & Kaspar, attorneys)

Record Closed: November 22, 1985 Decided: December 18, 1985

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner is a social worker employed by the Board of Education of the City of Vineland (Board), who suffered an accidental injury in the course of her employment. Petitioner asserts that she has been unable to resume working since her accident. Because of the alleged work-related injury, she seeks payment of her salary, pursuant to N.J.S.A. 18A:30-2.1, without having her absences charged to her annual or accumulated sick leave.

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The Board states that petitioner is not entitled to any additional benefits, pursuant to the statute, because any disability that she may be currently suffering was not caused by a work-related injury.

After petitioner's appeal to the Commissioner of Education, this matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by telephone on August 22, 1985, at which time the issue to be decided was established. Hearings were conducted October 24, 25 and 28, 1985, in the Department of Public Buildings and Grounds, Council Chambers, Vineland. Six witnesses testified and eight documents were admitted in evidence.

FINDINGS OF FACT

1. Petitioner, Graciela Lopez, is a bilingual school social worker (English-Spanish) employed by respondent, Vineland Board of Education.

2. The Board is a body corporate and politic of the State of New Jersey empowered by law to administer the City of Vineland School District.

3. On Friday, November 16, 1984, at Memorial Junior High School in Vineland, petitioner suffered an accidental injury when a chair that she was about to sit down on collapsed.

4. The left leg of the chair gave way and petitioner fell backwards towards her left side.

5. Petitioner struck her back and her head[1] when she fell, but she was not rendered unconscious.

6. After her fall, petitioner got up with some difficulty, but was able to complete her daily duties.

---

[1] The Board denies that petitioner struck her head and supports its position with the testimony of an aide who stated that she caught and "cupped" petitioner's head in her hands, preventing her head from striking the floor.

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7. Over the weekend following the accident, petitioner began to feel neck stiffness and low back pain. She also began to experience headaches and felt a numbness and a tingling sensation in her face.

8. Petitioner did not report to work on Monday, November 19, 1984, because of the injuries she had sustained in the accident on the previous Friday.

9. On November 19 and November 20, 1984, petitioner went to a chiropractor, Dr. Michael Harvey, for treatment.

10. On November 20, 1984, petitioner went to Bridgeton Hospital and was referred to Dr. Sharan Rampal, a neurologist.

11. Petitioner's daughter contacted the Vineland Board of Education about medical treatment for her mother and was supplied with Exhibit P-1, a list of doctors by whom employees were authorized to be treated for workers' compensation injuries.

12. Petitioner saw Dr. Joseph Bernadini, a doctor whose name appeared on Exhibit P-1, on November 24, 1984. Petitioner was not satisfied with his attitude toward her complaints and did not return to him.

13. On December 7, 1984, petitioner began treatment with another doctor listed on Exhibit P-1, Dr. George Glenn.

14. Dr. Glenn limited his treatment of petitioner to her back and neck through medication and traction at Kessler Memorial Hospital.

15. During the time of her treatment by Dr. Glenn, petitioner complained to him that she was experiencing facial numbness and tingling, including a sensation that cold water was running down her head to her neck. Petitioner, in her testimony, stated that in late 1984 and early 1985, she was experiencing pain in the back of her eyes and headaches. She began to have visual and auditory hallucinations as well.

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16. Dr. Glenn recommended that petitioner return to work on March 12, 1985. From the time of the accident through this date, petitioner had been receiving her full salary without the deduction of sick days as required by N.J.S.A. 18A:30-2.1.

17. Petitioner was physically unable to return to work on March 12, 1985, and has remained disabled to this time.

18. Petitioner did not return to Dr. Glenn after March 12, 1985, but sought out her own medical treatment.

19. Petitioner returned to Dr. Sharan Rampal for treatment after Dr. Glenn. Dr. Rampal admitted petitioner to Bridgeton Hospital from April 19 through April 27, 1985.

20. During the period from March 12, 1985 through May, 1985, petitioner was experiencing increasing problems with headaches, hallucinations, confusion, loss of memory, anxiety and personality changes. She was having trouble speaking, particularly in English. She was referred to see a psychiatrist, Dr. Johnson, at Omnicare in Ocean City on March 6, 1985. He immediately referred her to Dr. Alan Miller, the head of the Department of Psychiatry at Cooper Medical Center in Camden, New Jersey (P-8).

21. Petitioner was admitted to the psychiatric service of Cooper Hospital on May 7, 1985, and remained there until May 31, 1985 (P-3).

22. Dr. Paul Schraeder, the head of the Division of Neurology at Cooper Medical Center, and an expert in the field of epilepsy, was called in by Dr. Miller as a consultant (P-2).

23. A variety of diagnostic tests were performed. Most significantly, the EEGs (electroencephalograms) showed abnormal brain patterns (P-3; P-6; P-7).

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24. A diagnosis of a form of epilepsy was reached, along with psychiatric symptomatology in the form of severe depression (P-6). Her seizures were called temporal lobe seizures.

25. Both Drs. Miller and Schraeder opined[2] that petitioner's symptoms were causally related to the accident of November 16, 1984 (P-3; P-4; P-6).

26. After a diagnosis was reached, petitioner was treated with Tegretol, a drug used to treat someone experiencing temporal lobe seizure disorders.

27. Initially, petitioner improved while taking Tegretol, and she was released from Cooper Hospital on May 31, 1985 (P-3). She was to continue follow-up care with Dr. Schraeder on an outpatient basis.

28. Petitioner began to experience continued and increasing problems over the summer 1985. She still had difficulty with her memory, and both auditory and visual hallucinations had returned. Although she had majored in mathematics in college, she had lost her ability to calculate and she was no longer able to play the piano, although she had been an accomplished pianist. She became increasingly dependent upon her daughter.

29. Petitioner was readmitted to Cooper Hospital on October 9, 1985. She was still an inpatient at the hospital when she testified on October 24, 1985, but she had been given permission to leave the hospital for the day.

30. Both of petitioner's hospital admissions were to the hospital's psychiatric service, because Cooper Hospital does not have a separate unit for treating seizure patients.

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[2] Dr. Miller "assume[d]" that petitioner's symptoms were causally related to her seizure problems in the absence of any problems prior to her accident and the head trauma.

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31. During the October 1985 admission, it was determined that petitioner was not managing well while taking Tegretol. Ultimately, her medication was changed to Dilantin, which Dr. Schraeder described as "a major anti-seizure drug, anti-epileptic drug."

32. Petitioner has experienced improvement while taking Dilantin. This was confirmed by her own testimony, that of her daughter and that of both doctors.

33. During the October 1985 admission, Dr. Miller ordered psychological testing of petitioner. The results of the psychological testing confirmed that petitioner's problems have an organic basis and that her problems are more severe in the left hemisphere of her brain than in the right.

34. After petitioner was ordered to return to work by Dr. Glenn on March 12, 1985, the Board paid her only for the sick days she had accumulated. From approximately late March 1985, through the time of the hearing, she received no salary whatsoever from the Board of Education. Furthermore, she was required to pay for her own medical insurance and prescription plan premiums.

Petitioner seeks payment of her salary from March 12, 1985 through June 30, 1985; and from September 1, 1985 through November 16, 1985, one year following her accident. (N.J.S.A. 18A:30-2.1).

DISCUSSION

The Board concedes that petitioner was absent from her post of duty as a result of an accident she sustained at work on November 16, 1984, a Friday. Because of the work-related injury the Board paid petitioner's full salary without any deduction of her accumulated or annual sick days from November 19, 1984 through March 12, 1985, pursuant to N.J.S.A. 18A:30-2.1.[3]

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[3] This statute provides for one year's salary without such deductions if the injury is work-related.

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After seeing several doctors, petitioner began her treatments with Dr. George Glenn on December 7, 1984. Dr. Glenn treated her until March 12, 1985, when he recommended that she return to work. The Board relies on this recommendation and the testimony of one of its aides in determining that petitioner is not entitled to any further salary under the cited statute.

Only two witnesses testified for the Board. One is a terminal operator who was present when petitioner fell. She testified that petitioner's chair gave way and that she fell backwards "all the way to the floor." The accident happened very fast and petitioner complained of discomfort immediately. The other aide was walking by petitioner as she fell. The operator was unable to see which parts of petitioner's body struck the floor.

The aide testified that petitioner's chair gave way as she was walking by. Petitioner fell backwards and to her left. The aide kept petitioner's head from hitting the desk. Petitioner's legs and back struck the floor but the aide "cupped my hands" behind her head so her head would not hit the floor. The aide testified that "she took a heavy fall." Petitioner complained immediately that she could feel the results of the fall because of her age (46) and said "it might not bother someone younger." Petitioner complained that her back hurt.

Based on Dr. Glenn's recommendation that petitioner return to work, the Board concluded that petitioner was able to return to work after March 12, 1985. The Board asserts alternatively, that if petitioner was not and still is not able to return to work, her current illness is not causally related to her accident on November 16, 1985. Consequently, the Board states that petitioner has received her full entitlement pursuant to N.J.S.A. 18A:30-2.1, from the date of her accident until the date Dr. Glenn recommended that she return to work.

As will be detailed later, petitioner's psychiatrist and her neurologist testified that she is unable to return to work. Dr. Glenn, who recommended that petitioner return to work, was not called to testify by the Board.

Graciela Lopez testified as follows. She received a B.A. degree from the University of Puerto Rico, specializing in art, conservation, and mathematics. She moved to the mainland of the United States in 1965 or 1966, and she gained employment

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as an "employment worker" in New York City for one year. Respondent could not recall what she did after that time; however, she did move to Vineland in 1974, where she was employed by the Board until the present time.

On November 16, 1984, respondent fell backward when the chair in which she was attempting to be seated collapsed. The left legs of the chair gave way and she fell backwards to her left and struck the floor. She testified that she hit her head, back and neck on the floor. Although she got up by herself, she complained of discomfort and reported her accident to the school nurse.

On the following Monday, November 19, 1984, petitioner visited a chiropractor and later saw him a second time. The record shows that she thereafter visited a number of doctors. The third doctor she visited would not listen to her complaints. Petitioner complained of numbness in her mouth and the doctor told her that there were no nerves in her mouth, that she was no longer a teenager and that she should go back to work. Petitioner did not like his attitude because he would not listen to her complaints; therefore, a few days later she went to Dr. Glenn, who had been recommended to her through her union representative. Her treatment by Dr. Glenn began on December 7, 1984. At that time she told Dr. Glenn that on the weekend of her accident she began to feel stiffness in her neck and on Sunday, November 18, she began to get headaches. Her symptoms increased with more severity. During the course of her treatment with Dr. Glenn she complained of dizziness and headaches; however, Dr. Glenn paid no attention to those complaints. Several of petitioner's physicians, including Dr. Glenn, suggested to petitioner that she visit a psychiatrist. On March 12, 1985, Dr. Glenn recommended that she go back to work in order to occupy her mind.

Petitioner's daughter, Abigail Lopez, corroborated and strengthened her mother's testimony as follows. Her mother called her on the evening of November 16, 1984, and asked her if she could come and stay with her at her apartment in Philadelphia.[4] Her mother drove to Philadelphia where her condition worsened over the weekend. On Monday, her daughter drove petitioner to see a chiropractor. She testified that her

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[4] Petitioner's daughter was a graduate student at Temple University and is now on a leave of absence.

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mother had always been a self-sufficient and very capable woman. She had an acre of land and loved gardening. Although divorced for 17 years, her mother was able to hold down two jobs to take care of herself and her family. However, as the result of her accident, she is no longer able to care for herself. Petitioner's daughter drives her everywhere and takes care of her needs. Petitioner's daughter gave some examples as to how she takes care of her mother, including that she takes care of her mother's checkbook and pays her bills because she is no longer able to do that arithmetic. She also answers her mother's daily correspondence. She testified that her mother was an accomplished pianist but that she is no longer able to play the piano.

The record shows that when Graciela Lopez was injured and thereafter began to visit her several physicians, much of the information given to them concerning her injuries came through her daughter's representations. I consider this significant because petitioner had gradually lost her ability to articulate to her treating physicians the genesis of her problems. Consequently, the information which her physicians utilized in beginning her treatment was the information given to them by petitioner's daughter.

It is clear to me that when one's mother is ill, the supporting child would certainly want to give her mother's doctors the most complete and accurate information available so that her mother could be properly treated. I do not believe that Abigail Lopez would have told the psychiatrist and the neurologist that her mother had struck her head if in fact her mother had not related that information to her.

Accordingly, I also **FIND** as fact that Graciela Lopez struck her head when she fell at her place of work on November 16, 1984.

Having reached that finding of fact, the testimony and the documents submitted by Dr. Paul Schraeder, petitioner's psychiatrist, and by Dr. Alan Miller, petitioner's neurologist, are most significant.

Dr. Schraeder testified that prior to her accident, petitioner was operating at a high level of functioning. She had no previous problems; therefore, her condition was probably as a result of a head injury, temporally related. He stated that the temporal lobe of the brain is responsible for memory, time and that the intermittent discharging of nerve cells as he found during his diagnosis, is often caused by a head injury. He stated

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that injured nerve cells such as might be caused by bruising could cause bleeding and scar tissue. Such an injury could lead to seizure discharges and the hallucinations petitioner reported. He emphasized that petitioner's condition was not schizophrenic; rather, it came on suddenly in her middle age. By contrast, schizophrenia ordinarily begins at an early age. Although his treatment of petitioner began several months after her injury when she began to experience seizures, Dr. Schraeder testified that one does not develop seizures immediately after an injury. It may take a year or one, two or three months before the onset of seizures.

He testified further that petitioner was admitted to the psychiatric ward in Cooper Hospital in Camden because of severe depression. She had to be watched closely; therefore, the hospital was unable to put her on a regular medical floor. Dr. Schraeder also testified that petitioner's memory is fragile, that she would be unable to work as she did a year ago before the accident. He was unable to predict any long range result of her new drug treatment, and he testified that if she had a major psychiatric problem, her drug therapy would not work. He concluded that a head injury is the most common cause of the onset of seizures such as those experienced by petitioner.

Dr. Miller testified that petitioner was admitted to Cooper Medical Center psychiatric unit on May 7, 1985. Dr. Miller is the head of the psychiatric unit and he testified that most of the information about petitioner came from her daughter and that Graciela Lopez was noncommunicative at the time. When he evaluated her on May 8, 1985, petitioner was easily startled, suspicious, suffered emotional turmoil, was crying, and was paranoid. After a few days at the hospital she was able to communicate in both languages and she complained of many symptoms, including numbness and headaches. Petitioner heard voices and was fearful. Dr. Miller found these symptoms could be causally related to her head trauma sustained in November 1984.

At the time of this hearing, petitioner was still in the hospital undergoing treatment. Dr. Miller testified also that petitioner had major losses in skills in mathematics, music and languages. He stated that these are her deficits which have not improved and that she cannot go back to work now.

Dr. Miller testified also that in the absence of any prior incidents, the head trauma is etiologically responsible for petitioner's condition. Further, he testified that although one need not suffer a head trauma to get a temporal lobe seizure, it would be

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unusual for a temporal lobe seizure to happen so late in her life. He indicated that the head injury was the cause of petitioner's problems. In support of this testimony, petitioner offered into evidence Exhibit P-3, which is a discharge summary of her treatment during her first visit to Cooper Hospital between the dates May 7 and May 31, 1985. In the last paragraph of that discharge summary, Dr. Miller stated as follows:

> In view of the absence of her previous history of seizures and the temporal relationship between the head trauma on 11/16/84 and her subsequent symptomatology it is clear that a cause and effect relationship exists between that head trauma and her current condition [P-3].

Dr. Schraeder committed his examination to writing in Exhibit P-6, which states, in significant part, as follows:

> She was admitted to the psychiatric service because of symptoms of progressive loss of memory, paranoia, hallucinations which were both auditory and visual and general confusion which she had experienced for a [sic] last 6 months. She never had any prior history of psychiatric symptoms. These symptoms started when she fell to the ground after a chair upon which she was sitting collapsed while at work. As a result of this injury, she not only hit her head but also suffered neck, shoulder, and finger injuries. . . . It is my opinion that her treatment was very necessary in the hospital and the psychiatric service since we are in all probability dealing with a complex problem which is an interaction between epileptogenic discharges in her brain and psychiatric symptomatology in the form of severe depression. Often these two problems are conjoined to the detriment of the patient. I believe that it is highly probable that the patient's symptoms were the direct result of her head trauma and that she is suffering from a combination of a post traumatic syndrome as well as complex partial seizures. She is disabled at the level of 100 percent because of these symptoms which as of yet have not come under control. . . .

Exhibit P-6 was written by Dr. Schraeder on September 23, 1985.

The Board posits as follows:

> Assuming that Mrs. Lopez is suffering from injuries which preclude her from returning to her employment, is the personal injury caused by an action arising out of or in the course of her employment?

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The Board suggests that the Commissioner lacks jurisdiction to decide this issue while the same issue is currently pending in the Workers' Compensation court. However, the question of the Commissioner's jurisdiction in matters such as this has already been decided in Masino v. West Deptford Bd. of Ed., OAL DKT. EDU 4347-79, decided by Commissioner Nov. 20, 1980; reversed and remanded, St. Bd. of Ed. (Jul. 1, 1981); dismissed Superior Court (App. Div.) Dkt. No. A5469-80T1 (Jun. 15, 1983). In accordance with the above, the Commissioner has jurisdiction pursuant to N.J.S.A. 18A:6-9. If petitioner prevails in her quest for workers' compensation temporary disability benefits, she must reimburse the Board for excess payments made pursuant to N.J.S.A. 18A:30-2.1.

Based on the finding of fact that petitioner struck her head when she fell, I **CONCLUDE** that her current condition is causally related to her fall while at work on November 16, 1984. There is no evidence in this record to the contrary. Rather, petitioner had an unremarkable medical history until the day of her accident. Not only has the Board failed to offer any evidence to the contrary, it decided not to present the physician, who recommended that petitioner return to work on March 12, 1985, so that he might give supporting testimony for that recommendation.

The Board in its brief suggests that petitioner had been under great stress because of an earlier hysterectomy in 1981 and two subsequent bladder suspension operations. It was also brought out in her cross-examination that she had been divorced for 17 years. These are the elements which the Board asserts may be responsible for the stressful situation in petitioner's life which may have brought on her current condition.

These suggestions by the Board cannot be accepted as proof that petitioner's condition was brought on by causes other than her injury suffered while at work.

On the other hand, petitioner needs only to prove by a preponderance of the evidence that her injury is work-related. From my review of this entire record, petitioner

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has clearly shown by a preponderance of the evidence that she struck her head while at work on November 16, 1984, and that the resultant trauma, depression and psychiatric problems which she has suffered are causally related to that accident.

Based on the above, petitioner's appeal for the remainder of her salary for up to one year following her accident pursuant to N.J.S.A. 18A:30-1 is **GRANTED.**

Accordingly, the Board is **ORDERED** to pay petitioner the wages to which she is entitled under N.J.S.A. 18A:30-2.1 from the time her salary was terminated in March 1985 through November 16, 1985, together with any emoluments due her during this period while she was still employed by the Board.

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

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

18 December 85 — August E. Thomas
DATE — AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DEC [illegible] 1985

DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 23 1985

DATE — OFFICE OF ADMINISTRATIVE LAW

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GRACIELA LOPEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. It is noted that exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board avers in its exceptions that the ALJ failed to take into proper consideration testimony presented by the two eye-witnesses to the incident in question and that petitioner has failed to establish by a preponderance of the credible evidence that the injuries and complaints for which she now provides documentation were, in fact, caused by the fall which occurred in November 1984. Further, the Board avows that the initial decision fails to adequately take into consideration the testimony of the doctors presented by petitioner and that petitioner has failed to establish the causal relationship between the condition of which she now complains and the traumatic event which she alleges occurred during her employment.

In reply exceptions, petitioner responds first to the Board's contention that the ALJ failed to properly consider the testimony presented by Mrs. Flores and Mrs. Giovinazzi, the eye-witnesses. Petitioner replies on her part contending that the initial decision clearly indicates that the ALJ weighed the testimony of all the witnesses and reached the conclusion that she did strike her head when she fell. Petitioner adds that it is well-settled that the credibility resolutions of the finder of fact are entitled to great deference, citing In re Grossman, 127 N.J. Super. 13 (App. Div. 1974). The factual findings made by Judge Thomas, petitioner argues, should not be disturbed because they are clearly reasonable.

Petitioner's reply exceptions next address the Board's exception with reference to the medical testimony of Drs. Schraeder and Miller and contend that it must be rejected. Petitioner avers that the Board not only misapplied the standard of proof required of medical evidence, but implied that the doctors must actually have seen the accident to draw a reasonable conclusion as to causation. Petitioner advances the argument that in a traumatic accident, doctors must rely upon the history of the patient's symptoms as communicated to them. In the instant matter, petitioner cites to

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those symptoms proffered by her daughter. Petitioner states that the ALJ took specific note of the daughter's testimony in the initial decision, ante, and also states that the Supreme Court of New Jersey has held that:

> A petitioner is not required to prove his claim to a certainty. It is sufficient if the evidence establishes with reasonable probability that the employment caused or proximately contributed to the condition or disease of which he complaints.

(Petitioner's Reply Exceptions, at pp. 1-2, quoting Ciuba v. Irvington Varnish and Insulator Co., 27 N.J. 127, 139 (1958))

Petitioner's reply exceptions further state that

> the conclusions of Drs. Schraeder and Miller were based upon a variety of diagnostic tests, in addition to the history of symptons (sic) and their [temporal] relationship to the accident. Additionally, Respondent presented absolutely no medical evidence to rebut or contradict the testimony of Drs. Schraeder and Miller. (Petitioner's Reply Exceptions, at p. 2)

Finally, petitioner contends that "[r]espondent's attempt to blame Petitioner's current condition on the stress in her life is little more than a smokescreen." (Id., at p. 2) Petitioner argues that there is no evidence to support the assertion that stress caused her condition and, further, that Drs. Miller and Schraeder testified that the type of epilepsy which petitioner is diagnosed as having "is most clearly associated with head injury. (T11:1-4; T87:13 to 88:4) No contradictory medical evidence was presented." (Id., at p. 2)

The Commissioner has reviewed the record before him, including the exceptions and the medical testimony within the partial transcript supplied in the instant matter. Based on such review, the Commissioner determines that even accepting arguendo, that the eyewitness account is accurate that petitioner's head was held by "cupped hands", thereby buffering the head from injury, the fact remains that an injury was sustained and that the medical evidence proffered by petitioner represents reasonable medical confirmation of the fact that her condition was the result of injuries sustained by the fall on November 16, 1984, as petitioner contends. Notwithstanding the fact that Dr. Glenn, the Board-approved physician, recommended that petitioner return to work on March 12, 1985, it is unrefuted that Dr. Glenn also recommended at that time that she consult a psychiatrist, whose testimony, along with that of a neurologist, substantiates petitioner's contention that her symptoms were related to an "organic" condition that precluded her return to work on the date recommended by Dr. Glenn. (Tr.II-31) In the Commissioner's opinion, the aforesaid sequence

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of events tends to support the position of petitioner that she was, and remains, physically unfit to resume her work for the Board.

The Commissioner therefore finds and determines, as did the ALJ, that petitioner carried her burden of proving by a preponderance of the credible evidence that her "current condition is causally related to her fall while at work on November 16, 1984." (Initial Decision, ante) The initial decision is affirmed, and petitioner's appeal for the remainder of her salary for up to one year following her accident pursuant to N.J.S.A. 18A:30-1 is granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 3609-85
AGENCY DKT. NO. 141-5/85

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
MICHAEL GWALEY,
Respondent.

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

Mark J. Blunda, Esq., for respondent (Oxfeld, Cohen & Blunda, attorneys)

Record Closed: November 6, 1985 Decided: December 18, 1985

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

On May 28, 1985, the Middletown Township Board of Education filed tenure charges with the Commissioner of Education against Michael Gwaley, a teaching staff member in its employ. The filing included a certificate of determination. The certificate states that the Board has determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant the dismissal of the respondent or a reduction in his salary.

On June 10, 1985, the respondent filed an answer with the Commissioner of Education. The respondent denied charge four. He admitted to charges one, two and three but maintained that they do not rise to the level of unbecoming conduct as alleged by the Board.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held before the Honorable Joseph Lavery, ALJ, on July 1, 1985. I heard the matter on August 19, 20 and 21, 1985, at the Freehold Township Municipal Court.

I.
NATURE OF THE CHARGES

The Board charges that during the school year 1983-84 the respondent attended a party at the home of another teacher in the system. The party was attended by female pupils and certain staff members from the same school. Alcoholic beverages were available at the party for consumption by the pupils and were in fact consumed by the pupils.

The second charge is that during the course of the party referred to in the first charge, the respondent did kiss on the lips one of the female high school pupils who was present.

The third charge is that the respondent attended another party at the home of the same teaching staff member referred to in charge one on March 16, 1985. The party was attended by approximately 15 adults and approximately 16 female high school pupils ranging in age from 15 to 18 years. Alcoholic beverages were available at the party for consumption by the pupils and were in fact consumed by the pupils. Certain pupils became intoxicated.

The last charge is that the respondent secluded himself in one of the bedrooms of the home at the March 16, 1985 party with one of the female pupils. He did place his arms about the pupil and kiss her on the lips.

II.
EVIDENCE RULINGS

The respondent offered the testimony of his wife concerning his habit and custom in dealing with his pupils. The Board objected, maintaining that the testimony was neither probative nor material. The Board further argued that, if the testimony were

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accepted, it could appear to be tacit approval of a different standard of conduct when teacher and pupil are friends. The respondent argued that because two charges have to do with kissing female pupils the testimony is relevant. This sort of thing happens all the time in the athletic context.

I declined to hear testimony of the respondent's wife as to his habit and custom when dealing with pupils in other than classroom situations. The exclusion of testimony is somewhat unusual in an administrative proceeding. I therefore believed it appropriate to elaborate on the ruling.

N.J.A.C. 1:1-15.2(a) states:

> Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the Rules of Court except as specifically provided in the rules [Uniform Administrative Procedure Rules of Practice]. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his her or discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> (1) Necessitate undue consumption of time; or
>
> (2) Create substantial danger of undue prejudice or confusion.

In the present case, it is the first consideration, undue consumption of time, that undergirds the ruling. The respondent already has testified on the question. His wife's testimony on the same aspect of the case may be viewed as corroborative. It might as easily be reviewed as cumulative.

Although not bound by the New Jersey Rules of Evidence (Anno. 1985), I find useful instruction in the comments on Evid. R. 49. The rule itself states:

> Evidence of habit or custom whether corroborated or not is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

In the first comment, it is stated that, if in a particular case the probative value of the evidence of habit or custom is substantially outweighed by the counter-factors of undue consumption of time, undue prejudice or confusion of issues, the offered

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evidence of habit may be excluded in the court's discretion. The virtually identical language of the Administrative Rule is immediately seen.

Importantly, however, Evid. R. 49 admits evidence of habit or custom whether corroborated or not. So, too, do the Administrative Rules. Therefore, the respondent's testimony on the question, if I accord any weight to it, will be sufficient and the cumulative testimony of his wife would be surplusage and, hence, would unduly consume time. The concern of the law for orderly and efficient administration has been made clear in our state many times. See, e.g., State v. Garfole, 76 N.J. 445 (1978).

Mr. Blunda's exception is, of course, noted. Nevertheless, with this amplification, the ruling stands.

At the outset of hearing, the Board moved for entry into evidence of the deposition of T.C. The respondent opposed the admission arguing that testimony should be live, and if there were conflict with other testimony the judge would need to assess the credibility of the witness. The Board counterargued that it had applied to take the deposition of T.C. because she is going out of state to attend school. Not using her testimony simply because she can not be present is not enough to bar its use. The bench can compare it to testimony given at the hearing. Further, both parties were represented at the taking of the deposition and assumed it would be used in this hearing.

The deposition was admitted into evidence without comment as to the weight that might be ascribed to the preserved testimony.

Many reasons support the open admission of hearsay and other legally incompetent evidence in administrative hearings. Foremost among them is the fact that the exclusionary rules do not determine the probative value of the proferred evidence. Professor Davis, the leading proponent that hearers should make no distinction between hearsay and nonhearsay evidence, makes the following point:

> The reliability of hearsay ranges from the least to the most reliable. The reliability of non-hearsay also ranges from the least to the most reliable. Therefore the guide should be a judgment about the reliability of particular evidence in a particular record in particular circumstances, not the technical hearsay rule with all its complex exceptions. "Hearsay in Administrative Hearings," 2 Geo. Wash. L. Rev. 689 (1964).

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Most hearsay in administrative hearings is documentary. The standard of admissibility thus applied both by reviewing courts and administrative law judges is that "an administrative tribunal is not required to exclude hearsay evidence in the form of a document if its authenticity is sufficiently convincing to a reasonable mind and if it carries sufficient assurance as to its truthfulness." Fairfield Scientific Corp. v. United States, 611 F. 2d 854, 859 (1979), appeal after remand 655 F. 2d 1062.

To require that an administrative law judge refuse to admit hearsay makes no sense where there is no jury to protect and the trier of fact is equally exposed to the evidence whether he admits it or excludes it. Admission without a ruling - as long as the evidence has some element of reliability - does no harm and can prove more efficient than requiring a ruling which may later be held erroneous. Discarding the exclusionary rules of admission does not eliminate the need for the parties to interpose protective objections. Unobjected to Hearsay and the Residuum Rule in Administrative Hearings, 116 N.J.L.J. 1, 9-10. See also, Murphy v. Div. of Pensions, 117 N.J. Super. 206 (App. Div. 1971). Nevertheless, it assures a complete, yet not necessarily unduly long record and might well avoid the need to reopen the record. Hearsay, of course, is not subject to current, in-court cross-examination, but that limitation affects the weight the evidence carries, not its admissibility. See, Calhoun v. Bailar, 626 F. 2d 145 (9th Cir. 1980), cert. den. 452 U.S. 906 (1980). See, generally, McCormick, Evidence, § 352 at 1009 (1984).

III.
RELEVANT TESTIMONY

C.L., a former pupil at Middletown High School South, testified that she knows both John Ahern and the respondent. She knows the respondent as a teacher and a junior varsity basketball coach.

On the night of March 16, 1985, she drove to a party at Ahern's home. She left Middletown at approximately 6:00 p.m. and provided transportation for C.M. and S.M., also female pupils. Upon arrival at the party she saw Ahern and the respondent as well as other adults whose names she cannot now recall. Alcoholic beverages were available in the kitchen. She does not know the exact nature of the beverages nor did she know who provided them.

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She spoke to the respondent "half way into the party." The party really never ended. At about 2:00 or 3:00 a.m., everyone fell asleep.

At some point during the party, she began a conversation with the respondent in the living room but the conversation ended in Ahern's bedroom. C.L. could not remember the exact time that the conversation took place. She does recall spending 15 or 20 minutes with the respondent in the bedroom.

They were sitting on the bed. C.L. does not recall if the door was open or closed.

C.L. stated that she was upset. The respondent put his hand on her back and kissed her. Their lips and arms made contact for approximately two or three seconds. He also hugged her. They then left the bedroom and she was not again alone with the respondent during the course of that evening. C.L. does not know when the respondent left the party.

On cross-examination, C.L. recalled that the conversation with the respondent began in the living room, moved outside and then went into the bedroom. She states they merely went somewhere to speak quietly and privately. She believed the respondent kissed her to be friendly and comforting. She believed that she could confide in the respondent. The respondent never made sexual advances toward her. He also told C.L. to tell the truth during the principal's investigation of the March 16 party.

C.M., also a former pupil at Middletown High School South, testified that she knows both Ahern and the respondent. Both were her coaches. She also had the respondent as her speech teacher. Concerning an earlier party at Ahern's home, this witness testified as follows. She stated that she consumed two or three cans of beer. She did not observe the respondent drink. She spoke to the respondent several times during the evening.

At one point late in the evening, she was alone with the respondent in the kitchen. The respondent kissed her and put both arms around her. He kissed her on the lips and the kiss lasted two or three seconds.

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C.M. spoke to the respondent the next morning by telephone. He called, apologized for the kiss and said that he did not want her to get the wrong impression.

C.M. also stated that the party was "a sleep-over." She does not know when the respondent left nor does she recall any discussion by any adult of who could and could not drink alcoholic beverages.

On the night of March 16, 1985, she attended another party at Ahern's home. In this regard, her testimony was similar to that of C.L. The same beverages were available as at the earlier party. Beer was kept in a keg in a corner of the dining room. No one tended bar. Pupils could, if they wished, help themselves to beer and some did. This witness drank two or three glasses of beer openly. No adults said anything about pupils and the beer. She does not recall at what time the respondent left but does recall that he did not stay the night.

On cross-examination, this witness testified that she had made a statement in April 1985 in which she used the words, "but we were not supposed to." The witness stated that these words were in reference to drinking beer. Also in regard to her earlier statement, the witness said that the respondent did hold her, but not tightly; the kiss was not a prolonged kiss; a kiss or a hug from a coach after a game was not unusual, and that the respondent had made no sexual advances.

She believed the respondent to be a friend and confidant but still was surprised when he kissed her.

The high school principal testified. He identified the respondent's employment history (P-3). On March 19, 1985, he was informed by an assistant principal of student talk about a party held at Ahern's home involving pupils and teachers and the consumption of beer.

The principal called the respondent in and asked him what had happened. They discussed the party, the fact that the respondent was there, that beer was plentiful and that some pupils consumed beer.

The principal first spoke to Ahern on March 19. On March 21 he again spoke to the respondent because he had received conflicting statements from the two men. At

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this point, the principal informed the superintendent and compiled a list of questions. In his March 21 meeting with the respondent, the respondent answered directly that beer was available at the party and that almost all pupils drank beer at the party. The questions the principal asked of the respondent were typed. As the respondent answered, the principal wrote down the answers. The respondent reviewed his answers, amended one answer on page 3 and then signed the statement (P-4).

The principal then started to call in involved pupils. He was much concerned about pupils and the use of alcohol.

On March 27 he sent a memorandum to the respondent setting up a meeting for the next day (P-5). On March 28, the principal again asked the respondent several questions and again recorded his responses. The respondent signed the document in the presence of an assistant principal (P-6).

The principal then reviewed the whole matter with the superintendent. They decided to hire a private investigator. The investigator met with involved pupils on March 29 and April 2. He asked questions of each pupil. The answers were recorded by a stenographer. The transcript was typed and sent to administration.

The principal met with other teachers who had attended the party. On April 2, the last statements were taken. All information was reviewed. The principal recommended tenure charges against the respondent to the superintendent. The charges were filed on April 15.

The respondent was present when the Board met on March 20, 1985. The superintendent and Board attorney were present at that meeting. The respondent presented an affidavit in response to the charges and other documents (P-7).

On cross-examination, testimony was adduced showing that there had been no prior disciplinary actions against the respondent. He has undertaken, both for extra compensation and gratis, a number of cocurricular activities (R-1a through R-1m).

The principal also stated that he did not advise the respondent he could be represented at the first questioning because that was a purely preliminary activity. The four charges preferred against the respondent were preferred at the recommendation of

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the principal. The principal expressed the opinion that attending and condoning the Ahern parties constitutes unbecoming conduct. In connection with the same incidents, the principal recommended to the superintendent the withholding of salary increments of several other teachers. Of the nine staff persons who attended the March 16 party, tenure charges were filed against two, withholding actions were taken against four, two resigned for personal reasons and no action was taken against one teacher. As to the latter, he had arrived at the party, observed what was going on, and left of his own accord.

Ahern and the respondent were charged. The respondent attended both parties, alcohol was served at both parties, pupils stayed overnight at both parties, the respondent had a special role as a coach, and should not have permitted such activities as a teacher and especially as a coach. In addition, kissing two female pupils is far more serious than the activities in which the other teachers engaged. The principal made the four withholding recommendations because those persons attended the party, knew what was going on concerning the consumption of beer, which they also drank, and did nothing about it. The principal also verified that the ages of the female pupils at the parties ranged from 15 to 18 years.

C.P., also a former student at Middletown High School South, testified that she knows Ahern and the respondent as teachers and coaches. She attended the March 16 party at Ahern's home in Brick Town.

She arrived at approximately 8:00 p.m. M.G. (female) drove to the party. C.F. also was in the car.

Nearly everyone had brought something. Soda and a keg of beer were provided. The beer was located in the dining room. She noticed no one in control of the beer.

C.P. drank two or three glasses of beer and became intoxicated. M.G. (female) and C.F. also drank beer. C.P. heard no announcement that pupils were not to drink beer.

D.V. (male) came to the party and took C.P. home. She had called D.V. about a date later that evening. She told him she had been drinking. D.V. came and drove C.P. home.

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C.P. stated that she saw the respondent throughout the time she was at the party. The respondent asked questions about the ability of M.G. to drive and about how C.P. was feeling. The respondent did not allow the pupils near the door of the apartment if they had been drinking.

This witness also stated that she consumed nothing but beer. She used no drugs or other liquor. She had nothing to eat at the party. On the way home, she became sick to her stomach. She believes that D.V.'s driving contributed to her nausea.

Upon conclusion of the Board's case in chief, the respondent moved that charges one and two be dismissed. I denied the motion, finding that there was enough in the record to require a defense.

The respondent then testified in his own behalf. His testimony concerning his employment history parallels that given by the principal and the information in P-3. His performance reports, November 28, 1979 through June 1984 were accepted in evidence (R-10a through R-10o).

As a coach, the respondent has touched pupils; for example, a pat on the back after a good play.

Concerning charge one, the respondent states that he attended a 1984 party at Ahern's home. Some parents were present. He neither brought nor served alcoholic beverages. He has no recall of anyone at the party being intoxicated. He does not know if any pupils stayed the night. He believes each pupil had parental permission to attend the party.

Concerning charge two, the respondent stated he did kiss C.M. It occurred in the kitchen. The lights were on. The kitchen opens to the den on one side and to the living room on the other. The kiss occurred near the sink. No one else was in the room, but he and C.M. were visible from other rooms. The kiss lasted two or three seconds. He was holding her two upper arms. In his words, it was a "don't worry everything's going to be fine" kiss. He made no other contact with C.M. He called her the next day because she seemed upset about a home situation and also to say she shouldn't get any wrong ideas from the kiss.

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Concerning charge three and the March 16 party at Ahern's home, the witness stated that he knows pupils had parental permission to attend. Pupils each brought a covered dish. The party began between 4:00 and 5:00 p.m. Other faculty were invited. He arrived between and 7:00 and 8:00 p.m., alone. His wife could not get a babysitter. He did not take, pay for or serve beer. He did not tell pupils that they could drink. He took beer away from M.G. when he learned she was to drive.

He saw no one who appeared to be intoxicated. He did not allow the pupils out into the parking lot if they had been drinking. He did not see any pupil who was ill. He does not know what each pupil had in her cup at all times; it could have been any beverage.

The respondent stated he was questioned by the principal on March 21. He answered questions and the principal wrote down his answers. He said that almost every pupil was drinking beer. He now says he saw only M.G. with beer.

The respondent spoke to the involved pupils before speaking to the principal. He states they were upset about being questioned. He told them just to tell the truth.

Concerning charge four, the witness testified that C.L. was a pupil of his. He did kiss her on the lips at the March 16 party. They were in one of the bedrooms at the time but they did not seclude themselves. C.L. wanted to discuss a problem. It was too noisy in the living room and too cold outside so they went into the bedroom.

They sat side by side on a bed. The kiss was awkward. It "just happened" at the close of the conversation. He had never on any other occasion had contact with C.L. He made no overtures, suggestions or innuendos. The kiss was to comfort her. He stated he patted her on the back and they both laughed a lot.

On cross-examination, the witness affirmed that his evaluations repeatedly speak about his good rapport with pupils. He has been to two parties at Ahern's home involving pupils and adults. He then stated he had attended a party in 1984, a party in February 1985 and a party in March 1985.

He believes that all preparations for the parties were made in advance. He did not help set them up. He has no recall of alcohol being served at the 1984 party. If it

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were there, he would have consumed it. He has no recall of alcohol at the February 1985 party. He does recall beer being present at the March 16, 1985 party.

At that party, he drank soda and beer. He does not recall how much he consumed. He estimates he may have had three or four glasses of beer. The cups probably held 12 ounces each.

The respondent arrived at the March 16 party between 6:00 and 7:00 p.m. When he arrived, Ahern and some team members were present.

He has known C.M. for three years. She is honest and credible. He has no reason to doubt her testimony that she drank beer at the 1984 party. At the March 1985 party he was alone with her in the kitchen. He held her by her upper arms for two or three seconds and kissed her for two or three seconds. They were in the kitchen for approximately three minutes before the kiss and approximately one minute after. The next day he called C.M.

The respondent stated he does not approve of pupils consuming alcohol and sleeping at a male teacher's home. He did not, however, report these incidents to the school administration nor did he counsel Ahern against this type of behavior.

The witness attended the February 1985 party but did not question Ahern in advance about alcoholic beverages or sleeping arrangements. He again stated he had no recall that the February 1984 party was a sleep-over or that alcohol was present.

Concerning the March 16 party, Ahern invited him some two weeks before. The witness did not tell the principal that he was going to the party because Ahern sometimes got out of hand and the witness knew beer would be present. He knew that previous parties had been sleep overs. He did not question Ahern regarding either the sleeping arrangements or the presence of beer although he disapproves of both. This witness knows of alcohol-related deaths among pupils each year for the last 10 years. However, he did not feel obliged to say anything to Ahern.

Concerning his March 21, 1985 statement to the principal, the witness testified that he saw pupils consume beer; that in question six he referred to "almost everybody"; he made no announcement to pupils not to drink; he said nothing to Ahern and felt no

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obligation to do so; he believes he should have said something, but he acted only as to M.G. He now says that his statement of March 21 is incorrect in that he said of the pupils that "almost everybody" was drinking beer so as to avoid giving specific names. He states he did not try to hide information from the administration but felt he could not reveal specific names.

The witness stated that while in the bedroom with C.L. during the March 16 party, the door to the room was closed. In exhibit P-8, an affidavit prepared by him, he denies that he secluded himself in a bedroom with a female pupil. He says this is not inconsistent because what he did was not "secluding." However, he also denied that he embraced C.L. and kissed her on the lips. His own later testimony contradicts that response in exhibit P-8.

The witness also denied that he called C.M. after the party to apologize. Notwithstanding C.M.'s testimony, he states he spoke to her but did not apologize. In exhibit P-6, the witness denied kissing C.M. but claims this is not inconsistent because he did not kiss her on March 16, 1985. The question asked him does not mention the 1984 party.

Also concerning exhibit P-6, it was not important to the witness, when the principal asked him, to answer as to who was drinking beer. He said "almost everybody" was drinking beer but reiterates that this was to avoid giving specific names. The witness believes he did not give a correct and accurate answer to the principal but that he did not lie. Rather, he simply did not answer the principal's question.

The witness stressed that on the occasions that he kissed pupils, the pupils were upset about something. The kisses were not so much to console as to reassure.

The respondent later learned that parents knew there would be beer at the party. Parents also told him that they allowed their daughters to sleep over to avoid any drinking and driving problems. This posed a dilemma to the respondent because he believed sleeping over as well as drinking and driving were wrong. However, if no alcohol was served, some pupils might have stayed over merely because the party ran late. The witness also stated that he could have advised and counseled pupils without kissing them. In answer to a direct question as to whether the kissing were gratuitous, the respondent answered yes.

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Joseph Dauber, a guidance counselor at Middletown High School South, also testified. He attended the March 16 party at Ahern's home with his wife. They appeared briefly at the party from about 7:15 to 7:45 p.m. and then went out to dinner. They returned to the party at about 10:30 p.m. and left just after midnight.

This witness knew most of the persons at the party. He knew that the pupils present were basketball players. Many were his counselees.

Dauber took no alcoholic beverages to the party. He saw the respondent. He did not see the respondent bring or serve beer. He saw no drunk or ill pupils. He can recall seeing no pupil drink beer.

This witness did observe the keg of beer in the dining room. No one tended the keg. He heard no announcements as to who could have beer. He saw no hard liquor and he saw no one drinking hard liquor. Dauber and Ahern each had a glass of beer but the witness could not say whether other teachers had had beer. Nor could he say what the pupils were drinking.

When he and his wife returned to the party at about 10:30 p.m., another faculty member's wife took some pictures. Some persons depicted had glasses or cups in their hands. Although he saw pupils drinking at the party, he has no knowledge of what they drank. He did not see any pupil draw beer from the keg. He did see adults draw beer from the keg, however.

The witness identified a schematic diagram of Ahern's home (P-9a) and identified the placement of the keg of beer, soft drinks, and food. As far as he knows, beer and wine were the only alcoholic beverages at the party. The wine was in the refrigerator.

Dauber believes the pupils are absolutely credible. He would not doubt T.C.'s statement concerning the presence of vodka. Similarly, he has known C.M. for approximately two years and believes her to be credible and trustworthy. If she says she had beer, he believes she did, although he did not see her drink it.

Shortly before conclusion of the hearing, it was learned that T.C. had not left New Jersey on August 18 as had been represented to counsel. Counsel immediately tried

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to contact T.C. or her parents. The respondent moved to strike her deposition (P-1). The Board argued that the represenation had been made by T.C.'s parents that she was, indeed, leaving for college on August 18. After learning this, the Board told the respondent and the ALJ and asked to take T.C.'s deposition. In a conference of counsel held on July 30, the ALJ granted the motion to take a deposition and signed an order authorizing the same.

On August 21, however, after learning that T.C. had not left the jurisdiction on August 18, the Board attempted to contact T.C.'s mother.at her place of employment and was told that Mrs. C. would be "out until Monday."

For reasons set forth below, I decided to let the admission of T.C.'s deposition stand.

On rebuttal, the Board recalled the high school principal.

The principal stated he heard the respondent's testimony concerning their March 19 meeting. The respondent does not recall details and he did not recall saying that alcohol was "plentiful." The principal stated that the two met between 11:00 a.m. and 1:00 p.m. on March 19. The principal saw the respondent in the hallway and asked him to come into the principal's office. He asked Mr. Gwaley, "What happened on the sixteenth?" The respondent stated that he was there to keep a lid on things; that alcohol was there and plentiful, and that pupils were drinking.

Several pupils made statements (e.g., P-10, P-11). As each pupil answered the questions, the principal recorded their responses. A female assistant principal was present. When completed, the form was given to the pupil. If all facts were correct, the pupil signed the statement and the assistant principal witnessed the signature.

On cross-examination, the principal stated that the pupils were not represented by counsel at the first interview nor were any parents present. All writing on these forms is the principal's except for the pupils' signatures. These are not sworn statements.

The principal also stated that when he questioned the respondent on March 19 concerning the March 16 party, he did not advise the respondent that the respondent could have a representative present. The respondent stated that he was there and further

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stated that Ahern has a tendency to let things get out of hand. The respondent's written statement of March 21 says alcohol was present but does not say that it was plentiful and does not mention that Ahern has a tendency to let things get out of hand. The respondent's March 28 statement is consistent with his statement of March 21.

IV.

DISCUSSION, FINDING AND CONCLUSIONS

Concerning the admission into evidence of the deposition of T.C. I ruled, subsequent to the hearing, as follows:

> At the conclusion of plenary hearing in this matter on August 21, 1985, I advised counsel that I would rule on Mr. Blunda's motion to strike the deposition of T.C. before counsel made their posthearing submissions.
>
> Inasmuch as the events surrounding the departure of T.C. from the jurisdiction were outside the control of both parties, counsel relied on the representation of T.C.'s parents that she would leave for school on August 18, the deposition was applied for and taken in good faith, and both parties were present at the taking, the deposition is admitted into evidence as petitioner's exhibit 1 (P-1). The initial decision will discuss the weight that may be accorded to this document in evidence.

Having read the deposition I **FIND** the preserved testimony to be corroborative of the testimony given at hearing by C.L., C.M. and C.P. Although the document clearly is hearsay, it is admitted pursuant to N.J.A.C. 1:1-15.8(a). I **FIND** and **CONCLUDE** that the deposition is corrobative in nature and reliable. No ultimate finding of fact in this matter rests on the deposition. N.J.A.C. 1:1-15.8(b).

CHARGE ONE

The respondent asserts that there is no evidence in the record to support the Board's charge that he condoned the consumption of alcohol by students. To the contrary, the record is devoid of any evidence of intoxication, student or otherwise. Moreover, he denies bringing alcohol, serving alcohol or permitting students to drink alcohol. That testimony is unrebutted. The only student who testified that she drank beer gave no indication that the respondent saw her consume it.

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Yet the record shows that members of the girls' basketball team attended the two parties, were not of legal age to consume alcoholic beverages, did consume alcoholic beverages, and were not advised by the teachers and coaches, with whom they were socializing, not to consume alcoholic beverages.

The record also shows the respondent enjoyed excellent rapport with his pupils. The pupils' testimony as well as the respondent's shows that the pupils looked to him for guidance. Whether a teaching staff member seeks a role or not, he is a role model. The petitioner here abrogated his role. While he should have been setting an example, he condoned the drinking of alcoholic beverages by pupils under the legal drinking age and he socialized with these pupils while the drinking occurred. His lack of proper judgment casts doubt on his fitness to teach.

In Tenure of Tordo, 1974 S.L.D. 97, the Commissioner of Education states at 99:

> In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members, and the community at large.

As the Board effectively argues, if the respondent's behavior is tolerated, the wrong impression will be transmitted to the pupils, their parents, other teaching staff members and the community at large.

Having reviewed all evidence pertinent to Charge One, I **FIND** it contrary to common sense that the respondent could have attended the parties but not know what was going on. There is no fine point of law here. This is a simple fact question. The testimony adduced convinces me that the respondent was present, the respondent knew what was going on and the respondent did nothing to stop behavior which he has said in his own testimony he regards as improper. I further **FIND** that the Board has proven Charge One by a preponderance of the credible evidence in the record.

CHARGE TWO

The second charge concerns kissing a 17-year-old female pupil while at a party at another teacher's home in 1984. C.M., the pupil who testified to consuming beer at the

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1984 party, also stated that at the same party she was kissed on the lips by the respondent while the two of them were alone in the kitchen. Her testimony was both explicit and credible.

The respondent's assertion that the members of the basketball team regarded him as "someone somewhat different than any other teaching staff member," begs the point. The pupils' perception of the respondent does nothing to lessen his responsibility as a teaching staff member. In fact, the special relationship he enjoyed with his pupils placed him in a situation in which he had to be more vigilant than the ordinary teaching staff member. This is so because the minor pupils in question placed special faith and confidence in him.

Therefore, no matter in what guise, when the respondent kissed a minor pupil, he violated a basic tenet of professional behavior. In Tenure of Sammons, 1972 S.L.D. 302, the Commissioner stated at 321:

> [T]he teachers 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 duty of self-restraint and controlled behavior rarely requisite to other types of employment.

The facts behind the charge are not in dispute. The petitioner's attempts to minimize the import of the incident actually accomplish the contrary. C.M.'s testimony concerning a telephone call from the respondent on the day following the incident similarly does nothing to assuage. Having reviewed all evidence relevant to the charge, I **FIND** the Board has proven Charge Two by a preponderance of the credible evidence in the record.

CHARGE THREE

The third charge against the respondent is that he attended a second beer-drinking party with teachers and pupils present. The pupils' ages at that party ranged from 15 to 18. I **FIND** from the testimony that the respondent could not have been unaware that the pupils were drinking alcoholic beverages. In a statement given tothe principal on March 21, 1985, he stated that "almost everybody" was drinking beer. The

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statements and testimony of certain pupils involved make clear that they did, indeed, drink beer at the party. See e.g., P-10.

In addition, the respondent stated that he circulated among the guests throughout the party, that he spoke to or in some way communicated with all of the guests. It seems contrary to common experience that in doing so the respondent would fail to recognize that pupils were drinking alcoholic beverages.

The respondent testified that he did not at any point make an announcement to the effect that pupils should not drink beer or, if they had already drunk beer, should drink no more. (T-2, 117-118).

The respondent further testified that, so long as he is not the host but merely a guest, pupils are permitted to drink alcoholic beverages in his presence.

I **FIND** the Board's assertion that the petitioner's actions amount to condoning what occurred at the party constitute unbecoming conduct as set forth in N.J.S.A. 18A:6-10, to be true in fact.

CHARGE FOUR

The facts concerning Charge Four are not in dispute. The pupil, C.L., testified she was in a bedroom with the respondent for 15 to 20 minutes. (T-1, 22-23). The respondent, while sitting on the bed, put both arms around her and kissed on the lips for two to three seconds. (T-1, 22-25). The respondent admitted this incident in his testimony (T-2, 146).

The petitioner's explanation that he was comforting the pupil - the same explanation he offered as to Charge Two is not acceptable.

I **FIND** that the physical contact was unwarranted and an abuse of the trust that the respondent had built up between himself and the members of the team. I further **FIND** that this is conduct unbecoming a teaching staff member.

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CONCLUSION

In Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), the Court adopted the language of the Commissioner that

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

Although any of the proven charges, standing alone, would be sufficient ground to recommend the dismissal of the respondent, I **CONCLUDE** that the cumulative effect of the charges goes so far beyond the standard established in Redcay, above, as to require the State Board of Examiners to be apprised of the decision in this case.

ORDER

It is **ORDERED** that Michael Gwaley shall be and is hereby **DISMISSED** as a teaching staff member in the employ of the Middletown Township Board of Education retroactive to the date of his suspension, and it is further **ORDERED** that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

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

18 December 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DEC 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 20 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL GWALEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MIDDLETOWN, MONMOUTH COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. It is noted that exceptions were timely filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b, and c.

Respondent initially avers that it was prejudicial error for the Administrative Law Judge to base his findings upon paraphrase and characterized testimony, rather than the verbatim testimony from the official court transcript. The court's failure to support its findings with transcript references, respondent argues, makes it enormously difficult to formulate the exceptions to his decision. More importantly, respondent avows,

> ***the fact of the matter is that many of the Court's findings and conclusions are not supported by the testimony in the record or the paraphrased testimony is an inaccurate or incomplete recitation of the verbatim testimony. (emphasis in text)
> (Respondent's Exceptions, at p. 2)

In addition to his introductory exception, respondent raises ten other exceptions which are summarized below:

1. It was prejudicial error for the ALJ to exclude the testimony of one of the respondent's three witnesses since the basis for the ruling, undue consumption of time, was never established.

2. It was reversible error to admit into evidence a deposition in lieu of live testimony, particularly when the witness was available to testify, despite sworn representation to the contrary.

3. The court erroneously made findings regarding a party in February 1985 after ruling it was not a part of the tenure charges and excluding evidence on that subject.

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4. The court's findings with regard to tenure Charge No. 1 are unsupported by the record.

5. It is inconceivable that respondent can be guilty of unbecoming conduct for being a guest at the 1983-84 girls' basketball party (1984 party) when no other attendee was disciplined, including the host, who provided alcoholic beverages and arranged a sleepover.

6. The Commissioner of Education must reject the ALJ's initial decision and recommendations since he made findings of fact unsupported by the record and omitted relevant testimony in the record.

7. The ALJ erroneously failed to differentiate between the gravity of the offenses committed by respondent, guests and the host of the parties in question.

8. The recommended penalty of tenure revocation must be rejected by the Commissioner since the ALJ erroneously failed to consider respondent's prior exemplary record in determining an appropriate penalty.

9. Even assuming arguendo that the court's factual conclusions were accurate, the penalty of tenure revocation was, nonetheless, totally inappropriate for a teacher with thirteen years of exemplary service, an unblemished record and a long history of voluntary and extracurricular activities for the district.

10. It was clear and reversible error for the ALJ to ignore the pupils' own version of the physical contact with respondent.

The Board, on its part in reply exceptions, refutes point by point the contentions raised by respondent in his exceptions, and the Commissioner incorporates such reply exceptions herein by reference.

Having comprehensively reviewed the transcripts, briefs and exceptions filed in this matter, the Commissioner concurs with the Order of Dismissal for the reasons set forth below. He finds that, save for Exception No. 3, which, along with the other exceptions and reply exceptions, will be addressed at length below, respondent's exceptions to the initial decision are without merit.

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Respondent's introductory exception, which avers that the ALJ based his findings upon paraphrase and characterized testimony rather than the verbatim testimony from the official court transcripts, is a blanket observation which respondent addresses in Exception No. 4 through specific references from the transcript. The Commissioner will address those specific allegations in a subsequent portion of his decision. Further, even assuming arguendo that the initial decision fails to document each finding with transcript references, the Commissioner has the actual testimony before him whereby he may make his own determination as to whether any particular conclusion was accurate. Finally, the Commissioner's decision is based upon the total record before him. Failure on the part of an ALJ to cite transcript references at every juncture does not rise to the level of prejudicial error.

Similarly, the Commissioner finds that the ALJ's excluding the testimony of respondent's wife on the basis of "undue consumption of time" (Initial Decision, ante) does not rise to the level of prejudicial error. On the contrary, the ALJ's determination in this regard is consistent with the rules of evidence, case law and our administrative regulations. (See Initial Decision, ante, for discussion, citations.) Further, the Commissioner agrees with the ALJ's determination that the wife's testimony could only represent corroboration of the character of respondent, who himself testified, since she was not present at the time of the incidents in question. Thus, whether all five of the days scheduled for hearing were expended, as respondent argues, is immaterial to whether the testimony in question constituted "surplusage." (Initial Decision, ante) Exception No. 1, therefore, is dismissed.

Respondent's Exception No. 2 is likewise deemed to be without merit. While the Commissioner agrees that, in light of the fact that it was learned sometime in the middle of the hearing that T.C., the deponent in question, was, in fact, available at the time of the hearing, both parties held a good faith belief that she would be unavailable. Further, both parties were represented at the deposition of T.C. and there was ample opportunity provided then for cross-examination of the witness. The record indicates that the situation that prevented T.C. from leaving for school before August 18, the date of the first day of the hearing, was documented by affidavit, reflecting the change in circumstances. It is also clear from the record, and the ALJ so states in the initial decision, that "no ultimate finding of fact in this matter rests on the deposition." (Initial Decision, ante) Since it is clear that hearsay testimony is permissible in administrative hearings (see Initial Decision, ante, for citation of cases in support of this proposition), and the ALJ properly determined that the weight to be assigned such hearsay is as corroboration only, the Commissioner finds that respondent's Exception No. 2 is without foundation.

However, the Commissioner does find merit in Exception No. 3, in which respondent argues that the court erred in making a finding regarding a party in February 1985, inasmuch as there was no

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tenure charge filed against respondent in connection with that party. The Commissioner discounts any conclusion in the initial decision based upon the confusion of the ALJ pertaining to the party of February 1985. Notwithstanding such determination, and viewed in the context of the total record, the ALJ's reference to the February 1985 party is in no way fatal to the ultimate conclusion made by the ALJ. In fact, as noted by the Board in its reply exceptions:

> ***[T]he recordation of the testimony of the respondent regarding the three parties appears in Part III of the Initial Decision which is the Testimony section of the decision. Part IV is the Discussion, Findings and Conclusions section of the Initial Decision. In the latter the Judge does discuss and make particular findings and conclusions with regard to each of the four charges in question and supports same with case law and statutory references.
> (Board's Reply Exceptions, at p. 3)

The Commissioner finds, in review of the whole record before him, that there was no prejudicial error as a result of this information appearing in the initial decision that could be construed as tainting the entire proceedings. Exception No. 3 is therefore dismissed.

Exception No. 4 avers that the court's findings with regard to tenure Charge No. 1 are unsupported in the record. The Commissioner agrees with the Board that "[n]othing can be further from the truth." (Board's Reply Exceptions, at p. 3) The Commissioner notes that each of the allegedly unsupported conclusions have been addressed by the Board in its reply exceptions, which provide excerpts from the record in rebuttal to respondent's contentions. Those portions of the record providing support for the conclusions reached by the ALJ are cited below. Respondent avers that the court has conveniently found him "guilty of Tenure Charge No. One by finding him guilty of Charges Two, Three and Four and each charge levelled against John Ahern [the teacher who hosted the party]." (Respondent's Exceptions, at p. 13)

Respondent freely admitted that he attended the party following the 1983-84 girls' basketball season (Tr.II-91-92), as well as the one of March 16, 1985 (Tr.II-156-157), that he circulated among the guests at the party, which the record clearly indicates was attended by minor pupils and other faculty. Canned beer was available to the students at the party and C.M. did consume two or three cans of beer at the party. (Tr.I-40) There was testimony that there had been no announcement at this party that pupils could not drink the beer and that pupils other than C.M. did also drink alcoholic beverages. (Tr.I-43) Further, the record is unequivocal, contrary to respondent's Exception VI, that respondent, by his presence alone, knew of and condoned the drinking of alcoholic beverages by minor pupils and, further, that he was of the opinion that he had no obligation or responsibility concerning the

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consumption of alcohol by minors where he was not the host of the party. (Tr.II-117-118, 155-156)

Also, respondent admitted that he had heard C.M. testify that she had two or three cans of beer at the aforementioned party and he had no reason to doubt that testimony. (Tr.II-96) As the Board averred in its reply exceptions:

> In view of this testimony, the Administrative Law Judge concluded that it was contrary to common sense to accept the fact that respondent was in attendance, but was unaware of what was occurring. As the Administrative Law Judge pointed out, this does not involve a fine point of law. It merely involved a fact question. The Judge, based on the evidence, found that the Board had proven the charge in question and that Michael Gwaley's conduct in attending and condoning such a party was conduct unbecoming a teacher as set forth in N.J.S.A. 18A:6-10. The Exception is without merit.
>
> (Board's Reply Exceptions, at p. 3)

The Commissioner concurs.

Respondent's behavior in attending the party and condoning the pupils' drinking cannot be excused on the pretext that he was not the host nor personally served any alcoholic beverages, as respondent avers in his Exception V. As noted by the Board:

> The record is replete with references to Michael Gwaley's good rapport with his students, the fact that they looked to him for guidance and comfort. He unquestionably stood in the position of a role model. His conduct should have been that of an exemplar, on the contrary, he condoned the drinking of alcoholic beverages by students under the legal drinking age. Not only did he condone it, he socialized with these students while it was occurring. This is conduct unbecoming a teacher. His lack of proper judgment calls in question his fitness to teach.
>
> (Board's Post-Hearing Brief, at p. 2)

Petitioner's post-hearing brief cites In the Matter of the Tenure Hearing of Ernest Tordo, 1974 S.L.D. 97, 99 wherein the Commissioner held:

> In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members, and the community at large. (Id. at p. 2)

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The Commissioner agrees with the Board's comment that

> ***[s]should Michael Gwaley's tenure not be severed, the Commissioner would effectively be announcing to the pupils of Middletown Township, their parents, other teaching staff members and the community at large that in New Jersey, there is no objection to teachers and students socializing at parties where everyone is permitted to consume alcoholic beverages, even the students under the legal drinking age.
> (Id., at p. 2)

Contrary to respondent's Exception VII in which he addresses the issue of the host's and respondent's penalties, it is of no moment in this case who was host, who else was present or what penalty they were meted, nor who helped whom to a drink. Rather, what is important is whether the charge against respondent is, in fact, true and has been proved and, if so, whether the penalty of dismissal is warranted in the instant case. In regard to these matters, the ALJ has made specific findings of fact. Based on the record, the ALJ was satisfied that respondent, by his attendance and conduct at the 1984 party -- and in the Commissioner's opinion also by his conduct in attending the March 16, 1985 party -- was guilty of unbecoming conduct. The Commissioner finds no basis to upset the finding and concurs with it.

The Commissioner's conclusion is the same concerning the two separate instances where respondent kissed female pupils on the lips. Respondent admits both Charge No. 2 (Tr.II-96-97) and Charge No. 4 (Tr.II-146). Respondent's explanation that, in both instances, he was simply comforting the pupils concerned is neither clear from the record nor is it an excuse for such behavior. The settings of these episodes, isolated in the kitchen at the 1984 party, and secluded in the bedroom at the March 16, 1985 party, further belie the "friendly peck" rationale proffered by respondent in explanation of his behavior. Nothing in respondent's exceptions, including his otherwise exemplary record as averred in his Exceptions VIII and IX, nor in the Commissioner's review of the record, convinces him that such conduct can be construed as anything but entirely outside the standards of deportment established for teachers in In the Matter of the Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302, which states:

> ***[Teachers] are professional employees to whom the people have entrusted the care and custody 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. (at 321)

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Regardless of the fact that the record indicates that one of the pupils testified "I didn't think anything of it" when asked her reaction to being kissed by respondent (Tr.I-31), the context surrounding the incident as well as the inappropriateness of physical contact between a teacher and a pupil leaves no question in the mind of the Commissioner that the behavior was entirely uncalled for. Add to that the testimony of the other pupil kissed who testified as follows:

> Q. The question was asked of you: "Now, again, Mr. Gwaley kissing you, was that a prolonged kiss?" and your answer was: "No."
>
> Was that accurate?
>
> A. Yes.
>
> Q. And the question is asked at line 11: "Okay. Would you classify it more than a friendly peck?"
>
> Your answer: "Yeah." (Tr.I-61-62)

and what emerges is a clear indication of conduct unbecoming a teacher, repeated on more than one occasion. Respondent's Exception X, which averred that the physical contact between him and these pupils cannot be viewed in the abstract, is noted. In both incidents, the contact between respondent and the pupils occurred while at a party where pupils and teachers were socializing, where alcoholic beverages were available and consumed by both the adults present and the pupils. As the ALJ notes, the kiss in both incidents was on the lips, no one else was present at the time, and the encounters involved an embrace as well lasting two to three seconds. Nothing in the record before him suggests that the ALJ considered the physical contact in each instance in the abstract. The facts are plain. The behavior of respondent was absolutely inappropriate and unmitigated by his dedicated service or the "special relationship between these three individuals." (Respondent's Exceptions, at p. 27)

For the reasons stated herein, the Commissioner adopts as the final decision in this matter the judge's recommendation dismissing Michael Gwaley from his position as a teaching staff member in the employ of the Middletown Township Board of Education effective as of the date of this decision. It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 30, 1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL GWALEY,	:	
SCHOOL DISTRICT OF THE TOWN-	:	STATE BOARD OF EDUCATION
SHIP OF MIDDLETOWN, MONMOUTH	:	DECISION
COUNTY.	:	
	:	

Decided by the Commissioner of Education, January 30, 1986

For the Petitioner-Respondent, Kalac and Newman
(Peter P. Kalac, Esq., of Counsel)

For the Respondent-Appellant, Oxfeld, Cohen and Blunda
(Mark J. Blunda, Esq., of Counsel)

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

June 4, 1986

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INITIAL DECISION
OAL DKT. NO. EDU 6259-85
AGENCY DKT. NO. 306-8/85

NEWARK BOARD OF EDUCATION,
Petitioner,
v.
JEAN E. SMITH,
Respondent.

Roxanne Jones Gregory, Asst. Counsel, for petitioner
(Vickie A. Donaldson, General Counsel of Newark Board of Education, attorney)

No appearance on behalf of respondent

Record Closed: November 21, 1985 Decided: December 24, 1985

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

Statement of the Case

This is a tenure proceeding brought by the Newark Board of Education ("Board") against an elementary school teacher. Presently, the matter comes before the Office of Administrative Law on the Board's motion for summary decision for respondent's failure to answer the pending tenure charges. The Board is seeking to dismiss respondent

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Jean E. Smith ("Smith") on various charges, including use of corporal punishment. As a result of the last incident, the Board suspended Smith from all teaching duties on January 28, 1983, but continued paying her salary until August 27, 1985.

Two issues are presented for determination. First, whether the Board has satisfied the requirements of N.J.S.A. 18A:6-11 for service of tenure charges upon an accused employee. Second, whether the record contains sufficient evidence to justify dismissal of Smith for "unbecoming conduct" or "other just cause" under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10.

Procedural History

By resolution adopted on August 27, 1985, the Board determined the existence of probable cause to credit the evidence in support of tenure charges which, if true, would be sufficient to warrant dismissal of Smith from her employment. On August 29, 1985, the Board filed these charges, together with a sworn statement of evidence and voluminous supporting documents, with the Commissioner of Education. When Smith failed to file an answer within the extended time period of 30 days, the Commissioner transmitted the matter to the Office of Administrative Law on October 1, 1985 for handling as a contested case. Smith did not attend the prehearing conference scheduled for October 16, 1985. Subsequently, on November 14, 1985, the Board filed the present motion, together with supporting certification and brief. Oral argument was heard on November 15, 1985. Upon receipt of a supplemental affidavit submitted by the Board, the record closed on November 21, 1985. Documents considered in deciding this motion are listed in the appendix. For the reasons which follow, the Board's motion for summary decision will be granted.

Findings of Fact

All of the relevant facts are set forth in uncontested certifications or affidavits supplied by the Board. I **FIND:**

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Much of the evidence relates to the efforts made by the Board to serve notice of the tenure charges on Smith. Employees of the district are required to keep the Board informed of any change of address. Section 4112.6 of the Board's regulations provides:

> Teachers shall notify the executive director of personnel, immediately in writing of any change of name or address in order that the department of personnel's records may be kept up to date at all times.

Smith was aware of this requirement, as shown by her compliance on two prior occasions. On August 30, 1983, Smith filed a change of address form indicating a change of address from 1047A Sheridan Avenue, Elizabeth, New Jersey to 521 East Elizabeth Avenue, Linden, New Jersey 07036. Later, on December 19, 1983, she again notified the Board of a change of address to 325 West Jersey Street, 3-C, Elizabeth, New Jersey. She continued to receive and cash payroll checks sent to that address until the end of the 1984-85 school year. Her last payroll check, issued June 26, 1985, was returned to the Board undelivered.

Before leaving her last known residence, Smith had actual notice that the institution of tenure charges against her was imminent. In late March 1985, the Board sent a letter to Smith at her last known address asking that she contact the its legal representative to discuss the filing of tenure charges. During a telephone conversation on March 28, 1985, the Board's attorney "informed her that the filing of tenure charges had been recommended and suggested to her possible alternatives." Smith promised to discuss the matter with appropriate persons and get back to the Board's attorney. Thereafter, on April 3, 1985, Smith telephoned the Board's attorney and indicated "that she would be resigning her position with the Board and . . . would forward the appropriate papers." No letter of resignation was ever received. This was the last direct contact between the Board and Smith.

Consequently, the Board prepared written tenure charges, along with statements of evidence under oath, and attempted to serve these documents on Smith. At least two attempts were made to obtain personal service. On August 8, 1985, a messenger from the Board went to 325 West Jersey Street in Elizabeth in order to deliver a package

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containing the documents. He encountered a woman who "appeared in a third floor window and indicated that Jean Smith did not live there and had moved sometime ago." Next day, on August 9, 1985, the Board's attorney visited the same address. She was "unable to gain entry into the building" and "received no response when ringing the doorbell." While at the location, she "observed that the name 'M. Mitchell' appeared on the mailbox designated 3-C."

Simultaneously, the Board attemped to effect service by mail. On August 8, 1985, a clerk employed by the Board mailed the documents to Smith at her last known address by certified mail. On the following day, August 9, 1985, the clerk mailed the documents by express and by regular mail. Ultimately, all three envelopes were returned as undeliverable.

After its vote to certify tenure charges, on August 28, 1985 the Board again tried to serve the necessary papers on Smith by certified mail directed to her last known address. Once more, the post office returned the envelope marked "addresse unknown." At the direction of the Administrative Law Judge, the Board took further steps to locate the missing Smith. On or about October 18, 1985, the Board made inquiries of the post office, the local police department, the Division of Motor Vehicles and Smith's next of kin. None of these sources provided any leads to Smith's current whereabouts.

With respect to the merits of the underlying charges, the Board's statement of evidence has attached over 70 observation reports, evaluation reports, incident reports and other documents to substantiate its allegations against Smith. Complaints came from school administrators, teachers, and the parents of children whom Smith mistreated. The most serious complaints involve incidents of physical abuse of children entrusted to Smith's care. Illustratively, on January 26, 1983, another teacher heard screaming and ran "into the room . . . where Ms. Smith was holding [a] student's chin forcefully." A vice principal who examined the child immediately after the incident reported that "[h]er lower lip was bleeding and a red mark was on her right cheek." Shortly thereafter, the child's mother asked to have her daughter removed from Smith's class. Similarly, on

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December 6, 1982 a second parent told the vice principal that Smith had "pinched/twisted [her son's] lips and had 'busted' his mouth." Confronted with this charge, Smith admitted that "in the past she has touched pupil's lips" but in this particular case she had "gently maneuvered him to the door and pushed him out of the room." Earlier, on October 8, 1982, a third parent informed school authorities that Smith had disciplined her daughter for talking in class by holding her mouth, shaking her head and scratching her face. Smith admitted "putting her hand in [the child's] face," but claimed that the scratch was "accidental." On yet another occasion, on May 18, 1982, Smith scratched a child's face so deeply that the school nurse had to clean the cut and apply antibiotic ointment.

Besides these and several other examples of the improper use of physical force, the record is replete with comments about Smith's inability to teach and her lack of adequate preparation. Unsatisfactory performance ratings by Smith's supervisors cite innumerable instances where Smith failed to submit lesson plans, failed to provide any meaningful instruction, or failed to encourage individual participation by her students. One observation report, dated December 22, 1980, described the classroom atmosphere as "complete chaos" and the lesson as "totally unsatisfactory." Another observation report, dated March 4, 1981, mentioned that the teacher "has little, if any, control of [the] class," and that the students in her class display "a lack of motivation to learn." According to reports of observations on September 17 and October 25, 1982, Smith's students appeared "visibly bored." Notwithstanding the suggestions for change by her supervisors, Smith's performance did not improve over time. In a letter dated October 25, 1982, a resource technician blamed the lack of progress on Smith's own "negative attitude toward any suggestions given." Rather than trying to follow any ideas for improvement, Smith offered "many excuses as to why [such suggestions] can't be implemented."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board has satisfied the statutory requirements for notice; and, further, that the proofs are sufficient to justify dismissal for "unbecoming conduct" or "other just cause."

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Tenure protects qualifying teachers from arbitrary dismissal or reduction in compensation. N.J.S.A. 18A:28-5. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Apart from reductions in force for valid reasons of economy, a board of education can remove a tenured teacher only for "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. Procedural safeguards, including notice requirements, are written into the law for the benefit of teachers. N.J.S.A. 18A:6-11 provides, in part:

> Any charge made against any employee of a board of education under tenure . . . shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence, and an opportunity to submit a written statement of evidence under oath with respect thereto. After consideration of the charge, . . . [t]he board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address.

Where a statute authorizes service by mail, such service is "deemed complete when [the notice] is deposited in the post office, properly addressed and with the proper amount of postage." Amodio v. Civil Serv. Comm'n, 81 N.J. Super. 22, 27 (App. Div. 1963).

Actual receipt of notice by the addressee is not legally necessary, as long as the method chosen for delivery is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); N.J. Dist. Ct. Ass'n v. N.J. Sup. Ct., No. L-36201-85 (Law Div. June 5, 1985) (approved for publication). Here the Board fully met its statutory obligation under N.J.S.A. 18A:6-11 when it sent a copy of the charges and statement of evidence by certified mail to Smith at the last known address in her personnel file. Significantly, that last known address was one at which Smith had regularly collected payroll checks issued by the Board.

Additionally, the Board went beyond the minimum notice requirements imposed by statute. Not only did the Board seek to serve Smith by regular and express as well as certified mail, it also exhausted all reasonable means of tracking her new address.

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Moreover, Smith had a duty to report any change of address to her employer. While she may not have received notice of the tenure proceeding itself, she was aware that the Board was preparing charges against her. If she had wanted to enter her defense, it would have been easy for her to keep in touch with the Board. Instead, she left without leaving any forwarding address. School law descisions have consistently upheld the removal of tenured teachers whom the board, despite diligent effort, could no longer find to serve with papers. In re Donald Fancera, 1980 S.L.D. ___ (Comm'r of Ed. 1980) (unsuccessful attempts to communicate with respondent by telephone, mail, and repeated visits to place of business); In re Hayes, 1975 S.L.D. 18 (Comm'r of Ed. 1975) (respondent "absented himself" and efforts to reach him "proved unsuccessful"); In re Turner, 1972 S.L.D. 507 (Comm'r of Ed. 1972) (respondent had been evicted from her apartment and landlord did not know her whereabouts).

There are ample facts recited in the reports to warrant dismissal of Smith from her teaching position. Such reports, prepared in the ordinary course of business, are commonly regarded as trustworthy and reliable. Reliance on the contents of these reports is further strengthened by the fact that the described conduct is not an isolated instance, but rather a series of events independently corroborated by more than one witness. No reason exists to doubt the accuracy of similar statements by so many impartial observers. Taken as a whole, the reports reveal a continuing pattern of abusive and unprofessional behavior on the part of Smith. Absent any explanation of the circumstances by Smith herself, the unrefuted evidence presented by the Board must be accepted as true.

Order

It is **ORDERED** that Jean E. Smith is hereby dismissed from her employment by the Newark Board of Education.

And further **ORDERED** that Smith's suspension without salary, effective August 27, 1985, is affirmed.

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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.

December 24, 1985
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

DEC 27 1985
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 30 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Exhibits

No.	Description
P-1	Copy of Regulation No. 4112.6 of the Newark Board of Education
P-2	Copy of Circular No. 300 of the Newark Board of Education, revised November 18, 1975
P-3 (a)	Copy of change of address form signed by Jeanne E. Smith, dated August 30, 1983
(b)	Copy of a letter to the Newark Board of Education from Jeanne E. Smith, dated December 19, 1983
P-4	Certification of Roxanne Jones Gregory, dated November 14, 1985, with attached exhibits:
Exhibit A	Copy of letter to Ms. Jeanne Smith from Karimu F. Hill Harvey, Esq., dated March 21, 1985
Exhibit B	Copy of affidavit of Robert Walker, dated August 8, 1985
Exhibit C	Copy of affidavit of service by Roxanne Jones Gregory, dated August 9, 1985
Exhibit D	Copy of envelope sent by certified mail to Jeanne Smith, 325 West Jersey Street, Apt. 3C, Elizabeth, New Jersey 07202

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Exhibit D-1	Copy of a letter to Jeanne Smith from the Newark Board of Education, dated August 7, 1985
Exhibit E	Copy of a customer receipt for express mail delivery
Exhibit F	Copy of proof of service by Jean E. Durden, dated August 9, 1985
Exhibit G-1	Copy of a letter to Jeanne Smith from the Newark Board of Education, dated August 28, 1985
Exhibit G-2	Copy of an envelope sent by certified mail to Jeanne Smith, 325 West Jersey Street, Apt. 3C, Elizabeth, New Jersey 07202
Exhibit H	Copy of a letter to the Elizabeth branch of the United States Post Office from Roxanne Jones Gregory, dated October 18, 1985
Exhibit I	Copy of a response from the Elizabeth branch of the United States Post Office, received November 1, 1985
Exhibit J	Copy of a letter to the Division of Motor Vehicles from Roxanne Jones Gregory, dated October 18, 1985
Exhibit K	Copy of a letter to John Brennas, Chief of Police, City of Elizabeth, New Jersey from Roxanne Jones Gregory, dated October 18, 1985
Exhibit L	Copy of a letter to Roxanne Jones Gregory from John F. Brennas, Chief of Police, City of Elizabeth, New Jersey, dated October 4, 1985

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Exhibit M-1		Copy of a letter to Mrs. Donald H. Forbes from Roxanne Jones Gregory, dated October 23, 1985
Exhibit M-2		Copy of an envelope sent by certified mail to Mrs. Donald Forbes, 3225 Bermuda Road, Lake Park, Florida 33403
P-5		Affidavit of mailing by Jean E. Durden, dated November 15, 1985
OAL-1	(a)	Original envelope on the stationary of the Department of Education addressed to Jeanne Smith, 325 West Jersey Street, Apt. 3C, Elizabeth, N.J. 07202, postmarked from Trenton on August 30, 1985
	(b)	Copy of green return receipt

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IN THE MATTER OF THE TENURE	:	
HEARING OF JEAN E. SMITH, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record and initial decision rendered in the form of an Order for Summary Decision in the above-captioned matter have been reviewed.

For the reasons set forth in the initial decision, the Commissioner concurs with the recommendation of the Office of Administrative Law to dismiss respondent from her tenured employment with the Newark Board of Education. The Commissioner cannot but express his strong disapproval, however, of the Board's outrageous delay in considering written tenure charges against respondent, which delinquency resulted in the Board's having to pay respondent from the date of her suspension, January 28, 1983, until August 27, 1985, the date upon which the Board adopted the resolution determining the existence of probable cause to credit the evidence in support of the tenure charges against respondent. Such inordinate procrastination is tantamount to an abuse of the taxpayers' money and trust, notwithstanding the difficulty in trying to uncover respondent's whereabouts.

The Board's Motion for Summary Decision is granted forthwith. Petitioner is dismissed from her tenured employment with the Newark Board of Education effective as of the date of this decision. It is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 4, 1986

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INITIAL DECISION
OAL DKT. NO. EDU 2774-85
AGENCY DKT. NO. 101-4/85

MARIALANA SIRIANNI,
Petitioner,
v.
HOWELL TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Jan L. Wouters, Esq., for respondent (Bathgate, Wegener, Wouters & Neumann, attorneys)

Record Closed: November 12, 1985 Decided: December 26, 1985

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

Marialana Sirianni (petitioner) alleges the Howell Township Board of Education (Board) has improperly refused to comply with N.J.S.A. 18A:30-2.1 in connection with the disability she claims is service-connected. She further challenges the Board's refusal to allow her to return to work.

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

After notice, a prehearing conference was held on June 21, 1985, and certain procedures were settled. The matter was set down for hearing on September 18, 19 and

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20, 1985. Following the prehearing conference, but before commencement of hearing, the petitioner moved for summary decision in her favor. A joint stipulation of facts and all necessary papers were submitted by November 12, 1985.

I. STIPULATED FACTS

1. Petitioner is a tenured School Nurse employed by the respondent, Howell Township Board of Education.

2. The Howell Township Board of Education is responsible for the supervision and administration of all schools subsumed within the Howell Township School District.

3. Petitioner has been employed continuously as a School Nurse at the Newbury School within the Howell Township School District since September 1968.

4. During August 1984, petitioner, as part of her job duties and responsibilities as a School Nurse at the Newbury School, was involved in working with certain pre-school handicapped students and in the course of her duties and responsibilities as a School Nurse came in contact with excreta from said children.

5. On August 28, 1984, petitioner became ill and on August 29, 1984 was admitted to the Jersey Shore Medical Center in Neptune, New Jersey at which time she was under the care of Dr. Joseph Schauer, Howell Township School Physician and Emergency Room Physician at the Jersey Shore Medical Center on call and Dr. Mark Colmer, her private physician.

6. Petitioner's illness was subsequently diagnosed as Shigellosis, which, as attested to by her private physician, Dr. Mark Colmer, was contracted while working with the aforementioned pre-school handicapped students as part of her professional responsibilities within the Howell Township School District. Annexed hereto are copies of documentary evidence consisting of medical reports which clearly attest to the service-

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connected nature of petitioner's disability during the time period between September 1, 1984 and March 6, 1985, when petitioner resumed working on a full-time basis as a School Nurse within the Howell Township School District. These exhibits are annexed hereto as Exhibits A through N.

7. With the exception of several hours of work performed on October 4, 1984, petitioner was absent due to the aforesaid service-connected disability until March 6, 1985.

8. The respondent Board of Education placed total reliance on the judgment of its workers' compensation insurance carrier, Liberty Mutual, Inc., with regard to the nature of petitioner's disability and made no independent investigation, pursuant to N.J.S.A. 18A:30-2.1, to ascertain whether petitioner's disability was work related, pending the completion of Liberty Mutual's investigation.

9. Upon the exhaustion of her accumulated sick leave, petitioner initially did not receive any salary from the respondent Board of Education during the period between approximately November 10, 1984 and March 5, 1985, notwithstanding medical documentation proffered to the Board that established that her disability was service-connected and should be treated in accordance with the prescriptions of N.J.S.A. 18A:30-2.1.

10. In addition to the above, petitioner was advised that although certain of the fringe benefits accorded to professional employees within the Howell Township School District were provided to her during her period of disability, the Board of Education, as of November 20, 1984, unilaterally stopped making deductions to her tax-sheltered annuity program.

11. On or about February 25, 1985, the respondent, after discussions with representatives of the Liberty Mutual Insurance Company, finally agreed that petitioner had contracted Shigellosis because of her employment responsibilities. However, the respondent determined that N.J.S.A. 18A:30-2.1 would be applicable only for the period between September 1, 1984 and November 30, 1984.

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12. As a result of Liberty Mutual's findings, the Board of Education subsequently complied with the prescriptions of N.J.S.A. 18A:30-2.1 vis-a-vis petitioner through November 30, 1984, but has continued to insist, to date, that it has no obligation to remit any additional monies to petitioner pursuant to N.J.S.A. 18A:30-2.1, unless directed to do so by the Commissioner of Education.

13. On or about January 2, 1985, petitioner telephoned a representative of the Board of Education stating that she had received permission to return to work from her private physician as of January 7, 1985. She informed the Board representative that her doctor had placed certain restrictions on her return to work in terms of the duties that she she could perform without endangering her health. The reasons for these resrictions were explained to the representative of the Howell Township Board of Education in detail, e.g., her resistance was still somewhat low, there was an enhanced risk of exposure to winter viruses and the flu, and petitioner did not have a spleen to ward off infection.

14. On January 3, 1985, petitioner phoned her employer again requesting approval of her return to work on January 7, 1985. This request was denied.

15. It is uncontroverted that the sole reason why representatives of the respondent Board of Education did not agree to petitioner's return to work as of January 7, 1985 on a full-time "light duty" basis as a School Nurse related to the failure of Liberty Mutual, at that time, to acknowledge the service-connected nature of petitioner's illness. Had Liberty Mutual recognized the contraction of Shigellosis by petitioner as having been service-connected prior to petitioner's request for reinstatement on a light duty basis effective January 7, 1985, the Board of Education would have reinstated petitioner on a full salaried, light duty basis as School Nurse, effective January 7, 1985.

16. The Board of Education acknowledges that there were sufficient light duty nursing assignments available for petitioner to have been reemployed within the district to perform said duties during the time

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period between January 7, 1985 and March 6, 1985, when petitioner was cleared for a return to work on a full-time, "no restrictions" basis by her personal physician.

17. The respondent Board of Education, in addition, does not challenge the factual accuracy and/or medical findings set forth in Exhibits A through N submitted on behalf of petitioner's physicians and medical consultants. The Board of Education has exclusively relied upon documentation supplied by Liberty Mutual and its medical agents annexed hereto as Exhibits O through U in support of its refusal, to date, to treat any portion of the period between December 1, 1984 through March 6, 1985, as being compensable in accordance with the prescriptions of N.J.S.A. 18A:30-2.1.

18. The respondent Board of Education does not challenge the factual findings and medical judgments of petitioner's physicians as set forth within Exhibits A through N that she was unable to resume a full-time position within the district on a "no restrictions" basis until March 6, 1985, because of the continuing nature of her service-connected disability.

The foregoing are adopted as **FINDINGS OF FACT** in this matter.

II.

The petitioner argues convincingly that she has established she was entitled to compensation, pursuant to N.J.S.A. 18A:30-2.1 for the entire period November 30, 1984 - March 5, 1985. The Board does not challenge the factual accuracy of the medical findings and recommendations set forth in exhibits A - N.

Furthermore, the Board does not challenge the factual findings and medical judgments of the petitioner's physicians that she was unable to resume a full-time nursing position within the district on a "no restrictions" basis until March 6, 1985, because of the continuing nature of her disability.

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The Board appears to have relied on findings of its workers' compensation insurance carrier. See, exhibits N - U. The petitioner notes that the carrier did not schedule a consultation with a physician to evaulate the petitioner's condition until February 1985, five months after the petitioner had contracted Shigellosis as a result of her school nursing responsibilities. This consulation was one month after the petitioner had been advised by her physicians that she could resume work on a light duty basis. The Board rejected the return of the petitioner on a light duty basis. Moreover, the consultation occurred only approximately one month before the petitioner was cleared for a return to work on an unrestricted basis.

Petitioner questions how any medical examination of her on February 7, 1985, could have revealed anything concerning her physical condition months before or even her ability to resume work during that period of time.

In Sussman v. Greater Egg Harbor Regional High School Dist., OAL DKT. NO. EDU 68-84 (Aug. 23, 1984), aff'd, Comm'r of Ed. (Oct. 2, 1984), the administrative law judge discusses Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982) and Masino v. West Deptford Bd. of Ed., OAL DKT. 4347-79 (Oct. 3, 1980), aff'd Comm'r of Ed. (Nov. 20, 1980), rev'd State Bd. of Ed. July 8, 1981), appeal dismissed (N.J. App. Div., June 15, 1983, A-5469-80T1) (unreported), in which it is established that "accident arising out of or in the course of employment" as used in N.J.S.A. 18A:30-2.1 was intended to have the same meaning as in the Workers' Compensation Act, N.J.S.A. 34:1A-1 et seq. Masino, also establishes that:

> Even though compensation under N.J.S.A. 18A:30-2.1 and under the Workers' Compensation Law both depend upon a factual finding that the injury arises out of and in the course of one's employment, the Commissioner clearly has jurisdiction to determine that issue insofar as the provisions of Title 18A are involved. Whether or not an award will also be made under the Workers' Compensation Law will be decided by the Division of Workers' Compensation. That does not mean, however, that the Commissioner cannot determine the same factual issues for the purpose of applying N.J.S.A. 18A:30-2.1. (State Board at 2.)

In the present case, the Board has stipulated that there were sufficient light duty professional nursing assignments available within the district for the petitioner to have been reemployed to perform those duties on a full-time basis in the period January 7 - March 6, 1985. The only reason the Board did not approve the petitioner's

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application to return to work effective January 5, 1985, was that the Board at that time had no indication that its compensation carrier would support the petitioner's physicians' determination that she contracted Shigellosis as a result of her professional nursing duties within the district.

The petitioner asserts and I agree that the Board should not have deferred to an insurance carrier and should have independently investigated the nature of the petitioner's disability to determine whether she was covered under N.J.S.A. 18A:30-2.1. As per Stipulation number 5, a Howell Township Board of Education physician was on call when the petitioner was admitted to Jersey Shore Medical Center. Had the Board directed that the case be followed up by its medical inspector it would doubtlessly have acknowledged the petitioner's service-connected disability as early as September 1984.

III.

Having reviewed the whole record in this matter, particularly the medical experts exhibits attached to the stipulations of fact, I **FIND** in addition to the facts previously adopted the following:

1. The petitioner's service-connected disability continued from November 30, 1984 to March 5, 1985.

2. The Howell Township Board of Education violated N.J.S.A. 18A:30-2.1 by its refusal to pay the petitioner for the period November 30, 1984 - March 6, 1985.

Accordingly, I **CONCLUDE** that the Howell Township Board of Education shall pay to Marialana Sirianni all compensation, including salary payments withheld from her during the period November 30, 1984 - March 6, 1985. I further **CONCLUDE** that the Board must recredit the petitioner for any sick leave improperly charged against her accrued sick leave during the period November 30, 1984 - March 6, 1985. I further **CONCLUDE** that the petitioner is not entitled to receive interest at the lawful rate of 12 percent on the salary payments withheld from her during the subject period. Newark Bd. of Ed. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984). This is not prejudgment interest and does not require a showing of "overriding and compelling equitable reasons." Id., at 244. An adjudicated liability, however, obviously stands on a completely different footing

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from an unadjudicated claim of liability. Ibid. The Levitt court cautions that, in awarding post-judgment interest, the public body should be accorded a reasonable time under the circumstances to make payment of the judgment before post-judgment interest begins to run. Since there will be no judgment until the Commissioner issues his final decision in this matter or this initial decision becomes the final decision by operation of law, the "reasonable time under the circumstances" cannot begin to run until that time.

Accordingly, it is **ORDERED** that the Howell Township Board of Education pay to Marialana Sirianni all compensation, including salary payments, withheld from her during the period November 30, 1984 - March 6, 1985. It is further **ORDERED** that this payment be made within 30 days of the date of 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.

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

26 DECEMBER 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DEC 27 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 31 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/E

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MARIALANA SIRIANNI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner agrees with the determination of the Office of Administrative Law that "***the Board should not have deferred to an insurance carrier and should have independently investigated the nature of the petitioner's disability to determine whether she was covered under N.J.S.A. 18A:30-2.1." (Initial Decision, ante) Having carefully reviewed the record before him, including the many medical reports in the instant matter, the Commissioner is convinced, as was the ALJ, that petitioner's service-connected disability continued from November 30, 1984 until March 5, 1985.

Accordingly, the Commissioner finds and determines that the Howell Township Board of Education shall pay to Marialana Sirianni all compensation, including salary payments withheld from her during the period November 30, 1984 through March 6, 1985. The Commissioner further orders the Board to recredit petitioner for any sick leave improperly charged against her accrued sick leave during the period from November 30, 1984 through March 6, 1985.

Additionally, and contrary to the conclusion of the ALJ, the Commissioner grants petitioner's request for interest on the amount due her as a result of the Board's inordinate delay in referring her to a Board-approved medical inspector in an effort to expedite the insurance company's determination as to whether petitioner's illness was work-related. It is the Commissioner's opinion that the Board's failure to so direct an independent investigation of this matter until six months after petitioner fell ill was entirely unreasonable and constitutes an "overriding and compelling equitable reason to justify an award of pre-judgment interest" in keeping with the definition of such interest provided by the Court in Newark Bd. of Ed. v. Levitt and Sasloe, 197 N.J. Super. 239, 244 (App. Div. 1984). See also, David Bryan et al. v.

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Bd. of Ed. of Mainland Regional High School District, Atlantic County, decided by the Commissioner December 4, 1985. The Commissioner notes, however, that regulations regarding pre-judgment interest are currently pending before the State Board. During the pendency of these regulations before the State Board, R. 4:42-11(a) shall be applied.

Accordingly, the Howell Township Board of Education is further ordered to pay petitioner forthwith, pre-judgment interest on the compensation owing her from November 30, 1984 through March 6, 1985. Interest is to be calculated at the rate of 12 percent simple interest per annum.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1480-85
AGENCY DKT. NO. 31-2/85

AVALON EDUCATION ASSOCIATION,
Petitioner,
v.
BOARDS OF EDUCATION OF THE BOROUGH OF AVALON AND THE CITY OF SEA ISLE CITY, CAPE MAY COUNTY,
Respondents.

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

Thaddeus Raczkowski, Esq., for respondents (Gruber & Raczkowski, attorneys)

Record Closed: December 18, 1985 Decided: December 30, 1985

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

This matter concerns an appeal by petitioner contesting an action by the Board of Education of the Borough of Avalon (Avalon Board) to change the contractual terms and conditions of a music teacher assigned to the Avalon Board by way of the Tri-district Music Consortium, comprised of the boards of education of Avalon Borough, Sea Isle City, and Stone Harbor Borough, with the Board of Education of Sea Isle City (Sea Isle Board) designated as L.E.A. By way of a motion advanced by petitioner, the undersigned granted said motion and ordered the Sea Isle Board be made a party respondent to the herein action. Petitioner alleges, among other things, that said teaching staff member was, and is, an employee of the respondent Avalon Board as a matter of law; that the actions by

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respondent Avalon Board were in violation of petitioner's rights and responsibilities as the majority representative of all certified teaching positions in the district and deprived petitioner and its members of its legal right to negotiate concerning the music teacher's terms and conditions of employment. The Avalon Board denies petitioner's allegations, asserting that all its decisions were and are correct, legal, appropriate, necessary and beneficial to its constituents.

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. Subsequent to a prehearing conference, the parties requested and were granted leave to have the matter placed on the inactive list for the purpose of settlement discussions and negotiations. On December 18, 1985, the undersigned was in receipt of a duly-executed Settlement Agreement and Stipulation of Settlement and Dismissal of the matter which is set forth, in toto, as follows:

> WHEREAS, the parties to this matter have reached an amicable resolution concerning the controversy which is the subject matter of this case, it is hereby agreed that the entire controversy and dispute between the parties shall be settled and resolved on the following basis, and that all claims of all parties arising out of the entire controversy and dispute herein shall be settled and resolved based upon the following terms:
>
> 1. The actual contract to be issued for the music teacher position in dispute herein shall be issued by the Sea Isle City Board of Education.
>
> 2. The salary applicable to said music teachers' position shall be computed on a pro rated basis, set in the following manner. The salary shall be based on the percentage of employment in each district in which the music teacher serves, based upon the salary scale in effect in each district according to percentage of employment in each district. Thus, if the person filling the position serves 40 per cent of her time in the Respondent Avalon School District, she will receive 40 per cent of a full-time teachers' salary in Avalon for such service. The remainder of her salary will be set on the same basis, i.e. her salary will be attributable to the percentage of her employment in each district, based upon the salary scale in effect in each district.
>
> 3. Fringe benefits for the position shall be based upon those fringe benefits provided by the Respondent Board of Education of the City of Sea Isle City.

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4. Compensation for any extra curricular or co-curricular activities or positions that the person occupying said position engages in or fills shall be governed by the negotiated agreement in effect or through negotiations with the majority representative pursuant to the New Jersey Employer-employee Relations Act in the specific district in which the services are rendered.

5. Terms and conditions of employment, including working conditions, shall be governed by the negotiated agreement or negotiations with the majority representative in each specific school district in which the services are rendered.

6. Any grievances filed by the person filling the music position or filed relative to the music position will be subject to the grievance procedure in effect in the specific district in which the grievance arises.

7. This agreement does not address and shall not effect the tenure or seniority rights which shall be acquired by the person filling the music position. This agreement shall not be considered a waiver of tenure or seniority rights for the person filling such position in any or all of the districts involved in this litigation or in which the individual may serve. This agreement shall not be considered an admission by respondents that tenure or seniority rights are obtained for the position in any particular district. Furthermore, this agreement shall not be considered to be an admission by petitioner that a joint arrangement for teaching of music is legal or permissible, that the individual filling the position is not employed by each district in which she serves, or that said individual does not acquire tenure rights in any district in which she serves. The tenure and seniority rights applicable to said position shall be governed solely by the applicable sections of Title 18A of the New Jersey statutes and NJAC 6:3-1.10 et seq. of the New Jersey Administrative Code.

8. The parties agree that this agreement, once approved by the Commissioner of Education, shall be considered an addendum to the negotiated agreement in effect in each of the Respondent school districts. However, nothing in this agreement shall preclude the parties to this agreement from negotiating terms and conditions different from those set forth in this agreement, provided that the terms of this agreement shall apply and be controlling until such time as the parties mutually agree to other terms and conditions.

Having reviewed and considered the entire record before me in this matter, including the terms and conditions of the Stipulation of Dismissal, I **FIND** that:

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1. The parties to this action have voluntarily entered into the settlement agreement; and

2. The parties to this action have agreed, as evidenced by their signatures and the signatures of their representatives, to the terms and conditions of the settlement; and

3. The agreement as reflected by the Stipulation of Dismissal is a fair one and fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE**, therefore, that this matter is no longer a contested case before the Office of Administrative Law.

Accordingly, it is hereby **ORDERED** that the parties comply fully with the settlement terms and conditions and that these proceedings be and are hereby concluded.

It is further **ORDERED** that this matter be and is hereby **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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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

30 December 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 3 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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AVALON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE BOROUGH OF AVALON AND THE CITY OF SEA ISLE CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENTS.	:	

The record in the instant Petition of Appeal has been reviewed. While the Commissioner is in full support of the parties herein reaching amicable resolution of this matter, he cannot consent to the settlement herein which, from the outset, will create uncertainty as to the employment status of the individual involved. Based on the limited information before him, as well as the agreement itself, it is clear to the Commissioner that the teaching staff member herein is, in effect, neither an employee of one school district nor another. Either the music teacher has to be employed by a single district, in which case her tenure and seniority rights accrue in that district alone, or the individual has to be employed proportionally by all three districts involved, in which case the tenure and seniority rights accrue with each separate board proportionate to the time served in each district. Treating the teacher as though she were under contract to only one board, while

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also employed by two other boards creates a lack of certainty in two areas:

1. Who is her employer or employers?

2. What is the impact on future tenure and seniority rights?

Accordingly, the settlement in the instant matter is rejected. The Petition of Appeal is remanded for clarification or amendment consistent with law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 5, 1986

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INITIAL DECISION
OAL DKT. NO. EDU 1904-85
AGENCY DKT. NO. 67-3/85

MARY E. HEMPLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY,
Respondent.

Roger J. McLaughlin, Esq., for the petitioner (Mangini, Gilroy, Cramer & McLaughlin, attorneys)

Joseph D. Marchand, Esq., for the respondent

Record Closed: December 5, 1985 Decided: December 26, 1985

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner was employed as a bus driver by the Hopewell Township Board of Education (Board) when she was suspended without pay for thirty (30) days beginning October 16, 1984, for wrongfully discharging her pupils after her bus broke down.[1] She asserts that she exercised reasonable judgment in releasing her pupils to their parents, legal guardians, and neighbors, whom she knew to be trustworthy and reliable, based on her many years of experience as a bus driver and her residence in the community.

---

[1] Petitioner had been suspended earlier, on September 28, 1984, by the chief school administrator (CSA) pending Board action at its meeting on October 15, 1984.

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This matter was filed in the Superior Court of New Jersey, Law Division, Cumberland County on December 3, 1984. After the answer was filed on December 20, 1984, the Honorable Edward S. Miller, J.S.C., transferred this matter on February 1, 1985, to the Commissioner of Education. The Commissioner transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. After a prehearing conference on March 8, 1985, hearings were conducted on October 10, 1985, in the Bridgeton City Hall, Bridgeton, and on October 20, 1985, in the Cumberland County Courthouse, Bridgeton. Twelve witnesses testified and sixteen documents were admitted in evidence. Counsel filed concurrent letter briefs after the hearing. The record was closed on December 5, 1985, on receipt of the Board's letter reply brief.

DISCUSSION

Petitioner had been employed by the Board as a bus driver for fifteen (15) years at the time of this incident which occurred on September 24, 1984. She picked up fifty-four (54) pupils at her school at 2:40 p.m. She had discharged 12 to 15 of them when her bus suffered a breakdown at a curve one and one-half to two miles from school at 2:55 p.m. Petitioner was able to pull the bus off the road onto an open field.

The day was very hot. The bus windows would not open and the pupils became "rowdy." Petitioner let the pupils out of the bus to sit on the grass away from the road. She testified that cars were speeding by[2] and that the pupils were safer off the bus.

One of the pupils went to his home, nearby, and called Howard Searle, the transportation supervisor at the school. Howard Searle testified that when a bus breaks down, the driver is supposed to arrange for such a call for help and then wait with her pupils until (1) a mechanic delivers a spare bus; or (2) the mechanic fixes her vehicle; or (3) a driver whose run is completed returns to pick up her pupils.

On the day in question, neither of the district's two spare buses was operational. Two local residents who came on the scene were unable to repair petitioner's bus. The mother (A.G.) of a pupil on the bus stopped and petitioner released her child to her together with seven other children. Petitioner testified that she knew A.G. as a neighbor and that A.G. knew where the seven children lived. A.G. transported those pupils to their homes in her three-seat Surburban station wagon.

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[2] The speed limit was 50 mph.

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At 3:15 p.m., another school bus driver (S.S.) stopped and was advised of petitioner's problem. S.S. was near the end of her run and told petitioner that she would return in 30 minutes. In the meantime, the mother (L.S.) of two other pupils happened by. With petitioner's permission L.S. transported her own two children, two cousins and three other pupils (seven in all) to their residences. She was driving a six-passenger Ford Fairmont. The seven children ranged in age from five (kindergarten) to 11 years.

Petitioner continued to discharge her pupils to persons whom she knew. At 3:25 p.m. when the mechanic (D.C.) arrived, only four pupils remained at the scene. Another mother (D.G.) testified that she became worried when her children failed to appear on time. She was greatly relieved when A.G. delivered them. Since it was such a hot day, she believed it would be a neighborly act to pick up the remaining children and take them to their residences, and she did. Shortly after 3:25 p.m., Howard Searle, the transportation supervisor and S.S., the other school bus driver, arrived. All of the children were gone. Petitioner was transported to her home in S.S.'s school bus.

These are the material facts regarding this incident which occurred on Monday, September 24, 1984. Therefore, I adopt them as my **FINDINGS OF FACT.**

ARGUMENT

Petitioner asserts that she violated no regulation or any Board policy. There was no injury or negative impact to any of her pupils or their families. Therefore, there should be no penalty for her actions. In the alternative, the penalty is too severe.

The Board asserts that the standard to be examined here is whether or not it was arbitrary or capricious in setting its penalty, particularly in view of the fact that petitioner had been disciplined in a prior year for releasing two pupils from her bus to a stranger.

Petitioner received a letter of reprimand from the chief school administrator (CSA) for that earlier incident which occurred on Wednesday, September 15, 1982. On that day, petitioner had a near-accident which resulted in a head cut on a young boy pupil on her bus. The driver of the other vehicle was very concerned about the near-accident which resulted in the pupil's injury. The driver volunteered to deliver the injured pupil to his mother so that she might transport him to the hospital. Petitioner released the boy and his sister to the young man even though she did not know the man.

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In her conversation with the CSA about this incident, petitioner stated that she used common sense rather than poor judgment in releasing the two children (J-1). Nevertheless, petitioner was given a written reprimand which is reproduced in pertinent and significant part as follows:

> I must remind you that we are bound by law and have a responsibility to the parents of our students. In simple terms, we are responsibile for the children from the time they walk out their door until they return home. When you allowed the driver of the other vehicle to transport the injured student and his sister, you violated this responsibility.
>
> Do not under any circumstances act in this manner if such a situation occurs again. Failure to follow the established guidelines will result in a recommendation to the Hopewell Board of Education that your employment be terminated in the district.

The chief school administrator explained that there is no difference between the 1982 and the 1984 incidents. Both involved the release of pupils to others without authorization. Petitioner argued that there is no similarity between the two incidents. Although she conceded that she did not know the young man in the 1982 incident, she trusted him and believed that she used good judgment in caring for the injured pupil.

By comparison to the 1984 incident, all pupils were released to their parents, neighbors, and others whom petitioner knew and trusted. She stated that the pupils would be safer at home than waiting at roadside for a spare bus. Petitioner conceded that (1) her bussing duties began with starting on time; (2) the safety of her pupils was her primary responsibility; and (3) she was responsible for her pupils from the time she began her duties until the pupils were returned to their homes.

Petitioner insisted that she has never been given any instruction, orally or in writing, concerning what she should do if her bus breaks down. She asserted that the J-1 and J-2 documents describe only the procedure to be followed in case of an accident. They do not prescribe a procedure to follow for the breakdown of a bus. Petitioner conceded that all bus drivers were told to call for a mechanic in such a circumstance and that she knew that another bus driver would come along about 4:00 p.m. She also conceded that Howard Searle and Richard D. Gable, CSA, "raked me over the coals" about the September 1982 incident. Both men told her she should have brought the injured pupil to the school.

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Howard Searle testified on behalf of petitioner. Prior to the breakdown of her bus, the only instructions given to drivers concerned evacuation procedures for pupils. Drivers were instructed to call the mechanic and the school when a bus became disabled. There were no written instructions concerning procedures to follow when a bus was disabled. It is his belief that the 1982 incident was different from that which occurred in 1984. He described petitioner as a good driver and a safe driver with an excellent record, having the best interest of the pupils at heart.

In a memorandum to the Board's chairman, transportation committee, on October 4, 1984, Howard Searle stated that he met with all bus drivers on August 29, 1984. He discussed new student registration; changing of two routes; adhering to the 58-seat capacity of a bus; and time limitations. Names of new students were given out together with their general geographic location in rural or housing development areas. Every driver was expected to have a seating chart, and an accident procedure was discussed, motivated by petitioner's "near-accident" in 1982 (J-1, J-2). The day after the September 24, 1984 incident, a memorandum was issued to all bus drivers regarding the release of pupils from a disabled bus. Drivers were directed not to release pupils to anyone other than a parent or legal guardian (J-3). Concerning the lack of written rules regarding the above incidents, Mr. Searle continued as follows:

> There is no set of rules covering these two incidents in the Guidebook for School Bus Transportation Supervisors; Transportation, New Jersey Handbook for School Boards and Administrators from the New Jersey State Department of Education; New Jersey Driver Training Manual for School Bus Drivers & Contractors from the State of New Jersey Department of Education; Driver Manual of the State of New Jersey Department of Motor Vehicles; or the School Bus Drivers Handbook supplement from the State of New Jersey Department of Education; or the Hopewell Township Board of Education Policy No. 409.
>
> I have looked through the above mentioned documents; talked with Mr. Norman Gomolski, County Transportation Coordinator; and I have talked with Mr. Carl Frank from the Division of Pupil Transportation, New Jersey Department of Education; and these three sources reaffirmed that there is no set of laws, rules or regulations covering these two topics. (J-8 at 1.)

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Based on the foregoing, the Board's motion for a directed verdict at the end of petitioner's case was **DENIED** on the basis that a prima facie case had been established that petitioner was suspended without violating any existing regulation or Board policy.

The CSA testified on behalf of the Board. He directed Mr. Searle to reprimand petitioner after the September 1982 incident. Later petitioner called him and asked "why I was worked up - why I was making a big deal out of it." The CSA followed up with a discussion and a reprimand to petititioner (J-1). After the 1984 incident, the CSA asked Mr. Searle for the details of the incident and for a recommendation regarding petitioner. He wanted to compare the 1982 and the 1984 incidents.

After the 1982 incident, the CSA told petitioner that her release of the injured pupil and his sister was a "violation of the trust parents have in us." He insisted that bus drivers were aware that Board policy is not to release pupils to anyone other than authorized personnel (J-2, J-3). He introduced in evidence Board policy No. 905, entitled School Visitors, to support that statement (R-1). He concluded that petitioner had used poor judgment. Her actions could not guarantee the safety of the pupils she released. "We must reduce the opportunity to create crisis situations." The CSA also testified that disciplinary action was necessary to reduce the Board's exposure to liability.

The 1984 incident took place on a Monday. Petitioner was suspended by the CSA the following Friday morning, September 28, 1984 (J-5). He waited until then to evaluate the Searle recommendation before he took action. The CSA discussed both incidents with the Board solicitor. He was advised by the solicitor that there were adverse legal repercussions if continued warnings were given over these serious incidents without any disciplinary action being taken (P-4). Following this, the CSA recommended to the Board that petitioner be terminated. His recommendation was based on Board policy 905 (School Visitors); his reprimand to petitioner after the 1982 incident (J-1); and Board counsel's advice on disciplinary matters (P-4).

Several bus drivers testified that they were given oral instructions to call the school in case of a breakdown. They were instructed to wait for help; however, each testified that there were no written instructions on what procedure to follow after a breakdown. Other drivers had breakdowns and waited for help. On one occasion, one of the drivers walked her pupils, two abreast, to the school. Another driver testified that she had never released a child to anyone other than a parent, guardian or law enforcement official.

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Based on these arguments, documents and the testimony, I **FIND** and **CONCLUDE** as follows:

1. Concerning a bus breakdown, no written policy explaining any procedure to follow with pupils was disseminated to bus drivers prior to the September 24, 1984 incident.

2. Oral instructions to call the school and wait for help were given to bus drivers prior to the September 24, 1984 incident.

3. Board policy No. 905 (School Visitors) is not applicable to the subject matter of this case. In any event it was not given to bus drivers; neither were they instructed about the policy (J-9).

The CSA discussed this entire matter with the Board's transportation committee. After reviewing the matter and the CSA's recommendation, the Board suspended petitioner for an additional 30 days without pay.

CONCLUSIONS OF LAW

The issue to be decided in this matter is whether or not the Board acted in an arbitrary, capricious or unreasonable manner when it suspended petitioner without pay.

The discretion of a board of education to act within its authority is set forth in George I. Thomas v. Bd. of Ed. of the Tp. of Morris, 89 N.J. Super. 327 (App. Div. 1965). In Thomas the Court stated at 332:

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Board of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962); Schinck v. Board of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 (App. Div. 1960).

In Schinck, the Court quoted further as follows:

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> We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy. To do so would constitute a judicial exercise of the administrative function. (at 476).

Based on the cited cases and with the understanding that the Board considered all of the information set forth above, I **CONCLUDE** that the Board was not arbitrary or capricious in reaching its determination to discipline petitioner.

Notwithstanding this conclusion, I also **CONCLUDE** that the penalty is too harsh.

Petitioner lost more than six weeks salary after fifteen years of excellent service with only one prior incident on her record.[3] Mr. Searle commended her service as follows:

> At the meeting with Mr. Gable, he brought to my attention a memo that I had written to Mrs. Hemple and all the bus drivers concerning releasing an injured child to either a parent or a guardian in the event of an accident. I personally feel that the incident of September 24, was different in nature, and I stand by my original memo and recommendation until either the administrative principal or the Board of Education instructs me to do otherwise either in a written recommendation or written Board policy. I strongly feel that Mrs. Hemple is a good driver, and she has not refused to assist me and her fellow drivers in attempting to provide transportation to and from school, field trips, and extra-curricular activities. If I felt that Mrs. Hemple did not have the best interest of the children at heart and had an unsafe driver record for the past fourteen years, I could not take this stand or make this recommendation. (J-4 at 2.) [Emphasis added.]

I observed the demeanor of the petitioner and concluded that she is a mature, responsible and dedicated driver. She was supported by parents and fellow drivers.

Although I believe petitioner exercised poor judgment on both occasions by releasing her pupils, I believe that this litigation alone is enough to remind petitioner and all bus drivers that they can never release pupils from their charge except by Board policy.

---

[3] The September 1982 incident.

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In my judgment, the two weeks' suspension without pay and reprimand given by the CSA is a sufficient discipline for petitioner's infractions.

Accordingly, the Board is **ORDERED** to compensate petitioner for the salary she would have earned during her thirty (30) day suspension which began on October 16, 1984.

The Board is further **ORDERED** to develop and disseminate a written policy on the procedures to be followed by its bus drivers following the breakdown of a bus.

Except for the relief as **ORDERED**, the Petition of Appeal in all other respects is **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.

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

26 December 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

DEC 27 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

~~Mailed To~~ Parties:

DEC 31 1985
DATE

Ronald L. Parks/s.s.
OFFICE OF ADMINISTRATIVE LAW

bc

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MARY E. HEMPLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

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

The Board excepts to the conclusion reached by the ALJ that the penalty assigned to petitioner by the Board was too harsh and notes the following six points:

1. Judge Thomas' decision in determining that the Board's penalty was too harsh is in itself arbitrary and capricious in that it ignores case law cited within the Judge's own opinion in that the agency's factual determinations must be accepted if supported by substantial, creditable evidence. Thomas v. Board of Ed. of Tp. of Morris, 89 NJ Super 327, 332 (1965). Furthermore, Schinck v. Board of Ed. of Westwood Consol. School District, 60 NJ Super 448, 447 (sic) (1960) stated that the reviewing party should not substitute their judgment for the specialized and expert judgment of the Board. To do so would constitute a judicial exercise of administrative function. Judge Thomas in his opinion felt two weeks suspension of the petitioner would have been sufficient penalty. In fact, the two weeks that the petitioner at first was suspended resulted from the Chief School Administrator (CSA) use of his emergency powers. The following thirty days suspension resulted from direct Board action. Certainly the difference between two weeks suspension and six weeks suspension is certainly too slight for Judge Thomas to "second guess" the Board and clearly is contra to the aforesaid stated case law.

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2. Judge Thomas' findings of fact failed to note that Mary Hemple received prior written notice not to release students to parties other than parent, guardian, or emergency personnel. (See J-1 and J-2). Furthermore, Mary Hemple admitted receiving the aforesaid documents.

3. Judge Thomas' conclusion number three stating that the Board Policy number 905 was not applicable "flies in the face" of the three bus drivers who testified at this trial, and indicated that at meetings with the Transportation Coordinator, oral statements were made to said bus drivers that they should not release students to parties other than parents, guardians, or emergency personnel. Furthermore, at said meetings they were instructed to await the arrival of another bus or the school mechanic if their bus in fact broke down. All of the aforesaid bus drivers stated that Mary Hemple was present at said meetings. Board Policy number 905 nearly "codifies" the aforesaid instructions as official school policy.

4. Judge Thomas did not rule on the credibility of Mary Hemple regarding her statement that she never received any instruction on what to do if her bus broke down. The latter statement was clearly contradicted by the other three bus drivers who testified at this trial specifically stating that Mary Hemple was present when the Transportation Coordinator instructed said bus drivers what to do in case their bus broke down. She was also present when further instructions were given that they were not to release students to persons other than parents, guardians, or emergency personnel.

5. Judge Thomas did not note in his findings of fact that all children were discharged from the disabled vehicle within thirty minutes of said disablement. His statements of facts do not state that at 2:55 p.m. the bus became disabled and by 3:25 p.m. when the Transportation Coordinator, School Mechanic, and another bus driver arrived on the scene, all children had been discharged.

6. After a petitioner's case in chief had been put into evidence and petitioner rested, it is submitted that the respondant's (sic)

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> motion for a directed verdict should have been granted, in light of the fact that J-1 and J-2 were in evidence and both documents were written notification to the petitioner that she should never release children to parties other than parents, guardians, or emergency personnel. Although petitioner noted that J-1 and J-2 referred to a September, 1982 incident which she claims was an accident and therefore different than the disablement that occured (sic) in September of 1984, said memos do not refer to "accident" in describing the aforesaid restrictions on release of children from her responsiblity (sic). (Board's Exceptions)

Additionally, the Board in its exceptions requested that the Commissioner overturn the determination of the ALJ concerning penalty and amend the order to dismiss the entire petition with prejudice.

In reply exceptions, petitioner avers that additional loss of 30 days' pay by a school bus driver can certainly not be said to be a slight or minor matter. Petitioner argues that the loss of pay is significant, and the ALJ's finding that the Board abused its discretion by imposing such a lengthy period of suspension was well-supported by the evidence.

Petitioner further avows that the testimony was quite clear that the Board's policy No. 905 was never communicated or given to the bus drivers, a fact, petitioner argues, that was clearly and candidly admitted by Mr. Searle, who was responsible for school bus transportation.

Petitioner argues that the Board's assertion that the credibility of petitioner should have been questioned with respect to her not receiving instructions as to what to do if the bus broke down is a misrepresentation of the record. Petitioner contends that the fact was clearly established that there had never before been a situation where a bus broke down and there was no spare bus available to be brought to the scene by the mechanic. The situation was unique, in petitioner's estimation, and no policy existed or had been communicated to cover such a situation. Further, it is petitioner's position in reply exceptions that the Board's position with respect to the timing of the discharge of the children is irrelevant in view of the uncontroverted fact that petitioner was aware of the fact that there was no spare bus available to pick up the children.

Finally, petitioner's reply exceptions aver that the suspension imposed was excessive and that this premise is supported by the ALJ's finding that the Board should be directed to develop and disseminate a written policy on the procedures to be followed by its bus drivers following the breakdown of a bus. The responsibility to establish such rules and regulations, argues petitioner, lies clearly with the Board, and her actions were reasonable because of the absence of a clearly defined discharge

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policy. Petitioner also notes that, while she continues to maintain her position that she should not have been disciplined to any degree arising from this incident, the ALJ's decision is based upon a thorough and reasonable review of all the evidence, and that the Board's exceptions are without merit.

Having carefully considered the record before him, the Commissioner is in accord with the ALJ and the Board that the latter was not arbitrary or capricious in reaching its determination to suspend petitioner without pay for thirty days for wrongfully discharging her pupils after her bus broke down. The record is clear that petitioner knew well the procedure to follow in case of an accident. Common sense dictates that she follow the same procedures in the event of a breakdown of the bus. It is also clear from the record that petitioner was personally on notice, following the earlier incident whereby she released two children into the custody of a stranger, that she was not to release pupils under any circumstances without proper authorization. (See J-1, J-2, J-3 and R-1.) It is unrefuted that on the second occasion, as in the first, petitioner did release her charges into the custody of other than authorized persons.

It is well established that boards of education in the State of New Jersey have broad powers in the administration of schools in the local districts. See Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345 (1938) as cited in Walker v. Wildwood Bd. of Ed., 1938 S.L.D. 324, 326. In exercising his function of reviewing the administrative acts of boards of education, the Commissioner will not 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 the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. (at 13)

(Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, aff'd St. Bd. 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948). See also, Thomas v. Bd. of Ed. of the Tp. of Morris, 89 N.J. Super. 327 (App. Div. 1965); Quinlan v. Board of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962); and Schinck v. Board of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 (App. Div. 1960))

In light of the fact that the Board herein was within its statutory right to assign the penalty it did, and that the ALJ found that the Board's disciplining of petitioner was not arbitrary, capricious, or unreasonable, the Commissioner finds and determines that it was not within the discretion of the ALJ, nor is it within

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the discretion of the Commissioner, to alter the Board's disciplinary determination.

Accordingly, the initial decision is modified to restore the penalty imposed on petitioner by the Board. The Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3917-84
AGENCY DKT. NO. 142-5/84

HADDONFIELD BOROUGH
BOARD OF EDUCATION,
CAMDEN COUNTY,
Petitioner,
v.
HELEN BROTZMAN,
Respondent.

Alan R. Schmoll, Esq., for the petitioner (Capehart & Scatchard, attorneys)

Linda E. Johnson, Esq., for the respondent (Greenberg, Kelly & Prior, attorneys)

Record Closed: November 12, 1985 Decided: December 26, 1985

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

This matter concerns the tenure charges brought against Helen Brotzman, a teacher employed by the Haddonfield Borough Board of Education (Board), which were filed with the Commissioner of Education (Commissioner) on May 2, 1984. In its resolution, the Board concluded that Ms. Brotzman should be dismissed, and the charges, attached to the resolution, allege that the respondent engaged in conduct unbecoming a teacher and incapacity.

In her response, filed with the Commissioner on May 24, 1984, the respondent denied the charges and the matter was transmitted by the Commissioner 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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PROCEDURAL HISTORY

A prehearing conference was held on July 13, 1984, and the parties agreed that the only issue in this matter is whether the tenure charges, if true, constitute good cause for the removal of the respondent from her tenured position or for the imposition of any disciplinary action. The matter was initially scheduled for hearing on October 29 through November 1, 1984.

Linda D. Johnson, Esq., on behalf of the respondent, filed a motion to compel discovery and for the imposition of sanctions on September 11, 1985. After discussing the matter with the parties, and the parties being in agreement, I placed the matter on the inactive list of cases by order, dated October 11, 1984, for the purpose of giving the parties additional time to prepare their respective cases and to discuss a possible settlement. Based on the issuance of this order, Ms. Johnson withdrew her motion to compel discovery and impose sanctions. In addition, the parties signed a consent order regarding the adjournment of the matter. Thereafter, with the concurrence of both parties, I continued the matter on the inactive list by order dated January 23, 1985, and the hearing was scheduled to start on April 16, 1985, unless the matter was settled before that date.

In the initial order placing the matter on the inactive list, I noted that Ms. Brotzman was working for the Board in another position. While the matter was on this list, the respondent filed a petition for emergency and declaratory relief, OAL DKT. EDU 8644-84, and alleged that the Board had given her a job assignment which was inconsistent with her tenured position. As reflected in the letter dated December 21, 1984, this matter was resolved before Administrative Law Judge Daniel McKeown, and the Board placed Ms. Brotzman in a suspension-with-pay status pending the final decision in this matter. Judge McKeown made no determination as to whether or not the Board acted improperly when it assigned the respondent to the elementary development project position.

On January 8, 1985, Ms. Johnson filed a motion for summary judgment and represented that there were no factual disputes in this matter. Ms. Johnson argued that based on the exhibits attached to her brief there were no reasonable grounds for either the removal or the discipline of Ms. Brotzman. Further, Ms. Johnson argued that the

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charge of incapacity should be dismissed since there was no evidence that Ms. Brotzman had a physical or mental infirmity which would render her unfit for her teaching position.

In his response filed on January 22, 1985, Mr. Schmoll argued that the Board could establish incapacity without showing a mental or physical infirmity and that factual disputes existed in the matter. In addition, Mr. Schmoll disagreed that the documents submitted by Ms. Johnson show that there was no reasonable basis for the tenure charges. After reviewing the briefs filed by the parties and after hearing oral argument on January 25, 1985, I denied the motion for summary judgment by order dated February 14, 1985. In this order, I concluded that there were factual disputes and I also agreed with Mr. Schmoll's argument regarding the proof necessary to show incapacity.

The hearing in the matter took place on April 16 and 17, 1985, May 6, 13 and 17, 1985, June 21, 27 and 28, 1985 and July 24, 25 and 26, 1985. After receipt of briefs[1] from the parties, the record in this matter closed on November 12, 1985.

At the end of the presentation of the petitioner's case, Ms. Johnson moved to dismiss the matter and argued that the Board had not presented a prima facie case. Mr. Schmoll disagreed and argued that the Board had shown a pattern of confrontation by the respondent which warrants her removal from her tenured position. After considering the arguments of the parties, I denied the motion to dismiss.

TESTIMONY AT THE HEARING

The respondent is a tenured teacher and has been employed by the Board since the start of the 1973-74 school year (9 T 8).[2] Prior to accepting this position with the Board, the respondent was a tenured teacher employed by the Camden Board of Education (9 T 5).

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[1]There was a delay in the receipt of the briefs from the parties due to the fact that some of the transcripts were not received in a timely manner. It should be noted that there is no transcript for the testimony received on April 16, 1985, due to the fact that the court reporter lost his notes.

[2]The number before the "T" refers to whether it is the first, second, third, etc., day of the hearing.

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Initially, Ms. Brotzman was assigned to teach a fifth grade class at the Central Elementary School and she taught there until she was transferred to the Elizabeth Haddon School at the beginning of the 1979-80 school year. The respondent taught at this school until her suspension on April 27, 1984.

Apparently there were no problems relating to Ms. Brotzman's performance as a teacher during the 1973-74, 1974-75 and 1975-76 school years. After a new principal, Dr. John A. Caggiano was assigned to the Central School, starting with the 1976-77 school year, he and the respondent had differences of opinion regarding several matters during his first year at the school which effected their relationship with each other (2 T 163, 9 T 36). These differences of opinion related to Dr. Caggiano's decision that the respondent's niece should be placed in her class (R-10, 2 T 119-20, 9 T 36-7), the arrangements made by Dr. Caggiano for the respondent's students to attend the funeral of a classmate (2 T 131, 9 T 41-2), and Dr. Caggiano's position regarding certain union matters which involved the respondent since she was active in the Haddonfield Education Association and served that year as its faculty representative and as the grievance chairperson for the Central School (2 T 133-4, 9 T 13-4).

The respondent felt that she had a difficult class for the 1976-77 school year because of the large number of students including several students with learning and behavorial problems (9 T 19, R-15, R-16, R-17, R-18) and she made known her concern regarding her class assignment to the parents during the Back to School Night Program which was held on November 8, 1976. This program is held annually for the purpose of acquainting the parents with the teacher and the curriculum for the school year (2 T 73). Dr. Caggiano, who was present, objected to the respondent's statements regarding her class and the school administration and to her negative attitude, and he sent her a formal letter of reprimand on November 9, 1976 (P-23, 2 T 70-76). During the November 16, 1976 conference with the respondent, Dr. Caggiano discussed his concerns and the negative comments he had received from the student's parents, both orally and in writing, regarding her comments and negative attitude during the program, and he advised the respondent that she had to change her approach to parents (2 T 76-79).

The respondent filed a grievance pursuant to the collective bargaining agreement and asked to have Dr. Caggiano's letter of reprimand as well as the uncomplimentary letters from the parents removed from her personnel file (P-23, 2 T 80, 9 T 23). An arbitration award was issued on December 16, 1978. The arbitrator concluded

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that the respondent had "exercised poor judgment and displayed a negative attitude at Back to School Night, which severely undermined both administrative and parental confidence in her ability to teach her fifth grade class" (P-23 at 8), and found that there was no evidence to support the respondent's claim of anti-union animus on the part of Dr. Caggiano (P-23 at 9). The arbitration award provided that an edited version of Dr. Caggiano's letter of reprimand should remain in the respondent's personnel file and ordered that the letters from the parents be removed (P-23).

During the 1976-77 school year, the parents of several students complained about Ms. Brotzman's attitude to them and their children to Dr. Caggiano, and a number of parents also complained to Matthew W. Costango, the superintendent of schools about the respondent (5 T 54-56).

Dr. Caggiano discussed her attitude to her students and their parents with Ms. Brotzman several times during the 1976-77 school year (2 T 104), and he noted the need for improvement as to her interpersonal skills in his evaluation report for that school year (P-33). In all other areas, Dr. Caggiano found the respondent to be an excellent teacher (P-33, P-34).

Ms. C.M.[3] testified that her daughter, D.M., complained about school during the 1976-77 school year, and that Ms. Brotzman avoided meeting with Ms. C.M. to discuss the matter and suggested to D.M. that she transfer to another fifth grade class (P-24, P-25, P-28, 5 T 37-8). Ms. C.M. stated that because of the respondent's rule restricting the use of the lavatory, D.M. started to wet her pants (5 T 51-2). At a conference, Ms. C.M. stated that the respondent told her that D.M. needed to be "broken" and that the respondent was going to "break" her strong willed attitude (P-25, 5 T 43). In addition, Ms. C.M. stated that when she brought D.M. to school on February 1, 1977, the respondent initiated a verbal tirade against her daughter for being late before she saw that Ms. C.M. was with her (P-26).

Although in Ms. C.M.'s opinion, Dr. Caggiano supported the respondent, he agreed to transfer D.M. to another class (P-27, P-28). On December 6, 1976, Dr. Caggiano wrote a letter to the respondent complimenting her on her attempts to resolve the dispute with Ms. C.M. and her husband (R-14). At the hearing, Dr. Caggiano

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[3]Initials will be used in this initial decision for the names of students and their parents.

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stated that he agreed to the transfer because of the continued personality conflict between the respondent and Ms. C.M.

The respondent stated that D.M. was constantly questioning everything done in the classroom and she told Ms. C.M. that it was necessary to curb her daughter's constant questioning so that the rest of the class could have a chance to ask questions (9 T 68). The respondent denied saying that she would "break" D.M., denied avoiding a meeting with Ms. C.M., denied suggesting to D.M. that she transfer to another class, and denied that she unreasonably limited the use of the lavatory.

Geraldine Rodan, a sixth grade teacher of language arts employed by the Board, testified that she also had a problem with D.M.'s habit of continually asking questions during the 1977-78 school year (6 T 27).

Ms. C.A.V. testified her son, J.V., was in the respondent's class during the 1976-77 school year and that she had him transferred out of the respondent's class because she teased him even after Ms. C.A.V. requested her not to tease him, and after the respondent said, in class, that J.V. had an ugly face (P-29). According to Ms. C.A.V., her son has an attractive face but is sensitive about some facial scars from an accident. Ms. C.A.V. stated that her son did not want to go to school and became ill because of the respondent's attitude to him (5 T 194). After he was transferred out of the respondent's class, Ms. C.A.V. stated that Ms. Brotzman tried to talk to him and grabbed him, and he came home upset with scratches on both arms (5 T 198-201).

Ms. Brotzman testified that J.V. was an extremely serious child and she tried to bring him out of his shell (R-39), and that she would not have teased him by calling him ugly if he were not attractive (9 T 84-5). After the transfer was approved, the respondent said she tried to apologize to J.F., and he misunderstood why she wanted to talk to him, became hysterical and she grabbed him to prevent him from hurting himself (9 T 92-3).

Dr. Caggiano stated that he considered that respondent's comment that J.V. was ugly was inappropriate (P-30).

Although she did not testify at the hearing, letters from Ms. E.N. complaining about the respondent's rude behavior towards her son, L.V., during the 1976-77 school year

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were admitted into evidence (P-31, P-32). Dr. Caggiano stated that L.V. had a behavior problem and needed firm direction and guidance (2 T 102).

Ms. Brotzman received excellent evaluations from Dr. Caggiano and there were no complaints from parents regarding her attitude during the 1977-78 school year (R-19, R-20, R-21, P-35, 2 T 150, 9 T 97) and the 1978-79 school year (R-22, R-23, R-24, 2 T 154, 9 T 98).

When she was transferred to the Elizabeth Haddon School at the end of the 1978-79 school year, the respondent was informed that the transfer was "to achieve a balanced utilization of strength and experience throughout the District" (R-25) and no other reasons were given to her for the transfer (R-25, R-40, 9 T 102). At the hearing, the petitioner's administrators testified that the transfer was intended to give the respondent a fresh start in a new school where the parents were not aware of any previous conflicts (3 T 25, 2 T 162), and it was hoped that the respondent would establish a better relationship with the principal of the Elizabeth Haddon School, Kenneth M. Florentine, than she had with Dr. Caggiano (3 T 25, 2 T 162).

Mr. Florentine was aware that Ms. Brotzman had been transferred in order to give her a change of environment and he initially thought that the respondent had not been treated fairly at the Central School (2 T 28). Mr. Florentine believes in having an informal relationship with his teachers and felt that he and the respondent initially had a good and cordial working relationship.

The Elizabeth Haddon School is commonly known as the "Country Club" since it was built on the site of a former country club. The school is located in the most affluent section of Haddonfield and provides more student programs than the other elementary schools.

During her first year at the Elizabeth Haddon School, Ms. Brotzman taught the fourth grade and Mr. Florentine considered her to be an outstanding teacher (R-1, R-2, R-3, P-3). During that school year, Ms. Brotzman had approximately twenty students and Mr. Florentine received complaints from nine parents about Ms. Brotzman's attitude to her students and their parents.

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Because of the number of complaints, Mr. Florentine concluded that the respondent lacked tact and was not sensitive to the position of the students' parents.

Ms. R.L. testified that she became concerned about her daughter, S.L., when she started crying in the morning and not wanting to go to school (P-1). Prior to this time, her daughter had had a positive attitude to school and was involved in school activities (5 T 86, 98). Ms. R.L. was aware that her daughter had to leave the classroom early at lunchtime since she had been selected to sell milk in the lunch room. During the Back to School Night Program, Ms. R.L. stated that Ms. Brotzman said that she would "break her daughter's spirit" (P-1, 5 T 89). Since she was upset about this comment, Ms. R.L. went to see Mr. Florentine and her daughter was transferred out of Ms. Brotzman's class.

As to this incident, Ms. Brotzman testified that she had told Ms. R.L. that her daughter had to leave ten minutes early at lunch time and was trying to take advantage of the situation by leaving earlier (P-2, 9 T 105-6). The respondent denied that she told Ms. R.L. that she would "break her daughter's spirit," and said that S.L.'s parents requested a transfer because they were upset about any criticism of their daughter (9 T 107).

Ms. R.D. testified that her daughter, J.D., did not want to go to school and complained about stomach aches and headaches, and that she was concerned since her daughter previously had always liked school (5 T 103). In November or December, Ms. R.D. asked for a conference with Mr. Florentine and Ms. Brotzman about her daughter, and during the conference, she asked that her daughter not be told about the meeting (5 T 107-8). On the next day, Ms. R.D. stated that her daughter came home upset and said that Ms. Brotzman had asked her why her parents had complained (5 T 109). Ms. R.D. was upset, and after she met again with Mr. Florentine, her daughter was transferred to another class (5 T 112-3).

Ms. Brotzman denied telling J.D. about her meeting with her parents and assumed that J.D. had learned about the meeting from friends who probably saw the parents in the school (9 T 111-2). After the transfer, the respondent stated that J.D. told her that she wished she was still in the respondent's class (9 T 115).

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Ms. V.D. testified that she was present in the respondent's classroom for a Halloween party and that when her son, B.D., tripped while participating a relay game, Ms. Brotzman called him, in a joking and belittling manner, a "clumsy oaf" and said that if it weren't for B.D., his team would have won (5 T 143-5). Ms. V.D. and her son were hurt and embarrassed by the incident and she talked to Ms. Brotzman after the party but the respondent did not apologize (3 T 148). Ms. V.D. stated that she did not ask for her son to be transferred since she felt that her son would meet people in life who did not like him and that it would be a good experience for him to stay in Ms. Brotzman's class.

As to this incident, Ms. Brotzman had a different recollection of what occurred at the Halloween party. She stated that B.D. got confused during the relay race and did not follow the right sequence, and that she stopped the race, repeated the directions and had it rerun so that B.D.'s teammates would not blame him if they lost (9 T 121-124). The respondent suggested that possibly Ms. V.D. heard one of the students call her son a "clumsy oaf" and denied that she used that term (9 T 123, 125). After the party, the respondent stated that she told Ms. V.D. that she was sorry about what happened and was impressed when Ms. V.D. stated that she felt her son's mistake was due to the pressure he felt because of her presence.

The respondent stated that one possible explanation for the number of parent complaints during the 1979-80 school year was that she gave lower grades than the preceeding teacher who had a lax grading system (9 T 126). She stated that the parents of many of her students were extremely concerned about their children's grades and were angry and offended if their children received low grades (9 T 104).

For the 1980-81 school year, Ms. Brotzman was assigned to teach a fifth grade class and in his reports, Mr. Florentine stated that she was an excellent teacher (P-4, R-4). During that school year, Mr. Florentine stated that he only received a few minor comments regarding Ms. Brotzman.

Ms. A.A.F. testified that when her son, J.F., was assigned to Ms. Brotzman's class, she asked for a transfer since she had heard adverse comments about the respondent but was persuaded to allow her son to remain in the respondent's class (5 T 155-6). After he was in the class for a while, J.F. complained about being intimidated by Ms. Brotzman and Ms. A.A.F. and her husband met with Ms. Brotzman on a number of occasions. Since they felt that Ms. Brotzman was cold and intimidating and did not understand their

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concern about their son's morale, they again asked for a transfer. Since Mr. Florentine refused, Ms. A.A.F. stated that they had their son attend a parochial school for the remainder of the school year. J.F. returned to the Elizabeth Haddon School for the sixth grade (5 T 160).

For the 1981-82 school year, Ms. Brotzman was assigned to a special continuous progress fourth grade class (9 T 133) and she was given excellent evaluations by Mr. Florentine (P-5, R-5). There were no complaints from parents regarding the respondent during that school year.

For the 1982-83 school year, Ms. Brotzman was assigned to teach a fourth grade class and even before the start of the school year, she was aware that she would have difficulties since the class contained students that were having problems interacting with each other (10 T 37-8), and she had suggested to Mr. Florentine that he consider reassigning some of the students (10 T 39). Mr. Florentine agreed to consider her request but later told her that he did not regroup the students since the parents he contacted objected to any change (10 T 40). During the school year, Ms. Brotzman stated that she recommended to several parents that they request that their children be transferred to the other fourth grade class to alleviate the behavior problems that existed (10 T 17-9).

For that school year, Mr. Florentine again found Ms. Brotzman to be an excellent teacher (P-6, R-6, R-7, R-8); however, he noted that she needed to develop more tact and diplomacy in dealing with parents and students. During the school year, Ms. Brotzman received a letter from Barry R. Ersek, superintendent of schools, complimenting her on the development of the reading material for her classroom (R-26).

During the school year, Mr. Florentine received negative comments about Ms. Brotzman from approximately 2/3 of her student's parents and several of the parents initiated discussions about having a meeting of parents about Ms. Brotzman. Mr. Florentine was able to dissuade the parents from having such a meeting; however, he felt that there was a reason for concern in view of the large number of complaints and the fact that the complaints were coming from parents who were normally supportive of the school and who had rarely complained about teachers in the past. Mr. Florentine stated that no other teacher employed by the Board had a comparable number of complaints made about him or her. Based on the complaints he received, Mr. Florentine concluded that the respondent was rude, curt, abrupt and condescending to the parents and that

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Ms. Brotzman's behavior was unprofessional. Of the parents who complained about Ms. Brotzman during the 1982-83 school year, eight testified during the hearing in this matter.

Ms. D.L. testified that at the parent-teacher conference after the first marking period, she and her husband were told by Ms. Brotzman that their son, S.L., would not be promoted at the end of the school year because he was socially immature (P-16). Both parents were upset and felt that Ms. Brotzman had made up her mind without giving S.L. a chance to improve within the remainder of the school year. After they spoke to Mr. Florentine, S.L. was transferred to the other fourth grade class (4 T 47). Ms. D.L. felt that they could make sure that their son matured rapidly (4 T 44) even if they had to bribe him to behave in class (4 T 59).

According to Ms. D.L., this was the first time it was suggested to her and her husband that their son be retained in a grade and she had no recollection of a similar suggestion being made by S.L.'s third grade teacher, Carol Paton (4 T 45, 52-55).

Ms. Brotzman stated that Carol Paton had suggested to Ms. D.L. and her husband that their son be retained in the third grade because of his difficulties with his subjects and his lack of maturity (R-28, R-29), and that she had discussed with them the possibility of retaining S.L. (R-30, 9 T 135). According to the respondent, neither Ms. D.L. nor her husband would accept the fact that S.L. was not ready for the demands of the fourth grade and that he would benefit by the retention (9 T 134-6).

Ms. K.K., who was a class mother, stated that while her son was in the respondent's class, he came home angry, was unhappy about school and complained about the other students in the class (P-19, 4 T 117). On one occasion, Ms. K.K. was told that Ms. Brotzman held up her son's report and told the class that she could not read his handwriting. Since Ms. K.K. was aware that her son had poor handwriting, she did not talk to Ms. Brotzman about the incident; however, she thought it was not handled properly (4 T 121-2). Ms. K.K. said that Ms. Brotzman made a number of negative comments to her and her husband about their son, including the fact that he talked too much and did not remain in his seat.

Ms. K.K. felt that Ms. Brotzman was allowing the class to get out of hand. According to Ms. K.K., the children in the respondent's class for the 1982-83 school year

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had been together since they started school and there were no serious problems until the respondent became their teacher. Thereafter, they became beligerent and there were fights among the students. Once while she was in the respondent's classroom, Ms. K.K. became upset when a student became distraught because he could not find a partner and started to cry. Another parent, rather than the respondent, found him a partner (4 T 115-6). Ms. K.K. was one of the initiators of the proposed meeting of parents regarding Ms. Brotzman.

Ms. Brotzman stated that if she had seen the boy who could not find a partner start to cry, she would have assisted him (10 T 8-9). On that day, Ms. Brotzman told the students to find partners and she had already predetermined that there was an equal number of students and that all of them could find a partner (10 T 6). The respondent was aware that two of her students sometimes had difficulties finding partners and she usually held back her help to give them an opportunity to find someone on their own (10 T 6).

Ms. T.G. stated that her initial contact with Ms. Brotzman was the respondent's note asking her to get her son, A.G., to stop teasing a girl in the class and suggesting she speak to the girl's parents. Ms. T.G. responded by a note stating that it was the respondent's responsibility to ensure that there were no problems in the classroom but that she would talk to her son about the matter. Thereafter, Ms. T.G. and her husband were scheduled to have a conference with Ms. Brotzman, and since the respondent was running behind schedule, Ms. Brotzman tried to rush through the meeting and made a series of negative comments about A.G. (P-21, 4 T 148). Starting sometime in November 1982, Ms. T.G. stated that her son told her that he was sitting alone facing the wall (4 T 149). Just before Grandparent's Day in April 1983, A.G. requested that he be allowed to sit with the rest of the class and he was upset when Ms. Brotzman refused (4 T 152). Ms. T.G. spoke to Dr. Ersek about the matter and he arranged to have A.G. moved and suggested that Ms. T.G. say nothing to A.G. so that Ms. Brotzman could make the change (4 T 152-3). On the following day, A.G. told his mother that Ms. Brotzman said that he was going to be moved at the request of Mr. Florentine (4 T 153). Dr. Ersek was disappointed in how the respondent handled the matter and felt it would have been better if the respondent had not told A.G. that she was ordered to move him (3 T 21-2).

At the suggestion of Dr. Ersek, Ms. T.G. and her husband met with Ms. Brotzman and Mr. Florentine. Ms. T.G. stated that Ms. Brotzman had nothing positive

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to say about her son, and stated that A.G. would get bored and roamed around the class, and that he was her worse disciplinary problem.

Ms. E.A. testified that her son, C.A., who loved going to school, started to get sick and did not want to go to school soon after he started the fourth grade in Ms. Brotzman's class, and that she was further upset when her son said that Ms. Brotzman indicated that he had a "motor-mouth" (5 T 7-8, 12). Ms. E.A., as a member of the Historic Society, went to Ms. Brotzman's class to make a slide presentation, and was annoyed when Ms. Brotzman did not greet her and her companion when they arrived nor did she thank them after their presentation (5 T 16-8).

Ms. J.R., Ms. D.R. and Ms. S.P.L. testified that their respective children, K.R., B.R., and M.K., had behavioral problems and did not like school while they were in Ms. Brotzman's class, and according to these parents, their children did not have any similar problems before or after they were in Ms. Brotzman's class. These parents were also upset by the way the respondent handled their complaints (P-14, P-15, P-20, P-22, 5 T 63, 5 T 121, 5 T 166).

Although she did not testify, Ms. E.S. wrote a letter to Mr. Ersek stating that the respondent was insensitive to her concerns about her child and that the problems in Ms. Brotzman's class were due to the way she handled the students (P-18). She noted that this class had been together for sometime without any problems and rejected Ms. Brotzman's alleged excuse that the pupil's actions were due to their age (P-18). Ms. E.S. was one of the organizers of the proposed meeting of parents regarding the respondent.

Although neither D.K. nor P.K. were in her classroom, their mother, Ms. C.K., spoke to Mr. Florentine and Dr. Ersek regarding two incidents involving her sons and Ms. Brotzman which occurred during the 1982-83 school year (P-17).

During that year, Ms. Brotzman, as the advisor to the Safety Patrol, gave D.K. 13 demerits. Since her son felt that he should have been assessed only two demerits, Ms. C.K. tried to talk to Ms. Brotzman about the matter in the hall of the school and Ms. C.K. testified that Ms. Brotzman was curt and said that she did not have the time to talk to her (4 T 70).

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The second incident occurred in April 1983 and related to a spitting incident in which P.K. was involved. Ms. Brotzman told P.K. to write a composition against spitting, and Ms. C.K. and her husband complained to Dr. Ersek that this was not an appropriate punishment and that her son should be punished by his teacher and not the respondent (4 T 74-5). Ms. C.K. stated that the respondent stopped P.K. in the hallway, and in front of his classmates, she called Ms. C.K. a troublemaker (4 T 76).

Mr. Florentine stated that the respondent did not deny that she called Ms. C.K. a troublemaker and she said that she used poor judgment (11 T 50-1). Dr. Ersek stated that the respondent admitted that she made a disparaging comment about Ms. C.K. to her son, P.K., in front of his classmates (3 T 27-8). Dr. Ersek felt that the comment was inappropriate and that it put P.K. in an unpleasant and demeaning position (3 T 27).

Ms. Brotzman stated that she was upset when the school administrators allowed Ms. C.K. to interfere in a discipline matter and allowed P.K. not to write the essay (9 T 173-6). According to the respondent, she was asked by Dr. Ersek to write a note to Ms. C.K. explaining why she assigned an essay to P.K. (9 T 169). When she gave the note to P.K., the respondent told him privately that she was distrubed about the fact that he had refused to write the essay (9 T 177). The respondent stated that she did not call Ms. C.K. a troublemaker (9 T 178). According to the respondent, Ms. C.K. had the reputation of being a difficult person (9 T 180-1).

As a witness for the respondent, Ms. C.S.T. stated that her daughter, C.T., was in the respondent's class during the 1982-83 school year, and that this class had behavior problems before the respondent became their teacher. According to Ms. C.S.T., the class contained many bright and active students who "egged each other on" and who teased the girls (6T 123). Ms. C.S.T. state that there were problems with this class also in the 1983-84 school year.

Mr. Florentine stated that he spoke informally on several occasions to Ms. Brotzman regarding the parents' complaints during the 1982-83 school year and had a conference with her regarding the matter in the spring of 1983. In addition, Dr. Ersek spoke to Ms. Brotzman regarding her behavior towards parents, including Ms. C.K., in the spring of 1983 (3 T 22-3). Both of these gentlemen stated that, at the time, they felt that Ms. Brotzman was cooperative and was willing to change her mode of behavior (3 T 31).

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In addition, before the end of the 1982-83 school year, Mr. Florentine spoke to Ms. Brotzman regarding the comments she had placed on her students' report cards and he indicated that it was his policy to have teachers balance any negative comments with affirmative and positive statements about the child's behavior and progress. Although Ms. Brotzman did not agree with this philosophy, Mr. Florentine felt that she understood the policy and would comply in the future.

For the 1983-84 school year, Ms. Brotzman was assigned to teach a fourth grade class and Mr. Florentine noted a favorable classroom observation on November 3, 1983 (R-9). During the initial part of that school year, Ms. Brotzman was assisted by a student teacher, Holly Ann Riddle (R-37). After Ms. Riddle left, Mr. Florentine received a number of adverse comments from parents about Ms. Brotzman.

Ms. N.J. testified that she was told initially by Ms. Brotzman that her daughter, H.J., was doing all right, and was upset when she received the first report card which showed that H.J.'s grades were substantially lower than in the past since she was not informed that there was a problem (P-12, P-13, 4 T 10-1, 21). At a conference with the respondent, Ms. N.J. was told that her daughter was not completing her work and apparently was not taking all of her papers home so that her mother could check her progress (4 T 12). Ms. Brotzman promised to staple H.J.'s papers in the future so that Ms. N.J. would get all of them; however, her daughter's papers were not stapled thereafter (4 T 11, 21). Ms. N.J. stated that Ms. Brotzman was upset about her complaint and implied that it was Ms. N.J.'s responsibility to ensure that her daughter did her homework and brought her work to school. Also, Ms. Brotzman suggested that H.J. might be disturbed and need psychiatric help (4 T 13-4). Ms. N.J. did not feel that her daughter needed such help, although she admitted that her daughter was a "brat."

After this conference, Ms. N.J. received a telephone call at work from her daughter on February 26, 1984 and her daughter said that the respondent had her call to say she had forgotten her homework folder (P-13). On the following two days, Ms. N.J. received similar calls from her daughter regarding her homework (P-13, 4 T 17-8). Ms. N.J. was upset that Ms. Brotzman had her daughter call her from school and felt that the matter could have been handled by telephone calls in the evening so that her daughter would not lose class time (4 T 19). In addition, Ms. N.J. felt that the calls were required by Ms. Brotzman as a retaliation for her complaint.

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Mr. Florentine agreed with Ms. N.J. that her daughter should have not been required to call her during the school day and he felt the respondent's conduct was unprofessional (2 T 32).

Ms. Brotzman stated that H.J. had a problem interacting with her classmates and that she did recommend outside professional help (10 T 59-60). In addition, H.J. was always forgetting to bring her work to school or bringing only a part of work, and that she hoped that by making her call her mother, H.J. would improve her performance (10 T 69-71). According to the respondent, the calls were placed during free periods and not while the pupils were being taught. The respondent admitted that she forgot to staple H.J.'s papers (10 T 65-6).

Ms. C.W. stated that she and her husband were upset when their son, J.W., was placed in a special reading class and when they were unable to set up a meeting with Ms. Brotzman. This matter was resolved after J.W. was given a reading test. Ms. C.W. stated that she was concerned since her son was unhappy and afraid to go to school and because his grades were low. During the conference with Ms. Brotzman in November 1983, Ms. C.W. asked if there was anything she could do to help her son and she did not get a satisfactory answer from Ms. Brotzman. During this conference, Ms. C.W. stated that Ms. Brotzman waved her son's report card in her face and said that the report card is what the world would remember and not his nice clothes and blonde hair (P-11, 4 T 90). At a subsequent conference, Ms. C.W. stated that Ms. Brotzman made negative comments about her son.

Ms. Brotzman stated that J.W. has an attitude and motivation problem which she discussed with Ms. C.W. (10 T 54-8), and denied waving J.W.'s report card in his mother's face and making the statement attributed to her by Ms. C.W. (10 T 55-6). The respondent did recall discussing the importance of grades as compared to superficial things which children consider important (10 T 56).

Ms. Riddle, who was present when the respondent had the conference with Ms. C.W. in November 1983, stated that Ms. Brotzman handled the conference well and tried to avoid creating tension, and that she did not wave a report card in Ms. C.W.'s face while making the statement attributed to her by Ms. C.W. (8 T 56).

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In addition to Ms. C.S.T. (6 T 118), the respondent presented the testimony of ten other parents of students she had taught while employed by the Board. These parents were Mr. D.F.T. (6 T 53), Ms. L.G.C. (6 T 103), Ms. C.R. (6 T 134), Ms. A.M.M. (6 T 154), Ms. S.R. (7 T 3), Ms. U.R. (7 T 15), Ms. K.T. (7 T 36), Ms. V.B.C. (7 T 60), Ms. M.H.S. (8 T 3), and Ms. S.C. (8 T 16), and all of them testified that Ms. Brotzman was an excellent teacher and that they have not been intimidated or upset by her behavior to them.

On cross-examination, Mr. Schmoll established that two of these witnesses, Ms. S.R. and Ms. M.H.S., were neighbors of the respondent. Also, most of these parents stated that they would have been upset if a teacher had told them that he/she were going to break their child's spirit, had called their the child a "clumsy oaf," had waved their child's report card in their face or had criticized the parent in front of the child and his/her peers.

In addition, the respondent presented the testimony of a former student, C.R., who stated that Ms. Brotzman was her teacher when her family first moved to Haddonfield and that Ms. Brotzman had helped her adjust to the school. Ms. C.R. considered Ms. Brotzman to be a perceptive teacher and a friend as well as her teacher (7 T 31).

Lastly, on behalf of the respondent, Barbara Rell, a learning consultant employed by the Board, who is also a member of the Child Study Team, testified that she had the opportunity to observe special education pupils while they were being taught by Ms. Brotzman both at the Central and Elizabeth Haddon Schools and she considered the respondent to be an excellent teacher (7 T 89-90). Ms. Rell stated that Ms. Brotzman was the type of teacher who really tries to help the students to adjust and is willing to do extra work to accommodate their needs (7 T 91-2).

At the end of the second marking period on January 27, 1984, Ms. Brotzman submitted report cards without any written comments. Mr. Florentine stated that it was the school policy to require teachers to place written comments on report cards for the second, third and fourth marking periods and a reminder about the written comments appeared in the school flyer that was sent to the teachers in early January (P-7, P-8, P-10).

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The report cards were returned to the respondent with an anecdotal note from Mr. Florentine (P-8). In this note, he asked Ms. Brotzman to place written comments on the report cards and to meet with him on February 1, 1984. Ms. Brotzman inserted the comments and returned the report cards within twenty-four hours, and she considered the matter resolved (10 T 75).

Ms. Brotzman stated that she did not initially submit any comments since she felt that she was in an "ethical quandary" (10 T 73) because it was her duty as a teacher to be honest in her comments and Mr. Florentine had asked her to be positive to the point of possibly misleading the parents (10 T 72-4).

Mr. Florentine stated that he sent the anecdotal note since he was discouraged by the respondent's action in view of the conversation regarding comments on report cards he had with her at the end of the previous school year. Mr. Florentine was further upset when Ms. Brotzman did not sign and return the anecdotal note and when she did not appear at the February 1, 1984 conference.

Mr. Florentine sent Ms. Brotzman a memorandum asking her to sign the anecdotal note and return it to him (P-9). The respondent indicated on the memorandum that she had thrown out the anecdotal note (P-9). Thereafter, when he asked Ms. Brotzman to sign a copy of the anecdotal note, she refused and suggested that he tear it up (11 T 51-2). Mr. Florentine stated that the respondent was abrupt and insubordinate, and he felt that she was challenging his authority (2 T 51-2).

On the anecdotal note form, it is clearly stated that the teacher's signature indicates only the receipt of the note (P-8). Mr. Florentine stated that Ms. Brotzman had received from him several anecdotal notes which had been complimentary of her performance and that she had returned these notes with her signature.

Ms. Brotzman stated that she felt hurt by Mr. Florentine's insistence on formality and that she reacted emotionally and refused to sign the anecdotal note (10 T 77). Ms. Brotzman stated that she was unaware that Mr. Florentine had checked the space provided for requesting a conference on the anecdotal note (P-8), and that if she had known that Mr. Florentine wanted a conference, she would have met with him (10 T 78).

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In his report regarding a subsequent meeting held on February 7, 1984, Mr. Florentine stated that Ms. Brotzman explained that she did not sign the note because she disagreed with the way the matter was brought to her attention, and she felt that Mr. Florentine had used poor managerial judgment and that the note was a display of power (2 T 51, P-10). Ms. Brotzman stated that she was not given an opportunity to sign the anecdotal note on February 7, 1984 (10 T 80).

Dr. Ersek, by letter dated February 23, 1984, scheduled a meeting on February 24, 1984, with the respondent to discuss the anecdotal note incident and her conduct towards parents (P-36, 3 T 11-2). The respondent called his office upon receipt of the letter, and left a message that the February 24, 1984 date was not convenient and suggested that they meet late in the week (P-37). By letter dated February 24, 1984, Dr. Ersek suspended Ms. Brotzman without pay (P-38).

By letter dated February 29, 1984, Dr. Ersek suggested possible dates for a conference with the respondent (P-39). This conference was held on March 16, 1983, and the respondent and Ms. Johnson were present. During this conference, Ms. Brotzman signed the anecdotal note.

I **FIND** that the facts as set forth above are not in dispute except for the testimony relating to the incidents involving Ms. C.M., Ms. R.L., Ms. R.D., Ms. V.D., Ms. D.L., Ms. C.K. and Ms. C.W. There is, in addition, disagreement as to the interpretation to be given to what took place between the respondent and many of the parents who testified on behalf of the Board.

It was admitted by the Board that none of the school administrators personally observed any impropriety by the respondent, except for her statements during the Back to School Night Program in 1976, and their conclusion that the respondent's attitude to parents was unprofessional was based on the number of complaints that they had received as well as the number of transfers that were requested. Mr. Schmoll argued that the parents who were called as witnesses for the petitioner were credible since they had nothing to gain by the outcome in this matter.

In response, Ms. Johnson argued that all parents have a natural bias or prejudice in favor of their children which is likely to taint their perception of events involving their children especially where the teacher is forthright in pointing out their

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children's shortcomings. In addition, she questioned the ability of parents to make judgments regarding the professional conduct of teachers. Lastly, Ms. Johnson noted that many of the parents' letters which were admitted into evidence on behalf of the petitioner were written only after an administrator called the parents and requested such a letter.

As to the incident involving Ms. C.W., I **FIND** based on the testimony of both the respondent and Ms. Riddle, that Ms. Brotzman did not wave the report card in Ms. C.W.'s face; however, she did make it clear that she thought Ms. C.W. put too much emphasis on material things instead of stressing the importance of school grades.

Since Ms. R.D. was not present when Ms. Brotzman allegedly told her daughter about the meeting and Ms. R.D.'s daughter did not testify, I **FIND** the respondent's testimony regarding the incident to be credible.

As to Ms. D.L.'s testimony regarding the respondent's statements regarding the promotion of her son, I **FIND** that Ms. D.L. has a poor memory regarding statements made as to the retention of her son and I **FIND** the respondent's testimony as to this incident to be credible.

Based on the testimony of Ms. C.K. and the admissions of the respondent made to Dr. Ersek and Mr. Florentine, I **FIND** that Ms. Brotzman did make a disparaging remark about Ms. C.K. to her son, P.K.

Also, I **FIND** that it is impossible to make determinations as to what took place during the other disputed incidents, those involving Ms. C.M. ("break" her daughter), Ms. R.L. ("broke" her daughter's spirit) and Ms. V.D. ("clumsy oaf"). However, I **FIND** that it is clear from the number of complaints and requests for transfers that the respondent did not attempt to be diplomatic in her dealings with parents notwithstanding the counseling she had received from her supervisors. Although it is not disputed that the respondent is an excellent teacher in that she knows her subject matters and is able to make a comprehensive presentation, I **FIND** that the respondent's actions and comments to a substantial number of parents resulted in a polarizing of positions rather than encouraging the parents to work with her for the benefit of their children.

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CONCLUSIONS OF LAW

Mr. Schmoll, on behalf of the petitioner, stated that the Board had shown a pattern of confrontation with students' parents arising from the respondent's negative, intimidating and belittling behavior, and that the counseling efforts of Dr. Caggiano, Mr. Florentine and Dr. Ersek produced only short-term improvements followed by a resurging of the problem. Mr. Schmoll argued that the respondent's inability to relate to parents in a professional manner established incapacity and noted that the Appellate Division has held that as to the issue of incapacity "the touchstone is fitness to discharge the duties and function of one's office or position," In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), cert. den., 65 N.J. 292 (1974).

In addition, Mr. Schmoll argued that the respondent's pattern of confrontation with parents is conduct unbecoming a teacher, Tenure Hearing of Ernest E. Gilbert, OAL DKT. NOS. EDU 3388-80 and EDU 7375-81 (Feb. 16, 1982), aff'd in part by Comm. of Ed., April 5, 1982, aff'd, State Bd. of Ed., October 6, 1982; Tenure Hearing of Betty Nacht, 1980 S.L.D. 431. Also, Mr. Schmoll argued that the incident relating to the respondent's refusal to sign the anecdotal note is insubordination and demonstrated the respondent's cavalier attitude to the directions of her supervisor. He noted that school law decisions have established that insubordination is conduct unbecoming a teacher, Gilbert; Tenure Hearing of Anthony J. Scarpignato, Comm. of Ed., May 9, 1983, aff'd with modifications, State Bd. of Ed., September 7, 1983; Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974).

Lastly, Mr. Schmoll argued that the respondent's pattern of unprofessional conduct towards parents, whether it were to be considered to be incapacity or conduct unbecoming a teacher, in addition to respondent's insubordination as to anecdotal note incident warrants her removal from her tenured position.

Ms. Johnson, on behalf of the respondent, renewed the argument she made as part of her motion for summary judgment, namely, that incapacity can only be proven by a showing that a teacher has a physical or mental infirmity and can no longer perform his/her assigned duties. Tenure Hearing of Evelyn Cohn, Comm. of Ed., August 12, 1983; Tenure Hearing of Blanche Sheets, 1979 S.D.L. 790, rev'd, State Bd. of Ed., 1980 S.D.L. 1536; Tenure Hearing of Nancy Bacon, 1978 S.D.L. 776; Tenure Hearing of Thomas Healy, 1977 S.L.D. 876, aff'd, State Bd. of Ed., 1978 S.D.L. 1019; Tenure Hearing of David

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Bernstein, 1967 S.L.D. 73. Ms. Johnson stated that in Grossman, the court's determination of incapacity was based on extensive medical testimony and that the court concluded that Ms. Grossman's presence in the classroom would "create a potential for psychological harm to the students" (Grossman at 32), and that the Board in this matter had made no such presentation. Ms. Johnson argued that if it were determined that the respondent's conduct towards parents is unacceptable, then the charge against her should be inefficiency. Such a charge can not be sustained in this matter since by statute, a board of education must give prior notice before certifying the charge of inefficiency to the Commissioner. N.J.S.A. 18A:6-11; Tenure Hearing of Barbara Roberts, Comm. of Ed., April 19, 1984; Tenure Hearing of Marilyn Feitel, 1977 S.D.L. 451, aff'd by State Bd. of Ed., 1977 S.D.L. 458.

Additionally, Ms. Johnson argued that the respondent's conduct towards parents was proper, and that the complaints presented by the petitioner were minor and insignificant. Ms. Johnson stated that Ms. Brotzman was an honest and forthright teacher who believed in telling the parents when their children were exhibiting any learning or behavioral difficulties even at the risk of creating friction in those cases where the parents were not receptive to her comments. Ms. Johnson stated that this is a laudable attitude by a teacher and does not warrant the imposition of any disciplinary action.

Further, Ms. Johnson stated that as to the anecdotal note incident, Ms. Brotzman was surprised by the sudden formality imposed by Mr. Florentine, and that she did not see the request for a conference nor did she think there was any need for a follow-up since she had complied with his request. Even if her actions were technically conduct unbecoming a teacher, Ms. Johnson argued it was a minor violation which does not warrant any disciplinary action.

Lastly, Ms. Johnson argued that if Ms. Brotzman's conduct warrants the imposition of any disciplinary action, removal is not appropriate and that some lesser penalty should be imposed in this matter.

As to the charge of incapacity, I am still persuaded that Ms. Johnson's argument as to what must be shown in order to prove such a charge is incorrect and that the charge can be sustained upon a showing that a person has demonstrated an inability to perform in an acceptable manner even if there is no showing of a physical or mental infirmity of the type which would necessiate medical attention. However, I agree with

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Ms. Johnson's argument and I **CONCLUDE** that the charge of incapacity was not proven. In this matter, there is no regular pattern of incidents over a lengthy period of time but rather sporadic problems separated by school years without problems. This demonstrates that Ms. Brotzman can conform to the Board's standards when she wants to do so. Also, I **CONCLUDE** that the respondent has not shown that the tenure charge should have been inefficiency rather than incapacity.

As to her conduct towards parents, I **CONCLUDE** that the Board has shown that Ms. Brotzman's actions constituted conduct unbecoming to a teacher, and that she has failed to comply with the Board's standard regarding such conduct, notwithstanding the numerous conversations and conferences with her immediate supervisors, Dr. Caggiano and Mr. Florentine as well as with Dr. Ersek. It was very clear from the testimony of the Board's supervisors that teachers were advised that they should point out to parents any learning or behavioral difficulties but that it should be done in such a manner that the parents would accept the teacher's comments and work with the teacher in formulating the corrective measures that should be taken. By her frank and abrasive manner, Ms. Brotzman antagonized the parents which made it much more difficult to achieve the necessary cooperation of the parents. There is no doubt that Ms. Brotzman is an intelligent and gifted teacher and that she has a sincere concern regarding her students' well-being. Where the parents were not offended by her manner, as shown by the parents who testified on her behalf, she and the parents were able to work together to ensure that the pupil received the best possible educational opportunities available to meet his/her individual needs. It is also quite evident that where the parents were offended by her approach or comments, a working relationship was not achieved and there was the likelihood that the pupil utlimately suffered by the situation.

As to the anecdotal note incident, I **CONCLUDE** that respondent's actions equate to insubordation and conduct unbecoming a teacher.

DISPOSITION

Based on my review of the facts as well as my consideration of the legal arguments presented, I **CONCLUDE** that the respondent's acts of insubordination and conduct unbecoming a teacher do not warrant removal but that the imposition of discipline is appropriate. Therefore, I **ORDER** that the Board reinstate the respondent to her position but that the respondent is not entitled to any back salary for the first 120

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days of her suspension. Further, I **ORDER** that the respondent be given a letter of reprimand regarding her conduct towards parents which advises her that if there is not a significant improvement in the future, she may be the subject of further disciplinary action. Lastly, I **ORDER** that the respondent's salary increment be withheld for the 1984-85 school year.

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

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

December 26, 1985
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DEC 27 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 31 1985
DATE

Ronald M. Parker/s.s.
OFFICE OF ADMINISTRATIVE LAW

ml/ee

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IN THE MATTER OF THE TENURE :
HEARING OF HELEN BROTZMAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF HADDONFIELD, CAMDEN COUNTY. :
:

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

It is observed that timely exceptions to the initial decision have been filed with the Commissioner by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions argues as follows:

1. With respect to the tenure charge of incapacity, the Board argues that the judge erred in failing to render a finding that respondent was guilty of incapacity, as well as unbecoming conduct and insubordination. In this regard the Board in its exceptions seeks to advance its position in pertinent part as follows:

> ***[T]he finding that dismissal based on incapacity can be avoided simply because the tenured teacher can subjectively decide when to act professionally and when not to should be summarily rejected. Whether or not respondent wants to conform to the Board's standards for professional conduct is irrelevant. Wanting to conform to the Board's standards is a condition of employment and a professional responsibility that is required of all school employees. Judge Tylutki's opinion would allow tenure teachers to decide for themselves when to act in an acceptable manner and avoid dismissal charges based on incapacity simply because the teacher is able to make short-term, cosmetic improvements.
>
> Here, the central issue is whether respondent did in fact meet the Board's acceptable level of professional conduct and the ALJ specifically found that she didn't. Indeed, the ALJ found undisputed the testimony of Dr. Caggiano and Mr. Florentine, respondent's principals, as well as Dr. Ersek, the Superintendent of Schools, of the repeated, unsuccessful efforts by these supervisors, in the form of conferences, evaluation comments and written reprimands, to change respondent's belligerent, rude and abrasive behavior. More specifically, the ALJ found that

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> respondent "did not attempt to be diplomatic in her dealings with parents notwithstanding the counseling she received from her supervisors." Initial Decision [ante].
>
> (Board's Exceptions, at pp. 6-7)

2. Notwithstanding the ALJ's findings of the tenure charges of unbecoming conduct and insubordination, the Board rejects the penalty recommended by the ALJ herein and urges the Commissioner to find and determine that nothing less than respondent's dismissal from tenured employment is warranted. The Commissioner does not agree.

Upon review of the Board's exceptions to the initial decision the Commissioner finds and determines that the ALJ's finding that the Board failed to prove its tenure charge of incapacity against respondent is consistent with the factual circumstances set forth in the record of this matter which are specifically supported by the conclusions of law addressed in the initial decision, ante.

What remains to be considered is the sufficiency of the penalty recommended by the ALJ resulting from those incidents related to the charges of insubordination and unbecoming conduct of which respondent has been found guilty as charged.

It is apparent from a review of respondent's classroom observations and annual evaluation reports prepared by her administrators that respondent has been determined to be a superior teacher during all the periods of time controverted herein.

However, a large portion of the documentation and testimony adduced at the hearing involved those incidents in which respondent was not formally evaluated or documented by her superiors in her annual evaluation reports.

While the Commissioner does not condone those actions of respondent for which she has been found guilty herein, nevertheless it must be pointed out that the failure of the school administration to include those incidents of respondent's unsatisfactory behavior in her annual evaluation reports from their inception, compromised the lawful intent for which such evaluations were intended. Thus, the gravity of respondent's conduct as viewed by her superiors and by the parents of certain pupils in her classroom over the years was not brought to the Board's attention for the purpose of invoking remedial disciplinary action.

Consequently, despite all the incidents pertaining to respondent's unsatisfactory behavior left unreported over the years, the Board was finally apprised of those events that occurred between respondent and her principal during the 1983-84 school year which initially gave rise to the tenure charges against her.

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In the Commissioner's judgment respondent's acts of insubordination and unbecoming conduct cannot be excused. However, in assessing a penalty to be imposed against her the Commissioner cannot ignore the fact that her superiors have evaluated her skills and abilities as a teacher as being superior while in the Board's employ.

In view of the above, the Commissioner concurs with the recommended penalty by the ALJ which shall be imposed against respondent in the instant matter.

Accordingly, the Board is ordered to reinstate respondent to a teaching position without salary for the first 120 days of her suspension on tenure charges and the Board is directed to withhold respondent's salary increment for the 1984-85 school year.

Finally, the Board is directed to place a letter of reprimand in respondent's file which advises her that, in the event there is not significant improvement in her objectionable conduct in the future, she may be subject to further disciplinary action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 10, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
PARTIAL SUMMARY JUDGMENT
OAL DKT. NO. EDU 6027-85
AGENCY DKT. NO. 297-8/85

A.A., ON BEHALF OF
HIS SON, A.A., JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY,
Respondent.

Carolyn Roscoe, Law Clerk, appearing pursuant to N.J.A.C. 1:1-3.12(a)4, for petitioner (Alfred Slocum, Public Advocate of New Jersey, attorney)

James E. Collins, Esq., for respondent (Cerrato, O'Connor, Saker & Collins, attorneys)

Record Closed: December 5, 1985 (Issue No. 1)

Decided: December 18, 1985

BEFORE LILLARD E. LAW, ALJ:

Petitioner filed a Verified Petition of Appeal before the Commissioner of Education on behalf of his son, A.A., Jr., a classified handicapped pupil, pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq., and under protest following a denial of a due process hearing request before the Division of Special Education, New Jersey Department of Education as provided by 34 C.F.R. § 76.780. Petitioner

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alleges, among other things, that $325.00 per pupil transportation limit as provided by N.J.S.A. 18A:39-1 and as applied by the Board of Education of the Freehold Regional High School District (Board) is substantially less than petitioner expends each school year to transport A.A. Jr. to a nonpublic school and is violative of petitioner's rights under the Education for All Handicapped Children Act (EHA), 20 U.S.C. §§ 1400 et seq., and pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Board answers the petitioner together with eight separate defenses whereby it asserts, among other things, that it has at all times acted properly in accordance with the law.

The Commissioner transmitted this matter to the Office of Administrative Law on September 24, 1985, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 25, 1985, at which it was agreed that the issue of jurisdiction was ripe for summary decision before a hearing on the merits of petitioner's appeal is to be heard. That issue as set forth in the prehearing order is framed, as follows:

> Whether this matter, which has been denied a due process hearing request by the New Jersey Department of Education, Division of Special Education under 20 U.S.C. §§ 1400 et seq., Education of the Handicapped Children's Act and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, is within the jurisdiction of the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9?

Pursuant to the prehearing order, the parties submitted letter memoranda, attachments and stipulations. The last document was received by the undersigned on December 5, 1985, which constituted the close of the record with respect to Issue No. 1.

STIPULATIONS

1. PETITIONER'S MEDICAL DISABILITY

> The respondent herein, Board of Education of the Freehold Regional High School District, Monmouth County, et al, stipulates to the fact that A.A., Jr. has an orthopedic handicap. That is, according to the confidential records from A.A., Jr., grammar school attendance, he unfortunately, is suffering form a spinal muscular atrophy disease called Anterior Horn Cell Disease.

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2. PETITIONER'S CLASSIFICATION

Petitioner, A.A., Jr., has been classified as of October 29, 1984, as orthopedically handicapped.

3. PETITIONER'S IEP

A.A., Jr. is currently functioning at or above grade level in all academic subjects. Recent evaluation conducted in October, 1984, indicated that A.A., Jr.'s testing results, report card grades and reports from school personnel document adequate, academic performance. No additional academic services deemed to be necessary in accordance with the most recent evaluation of A.A., Jr.

The Child Study Team conclusion is as follows:

Based on an evaluation of professional reports, A.A., Jr. is found to be eligible for classification as orthopedically handicapped in need of related services - transportation. The motor neuron disease from which he suffers results in impaired locomotive ability and voluntary muscle control weakness. Academic, adaptive and intellectual functioning are at or above age expectancy.

4. The circumstances under which Petitioner was removed from the Board's school and placed in Christian Brother's Academy (CBA):

A.A., Jr.'s placement at CBA is a voluntary placement and is totally unrelated to A.A., Jr.'s orthopedic handicap and/or any special needs relating to A.A., Jr.

The voluntary placement of A.A., Jr., at CBA, which is unrelated to his classification, is at the election of his parents and not required by any evaluation of A.A., Jr.

ARGUMENTS OF THE PARTIES

PETITIONER'S ARGUMENTS

Petitioner asserts that as a consequence of A.A., Jr.'s disabling condition, his mobility is so restricted that he cannot run, nor climb stairs except on his hands and knees, and easily loses his footing with a mild shove or push. Petitioner contends that A.A., Jr. is subjected to considerable personal risk if or when he uses the Board's regular pupil transportation system to CBA. With such use, A.A., Jr. is exposed to vehicular

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traffic which involves both a lengthy walk to the schoolhouse from the bus and an intermediate stop at a bus depot where pupils are required to regroup for transport to school and home. Petitioner asserts that it is his opinion as well as A.A., Jr.'s physician (Dr. Sidney Carter) that A.A., Jr. requires special transportation by way of a special van to assure curbside pickup and drop-off in close proximinty of the entrance to CBA. Alternatively, and less desirable, petitioner would concede to the use of the Board's regular school bus in the event A.A., Jr. was provided with an adult assistant to accompany him in getting on and off the bus and aid A.A., Jr. to the school building at CBA.

Petitioner objects to the Board's alternative to provide the statutory annual $325 (now $406) limit to petitioner in lieu of A.A., Jr.'s use of the pupil transportation to CBA supplied by the Board. N.J.S.A. 18A:39-1. Petitioner seeks an order compelling the Board to provide A.A., Jr. with a special van or, alternatively, an adult assistant to accompany him on the Board's regular pupil transportation to CBA.

With respect to the issue of jurisdiction, petitioner offers a two-part argument as follows:

I

Petitioner contends that this matter involves a violation of the EHA and is not within the jurisdiction of the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9. N.J.S.A. 18A:6-9 provides that, "The commissioner shall have jurisdiction to hear and determine,. . . all controversies and disputes arising under the school laws."

Petitioner has charged that, by asserting the statutory limitation contained in N.J.S.A. 18A:39-1 as the reason for rejecting petitioner's request for specialized transportation, respondent has violated the Education of the Handicapped Act (EHA) 20 U.S.C. § 1400. Petitioner does not allege a violation of the New Jersey school laws by the school board. It is, in fact, acknowledged that the statutory amount has been provided; it is asserted, however, that the amount is wholly inadequate for the services required. Provision of the amount mandated by state law will not in and of itself satisfy the clear-cut requirements of the federal EHA. As such, the petition does not allege a controversy arising under the school laws over which the Commissioner of Education has jurisdiction pursuant to N.J.S.A. 18A:6-9.

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II

Petitioner argues that the Commissioner of Education does have jurisdiction over the matter, pursuant to 20 U.S.C. § 1415; however, the decision of the administrative law judge is final.

20 U.S.C. § 1415(a) requires the establishment and maintenance of procedures, "to assure that handicapped children and their parents . . . are guaranteed procedural safeguards with respect to the provision of free appropriate public education." One such procedure, stated in § 1415 (b) (E), is the opportunity to present complaints.

20 U.S.C. § 1415 (2) goes on to provide that upon presenting a complaint, "parents . . . shall have an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or intermediate educational unit, as determined by state law or by the state educational agency."

Petitioner originally requested a special education due process hearing, pursuant to N.J.A.C. 1:6A-2.2, alleging a violation of 20 U.S.C. § 1400 et seq. The petition was rejected on the ground that N.J.A.C. 6:28-6.3(e) is intended to limit petitioner's rights, as a nonpublic school pupil, to a special education due process hearing only where the provision of a limited number of services is being challenged. The enumerated services did not include the provision of the local school board, of the related service of transportation.

Upon the recommendation of the Director of the Division of Special Education, and following his initial refusal to accept the complaint, the petition was filed, under protest, with the Commissioner of Education. However, pursuant to 20 U.S.C. § 1415(b)(2), the Commissioner shall have no power over the decision.

In complaints charging a violation of EHA, the role of the Commissioner is limited to receiving the petition. 20 U.S.C. § 1415(b)(2) of the statute requires that the hearing shall be conducted by an impartial hearing officer. 20 U.S.C. § 1415(e)(1) further provides that the decision of the hearing officer shall be final, subject only to the right of appeal in a civil action brought in a state court or district court. The decision is not

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recommended nor is it subject to approval by the Commissioner. Thus, in the present case, the Commissioner is precluded by the federal statute from rendering a decision in the matter or in any way affecting the decision rendered by the independent hearing officer.

In conclusion, petitioner asserts that the instant matter, charging a violation of the EHA is before the Commissioner under protest. Petitioner believes that the complaint should more properly be before the Division of Special Education because a violation of the federal special education law is charged. However, to the extent the Department of Education has jurisdiction over the matter, it is limited to receiving the complaint and does not extend to issuing a decision that is final. The authority to hear the complaint and issue a final decision is in the independent hearing officer.

THE BOARD'S ARGUEMENT

The Board observes that at the prehearing conference conducted on October 25, 1985, the undersigned requested that as to issue No. 2 before this court, that counsel address whether or not the respondent, Board of Education, is in compliance with the provisions as set forth in N.J.S.A. 18A:39-1. On page two of petitioner's brief, it is, in fact, acknowledged that the statutory amount of $406 is being expended for the transportation of petitioner's son, A.A., Jr. Despite petitioner's assertions to the contrary, it is not up to the parties involved in the present matter to ascertain whether or not this statutory allowance is adequate for the services allegedly required.

During discovery in this matter, petitioner was provided with a letter from Doctor H. Victor Crespy, Superintendent of Schools, stating that no federal funds are received by respondent for any allocation towards transportation. In conjunction with this, it is important to recognize that 20 U.S.C. § 1400(b)(9) states:

> it is in the National interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to ensure equal protection of the law.

The Board asserts that no financial assistance from the federal government is, in fact, directed towards that transportation aspect of public education in the Freehold Regional District.

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The Board observes that on August 29, 1985, the United States Department of Education administratively closed petitioner's compliant which was filed under Section 504 of the Rehabilitation Act of 1973 for want of jurisdiction. Accordingly, page two of that letter, in part, reads as follows:

> A review of the Federal financial assistance information supplied by the District and an interview with the District's Director of Transportation lead OCR to conclude that the District's private school transportation program does not receive or benefit from Federal financial assistance. Therefore, based on the information provided by the District, we cannot establish that the alleged discrimination occurred in a program or activity which is subject to the requirements of the Section 504 implementing regulation. Accordingly, we have determined that we do not have jurisdiction to issue a compliance determination in this complaint. [Exhibit A]

The Board observes that the prehearing order further directed that the parties ascertain whether or not the Commissioner of Education has jurisdiction over the matter, pursuant to N.J.S.A. 18A:6-9. Notwithstanidng petitioner's conflicting statements on page two of his brief, it is submitted that N.J.S.A. 18A:6-9 indicates that:

> The Commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

The Board argues that despite clarity, petitioner states that although no New Jersey School Laws have been violated by the respondent, Federal Law is cognizable in this forum. Petitioner's own references defeat this contention. Petitioner's reliance on 20 U.S.C. § 1415 (2) may well be consistent with the result that was reached when their request for a special education due process hearing, pursuant to N.J.A.C. 1:6A-2.2 was denied. The petition was rejected on the ground that N.J.A.C. 6:28-6.3(e) is intended to limit petitioner's rights, as a nonpublic school student, to a special education due process hearing only where the provision of a limited number of services is being challenged. In part, 20 U.S.C. § 1415(b)(2) reads:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardians shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

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However, this subsection of 20 U.S.C. § 1415 may not be read in an isolated fashion. It is to be read in conjunction with § 1415(a) which specifically conditions the enumerated procedural safeguards required under the receipt of federal funding with regard to the service being challenged. Discovery has clearly indicated that no federal funds are allocated in this district towards transportation. Hence, it is inappropriate for petitioner to invoke federal law that may be beneficial when, in fact, respondent has derived no assistance from the federal government.

Additionally, respondent takes exception to petitioner's suggestion that the CBA is located within the Freehold Regional High School District. This is patently not so. The CBA is located in the Lincroft section of the Middletwon Township and the Middletown Township Board of Education is a separate school district. Inasmuch, as the petitioner has elected to have A.A., Jr. attend a private school, not in conformance with any of the requirements of the IEP, the petitioner must bear the responsibility for any additional, individual, or particular transportation costs relating to this voluntary decision.

The Board contends that state law does no inequity to the EHA. If petitioner could place his son in a program approved under N.J.S.A. 18A:46-1 et seq., the transportation costs for same would be borne almost entirely by state aid to the school district. N.J.S.A. 18A:46-23.

For these reasons, the Board requests that the petition be dismissed.

DISCUSSION

The sole issue for consideration at this juncture is whether petitioner's claim for transportation service for a handicapped pupil voluntarily attending a private, nonpublic school is cognizable under the jurisdiction of the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9 or, rather, is justiciable under the provisions of EHA, 20 U.S.C. § 1400 et seq and/or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The stipulated facts in this matter need not be recited here and are therefore adopted, by reference, as FINDINGS OF FACT.

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It is apparent from the record that petitioner brought a "complaint" against the Board before the United States Department of Education, Office on Civil Rights (OCR), alleging, among to her things, that the Board discriminates against A.A., Jr. on the basis of his handicap with respect to its pupil transportation services, pursuant to Section 504, 29 U.S.C. § 794 (Exhibit A). Subsequent to an on-site visitation by representatives of OCR, together with data and information gleened therefrom, OCR determined it had no jurisdiction to issue a compliance determination to petitioner's complaint under Section 504 (Exhibit A).

The OCR's determination is supported, in part, by the opinion delivered by Chief Justice Burger, United States Supreme Court, in Irving Independent Sch. Dist. v. Tatro, 52 U.S.L.W. 5151 (1984), where the majority held that relief under Section 504 of the Rehabilitation Act is "inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services." Id. at 5154 (Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part). In denying jurisdiction with respect to petitioner's complaint under Section 504, the OCR stated, in part, that:

> The complainants allegations, if true, also could constitute a violation of the Education of All Handicapped Children Act of 1975 (EHA), 20 U.S.C. §§ 1401 et seq. Specifically, the District's alleged failure to provide a handicapped student enrolled in a private school with transportation services could violate 34 C.F.R. § 300.452 of the EHA implementing regulation. [Exhibit A at 2].

Petitioner subsequently brought its complaint against the Board before the New Jersey Department of Education, pursuant to N.J.A.C. 1:6A-2.2, alleging a violation of 20 U.S.C. § 1400 et seq. Petitioner's complaint was rejected by the Department of Education on the ground that the regulatory scheme under N.J.A.C. 6:28-6.3, Services for Nonpublic School Pupils; specifically N.J.A.C. 6:28-6.3(e), is intended to limit petitioner's rights, as a non-public school pupil, to a special education due process hearing (N.J.A.C. 6:28-2.6 and 2.7) only where the provision of a limited number of services is challenged. The enumerated services did not include the provision by the local board of education, of the related service of transportation. As a consequence of the Department of Education rejection of petitioner's complaint under 20 U.S.C. § 1400 et seq., petitioner filed the herein Petition of Appeal, under protest, before the Commissioner.

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A most comprehensive review and discussion of the EHA, 84 Stat 175, as amended, 20 U.S.C. § 1400 et seq., is set forth in the majority opinion by the United States Supreme Court in Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 73 L. Ed. 2d 690 S. Ct. 3034 (1982). In summary, EHA provides federal money to assist state and local agencies in educating handicapped children, and conditions such finding upon a state's compliance with extensive goals and procedures. Rowley at 179. "The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting time when they were old enough to 'drop out'" Ibid. citing HR Rep. No. 94-332, p.2 (1975) (HR Rep).

In order to qualify for federal financial assistance under the Act, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." Id. at 181 citing 20 U.S.C. § 1412(1). The Act expressly defines "free appropriate public education" as meaning special education and related services. 20 U.S.C. § 1401(18). Special education is defined as "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. § 1401(16). Related services are then defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401 (17). Id. at 188.

The state policy must be reflected in a plan submitted to and approved by the Secretary of Education, 20 U.S.C. § 1413, which describes in detail the goals, programs and timetables under which the state intends to educate handicapped children within its borders. 20 U.S.C. § 1412, 1413. Further, the Act imposes extensive procedural requirements upon states receiving federal funds under its provisions. Rowley at 182; see: 20 U.S.C. § 1415.

20 U.S.C. § 1415(a) provides as follows:

> (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through

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> subsections (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

The remainder of 20 U.S.C. § 1415 requires that hearings be conducted by an impartial hearing officer because the state or local agency or intermediate unit will be a party to any complaint presented. Helms v. McDaniel, 657 F. 2d 800, 802-803 (5th Cir. 1981) citing S. Conf. R. No. 94-455, 94th Cong., 1st Sess. 49 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1502.

Whether the due process hearing is provided by the state or local educational agency is left to the discretion of the states. 20 U.S.C. § 1415 (c). New Jersey provides that if an agreement is not reached at a settlement conference conducted by the Department of Education, the complaint is transmitted to the Office of Administrative Law. N.J.A.C. 6:28-2.7(a)(6). The decision of the administrative law judge is then considered to be final. N.J.A.C. 6:28-2.7(a)(7). See: 20 U.S.C. § 1415(e)(1). The decision of the administrative law judge is not subject to review by the Commissioner of Education, but may only be appealed in state court or federal district court. 20 U.S.C. § 1415(e)(1).

Petitioner was denied a due process hearing on his complaint alleging a violation of 20 U.S.C. § 1400 et seq. It is well settled that parents who choose to voluntarily remove their children from an appropriate educational placement offered by a local board of education in favor of a private placement may not receive reimbursement for the child's educational expenses. Cf., Rowley, supra; Rabinowitz v. N.J. St. Bd. of Ed., 550 F. Supp. 481, 490 (1982) citing Vander Malle v. Ambach, 673 F. 2d. 49, 52 (2d Cir. 1982).

The federal regulations, at 34 C.F.R. § 300.403, Placement of children by parents, states that:

> (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under § 300.450-300.460.

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> (b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.
> (Authority: 20 U.S.C. 1412(2)(B); 1415)
> [emphasis added]

Section 300.403(a) explicitly frees the local board of education from any liability for a handicapped pupil's educational expenses where the local board provides a "free appropriate education" and the parent chooses to place the handicapped pupil in a private school. The local board is not free, however, to exclude the private school pupil from "related services" as set forth in the second sentence of § 300.403(a). Section 300.403(a) directs that the local agency shall make such services available to the private school handicapped pupil under the provisions of 34 C.F.R. §§ 300.450-300.460, capitioned Handicapped Children in Private Schools not placed or referred by Public Agencies. Pursuant thereto, § 300.452 provides that:

> (a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.
> (Authority: Sec. 1413(a)(4)(A); 1414(a)(6))

The word "shall" is mandatory rather than permissive, placing an obligation on a local public educational agency a requirement to provide such related services necessary to meet the needs of a private school handicapped pupil within its jurisdiction.

Notwithstanding the language embodied in § 300.403(a), which exempts a local board's responsibility for a pupil's educational expense where the parent has made the choice to place their child in a private school and a free appropriate public education is available, this alone does not preclude petitioner's right to a due process hearing. Section 300.403(b) clearly and unambiguously provides the parent of a nonpublic school pupil the rights and privileges to the due process procedures.

In denying petitioner's complaint and application for a due process hearing, the New Jersey Department of Education relied upon N.J.A.C. 6:28-6.3(e); interpreting that section of the regulations as a preclusion to petitioner's rights. For whatever reason or reasons, the Department of Education ignored or failed to recognize subsection (i) in N.J.S.A. 6:28-6.3, which provides that:

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(i) When the provision of programs and/or services under this subchapter requires transportation, the district board of education shall provide the transportation and the cost shall be paid from State aid received under this subchapter by the district board of education.

In any event, it is generally held that ". . .to the extent that state law conflicts with a state's obligations under federal law, the federal law governs." Rabinowitz, supra at 489, citing King v. Smith, 392 U.S. 309, 333 and n.34 (1968). In the instant matter, there is a clear conflict of law where the Department of Education has placed its reliance upon a New Jersey State Board of Education regulation in denying petitioner's complaint and application for a due process hearing, rather than adhering to the mandates of federal law and regulation which has preeminance. 34 C. Fr. § 300.403(b) without exception, obligates the Department of Education to provide petitioner the due process hearing procedure as required under 20 U.S.C. § 1415.

Accordingly, I **FIND** and **CONCLUDE** that the New Jersey Department of Education misapplied the relevant law and was in error when it denied petitioner's complaint and application for a due process hearing.

I further **FIND** and **CONCLUDE** that the instant matter is cognizable under 20 U.S.C. § 1400 et seq. and, therefore, does not lie within the jurisdiction of the Commissioner of Education under N.J.S.A. 18A:6-9.

Having arrived at the above findings and conclusions with respect to Issue No. 1, involving the appropriate jurisdiction of this matter, I **CONCLUDE** that it is unnecessary for this case to be remanded to the Department of Education for a due process hearing, pursuant to 20 U.S.C. § 1415. Rather, this administrative tribunal retains jurisdiction for the purpose of moving forward to a de novo plenary hearing as expeditiously as possible.

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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.

18 December 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DEC 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 20 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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A.A., on behalf of his son, A.A., JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY.	:	DECISION
	:	

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

Upon review of this matter, the Commissioner is unable to accept the findings and determination of the Office of Administrative Law because, procedurally and substantively, the ALJ is incorrect.

Procedural error exists in that the ALJ exceeded his authority when he failed to stay within the terms of the Petition of Appeal and the direction provided to him by the Commissioner with respect to the issues to be considered by the Office of Administrative Law. The ALJ has no independent authority to hear and determine cases arising under education law. His authority and jurisdiction derive from the procedures set forth in Administrative Procedure Act, N.J.S.A. 52:14F-1 et seq., to conduct hearings for and make recommendations to the Commissioner. The question of whether there is a jurisdictional basis for a case or controversy to be heard by the Commissioner is a determination to be made by the Commissioner. As such, an ALJ may not take it upon him or herself to determine that the Commissioner is without jurisdiction. Further, it is obvious that, if the Commissioner is without jurisdiction to entertain a matter, an ALJ is without jurisdiction as well.

The issue before the ALJ was not entitlement to due process under state and federal statute or code regarding the education of handicapped children. Rather, the Petition of Appeal contained allegations with respect to the provisions of law contained in N.J.S.A. 18A:39-1.

Pursuant to the foregoing, the ALJ, having gone beyond the issue of N.J.S.A. 18A:39-1 to address the issue of entitlement to a due process hearing pursuant to 20 U.S.C. sec. 1400 et seq., erred in determining that the Commissioner does not have jurisdiction over the issue of entitlement to due process.

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The ALJ found and concluded, in the initial decision, ante, that "the New Jersey Department of Education misapplied the relevant law and was in error when it denied petitioner's complaint and application for a due process hearing." It is the determination of the Commissioner that this finding and conclusion is erroneous. Further, it is determined that the ALJ himself misapplied and erroneously cited the relevant law applicable to this matter as explained below.

ENTITLEMENT TO DUE PROCESS UNDER 20 U.S.C. SEC. 1400 ET SEQ. FOR HANDICAPPED CHILDREN VOLUNTARILY ENROLLED IN PRIVATE/NONPUBLIC SCHOOLS

34 C.F.R. 300:403 reads:

> (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.
>
> (b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under Regs. 300.500-300.514 of Subpart E. (emphasis supplied)

In accordance with this regulation, a parent has entitlement to due process procedures to challenge an assertion by a local board of education that a free appropriate public education (FAPE) has been made available to the child by the public agency such as found in M.B., through his parents R.B. and J.B. v. Bernards Township Board of Education (OAL DKT. NO. EDS 5354-85, AGENCY DKT. NO. 85-1479, October 25, 1985) and L.D., by his mother J.D. v. East Windsor Board of Education (OAL DKT. NO. EDS 3183-85, AGENCY DKT. NO. _____, August 14, 1985).

The instant matter does not constitute such a case. Before a determination can be reached as to a parent's entitlement to due process procedures under 34 C.F.R. 300.500-300.514 regarding private school handicapped children not placed or referred by a public agency, it is first necessary to determine if the service sought, such as transportation herein, is a service mandated to be provided by 34 C.F.R. 300:450-300:460.

The ALJ correctly notes that 34 C.F.R. 300:452 requires that each local educational agency shall provide special education and related services to meet the needs of handicapped children

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residing within its jurisdiction in private schools not placed or referred by a public agency. However, this requirement must be read in pari materia with 34 C.F.R. 300:451 and 34 C.F.R. 76.651-76.663, all of which regulate the manner and extent to which such services must be provided. 34 C.F.R. 300:451 reads:

> The State educational agency shall insure that -
>
> (a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and
>
> (b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

There is no federal requirement that local educational agencies expend any funds other than those generated by Education of the Handicapped Act (EHA) Part B funds for private/nonpublic handicapped children voluntarily enrolled by their parents. See May 1984 letter from W. Cullar, Director, Office of Special Education Programs to J. Osowski, Director, Division of Special Education, New Jersey State Department of Education (C-1) and EHA ruling, inquiry by Brian T. Hartman, Education for the Handicapped Law Report, Supplement 95, April 29, 1983, 211:294 (C-2) for further clarification.

There are a number of factors which determine whether a particular handicapped child, voluntarily enrolled in a nonpublic school, will receive services under EHA Part B. These include such factors as the amount of Part B funds available to a local educational agency and the relative needs of the public and private school children. 34 C.F.R. 76.652 mandates that the local district develop a service plan in consultation with representatives of the private/nonpublic school students during all phases of the development and design of the project/program covered by its application for Part B funds when determining the amount of funds to be used. Such consultation is required for identification of private/nonpublic handicapped pupils' needs and for development of the project/program to meet those needs.

However, the ultimate responsibility and authority for deciding how to apply those funds and which students participate in the EHA Part B program/project rest with the local district.

In the instant matter, EHA Part B (federal) funds are not used to provide transportation for private/nonpublic school handicapped pupils voluntarily placed by their parents in private/nonpublic schools. (Exhibit A)

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Thus, petitioner would have been entitled to due process procedures if:

> (1) transportation was one of the services funded by respondent's EHA Part B program/ project, or
>
> (2) a decision was made that A.A. was to participate in respondent's EHA Part B program/project and transportation was needed to access the program.

However, such is not the case here. Therefore, petitioner is not entitled to due process.

If petitioner has a complaint as to the Board's service plan with respect to private school handicapped children pursuant to 34 C.F.R. 300.450-300.452 and the EDGAR provisions at 34 C.F.R. 76.651-76.662, he has recourse in the procedures under 34 C.F.R. 76.780(a) (EDGAR). It must be emphasized that these complaint procedures are separate and distinct from the due process procedures available to parents under 34 CFR 300.500-300.514. Exhibit C-4 appears to indicate that petitioner invoked the EDGAR complaint procedure to challenge the denial of his transportation request and a report/letter of response issued by the Division of Special Education Director, J. Osowski.

By way of summary and in order to clarify the issue of entitlement to due process to parents of handicapped children who have chosen to enroll them in private schools, the following digest of a response to an inquiry made to the Division of Assistance to States, Special Education Programs, U.S. Department of Education is reproduced below. Three instances of entitlement for due process procedures are delineated.

> Due Process Procedures
>
> Under Regs. 300.504(a) and 300.506(a), private school students are entitled to due process in disputes related to their identification and evaluation. [Instance 1] Also, once a decision has been made that a child will participate in the public school program, [EHA Part B program], due process procedures could be used to resolve disputes concerning the special education and related services that the agency proposes to provide. [Instance 2] In addition, if there is a disagreement between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility, due process procedures

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are also available. [Instance 3] (EHA ruling, inquiry by Janet Rajohn, Education of the Handicapped Law Report, Supplement 95, April 29, 1983, 211:291)(C-3)

ENTITLEMENT TO DUE PROCESS PROCEDURES AND TRANSPORTATION UNDER STATE LAWS FOR HANDICAPPED CHILDREN VOLUNTARILY ENROLLED IN PRIVATE/NONPUBLIC SCHOOLS

N.J.S.A. 18A:46A-1 et seq. and N.J.A.C. 6:28-6.3 have relevance in the present matter insofar as they specify the sole services mandated by State law for the identification, referral, evaluation and educational programming available to handicapped children in private/nonpublic schools. Due process procedures are afforded to parents of such children for appealing local district decisions regarding the services/programs enumerated in State statute and law. Thus, contrary to the ALJ's determination, the Department of Education did not err in denying due process procedures to petitioner pursuant to N.J.A.C. 6:28-6.3(e) because the relief sought, transportation, is not a service mandated by State statute or code to private/nonpublic handicapped children.

Further, the ALJ erred in stating, "the Department of Education ignored or failed to recognize subsection (i) in N.J.S.A. (sic) 6:28-6.3***." (Initial Decision, ante) Subsection (i) requires transportation only when needed to provide one of the specified programs/services mandated by subchapter 6; it does not require the provision of transportation to/from the nonpublic school in order for the child to be educated by that facility.

Any entitlement petitioner has to transportation, therefore, is controlled by N.J.S.A. 18A:39-1, the very issue upon which this matter was transmitted to the Office of Administrative Law and subsequently not addressed by the ALJ. Upon examination of that statute, it is the determination of the Commissioner that the Board is providing to petitioner the maximum statutory amount required by law and that the Commissioner is without authorization or power to order it to exceed that maximum.

Accordingly, the initial decision of the Office of Administrative Law is reversed and the Petition of Appeal is dismissed for the reasons expressed herein.

COMMISSIONER OF EDUCATION

February 10, 1986

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A.A. on behalf of his son A.A., Jr.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 10, 1986

For the Petitioner-Appellant, Alfred A. Slocum, Public Advocate of New Jersey, (Carolyn Roscoe, Esq., Assistant Deputy Public Advocate, of Counsel)

For the Respondent-Respondent, Cerrato, O'Connor, Saker, and Collins (James E. Collins, Esq., of Counsel)

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

July 2, 1986

Pending N.J. Superior Court

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BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT. :

:

The Middle Township Board of Education (Board) has appealed to the Commissioner of Education an adverse decision of the Executive Committee of the New Jersey State Interscholastic Association (Association) rendered on January 15, 1986.

The Board's appeal to the Commissioner has been filed pursuant to the provisions of N.J.S.A. 18A:11-3. The Board's appeal requests injunctive relief pending a full hearing on the merits of its allegations that the action of the Association's Executive Committee in denying its reclassification request from a Group III to a Group II status is arbitrary, capricious and unreasonable.

The relevant facts giving rise to the Board's appeal of the adverse decision rendered by the Association's Executive Committee are not in dispute and are recited in pertinent part below.

Article VI of the NJSIAA Constitution requires that all of the public and parochial schools who are members of the Association must be classified into separate divisions for competitive purposes. (NJSIAA Constitution and Bylaws Association's Exhibit G, at p. 28)

In December 1970 the general membership of the Association adopted the following pertinent Sections (3, 5 and 6) of Article III of the Bylaws in order to implement the Classification of Member Schools in the public schools division.

> ....."Section 3. All public schools shall be divided into "Groups" (I, the least pupil population, to IV, the greatest pupil population) on the basis of quartiles in their respective geographic sections. These quartiles would be grouped or determined by the Executive Committee on the basis of the official school report based on pupil enrollment in grades 10, 11, and 12 dated September 30th of each year. Forms indicating enrollment shall be due in the Central Office no later than October 5."

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> ....."Section 5. Secondary schools are grouped for competitive athletics according to enrollments. The main objective[s] of this grouping procedure are the health and safety of the students as well as balance in numbers among all groups, therefore, groupings will be established for all schools only on the basis of their enrollments and may not be changed even at the request of the school. Such requests tend to circumvent the purposes of grouping."
>
> ....."Section 6. The assignment of schools to the various groups shall be made on the basis of the official school report dated September 30. Forms indicating enrollment shall be due in the Central Office no later than October 5." (emphasis supplied)
>
> (Association's Brief, at p. 2)

During the past several years, including the 1984-85 school year, problems had been encountered by the Association's Classification Committee because of improper calculations made on the annual Enrollment Reports submitted by member schools which were due on October 1 of each year. These problems were centered upon the method in which handicapped pupils were being accounted for on the Enrollment Reports.

More specifically this dilemma is addressed in pertinent part in the Association Brief and reads as follows:

> ***Unfortunately, over the past several years, one major problem that has arisen concerning the computation of handicapped students. Typically, these students are not assigned to a "grade" in the submissions by public boards to the Commissioner's office, pursuant to N.J.S.A. 18A:7A-16. Therefore, on a number of occasions, schools have either totally excluded handicapped students from their enrollment reports, even though they were at the tenth, eleventh and twelveth (sic) grade levels and were able to compete; while other schools included handicapped students who were at the ninth grade level. Since principals were required to report proper enrollment figures within a day or two of the official September 30 computations, there had been errors made which were thereafter corrected by the NJSIAA. Accordingly, through the seven year period, from 1978/79 through 1984/85, NJSIAA had allowed 43 corrections in enrollment figures by schools, resulting in 13 schools being regrouped for competitive purposes, (see p. 2 of Support Data, Tab 1). Each time a group change was made, a school which had been classified in a lower or

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more advantageous grouping for competitive purposes, was forced to be classified in a higher group, bringing mounting complaints to the NJSIAA, not only by the involuntarily reclassified schools, but by schools who were competing against the downgraded school, and who would suffer a reduction in "power points", by which the NJSIAA qualifies schools for the annual football championships. (see Tab 5; also Tab 8, TOR 33).

B. The Change in the Classification Forms for 1985/86

The mounting complaints by member schools who believed they were penalized by recalculations of enrollment forms by schools, who had usually miscounted their handicapped students, reached a culmination in November 1984. On October 4th, the NJSIAA Classification Committee classified all the public and parochial schools based upon data which was to be submitted by the schools not later than October 1st. (Tab 7). Based upon that information, the NJSIAA promulgated its annual list of groupings, listing Toms River High School South as a Group III school for the South Section of the State, while Willingboro High School was classified as a Group IV school in the same sector. However, shortly after the promulgation of the groupings, Willingboro High School advised the NJSIAA that they had mistakenly counted freshmen classified students, and asked for a downward adjustment in their enrollment. When the NJSIAA Executive Office granted the adjustment, it resulted in Willingboro being classified as a Group III school and Toms River High School South being reclassified as a Group IV school, in the South Section of the State. As a consequence, Dr. John H. Holloway, the Principal of Toms River High School South, appealed to the NJSIAA pointing out that the adjustments were in direct violation of Article III, which stated that enrollment forms are to be sent to the Central Office no later than October 5th. (See Tab 3 and 4). In addition, Michael Cipriano, the Principal of Ocean City High School, complained that since his school had played, and apparently defeated, Willingboro High School, that this reclassification would adversely impact on that school's chances to participate in the State football playoffs. (Tab 5).

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> On the basis of the appeal of Toms River South, an extensive hearing was held by the NJSIAA Executive Committee on November 12, 1984 (transcript of hearing at Tab 8). Although the Committee denied this appeal it did so only because of the past practice in making such adjustments (Tab 8, TR. 43-44).
>
> (Association's Brief, at pp. 3-5)

On January 16, 1985 (1984-85 school year) the Association's Executive Committee directed its Policy Committee to come up with recommendations to revise the Enrollment Report after it had surveyed the members of the Association. The Policy Committee developed and distributed a survey to all public and parochial school members on January 24, 1985. The results of the classification portion of the survey are documented in the Association's Brief as follows:

> "CLASSIFICATION
>
> 1. Do you favor establishing classification for a two-year period? YES - 77; NO - 131.
>
> 2. Do you favor not permitting changes in enrollment figures after enrollment form has been submitted to NJSIAA under the present system of classification? YES - 139; NO - 59.
>
> 3. Or would you favor new classification procedures that would require.
>
> A. June 1 - Submission of present enrollment figures of grades 9-10-11.
>
> B. Adjustments in the above figures permitted until September 15. No changes after that date.
>
> C. Classification for that school year released October 1 by NJSIAA. YES - 77; NO - 87." (Tab 15)
>
> (Association's Brief, at p. 10)

It is noted that the Board through its superintendent, high school principal and athletic director concurred with the majority of the members of the Association in opposing any changes to the annual pupil enrollment figures in the Enrollment Report after they had been filed with the Association. (Association's Exhibit H, Tab 15)

After the results of the survey were compiled by the Policy Committee they were then transmitted with its recommendations to the Executive Committee of which the Board's superintendent was a member.

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In March 1985 the Executive Committee adopted a resolution mandating that enrollment forms for future years commencing with the 1985-86 school year would

> ***separately delineate classified and non-classified students, from grades 10 through 12, and that the form should clearly state that once the NJSIAA has promulgated its enrollment classifications, that no corrections could be initiated by a school to reduce its enrollment. That resolution did allow for an increase in a school's enrollments where it discovered a mistake, since in those instances no school which did not create an error, would be penalized by having their grouping upgraded, as was the case with Toms River South. (Tab 16, TR. 41-43).***
> (Association's Brief, at p. 11)

In accordance with the March 1985 resolution of the Executive Committee, the Association's Central Office prepared and distributed a different Enrollment Report form to its members for the 1985-86 school year which reads in pertinent part as follows:

> "Note: Figures will be verified with respective County Superintendents.
>
> TOTAL PUPIL ENROLLMENT (Boys & Girls)
> Grades 10, 11, 12 _____(a)
>
> CLASSIFIED PUPILS (Boys & Girls)
> Grades 10, 11, 12 _____(b)
>
> TOTAL PUPIL ENROLLMENT
> (a) + (b) = _____
>
> Please check if your school enrolls only male students _____ or only female students _____.
>
> Note: Only 10th, 11th, 12th grade students are used for classification purposes. These figures are to be based on the official school report dated September 30 as submitted to the County Superintendent and MUST BE FORWARDED TO NJSIAA NO LATER THAN OCTOBER 1. Include all students whose names appear on the official register at your school.
>
> Shared-time students must be included if their names appear on your official register.
>
> Include all handicapped/classified pupils in the above figure (b) regardless of physical capabilities.

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Once classification has been determined and the information distributed NO CHANGES will be permitted except those adjustments placing a school in a higher grouping. AS PER EXECUTIVE COMMITTEE RULING THERE WILL BE NO EXCEPTIONS TO THIS POLICY. NO STAMPED SIGNATURES ACCEPTED.

Signature of Principal

Signature of Athletic Director

(Tab 20, p. 3; emphasis on original form)."
(Association's Brief, at pp. 11-12)

The Board through its high school principal and athletic director completed the 1985-86 Enrollment Report and transmitted it to the Association in compliance with the October 1985 deadline. Prior to October 5, 1985 an Association staff member verified the new enrollment data with the Board's representative and subsequent thereto submitted this information to the Association's Classification Committee. On October 8, 1985 the Classification Groupings were circulated among the member schools.

The Association in its brief describes what occurred as the result of the distribution of the 1985-86 Classification Groupings:

> ***Only after all of the verifications were complete, and after the convening of the Classification Committee, and the promulgation of the group classifications to all schools on October 8, 1985, did Middle Township discover its error. That error elevated the school from Group II to Group III. (See Tab 29, P-1; Tab 30, P-4).
>
> As a result of the October 8, 1985 circulation of the 1985/86 Groupings, three schools reported enrollment errors. Cinnaminson High School advised the NJSIAA by telephone on October 31st, that it had omitted 16 Juniors from a homeroom. Since this increased that school's enrollment from 733, as earlier reported, to 749, that school was elevated from Group II to Group III, with the result that Oakcrest (Mays Landing) was reduced from Group III to Group II (See Tabs 26, 31). However, two other schools reported that they had given a count too high, (as compared to Cinnaminson's lower number): Sussex County Vocational and Technical School, which had erroneously included 71 ninth grade Special Education students and 70 shared time students (Tab 21); and the Petitioner, Middle Township (Tab 20).

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At the November 18 1985 NJSIAA Executive Committee meeting, Dr. Johnson urged that the enrollment figures for his school be reduced to 704 pupils, so as to allow his school to maintain its Group II rating. (See Tab 23, TR. 12:15-32:18). During that discussion, it was pointed out that Cinnaminson was allowed to change its enrollment because it was upward and did not adversely affect any schools, consistent with the expressed provisions of the March 1985 Resolution and the warnings on the new enrollment forms (Tab 24, TR. 15:15-16:2). Since Dr. Johnson emphasized the fact that a new Athletic Director had completed the forms, it was also pointed out by another member of the Executive Committee, Dr. Eugene Westlake, the Principal of Northern Valley Regional High School, that the Principal also signed the erroneous form, and therefore should be responsible (Tab 23, TR. 27:20-28:15)*

As a result of the extensive debate on November 18, the Executive Committee, by a vote 24 to 12, voted to reject Dr. Johnson's appeal (Tab 23, TR. 32:19-22). In doing so, that Committee also directed that consideration be given to changing the enrollment form (Tab 23, TR. 33:1-34:22). Consistent with its action in the Middle Township appeal, the Executive Committee rejected the appeal of Sussex County Vocational and Technical School, seeking a lower adjustment in enrollment (Tab 23, TR. 37:25-38:4).***

Finally, on January 15, 1986, the Board through its Superintendent renewed its application to correct its 1985-86 enrollment figures from 766 to 704. The Association's Executive Committee again denied this request essentially for the same reasons it did so on November 18, 1985.

Although it is noted that the Association is considering the possibility of abandoning its present system of reporting for the 1986-87 school year in favor of obtaining computerized listings

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*It should be pointed out that the Principal is ultimately responsible for all forms submitted to the NJSIAA and his signature was always required on past enrollment forms. (see Exhibit G, Article IX, Section 1 of NJSIAA Bylaws, P-47; Tab 7). Also, the Principal in question, who co-signed the erroneous enrollment form, John T. McVey, has been the Principal at Middle Township High School for at least four years, according to the School Directories compiled by the NJSIAA. (Association's Brief, at pp. 13-14)

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of pupil enrollment from the Department of Education, it is apparent that such action has not been formally concluded as of the time the Board's appeal of this matter to the Commissioner.

The Commissioner has reviewed the arguments of both parties in support of their respective positions herein.

The Board maintains that it did in fact provide precisely that information requested by the Association on the 1985-86 Enrollment Report. It argues that because the Enrollment Report form for the year in question was erroneously constructed by the Association it resulted in the duplication of the number of classified pupils it was forced to report in grades 10, 11 and 12 in its school district.

Consequently, the Board maintains that it was not until it received notice from the Association on October 8, 1985 of its Group III rather than a Group II classification for championship competition did it become aware of the erroneous information upon which the Classification Committee's decision was made. The error that the Board claims it was seeking to correct on November 18, 1985, before the Executive Committee, was the duplication of 62 classified pupils required to be reported on the 1985-86 Enrollment Report which resulted in a total pupil enrollment of 766 rather than the accurate enrollment figure which was 704 pupils.

The Board argues further that it was the arbitrary and capricious denial of its application to reduce its total pupil enrollment by 62 on November 18 and again on January 16, 1986, by the Association's Executive Committee which unjustly caused its classification for championship competition to be designated in Group III rather than Group II.

Moreover, the Board argues that it is being deprived of an opportunity to qualify in the NJSIAA Championship basketball competition in Group II on February 3, 1986.

The Board urges the Commissioner to assume jurisdiction in deciding this matter in its favor inasmuch as the issue involves matters of controversy for which pupils may be denied an opportunity to participate in educational or co-curricular programs.

In this regard the Board argues:

> To permit the decision of Respondent to remain without a change in the classification operates to condone discrimination on behalf of smaller schools involved in the Association. While financial renumeration (sic) is not a consideration, the schools involved in the championships do derive an indirect economic benefit from attendance at these games. Students who participate in the championships also indirectly benefit as to potential scholarships for colleges

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> which may be awarded to students based on performance and success at these championship events. Students and schools can be deprived of these opportunities when there is created as a result of what is acknowledged by Respondent to be a form subject to misrepresentation which net result is to place schools at an unfair competitive advantage.
>
> (Board's Brief, Point I, at pp. 3-4)

Moreover, the Board maintains that its position taken in the instant matter can be distinguished from the decision rendered by the Commissioner in Cliffside Park Public High School District v. N.J.S.I.A.A., decided November 16, 1984. The Board maintains that it is an active participant in the deliberations of the Executive Committee by virtue of its superintendent's membership on that committee. Consequently, the survey upon which the Association relies to bind the Board as having approved the 1985-86 Enrollment Report is of no force and effect inasmuch as the form of the report failed to specifically delineate between classified and non-classified pupil enrollment upon which the Board's request for relief is grounded.

Finally, the Board argues in its Brief as follows:

> In reviewing all cases cited by Respondent, it is apparent from the face of those Petitions and matters that were before the Commissioner that all involved errors or dereliction of duty, many of the cases being inapplicable to the present controversy insofar as they involve eligibility and penalties of particular students in certain athletic competitions, but some factor of fault, neglect or human error or oversight was the basis for the bringing of those matters. In the present situation at hand, the underlying controversy is twofold, first there is no omission, error or dereliction of duty on the part of Petitioner/Appellant and secondarily, the very procedure which grants relief to some and not others, operates to act in a discriminatory, arbitrary, capricious and unreasonable application of the rules.
>
> The primary contention of Respondent in denying the Petitioner's request is that Petitioner is a member of a voluntary association and thereby agreed to be bound by and accepted the rules and regulations with respect to classification and survey enrollment forms. Admittedly, if the decision of Respondent to all applicants had been uniformly and consistently applied, this position may have merit, however, the actions of Respondent in permitting re-classification for some

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> schools and denying the same relief as requested here by Petitioner operates to permit arbitrary, capricious and unreasonable action when it determines that certain classifications would be permitted although they may be upgraded classifications but downgraded classifications are denied. The strength of Respondent's argument in that universal application of the rules and regulations, particularly the understanding and acceptance of all schools in the association that no changes would be made after a designated date is diminished by the very fact that consideration was given to other schools and changes were permitted in classification after the very deadline that Respondent alleges Petitioner should be bound to.*** (Board's Brief, Point II, at pp. 3-4)

The Association on the other hand seeks to persuade the Commissioner in part not to assert his jurisdiction in the instant matter or to substitute his judgment for that of the majority of a 43 member Executive Committee comprised of Public and Parochial School Superintendents, Principals, Athletic Directors and Board members throughout the State.

The Association argues that the issue of group classifications are designed specifically to equalize competition among opposing interscholastic teams. Therefore it is inconceivable that the Commissioner would want to exercise his jurisdiction in this matter absent any arbitrary or capricious determination by the Association which deprives pupils of participation in interscholastic sports on the grounds of pupil eligibility, racial or sex discrimination.

It is conceded by the Association that the Board's appeal raises the issue of whether or not an enrollment form which could admittedly be read in two ways should be construed in a manner contrary to the intended interpretation of those members of the Executive Committee, one of whom is the superintendent employed by the Board.

In support of its position the Association relies in pertinent part on the argument presented in its Brief:

> ***The Petition does not claim, nor can it, that Middle Township School was treated in an arbitrary or capricious manner. The subject of the classification forms has been a difficult problem for a number of years, principally because of the necessity to categorize handicapped students at grade level in a matter of days, so as to meet tournament qualification deadlines. When the NJSIAA allowed corrections to remedy errors in the past, it only resulted in

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more complaints by schools who were upgraded in their groupings. The record is replete with meetings of the NJSIAA Executive Committee and different Policy Committees over the last two years, dealing with this problem. As the result of the collective opinion of dozens of educators, including the Commissioner's very representative on the Executive Committee, a new form was promulgated in August 1985, delineating the classified from unclassified students. That same form warned all of the responding schools that "once classification has been determined and the information distributed, NO CHANGES, will be permitted except those adjustments placing a school in a higher grouping. AS PER EXECUTIVE COMMITTEE RULING THERE WILL BE NO EXCEPTIONS TO THIS POLICY. (emphasis contained on original form).

That warning was precisely what Middle Township had voted for, along with the overwhelming majority of responding schools to a special survey in January and February 1985. While the NJSIAA acknowledges that the form developed by its central office could have been more appropriately drafted, the fact is that Middle Township had that very document in its possession for over two and one-half months and never once sought clarification. Even after the school [had] submitted its erroneous figures, the NJSIAA office initiated a call to Middle Township to verify the figures given to the Association. Yet this very school now wants the Commissioner to place it in a more advantageous grouping, so that it will have a better chance of winning some type of State championship.***

Middle Township signed a survey urging that no changes in enrollments be made once the classifications had been promulgated; the Principal and Athletic Director of Middle Township signed a statement cautioning that no changes would be made once the classification listings had been formulated. Yet, this school now urges the Commissioner to repudiate its commitment to the very rules that it had urged the Association to adopt last year! (Association's Brief, at pp. 19-20)

The Association in its Brief relies on several prior decisions of the Commissioner and the courts which stand for the propositions that, absent any showing that its actions were arbitrary on unreasonable, neither the Commissioner nor the court will substitute its judgment in such matters notwithstanding their

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approval of agreement with the outcome of the Association's decision in question.

Both of the above-cited decisions involved attempts by petitioners which unsuccessfully sought to abrogate signed statements dealing with the Association's decision to invoke forfeiture penalities against its member schools.

The Commissioner has reviewed the respective arguments of the parties in this matter on appeal before him. Contrary to the arguments advanced by the Association urging the Commissioner to decline jurisdiction in these proceedings, the Commissioner accepts jurisdiction in this matter for the sole purpose of determining whether or not the Association's action complained of herein is arbitrary, capricious or unreasonable.

It is clear from the record before the Commissioner that a major problem concerning the reporting of enrollment and computation of handicapped pupils for the purpose of Group Classification for championship competition required the combined cooperative efforts of the Association's membership and Executive Committee in order to arrive a fair and equitable disposition of the matter.

Central to this issue was the survey conducted of the membership on January 24, 1985. The results of this survey indicated the will and commitment of the majority of the Association's membership to comply with the information requested on the 1985-86 Enrollment Report in a revised format.

Unfortunately, the format of the 1985-86 Enrollment Report was ambiguous to the extent that certain of the information provided to the Association could have duplicated the enrollment of handicapped pupils reported in the total pupil enrollment for Group Classification purposes.

The high school principal of each member district, however, was responsible for the accuracy of the school district's Enrollment Report transmitted to the Association on or before October 1, 1985.

Each report was verified with the member district upon receipt by a member of the Classification Committee on or before October 8, 1985. The high school principal was aware or should have been aware of the caution placed on the 1985-86 Enrollment Report to the effect that enrollment figures would not be changed after classification had been determined by the Classification Committee except as indicated thereon.

Consequently, there was an opportunity for the high school principal to make changes in enrollment figures by a member school district after the Enrollment Report was transmitted upon verification of those figures after being contacted by a member of the Classification Committee. Instead, nothing in the way of a correction to the Board's Enrollment Report was made by the high school principal prior to October 8, 1985 when contact with the school district came from a member of the Classification Committee.

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In fact the Board admits that the first formal request pertaining to the error in the Enrollment Report was made in writing on October 23, 1985 by the superintendent. At that time the Group Classifications had already been in circulation among the member districts since October 8, 1985.

In the Commissioner's judgment there is ample justification in the record of this matter to support the decision of the Association's Executive Committee on November 18, 1985 and again on January 15, 1986 when it denied the Board's application to change the figures on its 1985-86 Enrollment Report in order to be reclassified from a Group III to a Group II school district.

This determination is grounded on the record before the Commissioner as argued in the Association's Brief with accompanying Exhibits.

It is clear that the Board through its superintendent was involved in bringing about the rule prohibiting the changing of enrollment figures once the Group Classifications had been made.

Moreover, the Board did in fact wait some one and one-half months before bringing the error in its enrollment figures to the Association.

Accordingly, for all of the foregoing reasons the Commissioner hereby determines that the Board's appeal in this matter is without merit and is hereby dismissed.

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 6255-85
AGENCY DKT. NO. 326-9/85

HIGH FIDELITY SOUND CENTER, INC.,
A NEW JERSEY CORPORATION,
t/a CENTRAL JERSEY SOUND CENTER,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF HAMILTON AND
COSKEY'S ELECTRONIC SYSTEMS,
Respondents.

John Schuster, III, Esq., for petitioner

Dennis M. DeSantis, Esq., for respondent, Hamilton Township Board of Education (Destribats & Hamilton, attorneys)

Martin R. Salkman, Esq., for respondent, Coskey's Electronics Systems (Hendrick, Spanos & Phillips, attorneys)

Record Closed: November 14, 1985 Decided: December 30, 1985

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by High Fidelity Sound Center, Inc., t/a Central Jersey Sound Center (hereinafter "High Fidelity"), petitioner. High Fidelity charges that respondent Hamilton Township Board of Education (hereinafter "Board"), wrongly awarded a contract to install sound equipment in certain of its township schools to co-respondent Coskey's Electronic Systems (hereinafter "Coskey's). High Fidelity now moves before the Commissioner of Education, asking that: (a) the contract award to Coskey's be vacated, (b) the award of that contract now be transferred to High Fidelity, and (c) the Commissioner grant any other relief he deems appropriate.

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PROCEDURAL HISTORY

This matter was initiated by timely petition to the Commissioner of Education, seeking emergent relief, on September 20, 1985. Subsequently, the Commissioner declared the matter a contested case pursuant to N.J.S.A. 52:14B-1 and 52:14F-1 et seq. He transferred it to the Office of Administrative Law for plenary hearing on October 1, 1985. On October 10, 1985, an emergent hearing convened and an Order granting temporary restraints and scheduling plenary hearing for November 1, 1985 issued on October 18, 1985. On the scheduled date for hearing, the proceedings convened and concluded. Subsequently, briefs were submitted. The last was filed on November 14, 1985. On that date the record closed.

ISSUES

What must be resolved here is whether the bid and contract award process employed by respondent Board (specifically as to implementation of N.J.S.A. 18A:18A-26 et seq.), was legally deficient. If found deficient, it must then be determined whether that contract now should be awarded to High Fidelity. Alternatively, it must be decided whether the results of the bidding process must be otherwise modified.

Burden of Proof:

The burden of proof in this matter falls on petitioner. It must carry that burden by a preponderance of the credible evidence.

Some of the material facts are not in dispute:

This appeal flows from an attempt by the Board to contract with companies or individuals through the legal process of bidding, N.J.S.A. 18A:18A-21 et seq. The Board had need to install sound equipment in four of its township schools. These included Sayen, Sunnybrae, Yardville and Yardville Heights. In this fashion, the Board intended to furnish and install complete new sound apparatus and accomplish all related work in each school. The work would be performed by the contractor offering the lowest bid. After advertising

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in the Trentonian and Trenton Times, the Board sent "bid packages" (J-1) to each of the bidding competitors. The opening of their bids was scheduled for August 7, 1985, at 11:00 a.m. in the offices of the Board.

Eventually, both High Fidelity and Coskey's submitted their bid proposals (J-2 and J-3). These proposals included a "base bid" and an "alternate bid." On behalf of High Fidelity, Ronald J. Foti, Sales Manager, prepared and timely submitted the bid package. Mr. Foti did not himself attend the bid opening, since he was on vacation at that time. Significantly, the bid package did not include the Form DBC-3: "Notice of Classification" (J-4). It did include Form DBC-701: "Total Amount of Uncompleted Contracts." Also in timely fashion, Stephen J. Vargo, Sales Engineer for Coskey's, prepared and delivered the bid package on behalf of his company. That package did include both Forms DBC-3: "Notice of Classification" and Form DBC-701: "Total Amount of Uncompleted Contracts." Prior to the bid opening, Mr. Vargo called Claire McGrath, Purchasing Agent for the Board, who is responsible for bid dispositions. He inquired about the forms appropriate for submission in the bid package. At the bid opening itself on August 7, 1985, only Coskey's representative, Mr. Vargo, was present. Mr. Vargo asked publicly, when the bids were opened, whether High Fidelity had submitted the required "Notice of Classification." He was informed that High Fidelity had not. When the bids were opened by the Board, it was disclosed that Coskey's had submitted a "base bid" of $20,598 with an alternate bid of $23,189. High Fidelity had submitted a base bid of $21,341 and an "alternate bid" of $22,516, and now claims precedence as the lowest bidder.

Because of the missing Form DBC-3: "Notice of Classification", the Board decided to reject the bid of High Fidelity. The reason for rejection expressed by the Board was High Fidelity's failure to comply with bid specifications. Specifically, it had not submitted a form for prequalification in compliance with 18A:18A-26 et seq. (J-5).

Disputing the grounds for this rejection, High Fidelity instituted the present proceedings.

Arguments of the Parties:

Through testimony of witnesses and submission of briefs, the parties articulated their differing views of the contested event:

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High Fidelity's Argument (Petitioner):

Overall, High Fidelity suggests that the Board departed from normal bidding practice in the use of the forms which they employed. More importantly, the Board's bidding instructions (J-1) did not include the necessary forms and were themselves confusing.

Ronald J. Foti stressed that he had been preparing bids for over 24 years. He regularly completed them for State agencies. He had completed approximately 15 bids a year for the Department of Education in jobs requiring over $20,000, and about the same number for projects under $20,000. His company, High Fidelity, regularly perused trade magazines and tracked bid solicitation. He recalled that bid requirement packages included check lists in approximately half the cases. He had personally reviewed the Board's "Checklist", in J-1, and was confused by paragraph 3. Subparagraph b therein demands completion of a Form DBC-713: "Affidavit of Uncompleted Contracts" and Form DBC-701: "Notice of Classification." There was no Form DBC-713 in existence to his knowledge. Consequently, he filled out Form 701 (J-2). Mr. Foti also emphasized that the "General Conditions" in exhibit J-1 specified at Article 15A that a valid and active "qualification/classification certificate" was prerequisite to bid submission. In 24 years, Mr. Foti had never seen such a document. More pertinent to the present issue, he could not remember ever seeing a dual Board of Education requirement of (a) "Affidavit of Total Contracts" and (b) "Notice of Classification" in a project costing over $20,000. Mr. Foti noted that, although he had prepared J-2 entirely, it was signed by the president of his company, and notarized during his absence on vacation.

Mr. Foti was satisfied that Form DBC-701 satisfied all the requirements of paragraph 3b in the Board "check list" (J-1). He conceded however, that Form DBC-701: "Total Amount of Uncompleted Contracts" included in its first paragraph a caution that a "Notice of Classification" had to accompany the Form 701. He understood this to mean specifically Form DBC-3: "Notice of Classification." However, he added that this requirement was not part of the Board "Checklist" (J-1). He did submit a DBC-3 on August 15, 1985 (J-4), after the bids had been opened and made public. His purpose in doing so was to demonstrate to the Board that High Fidelity was in fact qualified to bid. Mr. Foti recalled that in meeting with Mr. Triverio, subsequent to the bid openings, but

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prior to the Board rejection of High Fidelity's bid, their conversation turned acrimonious. Mr. Triverio expressed annoyance that petitioner had contacted the State Department of Education. Mr. Foti denied ever speaking to Mr. Triverio by phone beforehand. He also denied conceding that the absence of the "Notice of Classification" was High Fidelity's oversight and that it had occurred in error while he was on vacation.

By way of brief, High Fidelity pressed the legal argument that it should be awarded the contract as lowest responsible bidder. Alternatively, if petitioner's omission of the Notice of Classification was held to be a material divergence, then all bids should be rejected.

Board's Argument (Respondent):

The Board contends in the main that it did all that was legally appropriate to obtain bids under N.J.S.A. 18A:18A-26.

In support of that position, Claire McGrath testified that since 1976 she has acted as Board Purchasing Agent. In that time, Ms. McGrath has prepared bid package specifications, appropriate advertisements, and coordinated the opening of bids on the designated dates. She stressed that the "Checklist" in dispute (J-1) was meant only as a convenience for the parties. The "General Conditions" (J-1), were also a convenience, and amply detail what is expected of bidders. Both High Fidelity and Coskey's were given the same bid preparation package by the Board (J-1).

Ms. McGrath remembered that Coskey's had called her prior to the bid opening. It had asked whether the "Notice of Classification" and the "Total Amount of Uncompleted Contract Forms" were necessary to compete the bid. Ms. McGrath answered that this was so. She also remembered that High Fidelity, through Mr. Foti, had attempted to submit Form DBC-3: "Notice of Classification" on August 15, 1985, after meeting with Mr. Triverio. She accepted the form (J-4), with the reservation that it could not be considered part of the bid package to be reviewed eventually by the Board on August 21, 1985.

On that date, the Board rejected High Fidelity's bid, on advice of Board counsel. Ms. McGrath thought that in the past, when all forms had not been submitted, bids had been similarly rejected. She conceded that in those cases there had been no

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complaints over the numbers affixed to the forms. Louis Triverio confirmed that he agreed to, and ultimately did, meet with Mr. Foti on August 15, 1985. Prior to that time, he had conferred with someone from High Fidelity, by telephone. That caller, whom he first recalled as being Mr. Foti, had asked that omission of the "Notice of Classification" be overlooked. Another employee had made the error while Mr. Foti had been on vacation. At their meeting, Mr. Triverio responded to Mr. Foti that the Board need not follow practices observed in other school districts. He also commented that on legal advice he would recommend to the Board that the High Fidelity bid be rejected.

The legal argument of the Board, presented through brief, was that it could not "waive" the requirement of "Notice of Classification." as a matter of law. Further, petitioner had no standing to sue, under the holding in Saturn Construction Company v. Middlesex County Freeholder, 181 N.J. Super. 403 (App. Div. 1981). Finally, the Board insists that the Commissioner of Education does have jurisdiction to resolve this dispute. If he rules that the complaint of petitioner is valid, the contract award still should not go to petitioner. Instead, the bids should be readvertised.

Coskey's Argument (Respondent):

Coskey's maintains that it submitted all the appropriate forms. These forms were standard and well-known. It should not now lose the contract because of High Fidelity's neglect to submit the necessary Form DBC 3: "Notice of Classification."

Stephan J. Vargo related the depth of his work experience. He had been in this business for 16 years. During that time, Mr. Vargo routinely surveyed schools, "spec-ed out" prospective jobs, evaluated potential costs, and recommended bids to his employer. In this instance, he had no problem understanding Paragraph 3 of the Board's " Check list". He paid no attention to the form numbers. The names alone were significant: "Notice of Classification" and "Affidavit of Uncompleted Contracts." He was confused only by subparagraph 3a, which described a Department of Education "Form C101." Mr. Vargo had never encountered such a form. This prompted him to call Ms. McGrath at the Board to assure that Coskey's had no obligation to submit Form C101. He was certain he never disussed the contents of Subparaph 3b or the two forms mentioned therein with

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3. Ronald J Foti of High Fidelity knew that Form DBC 713: Affidavit of Uncompleted Contracts" referred to in the "Checklist" (J-1) had been supplanted by Form DBC 701: "Total Amount of Uncompleted Contracts". Mr. Foti also knew that Form DBC 701: "Notice of Classification" referred to in the "Checklist" was now Form DBC 3: "Notice of Classification."

4. Ronald J. Foti of High fidelity knew that the forms which had to accompany his company's bid for the Board's advertised sound system installation had to be accompanied by two forms. The forms which he knew from experience were mandatory under these circumstances were: (a) Form DBC 3: "Notice of Classification", and (b) Form DBC 701: "Total Amount of Uncompleted Contracts". Mr. Foti was not confused by the numbering ascribed to each of the foregoing forms by the "Checklist" (J-1).

5. Louis Triverio, Board Secretary, did receive a phone call from someone in the employ of High Fidelity. That phone call was made after the opening of the bids but before the Board took formal action on August 21, 1985. The caller asked Mr. Triverio if the absence of Form DBC 3: "Notice of Classification" from High Fidelity's bid package could be overlooked. The request was made because Mr. Foti's vacation substitute had the form on his desk, and had omitted it from the package through oversight.

ANALYSIS

This case has two aspects which must be treated separately: the one factual, the other legal:

FACTS:

Finding a preponderance of the evidence, which is the evidentiary standard here, means concluding that reasonable probability exists, Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 487 (E. & A 1933). Stated differently, the evidence must be such as to generate the the belief that the tendered hypothesis is in all human

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likelihood the fact, Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). certif. den., 31 N.J. 75 (1959); overruled on other grounds, 36 N.J. 487 (1962). Particularly relevant to this standard is an assessment of credibility. Testimony to be believed must not only proceed from the mouth of a credible witness. It must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances, In re Perrone, 5 N.J. 514, 522 (1950). In judging the credibility of witnesses, the narrative describing the progress of events at High Fidelity and the state of mind of Mr. Foti, as related by the latter, are not fully persuasive.

At hearing, Mr. Foti projected a demeanor which was alert and intelligent. It is not probable that, with bid-related business acumen accrued over 24-years, that he would fail to appreciate the need for both forms. It is also unlikely that the admittedly erroneous numbering of the forms confused him. The current Form DBC 701 "Total Amount of Uncompleted Contracts", at paragraph one thereof, in language not susceptible to misunderstanding, demands concurrent submission of a "Notice of Classification". In like vein, both Mr. Coskey and Mr. Vargo believably testified that two separate forms, the "Notice of Classification" and "Total Amount of Uncompleted Contracts" routinely accompanied bids of this nature. Mr. Coskey even knew the "prequalification/ classification certificate", which was argued over at great length during hearing. He described it as a lengthy information form contractors submitted to "the State" to obtain or renew a "Notice of Classification". Mr. Foti candidly acknowledged the he was aware throughout that the "Notice of Classification" was Form DBC 3. He had submitted a completed version on August 15. Against this background stands the testimony of Board Secretary Triverio. He credibly related a phone conversation with a caller from High Fidelity. The caller attributed the missing Form DBC 3: "Notice of Classification" to inadvertance. While Mr. Triverio is plainly inaccurate in identifying the speaker as Mr. Foti (who was away), his recall of the conversation itself is convincing. Relying on this testimony, it can be concluded that the form was missing, not because of Mr. Foti's confusion, but because of his vacation. An employee who took his place made an error. High Fidelity now seeks to remedy that mistake. The next question then is, can it, consistent with applicable law.

The Law:

The short answer is that High Fidelity may not obtain such a remedy. It can point to no wrong.

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By way of brief, counsel for High Fidelity has carefully and thoroughly discussed that case law which can be argued as bearing on the circumstances. Yet, in the face of those facts found today, their holdings cannot be construed as favorable to High Fidelity. To begin with, the bidding process is obviously controlled by statute, N.J.S.A. 18A:18A-21, et seq. Though pertaining to schools, these statutory sections were adapted to conform with the Local Public Contracts Law, which governs municipalities. One implementing regulation, N.J.S.A. 6:20-7.2, which governs bidding qualification, defers to the implementing regulations of the Department of Treasury, See, N.J.S.A.17:19-1.1. et seq. The statutory and regulatory patterns are parallel. Thus, as the Board correctly asserts, the discretion of the Board should be afforded no more latitude than that accorded municipalities under the Local Public Contracts Law. Thereunder, local authorities must be guided by strict construction. L. Pucillo and Sons, Inc. v. New Milford, Mayor and Council, 73 N.J. 349, 356 (1977). Morever, under that law, there can be no waiver of disclosure, or extension of time to cure bids after acceptance. George Harms Constr. Co. v. Bor. of Lincoln Pk., 161 N.J. Super. 367, 373 (1978). Strict construction is essential to integrity. Id., at 374. Where an error is material, simple negligence cannot be cured after bids are opened. Id. at 376. Township of River Vale v. R.J. Longo Construction Co, 127 N.J. Super. 207 (Law Div. 1974), cited by High Fidelity, does not support the contrary view, even after application of its two-part test. Waiver there was favored only in the face of minor irregularity or immaterial variance, unaccompanied by fraud, bad faith or collusion. Id. at 215-216. A "Notice of Classification" goes to the heart of the bidding process' integrity. The specific information in that form is crucial, not minor or immaterial. Form DBC 701: "Total Amount of Uncompleted Contracts" does not render a DBC 3 a mere redundancy. It contains none of the fundamental data which Form DBC 3: "Notice of Classification" demands. Neither can Form DBC 701, lacking that essential information, elevate High Fidelity's effort to the level of "substantial compliance" envisioned by the court in P. Michelotti & Sons, Inc. v. Fair Lawn, 56 N.J. Super. 199, 202 (App. Div. 1959). Finally, even accepting High Fidelity's claim to low bidder status, no authority cited supports an award for that reason where there has been an oversight so serious as a missing "Notice of Classification." This is a material omission which cannot be waived, Albert F. Riuehl Co. v. Board of Trustees, Industrial Ed., 85 N.J. Super. 4, 16-17 (Law Div. 1964)

Inarguably, the Board's "Checklist" lacks the latest form numbers, and the directions in "General Conditions", Art. 15 are somewhat broadly phrased. These documents should be updated to avoid future controversy. Yet, referring to those facts

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found today, it cannot concluded that the Board's bid materials are "patently ambiguous". Neither can it be said that High Fidelity lacked a fair and reasonable opportunity to compete and bid intelligently, Fereday & Meyer Co., Inc. v. Elizabeth Board of Public Works, 27 N.J. 218, 223-224 (1958), quoting Camden Plaza Parking v. City of Camden, 16 N.J. 150, 159 (1954). Consequently, the Board's contract award to Coskey's should not be disturbed.

Because of the reasoning on which this initial decision is based, the remaining arguments of the the Board and Coskey's need not be addressed.

CONCLUSION

I CONCLUDE therefore, based on my review of the entire record, including the credibility of witnesses, and for the reasons expressed in the ANALYSIS portion of this opinion that:

The contract award to Coskey's as a result of the bidding process conducted by the Board was lawful, and did not violate the provisions of N.J.S.A 18A:18A-26 or any other related statutory provisions of the School Laws. See esp. N.J.S.A 18A:18A-21 et seq.

ORDER

I ORDER therefore that the appeal of petitioner High Fidelity be DENIED, and that the contract awarded to respondent Coskey's by respondent Board be AFFIRMED, and implemented immediately upon final administrative decision.

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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.

December 30, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

DEC 30 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 3 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

lj

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HIGH FIDELITY SOUND CENTER, INC., A NEW JERSEY CORPORATION, t/a CENTRAL JERSEY SOUND CENTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON AND COSKEY'S ELECTRONIC SYSTEMS, MERCER COUNTY	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. These exceptions are summarized below.

Petitioner avers that the initial decision does not accurately reflect the law on the subject of bidding either statutorily or by Court opinion. Petitioner avows that it must first be decided whether there is any mandate that a "Notice of Classification," form #DBC-3, be included in bid submission to a local board of education. Petitioner argues that, while it may be true that such a mandate exists when submitting bids to the State of New Jersey, Department of Education, along with form #DBC-701, no such requirement exists for local boards. In this regard, petitioner contends, the ALJ's second finding of fact is in error. It is petitioner's view that N.J.S.A. 18A:18A-26 is unequivocal and clearly does not require submission of form #DBC-3 or any information contained therein.

Petitioner contends that the next issue to be decided is whether the omission of the non-mandated form in question constitutes an immaterial variance in the bid submission. Petitioner asserts that the courts of New Jersey have recognized a two-fold test in determining that issue: first, would the omission deprive the board of its assurance that the contract would be entered into, performed or guaranteed; and second, does the omission put the bidder in an advantageous position over other bidders. Petitioner argues that the answer to both questions in the instant matter is in the negative. Thus, petitioner states, it can only be said that the omission of form #DBC-3 is a minor irregularity and an immaterial variance in the bid submission, and thus allowable. Petitioner cites his post-hearing brief for all arguments, statutory references and case citations in advancing his contentions.

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In reply exceptions, Respondent Coskey's Electronic System, (hereinafter Coskey's) argues point-by-point against those contentions raised in petitioner's exceptions citing its post-hearing brief in support of its counter-arguments. Said brief and arguments are incorporated herein by reference. Coskey's avers that the findings of fact and analysis prepared by the ALJ are in accordance with the laws of the State of New Jersey and the facts presented during the hearing. In particular, Coskey's avers that the first finding of fact is, in its estimation, the most important and most accurate in that the information required by the "Notice of Classification" form is not the same as is supplied in the "Total Amount Upon Completed Contract" form. Coskey's further contends that the former was a non-waivable requirement because it contained necessary information required by the Board. Thus, avows Coskey's, the failure of petitioner to submit the document was not a minor irregularity or immaterial variance.

Further, Coskey's concurs with the ALJ's finding of fact concerning the testimony of Ronald J. Foti, witness for petitioner, that he knew both forms were needed to accompany the bid, and that petitioner inadvertently failed to attach the pre-qualification, "Notice of Classification" form to the bid package. Coskey's avers that these findings require that the Commissioner sustain the initial decision rendered by the ALJ.

Upon careful review of the record in this matter including the exceptions, the Commissioner concurs with the ALJ's determination that "it cannot be said that High Fidelity lacked a fair and reasonable opportunity to compete and bid intelligently***." (Initial Decision, ante, quoting Fereday & Meyer Co., Inc. v. Elizabeth Board of Public Works, 27 N.J. 218, 223-224 (1958), quoting Camden Plaza Parking v. City of Camden, 16 N.J. 150, 159 (1954)) As noted by the ALJ, the testimony indicates that the information required by the "Notice of Classification" form is not the same as is supplied in the "Total Amount Upon Completed Contract" form. So long as the Board deemed the "Notice of Classification" as a non-waivable requirement, the Commissioner will not substitute his judgment for the Board's in that regard. Since the record is clear that the Board considered the absence of a "Notice of Classification" form "a material omission which cannot be waived," (Initial Decision, ante), a presumption of validity attaches to the Board's action. The Commissioner will not overturn its determination since there is no evidence that the Board's so deeming the Notice of Classification form indispensable was arbitrary, capricious or unreasonable. See Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966). See also Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

As to the factual determination of whether petitioner inadvertently failed to submit the proper forms, the Commissioner will defer to the ALJ on questions of credibility of witnesses where there is conflicting evidence and the findings are reasonably supported. See, Nicholas Campanile v. Board of Education of the Township of Middletown, Monmouth County, decided by the Commissioner

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March 2, 1982. Since the Commissioner's review of the record reveals no evidence to indicate that the determination of the ALJ was other than reasonable, the Commissioner affirms the conclusion that, because Mr. Foti was on vacation, form DBC-3, "Notice of Classification," was missing from High Fidelity's bid package.

Accordingly, the findings and conclusions of the initial decision are affirmed. The contract award to Coskey's as a result of the bidding process conducted by the Board was lawful and did not violate the provision of N.J.S.A. 18A:18A-26 or any other related statutory provision of the school laws.

The Petition of Appeal is hereby dismissed, and the contract award to Respondent Coskey's by Respondent Board is affirmed. Implementation of the contract between Respondent Coskey's and the Board is to be effected immediately upon issuance of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 13, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7775-84
AGENCY DKT. NO. 404-9/84

RITA CONNER, ELIZABETH McCLUSKEY AND BARBARA REBOLLO,

Petitioners,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVER VALE, BERGEN COUNTY,

Respondent.

OAL DKT. NO. EDU 8991-84
AGENCY DKT. NO. 466-11/84

DIANE GLADSTONE, MARCELLE VORT, LEANORE ROSENZWEIG, CAROL ADRIGNOLO, JOY MISHA, ELAINE MILLMAN and ADRIENNE HUBER,

Petitioners,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVER VALE, BERGEN COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Richard H. Bauch, Esq., for respondent
(Aron & Salsberg, attorneys)

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OAL DKT. NOS. EDU 7775-84
and EDU 8991-84

Record Closed: December 2, 1985 Decided: December 30, 1985

BEFORE **JAMES A. OSPENSON**, ALJ:

The above cases have been consolidated for hearing pursuant to N.J.A.C. 1:1-14.1 et seq. Eight petitioners in the consolidated cases (Conner, McCluskey, Rebollo, Vort, Adrignolo, Gladstone, Rosenzweig and Millman) were formerly employed by the Board of Education of the Borough of River Vale, Bergen County, in various positions as remedial or supplementary teachers and, for the 1984-85 school year, were assigned by the Board to full-time classroom teaching positions and installed on various steps of the salary guide for 1984-85, in accordance with a negotiated agreement in force in the district. Their placement on the guide by the Board was based on credit for teaching experience outside the district with no credit given for prior teaching experience within the district in remedial or supplementary positions, contrary, they alleged, to rights under N.J.S.A. 18A:16-11 and Spiewak v. Bd. of Ed., Rutherford, 90 N.J. 63 (1982). They sought judgment recognizing their status, correcting their 1984-85 salary guide placement to reflect uncredited years of prior experience in the district and granting all other such benefits due teaching staff members generally, including sick leave benefits, together with adjusted back pay since September 1, 1984. The Board admitted petitioners' tenure generally but denied their claims were remediable under N.J.S.A. 18A:29-9 and Hyman v. Bd. of Ed., Teaneck, 1985 S.L.D. —(State Bd. dec., March 6, 1985; appeal pending, App. Div.).

Two other petitioners (Misha and Huber) alleged they are tenured part-time remedial teachers employed by the Board and compensated for 1984-85 at an hourly rate of $10.50. They claimed such hourly compensation is less than a prorated fraction of compensation paid regular full-time teaching staff members employed by the Board and compensated under the 1984-85 salary guide. They alleged their compensation was improper and failed to reflect prior experience and academic training in the district. They sought declaration of their tenure, pro rata salary adjustment including credit for all periods of prior employment both in and out of the district and credit for academic

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attainments, together with adjusted back pay retroactive to September 1, 1984. The Board admitted those petitioners' tenure and their present and prior service in the district but denied their claims generally, contending they were not members of the negotiating unit and under Hyman, are not entitled to pro rata salary adjustment under N.J.S.A. 18A:29-4.1.

The petition of appeal under OAL Dkt. No. EDU 7775-84 was filed in the Bureau of Controversies and Disputes of the Department of Education on September 26, 1984. The Board's answer was filed there on October 16, 1984. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on October 19, 1984 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

The petition of appeal under OAL Dkt. No. EDU 8991-84 was filed in the Bureau of Controversies and Disputes of the Department of Education on November 20, 1984. The Board's answer was filed there on December 11, 1984. The Commissioner transmitted the matter to the Office of Administrative Law on December 17, 1984 for hearing and determination as a contested case.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on April 4, 1985 and an order entered. By order of the administrative law judge, the two matters were consolidated for hearing as involving common questions of fact and law, pursuant to N.J.A.C. 1:1-14.1 et seq. It was noted paragraphs 1, 2, 3, and 4 of the petition under OAL Dkt. No. EDU 7775-84 were admitted by the Board. Paragraphs 1, 2, 3, 4, and 5 of Count I and paragraphs 1 and 2 of Count II of the petition in OAL Dkt. EDU 8891-84 were admitted. The parties were directed by the administrative law judge to confer with a view towards fashioning stipulations of all relevant and material propositions of fact in the consolidated matters, including documentation, in chronological and sequential order. Thereafter, the matters at issue were to be addressed

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and resolved on pleadings, admissions, stipulations, documentation and memoranda of law, as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq., examination and cross-examination of witnesses having been waived. Thereafter, stipulations and memoranda of law having been filed, the record closed.[1]

As provided in the prehearing conference order, at issue in the matter generally are the following:

A. Whether petitioners' salary guide placements for 1984-85 were legally proper (as to all petitioners except Misha and Huber);

B. Whether Misha's and Huber's hourly compensation was correct, and/or whether they were entitled to salary prorated from the 1984-85 salary guide covering full-time teachers under Hyman; and

C. If not, what remedies (by way of salary and/or sick leave benefits) shall be granted.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having admitted and/or so stipulated, I make the following Findings of Fact:

1. Petitioners Conner, McCluskey and Rebollo are tenured full-time teaching staff members in the Board's employ.

---

1 The death of Adrienne Huber on October 18, 1985 is suggested on the record herein. By order of the administrative law judge, the Estate of Adrienne Huber, Richard T. Huber, executor, was substituted in her place as a party petitioner. Her last day of work in the district was September 18, 1985.

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2. Prior to the 1984-85 school year, petitioners Conner, McCluskey and Rebollo were employed as remedial teachers by the Board but were denied placement on the classroom teachers' salary guide. Petitioners received hourly wages and lesser benefits than classroom teachers during this period.

3. Commencing with the 1984-85 school year, petitioners Conner, McCluskey and Rebollo have been employed as classroom teachers by the Board.

4. The placement of Conner, McCluskey and Rebollo on the classroom teachers' salary guide for 1984-85 is based on credit for teaching experience outside of River Vale, with no credit given for petitioners' years of service as part-time remedial teachers in River Vale.

5. Petitioners Huber and Misha are tenured teachers employed by the Board in various remedial capacities under titles such as Chapter I, Supplemental, Compensatory Education and English as a Second Language. Petitioner Adrignolo was so employed by the Board until November 1, 1984.

6. Petitioners Huber and Misha are paid an hourly wage in their remedial capacity which is less than that paid, on a pro rata basis, to classroom teachers in the district with similar experience and academic training.

7. Until November 1, 1984, petitioner Adrignolo was paid an hourly wage in her remedial capacity that was less than that paid, on a pro rata basis, to classroom teachers in the district with similar experience and academic training.

8. Petitioners Huber and Misha also receive lesser benefits than classroom teachers, as did Adrignolo until November 1, 1984.

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9. Throughout all periods of employment, the Board has required petitioners Huber, Misha and Adrignolo to possess teaching certificates, and petitioners have fulfilled that requirement.

10. Pursuant to the decision in Spiewak petitioners Huber and Misha are teaching staff members as defined by N.J.S.A. 18A:1-1.

11. Petitoners Gladstone, Vort, Rosenzweig and Millman are employed by the Board for 1984-85 in positions that carry a salary based upon the classroom teachers' salary guide. Petitioner Adrignolo began to serve in said capacity as of November 1, 1984.

12. For 1984-85 the placement of petitioners Gladstone, Vort, Rosenzweig and Millman on the classroom teachers' salary guide does not include credit for petitioners' teaching experience both in and out of the River Vale school district.

13. A copy of the collective bargaining agreement between the Board of Education of the Township of River Vale and the River Vale Education Association for the period July 1, 1983 to June 30, 1985 is admitted and attached as J-1.

14. The following documents, relative to the employment of Rita Conner, are admitted and attached hereto:

    (a) employment history and hours (J-2A);
    (b) assignments (J-2B);
    (c) 1984-85 resolution of employment and salary (J-2C).

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15. The following documents, relative to the employment of Elizabeth McCluskey, are admitted and attached hereto:

    (a) employment history and hours (J-3A);
    (b) assignments (J-3B);
    (c) 1984-85 resolution of employment and salary (J-3C).

16. The following documents, relative to the employment of Barbara Rebollo, are admitted and attached hereto:

    (a) employment history and hours (J-4A);
    (b) assignments (J-4B);
    (c) 1984-85 resolution of employment and salary (J-4C).

17. The following job descriptions are admitted and attached hereto:

    (a) supplemental instructors (J-5A);
    (b) State compensatory education (J-5B);
    (c) E.S.L. (J-5D).

18. The following documents, relative to the employment of Adrienne Huber, are admitted and attached hereto:

    (a) employment history and hours (J-6A);
    (b) assignments (J-6B);
    (c) 1984-85 employment contract and salary (J-6C).

19. The following documents, relative to the employment of Joy Misha, are admitted and attached hereto:

    (a) employment history and hours (J-7A);
    (b) assignments (J-7B);
    (c) 1984-85 employment contract and salary (J-7C).

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20. The following documents, relative to the employment of Carol Adrignolo, are admitted and attached hereto:

(a) employment history and hours (J-8A);
(b) assignments (J-8B);
(c) 1984-85 employment contracts and salary (J-8C, D).

21. The following documents, relative to the employment of Diane Gladstone, are admitted and attached hereto:

(a) employment history and hours (J-9A);
(b) assignments (J-9B);
(c) superintendent's report (J-9C);
(d) Board minutes - April 18, 1984 (J-9D).

22. The following documents, relative to the employment of Elaine Millman, are admitted and attached hereto:

(a) employment history and hours (J-10A);
(b) assignments (J-10B);
(c) superintendent's report (J-10C);
(d) superintendent's report (J-10D)
(e) 1982-83 employment contract (J-10E);
(f) 1983-84 employment contract (J-10F);
(g) Board minutes - June 26, 1984 (J-10G).

23. The following documents, relative to the employment of Leanore Rosenzweig, are admitted and attached hereto:

(a) employment history and hours (J-11A);
(b) assignments (J-11B);
(c) 1984-85 salary notice (J-11C);
(d) superintendent's report (J-11D)
(e) 1978-79 employment contract (J-11E);

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(f) 1979-80 salary notice (J-11F)
(g) 1980-81 salary notice (J-11G);
(h) 1981-82 salary notice (J-11H);
(i) 1982 salary notice (J-11I);
(j) 1982-83 salary notice (J-11J);
(k) 1983-84 salary notice (J-11K);

24. The following documents, relative to the employment of Marcelle Vort nee Greenstein, are admitted and attached hereto:

(a) employment history and hours (J-12A);
(b) assignments (J-12B);
(c) 1984-85 salary notice (J-12C);
(d) superintendent's report (J-12D)
(e) 1977-78 salary notice (J-12E);
(f) 1978-79 salary notice (J-12F)
(g) 1979-80 salary notice (J-12G);
(h) 1980-81 salary notice (J-12H);
(i) 1981-82 salary notice (J-12I);
(j) 1982-83 salary notice (J-12J);
(k) 1983-84 salary notice (J-12K);
(l) Board minutes - April 18, 1984 (J-9D).

25. Copies of the following employee record cards are admitted and attached hereto:

(a) Carol Adrignolo (J-13A);
(b) Diane Gladstone (J-13B);
(c) Adrienne Huber (J-13C);
(d) Elaine Millman (J-13D);
(e) Joy Misha (J-13E);
(f) Leanore Rosenzweig (J-13F);
(g) Marcelle Vort (J-13G).

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26. A copy of the school calendar for the 1984-85 school year is admitted and attached hereto as J-14.

27. Adrignolo receives all benefits pursuant to the collective bargaining agreement. Adrienne Huber is a member of the Teachers' Pension and Annuity Fund. Joy Misha receives hospitalization, major medical, dental, and optical benefits. Misha is also a member of the Teachers' Pension and Annuity Fund. Any petitioner not specified receives all benefits pursuant to the collective bargaining agreement.

28. Full time classroom teachers are employed for 33.75 in-school hours per week. Their pupil contact time is generally 25 hours per week.

29. The 1984-85 work schedule for Carol Adrignolo from September 1 to October 31 is admitted and attached (J-14A). The times at which she started and ended her work day were as follows:

(a)	September -	9:00 - 3:10	2 days per week
		9:10 - 2:20	3 days per week
(a)	October -	9:00 - 2:25	3 days per week
		9:10 - 3:10	2 days per week

30. The 1984-85 work schedule for Adrienne Huber is admitted and attached (J-14A). The times at which she started and ended her work day were as follows:

(a) September to December - 9:00 - 12:30
(b) January to June 9:10 - 1:00 Monday - Thursday
9:15 - 1:00 Friday

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31. The 1984-85 work schedule for Joy Misha is admitted and attached (J-14C). The times at which she started and ended her work day were as follows:

(a) September to December - 9:00 - 12:30
(b) January to June 8:45- 2:45

32. Copies of the following vouchers for the 1984-85 school year are admitted and attached hereto:

(a) Carol Adrignolo (J-15);
(b) Adrienne Huber (J-16);
(c) Joy Misha (J-17).

33. The Board has not adopted any written policy restricting the use of part-time employment for placement on the salary guide. The Board has not adopted any written policy restricting the use of employment as a Chapter I, compensatory education, supplemental or E.S.L. teacher for placement on the salary guide.

34. Admitted and attached hereto are:

(a) Superintendent's report - July 22, 1983 (J-18);
(b) Superintendent's report - September 16, 1983 (J-19);
(c) Superintendent's report - August 20, 1976 (J-20);
(d) Related Board minutes (J-21);
(e) Board policies (J-22).
(f) Addendum to superintendent's report - December 14, 1984 (J-23):
(g) Addendum to superintendent's report - August 24, 1984 (J-24);
(h) Addendum to superintendent's report - July 17, 1984 (J-25);
(i) Superintendent's report - October 14, 1983 (J-26);
(j) Superintendent's report - September 16, 1983 (J-27);

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(k) Addendum to superintendent's report - July 17, 1979 (J-28);

(l) Superintendent's report - April 15, 1966 (J-29).

35. Admitted and attached hereto are documents reflecting pupil contact time worked by petitioners in the district prorated against a full-time teacher's pupil contact and non-pupil contact time (J-30A-D).

36. Teachers in the district must work at least one-half (1/2) of the academic year to move up a step on the salary guide.

37. (a) Huber possesses a B.S. degree

(b) Misha possesses a B.A. degree plus 16 graduate credits.

38. The daily period schedule for the Holdrum School operated by the Board is :

1. 9:13 - 9:55
2. 9:58 - 10:44
3. 10:43 - 11:25
4. 11:28 - 12:10
5. 12:13 - 12:55
6. 12:58 - 1:40
7. 1:43 - 2:25
8. 2:28 - 3:10

39. A total of 56 teachers have been hired in the district since September, 1974 through June, 1984 (J-31A-B).

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DISCUSSION

I

The petition of appeal by Gladstone, Vort, Rosenzweig and Millman sought judgment directing the Board to correct their salary guide placement to reflect full credit for prior teaching experience in any capacity and compensating them for salary and/or benefits lost on or after September 1, 1984 as a result of improper salary guide placement. The petition was filed November 20, 1984. The Board's answer in its fourth and seventh separate defenses raised the bar of the 90-day limiting period of N.J.A.C. 6:24-1.2:

> . . .[a] petition to the Commissioner to determine a controversy or dispute arising under the school laws must be filed within 90 days after the receipt of the notice by the petitioner of the action concerning which the hearing is requested. . .

The stipulated facts are clear. Petitioner Gladstone initially was placed on the salary guide, action she obviously then assented to, in 1982 at B.A. 8th step and was given credit for seven years of experience outside the district. J-9B. By action of the Board on April 18, 1984, Gladstone's position for the 1984-85 school year was established on the salary guide at B.A. 10th step at $20,360. J-9D.

Petitioner Vort originally was placed on the salary guide for the 1977-78 school year at B.A. 4th step. She previously had served in 1969-70 when she started on the salary guide at B.A. 3rd step. At the end of that year she resigned. J-12B. In succeeding years, she advanced regularly on the salary guide until April 19, 1984, when she consented to guide position at B.A. plus 15, step 11, at a salary of $21,550. J-12C, J-12H, J-12I, J-12J, J-12K.

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Petitioner Rosenzweig was first installed on the salary guide for the 1978-79 school year at B.A. 3rd step. She received a two-year experiential credit for service outside the district at the time. J-11D. By April 19, 1984, she had advanced and was installed on the guide at B.A. 9th step at $19,550 and expressly assented to such placement. J-11C.

Petitioner Millman originally was installed on the salary guide in 1982 for the 1982-83 school year on a prorated salary at M.A. 1st step. J-10D. By action of the Board on June 26, 1984, she was installed on the salary guide at full annual salary at M.A. 3rd step at $16,600. J-10G. She executed a written contract of employment at that step and rate for the 1984-85 school year on June 1, 1984. J-10C.

All those petitioners apparently had in-district experience not applied to their original salary guide placement. J-9B, J-12B, J-11B and J-10B. All such prior in-district experience was as Title I, S.C.E. and supplemental teachers.

All petitioners contended N.J.A.C. 6:24-1.2 was inapplicable to bar their claims, but if it was applicable, it would bar only those claims for compensation before date of filing of their petitions. The Board contended all such claims are necessarily barred, both retrospectively as well as prospectively and, moreover, that no occasion exists for relaxation of the rule under N.J.A.C. 6:24-1.19. I agree with the Board's contention. In North Plainfield Education Assn. v. Bd. of Ed., Borough of North Plainfield, 96 N.J. 587 (1984), two teachers sought credit on the salary guide for time spent on sabbatical leave but did not file their petitions before the Commissioner until more than nine months after expiration of a 90-day period under N.J.A.C. 6:24-1.2. An administrative law judge concluded the petition had been filed out of time, the Commissioner affirmed, and the State Board of Education affirmed the decision of the Commissioner. The Appellate Division reversed the State Board. On certification, the Supreme Court reversed the judgment of the Appellate Division and reinstated the State Board decision. The Supreme

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Court concluded that a teacher's entitlement to a salary increase or annual increment under N.J.S.A. 18A:29-8 was subject to denial by a school board for inefficiency or other good cause under N.J.S.A. 18A:29-14. An annual increment for meritorious service, therefore, said the Court, was not a statutory entitlement and claims for it were subject to the 90-day limiting period of N.J.A.C. 6:24-1.2. The Court noted petitioners in the case were aware their annual increment had been denied more than nine months before commencement of the 90-day limiting period. The Court also concluded petitioners' interrupted annual advances on the salary guide should continue in future years and barred them from relief as if for continuing future violations by the Board. The result was merely, said the Court, from the effect of an earlier employment decision, one that is protected by the regulatory period of limitations. North Plainfield at 593-5. The relief sought by petitioners Gladstone, Vort, Rosenweig and Millman here does not derive from statutory entitlement under N.J.S.A. 18A:29-8, since the legislation upon its face in N.J.S.A. 18A:29-9 makes original guide placement a matter of negotiation between employer and employee. To that extent, therefore, the holding of North Plainfield, is in apposition and controlling. Interposition of the bar, moreover, is consistent with prior decisions of the Commissioner. See, Kelly v. Bd. of Ed., Borough of Collingswood, 1981 S.L.D. — (Comm'r's dec. July 6, 1981). Petitioners have long since agreed to initial salary guide placement within the meaning of N.J.S.A. 18A:29-9, at various times when they accepted offers, none of which was within 90 days before their petition was filed. Passage of time has barred past, present or future correction.

Based on the foregoing, I **CONCLUDE** the claims of petitioners Gladstone, Vort, Rosenzweig and Millman should be, and they are hereby, **DISMISSED** as untimely under N.J.A.C. 6:24-1.2, there being no occasion for relaxation of the bar under N.J.A.C. 6:24-1.19.

II

Petitioners Conner, McCluskey and Rebollo, before the 1984-85 school year, were employed as remedial teachers and were denied placement on the classroom

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teachers' salary guide, receiving hourly wages and lesser benefits than classroom teachers during their service. For the 1984-85 school year, they were employed as full-time classroom teachers and installed in various positions on the salary guide based on teaching experience outside of the district, with no credit given for their years of service as part-time remedial teachers in the district. Petitioners Huber and Misha were employed in various part-time remedial capacities and remain so employed. Petitioner Adrignolo, like Conner, McCluskey and Rebollo, was previously so employed and was installed as a full-time classroom teacher on the salary guide according to prior years of service outside the district, on November 1, 1984.

The specific dollar claims of petitioners Conner, McCluskey, Rebollo and Adrignolo for proper salary guide advancement together with cash arrearages appear on page 27 of petitioners' brief. Similar claims for petitioners Huber, Misha and Adrignolo (the latter for a two-month period from September to October of 1984 and thereafter to date) are contained on pages 27 and 28 of petitioners' brief.

The collective bargaining agreement involved here, a post-Spiewak agreement, was effective from July 1, 1983 until June 30, 1985. J-1. Under it, the Board recognized the River Vale Education Association as the exclusive and sole representative for collective negotiations on terms and conditions of employment for, among others, teachers and supplemental teachers (hourly/part-time). Id., at 1. Article VI provides in part:

> 1. Each teacher may be placed on the proper step of the salary schedule as of the beginning of the school year with paragraph 2 below.
>
> 2. Credit up to the eleventh step of any salary level on the teacher salary schedule may be given for previous outside teaching experience in a duly accredited school. . .[Id., at 6.1].

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Article X provides:

> 3. The Board agrees to pay bedside instructors and supplemental instructors at the rate of $9.50 per hour for 1983-84 and $10.50 for 1984-85, following the State guidelines for arranging teaching time.
>
> Any hourly employee who works less than 20 hours a week shall not be entitled to fringe benefits such as leave of absence, health benefits, insurance benefits, insurance protection and other reimbursement except salary and mileage. [Id., at 10.2].

Stipulated facts demonstrated the Board had not adopted any written policy restricting use of part-time employment for placement on the salary guide, nor had it adopted any written policy restricting use of employment as a Chapter I, compensatory education, supplemental or E.S.L. Teacher for placement on the salary guide. Finding No. 33. Stipulated facts also demonstrated petitioner Adrignolo receives all benefits pursuant to the collective bargaining agreement. J-1. Petitioner Huber is a member of the Teachers' Pension and Annuity Fund. Petitioner Misha receives hospitalization, major medical, dental and optical benefits. She is also a member of the Teachers' Pension and Annuity Fund. All other petitioners in the case, including Conner, McCluskey and Rebollo, received all benefits pursuant to the collective bargaining agreement. Teachers in the district must work at least one-half of the academic year to move up a step on the salary guide. Finding No. 36. Petitioners Huber, Misha and Adrignolo (the latter for the time period September 1 to October 31, 1984) argued Spiewak dictated they should receive the same treatment, in terms of salary and benefits, as other teachers, commencing with the 1984-85 school year. To be refused, it was argued, would relegate them to a separate sub-category of teachers and thus unlawfully deprive them of statutory benefits in compensation. Just as their emoluments of tenure were recognized under the tenure laws in Spiewak or the Appellate Division decision in Rutherford Education Assn. v. Bd. of Ed., Rutherford, 99 N.J. 8, 14 (1985), they argued a declaration

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that remedial teachers enjoy the same legal status as traditional classroom teachers is meaningless if remedial teachers are maintained in an inferior salary status. As a result, they claimed both law and equity demand they be made whole for the injury done them historically and presently by the Board here. They urged further that they enjoyed de facto status and under N.J.S.A. 18A:16-11 are entitled to the emoluments and compensation appropriate for the work they perform. Otherwise, their compensation rights under that statute would be fraudently deprived them. They cited Dandorph v. Bd. of Ed. North Bergen, 1980 S.L.D. —(October 27, 1980).

Petitioners Conner, McCluskey, Rebollo and Adrignolo (since their full-time employment beginning November 1, 1984), it was urged, were entitled to use their years of service as auxiliary teachers for their current salary guide placement. Though they received credit for out-of-district experiential service, they claimed denial of in-district service as remedial teachers on the basis of unwritten, unadopted policy was a violation of their rights under N.J.S.A. 18A:29-4.1, citing Ball v. Teaneck Bd. of Ed., 1984 S.L.D. -- (Aug. 31, 1984). Finally, they argued that N.J.S.A. 18A:16-11 required inclusion of their prior years of in-district experience as remedial teachers when determining their current salary guide placement as an "emolument of their positions, such right being a non-pecuniary statutory right such as those under tenure laws, N.J.S.A. 18A:28-5, and seniority laws, N.J.S.A. 18A:28-9.

The Board's position was that none of the petitioners (Conner, McCluskey, Rebollo and Adrignolo) are entitled under education compensation statutes or Spiewak to salary guide placement, a proposition enunciated by the State Board of Education in Hyman. The holding in that case, it was urged, is dispositive of claims of petitioners Misha, Huber and Adrignolo (the latter for the period of September and October 1984) as well as the claims of Conner, McClusky, Rebollo and Adrignolo for alleged improper salary guide placement on assumption of full-time employment. Guide placement of the latter four petitioners recognized prior out-of-district experience even if not recognizing

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their prior in-district experience: Conner was placed on step 7 with a B.A. plus 15, McCluskey was placed on step 4 with a bachelor's degree, Rebollo was placed on step 2 with a bachelor's degree, and Adrignolo was placed on step 5 with a master's degree. In Hyman, the State Board said:

> . . . [N]either the tenure statutes nor those governing compensation confer on teaching staff members the right to placement on any particular salary guide. Nor does the decision in Spiewak create such right. We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.
>
> . . . .
>
> Thus, boards and teachers are free to negotiate terms of compensation within the parameters set by the education laws and specific department rules or regulations. [Id., at 11].
>
> [T]he compensation statutes do not require that full-time teaching staff members be paid any specific salary but merely set minimum salaries. N.J.S.A. 18A:29-5, 7, 12. . . Nor do the statutes require that salary credit be given for teaching experience outside the district or for experience in business. [Id., at 14].
>
> In sum, we conclude that the decision in Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes nor those governing compensation. Because supplemental teachers are not entitled to guide placement as a matter of law, we hold that separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws. . . .[Id., at 16].

In Baker v. Bd. of Ed., City of Clifton, 1985 S.L.D. — (Comm'r's dec. Oct. 18, 1985; appeal pending, St. Bd.), the Commissioner in adopting and affirming findings and determinations of the administrative law judge, approved the proposition that:

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> . . . Spiewak and its progeny do not require retroactive adjustments in initial placement and do not deny the Board discretionary rights granted by N.J.S.A. 18A:29-9 to offer initial step placement which gives reasonably variable credits for past experience. . . [Id., at 10].

> As was the case in Hyman, every petitioner here was and is a de jure employee; the board passed valid resolutions appointing petitioners as teachers first on part-time and later on a full-time basis. In order for petitioners to become de jure teachers, all the board had to do was pass the appropriate resolution at which point they held their positions "by right and just title.". . . If by some chance, the board neglected to do this and a petitioner, not knowing the lack of a resolution, performed the services anyway, he/she would be a de facto employee and would nonetheless be entitled to be paid under N.J.S.A. 18A:16-11. . . Since petitioners were at all times de jure employees of the board, the cited statute has no application to them. [Id., at 7].

Concerning the statute covering agreement as to initial salaries, N.J.S.A. 18A:29-9, it was held in Baker that the plain meaning of the statute is that initial step placement for petitioners such as those here who were not accorded credit for in-district prior experience was entirely legal. Initial step placement is not controlled by a negotiated contract. The statute does not mandate absolute equal treatment of all teachers for step placement, for that would preclude a board from offering a higher step placement to obtain teachers in short supply or on an emergent need basis. A principal purpose of the statute, it was held, was to enable boards to make offers of employment in accordance with their needs. . . [Id., at 7, 8].

In sum, it is my view that essential issues raised in the remaining claims here of petitioners Conner, McClusky, Rebollo and Adrignolo (in both aspects), as well as those of petitioners Misha and Huber for pro rata salary guide placement for their part-time

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employment positions, are meritless under existing decisional law enunciated principally in Hyman, and followed perhaps most recently in Baker. Thus, their petitions seeking judgment correcting their 1984-85 salary guide placement to reflect uncredited years of prior experience in the district, together with other employment emoluments and adjusted back pay since September 1, 1984, and seeking judgment for pro rata salary adjustment for years of prior employment within the district as part-time supplemental employees, together with adjusted back pay retroactive to September 1, 1984, should be and are hereby **DISMISSED.** More specifically, I **CONCLUDE** the Board here has acted properly within its statutory discretion for initial step placement recognizing out-of-district prior experience as authorized by its negotiated agreement in Article VI and in fixing hourly employment for part-time positions in the case of petitioners Misha and Huber at $10.50 per hour, neither tenure laws nor compensation laws representing any impediment thereto.

CONCLUSION

For all foregoing reasons, the petitions of appeal in both consolidated matters are **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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I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

December 24, 1985
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 3 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js/e

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RITA CONNER, ELIZABETH MC CLUSKEY AND BARBARA REBOLLO,	:	
PETITIONERS,	:	
AND	:	
DIANE GLADSTONE, MARCELLE VORT, LEANORE ROSENZWEIG, CAROL ADRIGNOLO, JOY MISHA, ELAINE MILLMAN AND ADRIENNE HUBER,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RIVER VALE, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. A summary of the positions of the parties is provided below.

Petitioners allege the initial decision improperly dismissed the claims of Gladstone, Vort, Rosenzweig and Millman as untimely pursuant to N.J.A.C. 6:24-1.2. They assert that in determining the applicability of that regulation, an examination must be made of their claims; that is, it is in the context of the specific claims made that any applicability of N.J.A.C. 6:24-1.2 must be judged. Citing Stockton v. Bd. of Ed. of City of Trenton, decided by the Commissioner November 19, 1984, rev'd State Board April 3, 1985 as support, petitioners avow that because they filed their claim on November 19, 1985 which is within 90 days of receipt of the first paycheck of the 1984-85 school year, the Petition of Appeal is timely. Because the claims relate to salary guide placement for 1984-85 and were filed within 90 days of the beginning of the school year, the regulation should not apply.

Further, petitioners contend that, even if N.J.A.C. 6:24-1.2 were determined to be applicable, it would not affect prospective relief, only retroactive relief.

In addition, petitioners assert that the initial decision incorrectly concluded that their substantive claims were contrary to the decisions in Hyman, supra, and Baker, supra, contending that reliance on these cases is inappropriate.

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Reliance on Baker, supra, is seen by petitioners to be inappropriate because the case was dismissed on the time bar issue (N.J.A.C. 6:24-1.2); thus, all references to the substantive nature of the claims in that case are pure obiter dictum. As such, that non-binding opinion should not be controlling or applied to the instant matter.

Petitioners contend that Hyman, supra, does not address the factual basis and legal issues raised in the present case in that Hyman does not examine the use of service as remedial teachers for salary guide placement as classroom teachers. Ball, supra, does, however, yet it was ignored. Further, in Hyman the part-time remedial teachers were paid on the basis of a pro rata salary established by a separate salary guide for remedial teachers, while, in the instant matter, full-time remedial teachers are placed on the salary guide for classroom teachers and part-time remedial teachers are paid on an hourly basis.

The Board's reply exceptions reject petitioners' legal arguments, averring that (1) the ALJ correctly held that N.J.A.C. 6:24-1.2 barred the claims of Gladstone, Vort, Rosenzweig and Millman; (2) Hyman, supra, was correctly applied; (3) the requirements of N.J.S.A. 18A:29-9 were met when petitioners agreed with their initial placement on the salary guide for full-time teachers; and (4) should the Commissioner find Conner, McCluskey, Rebollo, and Adrignolo entitled to relief, they are not entitled to the entirety of the relief sought.

Upon review of the record in this matter and the exceptions of the parties, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal for the following reasons.

The focal issues in the instant matter center on (1) what rights, if any, exist with respect to salary guide placement when a part-time, hourly wage, supplemental/remedial teacher moves to a full-time teaching position, (2) what applicability N.J.A.C. 6:24-1.2 has, if any, in such circumstances and (3) what entitlement, if any, exists for part-time teaching staff to pro rata compensation based on the full-time teacher salary schedule.

The State Board in Hyman, supra, determined that the tenure statutes do not confer to any teaching staff member the right to placement on a salary guide. Further, its analysis of the pertinent statutes concerning compensation of teaching staff members led the State Board to conclude that those statutes (N.J.S.A. 18A:29-4.1 et seq.) apply only to full-time members. Of this it stated:

> ***In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. Further, there is no requirement that

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> a board adopt a salary policy for its full-time teaching staff members, although it is authorized to do so under N.J.S.A. 18A:29-4.1.***
>
> (Slip Opinion, at p. 10)

This determination reached by the State Board in Hyman, supra, has significant bearing on the issues presented in this matter. Firstly, it fully supports the ALJ's determination that compensation based on a pro rata full-time teaching salary guide placement is not a statutory entitlement. Secondly, it provides the legal basis upon which the ALJ correctly determined that, given the factual circumstances herein, the movement from hourly, part-time wage status to full-time teaching status constituted initial employment in the district for salary guide purposes. N.J.S.A. 18A:29-9

Unlike the factual circumstances in Ball, supra, there does not exist herein a multi-step salary guide for part-time teaching staff members. Rather, a "flat rate" hourly wage has been negotiated by the Teachers' Association for part-time teachers.* Thus, there is not the question of movement from a multi-step part-time salary guide (which already incorporated in-district experience) to full-time salary guide placement as was found in Ball, supra, and Walter et al. v. Bd. of Ed. of Teaneck, decided by the Commissioner July 22, 1985.

Rather, the circumstances of the present matter are more analogous to Baker, supra, wherein it was determined that placement of part-time hourly wage teaching staff on a teaching salary guide when moving to a full-time position was, for compensation purposes, considered to be initial employment pursuant to N.J.S.A. 18A:29-9. Baker, supra, has bearing herein because in order to reach a determintion that petitioners in that case were time barred, the ALJ and the Commissioner had to first determine whether or not they were entitled by statute to in-district part-time experience when moving to full-time positions. Thus, the substantive discussion contained in that decision is not obiter dictum, as contended by petitioners herein. Rather, it is apposite and the ALJ was correct in relying on it in the present matter.

Consequently, the Commissioner affirms the conclusion of the ALJ that petitioners are not entitled by statute to credit for in-district experience. Initial salary pursuant to N.J.S.A. 18A:29-9 is a matter of agreement/negotiation between the employee and the board. Further, it must be stressed that initial placement is not controlled by a negotiated contract. Baker, supra

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* The Commissioner notes that the agreement between the association and the Board (J-1) excludes representation of part-time staff specially funded with private, state or federal monies, a factor which appears to be clearly contrary to numerous court decisions which dictate that source of funding cannot be used to differentiate teaching staff members. Spiewak, supra.

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The Commissioner also affirms the ALJ's determination that the claims of Petitioners Gladstone, Vort, Rosenzweig and Millman are time barred by N.J.A.C. 6:24-1.2. Pursuant to Hyman, supra, there is no statutory entitlement to salary guide placement. Moreover, movement from part-time hourly wage status to full-time teacher salary guide placement constitutes, in the present matter, initial employment pursuant to N.J.S.A. 18A:29-9, whereby salary is negotiated between the employee and the board and, thus, does not constitute a statutory entitlement. Therefore, any claims with respect to such initial salary are subject to the provisions of N.J.A.C. 6:24-1.2. North Plainfield, supra Even if a statutory entitlement existed, N.J.A.C. 6:24-1.2 would be applicable given the State Board's decision in Paul Gordon v. Bd. of Ed. of Twp. of Passaic, decided by the Commissioner October 31, 1983, aff'd in part/rev'd in part State Board March 6, 1985 because, as in Gordon, the issue herein is functionally related to teaching experience.

Accordingly, for the reasons stated herein, the Petitions of Appeal are dismissed.

COMMISSIONER OF EDUCATION

February 18, 1986

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RITA CONNER, ET AL. AND DIANE GLADSTONE, ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVER VALE, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 18, 1986

For the Petitioner-Appellant, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Aron, Salsberg and Rosen
(Richard H. Bauch, Esq., of Counsel)

We affirm the decision of the Commissioner with the modification that initial placement on a salary guide pursuant to N.J.S.A. 18A:29-9 is a matter of individual agreement between the employee and the board only if not superceded by a collective negotiations agreement. Belleville Education Association v. Belleville Board of Education, 209 N.J. Super. 93 (App. Div. 1986).

October 1, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5000-85

AGENCY DKT. NO. 218-7/85

GILDARDO OLARTE,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,

Respondent

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Suzanne Raymond, Esq., for respondent
(Gutfleish & Davis, attorneys)

Record Closed: December 27, 1985 Decided: January 8, 1986

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

Petitioner, a non-tenured accounts payable clerk, alleged the action of the Englewood Board of Education (Board) in nonrenewing his employment was arbitrary, capricious, made in bad faith, discriminatory or otherwise improper. The Board denies any impropriety and asserts its action was a lawful exercise of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on August 12, 1985. A Prehearing Order was entered on September 24, 1985 memorializing agreements at conference on that same

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date, wherein the parties agreed to a consolidation of a petition filed with the Division of Civil Rights on July 27, 1985 and docketed as Charge No. 022850896 with a predominant interest in the Department of Education. An Order to Consolidate with Predominatnt Interest was entered on September 26, 1985.

A plenary hearing was held on November 25, 1985 and post-hearing briefs were submitted by the parties. The record closed on December 27, 1985, the date established for the filing of simultaneous responses.

The following facts were stipulated by the parties and is adopted herein as FINDINGS OF FACT:

1. Petitioner began employment with respondent on a full-time basis as an accounts payable clerk on January 23, 1983.

2. The Board and the Association are parties to a collective negotiations agreement which includes Article 9 — Fair Dismissal Procedures. Exhibit J-1.

3. During the 1983-84 school year, petitioner used 59 sick days, including the 12 days permitted under the Agreement between the Association and respondent.

4. During the 1984-85 school year, petitioner used 16 sick days, including the 12 days permitted under the Agreement.

5. Respondent never formally disciplined petitioner for his absenteeism, however, petitioner was notified by Superintendent of Schools, Ruth Johnson, in a letter dated June 13, 1984 that termination would be recommended if petitioner's poor attendance record continued. A copy of said letter was placed in petitioner's personnel file. Exhibit J-12.

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6. During the course of his employment, petitioner received four evaluations, copies of which are attached as Exhibits J-2, J-3, J-4 and J-5.

7. Petitioner was advised both orally and in writing on March 28, 1985 that the Board intended to consider the non-renewal of his contract at its April 4, 1985 work session. Exhibit J-6. Petitioner requested and was granted a public discussion with respect to the non-renewal of his contract.

8. At its April 18, 1985 meeting, respondent voted to terminate petitioner's contract. Petitioner attended this meeting with his attorney. A copy of the Board resolution is attached as Exhibit J-7.

9. Respondent did not provide petitioner with a written statement of reasons for the non-renewal of his contract. Petitioner did not request from the Superintendent, either orally or in writing, a statement of reasons for the non-renewal of his contract.

10. Pursuant to Article 9.07 of the Agreement, petitioner submitted a letter dated May 13, 1985 to respondent accepting respondent's offer of employment for 1985-86. Exhibit J-8. Petitioner's letter of May 13, 1985 was not in response to an actual offer of employment for the 1985-86 year but rather constituted petitioner's response to his own interpretation of the events surrounding his non-renewal and the parties' collective negotiations agreement.

11. By letter dated May 17, 1985, Dr. Amatuzzi responded. Exhibit J-9.

12. On May 4, 1985, petitioner notified respondent of his inability to attend work due to medical problems. Exhibit J-10.

13. By letter dated May 15, 1985 and June 13, 1985, respondent corresponded with petitioner concerning, inter alia, his absence. Exhibits P-11 and J-12.

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14. Petitioner returned to work on June 18, 1984.

15. Petitioner filed a complaint with the Division on Civil Rights on July 26, 1985. Exhibit J-13.

Petitioner testified that he was advised on March 28, 1985 by the school business administrator and board secretary, Dr. Joseph R. Amatuzzi, that employment renewal could not be recommended because of petitioner's excessive absenteeism. He also testified that he attended an April 18, 1985 meeting of the Board with his attorney, who put forth effort to persuade the Board not to punish his client for absenteeism. He also testified the Board did not provide him with a statement of reasons for non-renewal; he was in physical therapy at the time he applied for employment; and that his doctor prescribed four to six weeks of therapy on March 28, 1985, exactly one year prior to Amatuzzi's notice of the non-renewal recommendation.

Petitioner further testified that Amatuzzi advised him in an October 1984 conference that his attendance at work was essential as a dependable employee.

Petitioner buttresses his belief that the Board's non-renewal action was discriminatory because he is Hispanic based on the failure of one Dr. Dines to say hello to him; Amatuzzi's negative attitude against him; and the employment of a white woman, one Patricia Harris, to replace him.

On cross-examination, petitioner testified that he did not request reasons for his non-renewal. He also testified that none of his evaluations (J-2 through J-5) stated his performance was up to expectations.

Upon examination by the undersigned, petitioner stated he received therapy three days per week for approximately one to one and one-half hours per session; was absent about 47 days; and would either lie down, walk, or stand when he was not in therapy.

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Amatuzzi testified that he gives consideration to performance, attendance, and staff relations for renewal recommendations, and upon review of a staff member's total record will not recommend "tenure appointments" in the absence of unquestioned quality performance.

He further testified that petitioner was absent 75 days in two years; the accounts payable clerk processes purchase orders and payment vouchers (about 4000 of the latter per year); there was an approximate 90 days backup when he arrived in the district (September 1, 1984); credit extensions were becoming difficult, vendors were reluctant to provide supplies without payment of back bills; support staff filling in for the absent petitioner were resentful of having to do so and petitioner's performance was average when he was on the job.

Amatuzzi also testified that his review of petitioner's evaluations and performance revealed a lack of evidence in attendance improvement or outstanding performance which negated a "tenure appointment" recommendation.

Further testimony from Amatuzzi indicated a full review and consideration by the Board occurred after listening to petitioner's counsel and questioning him (Amatuzzi) for responses in support of his recommendation of non-renewal.

On cross-examination Amatuzzi testified he did not question the legitimacy of petitioner's absences; petitioner's absenteeism was the primary but not the sole reason for non-renewal; petitioner's performance when on the job was not of sufficient quality to overcome his absences; the Board again reviewed petitioner's employment status on June 20, 1985 and reaffirmed its initial determination.

Russell C. Major, a Board member for over 10 years, testified there was extended discussion between the Board, Amatuzzi, and petitioner's attorney at its meeting on April 18, 1985; the fact that renewal of petitioner's employment would be tantamount to a tenure appointment was critical; petitioner's Hispanic heritage was not a factor at all as the Board is currently in litigation trying to keep a Hispanic social worker; and the Board

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reconsidered petitioner's non-renewal on two additional occasions after April 18 and determined there was insufficient rationale for a reversal.

On cross-examination Major summarized the rationale of the Board's non-renewal action by stating that the Board concluded petitioner was not an employee that could be depended on for good attendance and a consistent quality performance in the absence of evidence of a sincere dedication to professional responsibilities. Major further testified as to his belief that petitioner's evaluations were insufficiently positive for employment renewal with a tenure status at issue for any employee in the district, which would warrant a similar non-renewal action by the Board.

ARGUMENTS OF COUNSEL

Petitioner argues that the Board's determination not to renew his employment was arbitrary and capricious in the absence of an expressed policy on absenteeism, since it did not consider the basis for his absences and since it did not follow proper procedure. In support of his argument, petitioner cites Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

Petitioner also cites Donaldson v. Bd. of Ed. of North Wildwood, 65 N.J. 236 (1974) in support of his contention of procedural impropriety due to the Board's failure to state reasons for non-renewal.

Petitioner also argues that the Board's non-renewal action was based upon discrimination because of national origin primarily because petitioner was replaced by a white female whose attendance was no better than his. D'Ambrosio v. Warren Hills Regional Bd. of Ed., 1980 S.L.D. 290.

The Board also cites Kopera, wherein the court stated at 294:

> An action of a local school board which lies within the area of its discretionary powers such as the decision whether to reemploy a nontenured teacher, may not be upset unless it is found to be patently arbitrary, without rational basis or induced by improper motives.

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The Board also cites Goldstein v. Bd. of Ed. of the Twp. of Wyckoff, 1982 S.L.D. ____ (decided September 2, 1982) for the proposition that it is not obligated to renew contracts of staff members whose performance is even considered favorable. Reliance is also placed on Hallowell v. Bd. of Ed. of the Twp. of Springfield, 1981 S.L.D. ____ (decided July 6, 1981), wherein the Commissioner concluded that the petitioner's evaluations, which were not up to expectations, established sufficient reasons for non-renewal. The Board further relies on Nettles v. Bd. of Ed. of the City of Bridgeton, 1976 S.L.D. 555 and Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982).

The Board further argues for dismissal of the petition because petitioner failed to prove that his non-renewal was discrimatory based on his Hispanic origin, and relies on Peper v. Princeton University Board of Trustees, 77 N.J. 55, 80 (1978) for the proposition that an allegation of employment discrimination "does not affect the normal rule that the burden of proof by a preponderance of the evidence is with the complaining party even where invidious discrimination is alleged."

The Board also cites the New Jersey Law Against Discrimination, codified in N.J.S.A. 10:5-2.1, which states:

> Nothing contained in this Act . . . shall be construed to . . . prevent the termination or change or the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard . . .

FINDINGS OF FACT

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

1. Petitioner's absenteeism during a two year period was 75 days.

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2. The evaluations of petitioner's performance, supported by petitioner's own testimony, do not state that petitioner's performance was up to expectations.

3. Petitioner knew the reasons for his non-renewal although no formal reasons were conveyed to him in writing by the Board after its non-renewal action.

4. Petitioner never requested reasons for non-renewal in writing.

5. Evidence that the Board's non-renewal action was based on petitioner's national origin was nebulous at best.

6. The Board's non-renewal action was based on petitioner's absenteeism and an assessment of his performance perceived to be less than the quality expected for a renewal action which was tantamount to tenure accrual during its term.

7. The Board's non-renewal action was a proper exercise of its discretionary authority.

CONCLUSIONS OF LAW

I CONCLUDE that the Petition of Appeal shall be and is hereby DISMISSED.

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

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

8 January 1986
DATE

WARD R. YOUNG, ALJ

JAN 10 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 13 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

R

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GILDARDO OLARTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Initially, petitioner takes particular exception to paragraphs two and five of the ALJ's findings of fact. Petitioner also takes exception to the ALJ's finding in paragraph six that the Board's nonrenewal decision was based upon "an assessment of his performance [which was] perceived to be less than the quality expected***." (Initial Decision, ante) Finally, petitioner excepts to the ALJ's conclusion, stated in paragraph seven, that the Board's decision was a proper exercise of its discretionary authority.

More specifically, petitioner avers that the Board's expressed reason for its nonrenewal decision -- excessive absenteeism -- is pretextual. Flowing from this statement, it is petitioner's contention that the Board's nonrenewal of his contract was discriminatory based upon his national origin. Petitioner avers that, at the very least, the matter should be remanded for more detailed findings of fact to provide a basis, if any, to adequately except to this conclusion. Petitioner cites to his improved absentee record in the 1984-85 school year over his record in the 1983-84 year. Petitioner adds that it is undisputed that the Board did not discipline him for his absenteeism. Neither did the Board maintain a written policy concerning absenteeism. From these facts, petitioner concludes that the Board had every reason to believe that his attendance problems would continue to improve and, thus, his dismissal was discriminatory.

Petitioner further avows that, contrary to the position of the Board, there is no credible evidence in the record to support the position that petitioner's performance was deficient. Petitioner cites to his evaluations for evidence to the contrary. Based on the positive comments noted in the evaluations and his improved attendance record, petitioner avers that the nonrenewal decision could not be, and was not, based on petitioner's attendance

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or his allegedly deficient performance, and that the only other plausible reason for the Board's failure to renew was that the Board discriminated against petitioner because he is Hispanic. Petitioner points to the replacement employee's absence record to bolster his assertion of discrimination because the replacement employee had been absent as much in one year during the 1984-85 school year as petitioner had been over two years. Petitioner discounts the Board's contention that the replacement's absences were a one-time occurrence. Based upon the foregoing, petitioner requests that the Commissioner reject the initial decision and find that the Board's decision not to reappoint him was discriminatory based upon petitioner's national origin. Alternatively, petitioner requests the case be remanded for more specific factual findings in connection with paragraph five of the findings of facts.

The Board's exceptions state that, while it does not take exception to any portion of the initial decision, it would emphasize certain facts and legal principles which support the ALJ's determination and warrant consideration by the Commissioner. Those considerations follow:

1. The Board acted pursuant to its managerial prerogatives and had valid grounds for not renewing petitioner's contract for the 1985-86 school year.

   a. A board of education is not obliged to renew the contracts of nontenured employees whose performance is considered satisfactory or even favorable. Rather, it has the responsibility to hire the best staff members available. See Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982); Goldstein v. Bd. of Ed. of the Tp. of Wyckoff, 1982 S.L.D. ____ (decided September 2, 1982); Hallowell v. Board of Ed. of the Township of Springfield, 1981 S.L.D. ___ (decided July 6, 1981); Nettles v. Board of Ed. of the City of Bridgeton, 1976 S.L.D. 555.

   b. A board's action within its discretionary powers "may not be upset unless it is found to be patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).

   c. The petitioner's poor and unpredictable attendance interfered with the functioning of the district's accounts payable operations. The 60 to 90 day

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backlog in payments to creditors had resulted in an adverse reputation in the business community and the cut-off of the Board's credit in at least two instances.

d. The petitioner's conduct reflected a lack of dedication to his job responsibilities and a failure to understand the requirements and importance of the job.

e. The renewal of the petitioner's contract for the 1985-86 year would have resulted in an award of tenure to an employee with a poor attendance record whose job performance was mediocre.

f. The four evaluations of the petitioner for the 1983-84 and 1984-85 school years all state that his job performance was not up to expectations and that improvement was needed.

2. The petitioner was afforded proper notice of his nonrenewal and all elements of due process.

a. On March 28, 1985 the petitioner was provided with oral and written notice that the nonrenewal of his contract would be considered by the Board and of his right to request a public discussion.

b. On April 18, 1985 the petitioner attended the Board meeting with his attorney who participated in the discussion of his nonrenewal. The petitioner observed and heard the Board discussion and vote of nonrenewal which, in fact, provided him with actual notice of his termination.

c. The petitioner never requested and, therefore, was not furnished with a written statement of reasons for his nonrenewal. However, the reasons for the petitioner's nonrenewal of contract were clearly communicated to him by Dr. Amatuzzi and at the April 18, 1985 Board meeting which he attended.

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d. The Board's resolution of nonrenewal was not merely a rubber stamp of an administrative recommendation. At its April 17, 1985 meeting the Board reviewed the petitioner's file and discussed his nonrenewal for at least half an hour. It subsequently considered the matter at two closed session meetings and determined that the petitioner's employment record did not warrant an offer of a tenure contract.

3. The petitioner's allegations of discrimination based on his Hispanic origin are insubstantial and utterly without merit.

a. An allegation of employment discrimination is to be treated no differently than any other civil action and "does not affect the normal rule that the burden of proof by a preponderance of the evidence is with the complaining party even where invidious discrimination is alleged." Peper v. Princeton University Board of Trustees, 77 N.J. 55, 80 (1978).

b. All of the incidents propounded by the petitioner as a basis for his claim of discrimination were disproven and disposed of by the testimony at the hearing as being either factually incorrect or without any relationship whatsoever to the nonrenewal of the petitioner's contract. Significantly, none of the petitioner's statements were corroborated since he was the sole witness to testify on his own behalf.

c. The Englewood district's positive record with respect to minorities should be viewed in the context of the petitioner's charges. The Board has a history and record of employing many minority members including Hispanics in administrative, teaching and other positions in the district.

For all of the foregoing reasons, [the Board] respectfully request[s] that the Initial Decision of the [ALJ] dismissing the petition be upheld.
(Board's Exceptions, at pp. 2-3)

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Upon review of the record in this matter and thorough consideration of the legal arguments raised by petitioner in his exceptions, the Commissioner concurs with the ALJ's determination that petitioner's dismissal from his nontenured clerical position with the Board was not arbitrary, capricious, discriminatory or otherwise improper for the reasons expressed below. Preliminarily, the Commissioner notes:

1. It is a well-established principle of school law that a nontenured teacher or other nontenured employee has no vested right or entitlement to a renewal of contract. See Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). See also Goldstein v. Board of Education of the Township of Wyckoff, 1982 S.L.D. 837.

2. A school board's decision is presumed valid and the complaining party has the burden of proving that the board's actions are arbitrary, capricious or discriminatory. See Hallowell v. Board of Education of the Township of Springfield, decided by the Commissioner July 6, 1981. See also Kopera, supra.

3. A school board has great discretion with respect to an award of tenure. See Nettles v. Board of Education of the City of Bridgeton, 1976 S.L.D. 555, quoting Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 241 (1974) See also N.J.S.A. 10:5-2.1. (Respondent's Post-Hearing Brief at pp. 13-15 and Respondent's Supplemental Letter Brief, at p. 5)

The Commissioner also notes a recent State Board decision in Guerriero v. Board of Education of the Borough of Glen Rock, decided by the Commissioner March 4, 1985, aff'd State Board February 5, 1986.

Since the Board offered four reasonable bases for nonrenewal of petitioner's contract, the Commissioner finds, as did the ALJ, that the Board was within its discretionary authority in choosing not to reemploy petitioner for the 1985-86 school year. The reasons tendered by the Board in its brief and at the hearing and in exceptions, which the Commissioner finds to be entirely reasonable, are recited below:

c. The petitioner's poor and unpredictable attendance interfered with the functioning of the district's accounts payable operation. The 60 to 90 day backlog in payments to creditors had resulted in an adverse reputation in the business community and the cut-off of the Board's credit in at least two instances.

d. The petitioner's conduct reflected a lack of dedication to his job responsibilities and a failure to understand the requirements and importance of the job.

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e. The renewal of the petitioner's contract for the 1985-86 year would have resulted in an award of tenure to an employee with a poor attendance record whose job performance was mediocre.

f. The four evaluations of the petitioner for the 1983-84 and the 1984-85 school years all state that his job performance was not up to expectations and that improvement was needed. (Board's Exceptions, at p. 2)

Further, petitioner rebuts the Board's position that the nonrenewal decision was based on petitioner's attendance and his performance. Since the evaluations (J-2 to J-5) include such language as "has been receptive to upgrading his skills," "assuming more responsibility," "continues to carry out his functions well," etc., petitioner argues that there is no basis for determining that his performance is deficient. The Commissioner disagrees. While these comments are a part of the evaluations, the four evaluations of petitioner for the 1983-84 and the 1984-85 school years leave no question that his job performance was not up to expectations and that improvement was needed. Further, adequate notice of his less-than-satisfactory performance is evident from the fact that in none of the evaluations is the Item I box "Performance up to expectation" checked. Further comments attesting to the need for improvement include "There is question as to whether continued employment is advisable due to the nature of the illness" and "At this time, I am concerned about his absences due to health problems. In the accounts payable operation, steady attendance is critical.***" (See J-3 and J-4.) In light of these comments and the fact that petitioner was advised both orally and in writing on March 28, 1985 that the Board intended to consider nonrenewal of his contract at its April 4, 1985 work session, coupled with his appearance at said meeting, the Commissioner finds, as did the ALJ, that petitioner's notice and due process rights were honored by the Board, notwithstanding the fact that he did not receive written notice of the reasons for his termination.

As to petitioner's allegation of employment discrimination based on his ethnicity, the Commissioner is in accord with the ALJ that petitioner's allegations concerning discrimination are "nebulous at best." (Initial Decision, ante) From his review of the record, which, it is noted, does not include a transcript of the hearing, it is the Commissioner's opinion that petitioner has failed to meet his burden of proving that the reason for his termination was merely a pretext for ethnic discrimination.

The record indicates that petitioner offered no corroborating witnesses to testify on his behalf. Petitioner's exceptions offer an inference only that because he believed either his attendance or allegedly deficient performance was not the basis for his termination, "[t]he only other plausible reason is that the Board discriminated against petitioner because he is Hispanic." (Petitioner's Exceptions, at p. 3) The Commissioner rejects this

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argument out of hand. Petitioner further argues in exceptions that his replacement, a Caucasian female, had an absence record worse than his. However, the Commissioner is convinced of the merit of the Board's explanation that the replacement's absences were predicated upon two catastrophic events not likely to recur or affect her future attendance. As to the other findings of fact made by the ALJ in the initial decision, the administrative standard of review is that set forth in Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976) wherein it was held in pertinent part as follows:

> ***We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. See, e.g., Jackson v. Concord Co., 54 N.J. 113, 117-118 (1969).*** (emphasis in text) (at 188)

Upon applying the above-cited standard of judicial review to the instant matter, the Commissioner is not persuaded by the arguments advanced by petitioner in his exceptions that the ALJ's findings of fact warrant a different conclusion or reversal of the initial decision. Further, there is no indication in the record to support remanding the instant matter for further finding of fact. Petitioner was provided a full and fair opportunity to present his case before the ALJ. That he failed to meet his burden is no justification to remand for a "second bite at the apple."

Accordingly, the Commissioner finds and determines that petitioner has failed to carry his burden of proof with regard to the relief he is seeking herein. This determination is based upon those findings and conclusions reached by the judge in the initial decision and supported in the record of this matter. In view of the above, the instant Petition of Appeal can be and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5624-85
(ON REMAND EDU 2249-85)
AGENCY DKT. NO. 398-9/84

SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Petitioner,
v.
EDDIE LEE HARRELL,
Respondent.

Robert C. Rosenberg, Esq., for petitioner

Saul R. Alexander, Esq., for respondent

Record Closed: December 3, 1985 Decided: January 6, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

This decision is the result of a remand to the Office of Administrative Law from the Commissioner of Education.

The procedural history of the matter is set forth at length in the Initial Decision dated July 12, 1985, in OAL Docket No. EDU 2249-85. That procedural history is incorporated herein by reference, without need for repetition.

On August 30, 1985, the Commissioner of Education rejected the findings and conclusion in the above mentioned Initial Decision, which ordered tenure charges against

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the respondent dismissed due to failure of the Board to comply with the requirements of N.J.S.A. 18A:6-13 at the time the charges were drawn, filed and certified. The Commissioner of Education disagreed with the Administrative Law Judge's interpretation of the applicable law. He chose to remand the matter for further findings and conclusions that would be consistent with his (the Commissioner's) interpretation of the statute upon which the procedural defect rested. The Decision on Remand of the Commissioner of Education, dated August 30, 1985, is also incorporated herein by reference in its entirety.

A prehearing conference was held at the Office of Administrative Law on October 30, 1985, and a Prehearing Order was filed, fixing, and limiting the issues to be decided, choosing a hearing date and regulating other procedural aspects of the forthcoming hearing. The issues to be decided were stated as follows:

A. To supplement the record with Findings of Fact and Conclusions of Law with respect to whether or not the matter should be dismissed on procedural grounds, as set forth in the August 30, 1985 remand.

B. If the matter is not to be dismissed on procedural grounds, to determine whether or not the acts or omissions of the respondent, as alleged in the charges, constitute incompetency or other cause for dismissal, pursuant to N.J.S.A. 18:6-10 et seq.

The Prehearing Order stated further that the parties would provide specific facts and information dealing with the four enumerated items set forth in the last paragraph on page 10 of the Commissioner's Decision on Remand of August 30, 1985. Appropriate documentation of the procedural defect was also to be provided, since the Commissioner had indicated that he could not accept the "mere acknowledgment" by both parties that the procedural defect existed. The parties were also advised that they should be prepared to present testimony of witnesses at the hearing to support their positions with regard to the substantive allegations of the Petition and the Answer.

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The hearing was held at the Office of Administrative Law in Newark, New Jersey, on December 3, 1985.

Addressing the substantive issue—the merits—of the charges (Issue B above), the attorney for the Board stated that, although he was retained as counsel after the charges were certified, he had reviewed the file thoroughly in preparation for hearing. He stated further that the attorney who was involved in preparation of the charges on behalf of the Board no longer had any connection with the matter. In addition, the administrative staff that prepared the allegations is also no longer employed, and the membership of the Board of Education has almost completely changed. The attorney said that no witnesses were available to testify in support of the charges, and that the Board did not intend to call any witnesses because it felt that the charges could not be supported or proven in any event.

The respondent's attorney replied that he would not offer any evidence to refute the charges because the Board had the burden of proof, by a preponderance of the evidence, and so long as the Board clearly could not sustain that burden, there was no need for the respondent to offer proofs in opposition.

The following stipulated facts were then placed upon the record by counsel:

1. There were seven charges, consisting of alleged incidents that took place between December 1, 1983 and May 10, 1984.

2. The charges were received by the Board from the Board Secretary immediately thereafter, between May 11 and May 15, 1984.

3. No further action was taken by the Board until August 1984, three months later, when the charges were certified for filing with the Commissioner of Education.

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4. The certified charges were forwarded to the Commissioner of Education for filing on September 17, 1984, and they were received in the Commissioner's Office on September 19.

5. The respondent filed an answer with the Commissioner of Education on October 19, 1984.

All of the foregoing, being matters of record, are found to be FACT.

The following additional information was then provided.

The respondent, Eddie Lee Harrell, testified in his own behalf. He stated, under oath, that the first time he was ever notified of the charges was one or two days after September 17, 1984, when the Board wrote him a letter informing him that the charges had already been certified and filed with the Commissioner of Education. Mr. Harrell stated that he never saw the charges before that time, and he was never given an opportunity to submit a written statement of position and evidence. It is noted that the Board received the charges from the Board Secretary in early May 1984 and then waited approximately four months in order to file the charges with the Commissioner. Mr. Harrell stated unequivocally that during those four months he was never provided with a copy of the charges and a statement of evidence. Obviously, since he never received a copy of the charges, he never responded to them. Mr. Harrell testified that the Answer to the charges filed by his attorney with the Commissioner of Education on October 11, 1984 was the first response that he was able to submit.

In order to provide documentation to support the above, the parties submitted a letter written by the Board counsel to the respondent on September 17, 1984. That letter was accompanied by a copy of the charges which had that day been filed with the Commissioner of Education. The Board resolution approving the certification was also enclosed. The letter was marked Exhibit J-1 in evidence. The Board's attorney stated that, apart from the foregoing letter, there was nothing in the Board's file to indicate that a copy of the charges was sent to the respondent prior to September 17, 1984. The only

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other correspondence in the attorney's file dealing with the respondent's receipt of the charges was a letter from Mr. Harrell's attorney, written after September 17, 1984, stating that he would represent the respondent in defending against the charges.

Based upon the foregoing, I **FIND** the following additional facts, by a preponderance of the credible evidence:

6. The respondent was never provided with a copy of the charges against him or a statement of the supporting evidence until after the charges had been certified by the Board and filed with the Commissioner of Education on September 19, 1984.

7. More than four months elapsed between the time that the Board first received the charges and the time the respondent was provided with a copy of the charges and a statement of the evidence. That only took place after the Board certified the charges to the Commissioner of Education.

8. The respondent was therefore never given an opportunity to submit a written statement of position and evidence before the charges were certified and filed.

9. Based upon the above, it is obvious that the respondent did not and could not have possibly responded to the charges before they were certified by the Board and filed with the Commissioner of Education.

10. The foregoing situation is corroborated by Exhibit J-1, by the sworn testimony of the respondent, and by the representations of both attorneys.

All of the above constitutes the information requested by the Commissioner in the four enumerated items listed in the remand (last paragraph on page 10).

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LEGAL DISCUSSION AND CONCLUSIONS

The Commissioner of Education was acting within the scope of his authority under the rules of procedure when he remanded the matter for further findings.

> An agency head may enter an order remanding a contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or incompletely considered. The order of remand shall specifically state the reason and necessity for the remand, the issues or arguments to be considered, the scope of these issues or arguments, and their relationship to the issues or arguments already considered. The judge shall hear and render an initial decision on the remanded matters. Where a party or the judge questions the necessity or propriety of the remand, the judge may also make findings and recommendations to the agency head on the issue or questions raised. N.J.A.C. 1:1-16.5(c).

In accordance with the above, all of the following constitutes findings and recommendations to the agency head on the issues and questions raised in the remand.

The Commissioner has suggested that the Judge made an erroneous determination in stating that, "The statutory language in N.J.S.A. 18A:6-13 is clear and unequivocal." In taking issue with the Judge on the question of statutory interpretation, the Commissioner has cited an excerpt from his own decision in In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, 1977 S.L.D. 451, aff'd State Board of Education, 1977 S.L.D. 458. That decision referred in turn to discussion by the Supreme Court of New Jersey on the subject of statutory interpretation in State v. Green, 62 N.J. 547, 554, 555 (1973), wherein the Court held that, "It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter. Statutes in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent."

Based upon the foregoing statement by the Supreme Court in Green, the Commissioner held in Feitel that it was necessary to read N.J.S.A. 18A:6-13 in pari

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materia with N.J.S.A. 18A:6-11 and 6-14. The Commissioner then extended that holding to the instant matter. Since the Commissioner has made that construction of the statute the law of this case, this matter will be decided in accordance with that interpretation (after the following comments dealing with principles of statutory construction and rulemaking through the adjudicative process).

Principles of statutory construction that compel an interpretation of the statute (N.J.S.A. 18A:6-13) without resorting to sources outside of the words of the statute are as follows:

It is axiomatic that where the wording of a statute is clear and explicit, a Court is not permitted to indulge in any interpretation other than that called for by the express words set forth. See, Duke Power Co. v. Patten, 20 N.J. 42 (1955); Zietko v. New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E. & A. 1944); Bass v. Allen Home Improvement Co., 8 N.J. 219, 226 (1951); Sperry and Hutchinson Co. v. Margetts, 15 N.J. 203, 209 (1954); 2A Sutherland Statutes and Statutory Construction (4th Ed. 1984), §45.02.

Additionally, the law is abundantly clear that the meaning of a statute is primarily ascertained by reading the language employed in its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957); Jamouneau v. Harner, 16 N.J. 500, 513, cert. den. 349 U.S. 904 (1954); Julius Roehrs Co. v. Division of Tax Appeals, 16 N.J. 493, 497, 498 (1954); Abbotts Dairies, Inc. v. Armstrong, 14 N.J. 319, 325 (1954); Eckert v. New Jersey State Highway Dept., 1 N.J. 474, 479 (1949).

> [W]here the words of a statute are clear and their meaning and application plain, there is no room for judicial construction [citations omitted]. Preziosi v. Buonaccorsi, 16 N.J. Super. 15, 21 (App. Div. 1951).

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In construing a statute, if the language chosen by the legislature is plain and the result is not contrary to obvious legislative intent, there is no room for judicial interpretation.

> The meaning of a statute must . . . be sought in the language in which the act is framed, and if that is plain . . . the sole function of the court is to enforce it according to its terms. Sheeran v. Nationwide Mutual Ins. Co., Inc., 80 N.J. 548, 556 (1979), quoting Caminetti v. United States, 242 U.S. 470 (1917).
>
> 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. State v. Butler, 89 N.J. 220, 226 (1982).
>
> We are required to enforce the legislative intent as written, "and not according to some supposed unexpressed intention" [citations omitted]. Even "where the path is not clear, then the courts should refrain from usurping the legislative function" [citation omitted]. International Brotherhood of Electrical Workers v. Gillen, 174 N.J. Super. 326, 329 (App. Div. 1980).
>
> Ordinarily, such [legislative] intention is to be gleaned from the words used, and they are to be given their ordinary and well understood meaning in the absence of an explicit indication to the contrary [citations omitted]. Only if an ambiguity exists is it necessary to go beyond words of the statute itself. Ruehl Co. v. Board of Trustees, Industrial Ed. , 85 N.J. Super. 4, 12, 13 (Law Div. 1964).

In the view of this Judge, the language and meaning of the applicable statute, N.J.S.A. 18A:6-13, is quite clear on its face. Its language is plain and unambiguous, and there is no necessity for interpretation or construction of legislative intent. Ruehl, supra.

The statute says: "If the board does not make such a determination [whether there is probable cause to credit the evidence in support of the charges, and if so, whether it is sufficient to warrant dismissal or reduction of salary] within 45 days after receipt of the written charge, ... the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon." N.J.S.A. 18A:6-13.

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The language used by the New Jersey Supreme Court in State v. Green, quoted by the Commissioner of Education in Feitel, was intended to be of assistance "with respect to ascertaining the meaning of a statute." Because of the clear and unequivocal language of the statute involved here, such efforts are unnecessary. However, as indicated above, the Commissioner's interpretation is accepted for purposes of this decision.

Even so, the facts in the matter at hand are distinguishable from those in Feitel. Here, there was a total lack of compliance with N.J.S.A. 18A:6-11, to the point where a copy of the charges was never even forwarded to Mr. Harrell before being certified. In Feitel the Board proceeded properly in all respects with regard to the charges of unbecoming conduct. Only the charges of inefficiency were dismissed because of a defect in the statutorily prescribed procedure, where the Board gave no consideration to the charges as required by N.J.S.A. 18A:6-11. That was considered to be a fatal flaw. The Commissioner's decision in Feitel is completely understandable under the circumstances of that case, but this situation is very different.

It is interesting to note that the Commissioner's interpretation of the statute in Feitel has not been promulgated as a rule, even though it reflects an administrative policy not previously expressed in any explicit agency determination, adjudication or rule, and it constitutes regulatory policy in the nature of the interpretation of law. Such agency action rendered through the adjudication process, as in Feitel, is, in effect, individualized rulemaking. See, Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984).

The Commissioner's Decision on Remand clearly indicates a determination by the agency that it intends to apply its interpretation of N.J.S.A. 18A:6-13 prospectively, as a general standard, and with uniformly continuing effect to all similarly situated persons. An agency interpretation not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute might better be considered as an administrative rule. Metromedia at p. 329. The remand opinion in this case reflects an interpretation of the enabling law and constitutes a decision on administrative policy,

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comporting with the general definition of a rule under the APA, N.J.S.A. 52:14B-2(e). Metromedia at p. 335.

Nevertheless, considering the marked lack of factual similarity between Feitel and the case at hand, it is most advisable to decide the instant matter on the basis of the particular facts and circumstances of this case. Procedurally, the specific chronology of events and findings of fact sought by the Commissioner in the last paragraph on page 10 of the Order of Remand are set out above. Despite the difference of legal opinion between the Commissioner and the ALJ ("This determination is erroneous, however." - Order of Remand, p. 9, line 20) relating to the question of statutory interpretation, as discussed above, the foregoing findings of fact comport with the Commissioner's Order of Remand and should cure the "glaringly deficient" record. Furthermore, documentation that would tend to corroborate the representations of counsel with respect to the 45-day requirement of the statute has been provided. It is therefore **CONCLUDED** that the Board clearly violated the requirements of N.J.S.A. 18A:6-13. Such conclusion is manifestly apparent, while accepting the legal viewpoint of the Commissioner and his application of Feitel. The petition should be dismissed based upon the procedural defect, which constitutes a fatal flaw in the statutorily prescribed procedure.

While not necessary to be ruled upon, following the above result, it is also **CONCLUDED** that the Board, having been given the opportunity at a hearing, has failed to prove or offer proof of the charges against the respondent by a preponderance of the credible evidence; and a dismissal of the charges should result for that reason also.

It is therefore **ORDERED** that the charges be **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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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

January 6, 1986
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

JAN 8 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 9 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF EDDIE LEE HARRELL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF PATERSON, PASSAIC COUNTY.	:	
	:	

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

Upon review of the record as supplemented by the decision on remand, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the charges against respondent. However, he emphasizes that the ALJ is in error regarding his statement that the language and meaning of N.J.S.A. 18A:6-13 is quite clear on its face and does not necessitate interpretation or construction of legislative intent. (Initial Decision, ante)

Given the tenor of the ALJ's comments regarding the 45-day time line enunciated in N.J.S.A. 18A:6-13, the Commissioner finds it necessary to stress that the requirements of that statute must be read in pari materia with N.J.S.A. 18A:6-11 because prior to the amending of 6-11, there was no requirement to notify the employee of the filing of a tenure charge, nor was it necessary to allow time for the employee to respond to the charges before board action to certify them. If N.J.S.A. 18A:6-13 were read in isolation, the result would be contrary to the obvious legislative intent of the amending of N.J.S.A. 18A:6-11.

Because of the ambiguity regarding the 45-day requirement of N.J.S.A. 18A:6-13, the wording of which was unchanged when 6-11 was amended and 6-12 repealed, Feitel, supra, served as the mechanism to clarify the time lines a board must follow in certifying tenure charges. The use of Feitel as the stare decisis case to delineate such time lines to be met in certification of tenure charges is an appropriate action by the Department of Education to accomplish its regulatory responsibilities as can be seen in the words of the New Jersey Supreme Court in In the Matter of the Appeal of Certain Sections of the Uniform Administrative Procedure Rules, 90 N.J. 85 (1982) which state:

> ***Thus, "the adjudicative functions of administrative agencies are actually an aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority." Hackensack v. Winner, 82 N.J. at 29. See Horn, 85 N.J. at 655-57; Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).

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> ***In the context of public administration, adjudication is regulation. In effect, an agency engages in ad hoc rulemaking everytime it decides a contested case. The agency can use the adjudicative process to set certain policies, to define the contours of its regulatory jurisdiction, to give specific content to general regulations, and to handle specialized problems that arise. Thus, the agency's decisional authority over contested cases is directly and integrally related to its regulatory function.
>
> ***Administrative agencies cannot be expected to cover the course of administrative regulation on one leg. They need both their rulemaking and adjudicatory powers to perform their duties properly.*** (at 93-94)

The requirement that the 45-day period designated in N.J.S.A. 18A:6-13 begins to toll from the date the employee files his/her statement or when the allotted time for the employee to file the statement expires, and not from the date the board receives the charges, has been affirmed by the Appellate Division in a number of cases. See In re Levitt, 1977 S.L.D. 976, aff'd State Board 1978 S.L.D. 1027, aff'd App. Div. 1979 S.L.D. 849 and In re Levine, 1977 S.L.D. 1129, aff'd State Board 1978 S.L.D. 1026, aff'd App. Div. 1979 S.L.D. 846. Until the proposed revisions to N.J.A.C. 6:24-1 et seq. are adopted, this ruling will continue to be applied without exception.

Having documented in the record of this matter the complete chronology of events surrounding the certification of the tenure charges, the Board's blatant failure to abide by the requirements of N.J.S.A. 18A:6-11 and 6-13 is apparent. Thus, the charges filed by the Board are hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 21, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7052-85
AGENCY DKT. NO. 378-11/85

S.T., ON BEHALF OF HER
MINOR CHILD, N.T.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF MILLVILLE,
CUMBERLAND COUNTY, AND
WARREN E. ELLIOTT,
PRINCIPAL OF MILLVILLE
SENIOR HIGH SCHOOL,
Respondents.

Joseph F. Shanahan, Esq., for petitioner

Frederick A. Jacob, Esq., for respondents (Jacob & Robinson, attorneys)

Record Closed: December 31, 1985 Decided: January 16, 1986

BEFORE LILLARD E. LAW, ALJ:

Petitioner, S.T., the mother of N.T., a minor pupil enrolled in the eleventh grade at the Millville Senior High School under the direction and control of the Board of Education of the City of Millville (Board), alleges, among other things, that the Board is in violation of her statutory right under N.J.S.A. 18A:35-4.7 to have N.T. excused and removed from the Board's required drug education course of study which is mandated by N.J.S.A. 18A:35-4 and N.J.S.A. 18A:4-28.7. Petitioner filed before the Commissioner of

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Education a verified Petition for Declaratory Judgment, together with an Application for Stay of Current Action taken by the Board in refusing to excuse N.T. from its drug education class.

On November 6, 1985, 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., with instruction for the conduct of an immediate hearing on petitioner's request for interim relief and stay of the Board's action not to excuse N.T. from its drug education program. Oral argument on petitioner's application for interim relief was to be heard on November 18, 1985. On November 15, 1985, the undersigned was advised that the parties had entered into a consent agreement, thereby eliminating the need for oral argument on petitioner's application for a stay of the Board's action. The consent agreement, to which the parties voluntarily entered, provided, in pertinent part, as follows:

> 1. The Board's Drug Education, pursuant to N.J.S.A. 18A:4-28.7, which is at issue here and in which petitioner, N.T., has been enrolled, has been completed for the First Semester of the 1985-86 academic year.
>
> 2. The Board's Second Semester Drug Education program is to commence on or about February, 1986. In the event of [sic] a final decision by the Commissioner of Education is not forthcoming prior to the commencement of the Second Semester, petitioner, N.T. is hereby excused from the Board's Drug Education Program, without penalty.

A telephonic prehearing conference was held on November 18, 1985, at which, among other things, the parties agreed that the issues to be determined by this administrative tribunal are as follows:

> 1. Whether the Board's refusal to excuse N.T. from its drug education is in violation of petitioner's constitutional right of the free exercise of petitioner's religion under the First Amendment to the United States Constitution.
>
> 2. Whether petitioner has met the excusal requirements from the Board's drug education program as provided by N.J.S.A. 18A:35-4.7.
>
> 3. Whether the Board may or may not penalize petitioner N.T. by the issuance of a failing grade, due to petitioner's absence from the Board's drug education program.

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4. Whether the Board is required to establish an alternate program for petitioner N.T. which is exclusive of and not associated in any manner with health, family life education and/or sex education curricula.

5. Whether petitioner has complied with the Board's policy and/or the statutory provisions (N.J.S.A. 18A:35-4.7) with regards to N.T.'s excusal from its drug education program.

6. What effect does N.T.'s removal from the Board's drug education program have with respect to the statutory mandate that ". . . each school district having secondary school grades shall incorporate into its health education curriculum the . . . drug education unit . . . a minimum of 10 clock hours per school year as a part of the ongoing health curriculum for secondary school grades"?

a. Are the provisions of N.J.S.A. 18A:35-4.7 applicable to N.J.S.A. 18A:4-28.7?

The parties stipulated to the material and relevant facts of the matter, therefore eliminating the need for a plenary hearing. The parties, accordingly, cross-moved for summary disposition seeking a declaratory judgment with respect to their respective positions by way of briefs. The last submission was received on December 31, 1985.

It was also agreed that because of the time constraints involved with this matter, the undersigned would make every effort to execute an initial decision on or before January 17, 1986, for the Commissioner's immediate consideration and determination.

STIPULATIONS

The parties stipulate as to the facts of this matter as set forth in petitioner's Petition for Declaratory Judgment and identified as Attachments A-1, A-2, A-3, B-1, B-2, B-3, C, D, E, F, and G. The documents are described and/or summarized as to their relevance to the herein matter, hereinbelow as follows:

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1. A hand-printed note, dated September 16, 1985, addressed to Warren Elliot, Millville Senior High School Principal (principal) from petitioner S.T., requesting that her daughter, N.T., be immediately withdrawn, without penalty, from the psychology and drug education courses. S.T. asserts that "the primary reason these classes are unacceptable to us is that research has shown these courses are permeated with the philosophy of secular humanism, which is diammetrically [sic] opposed to the Judeo-Christian principles to which we ascribe . . ." Petitioner suggested that "these objectionable courses be substituted by a mutually agreeable alternative mini-course" (A-1).

2. A three-page notarized document, having been sworn and subscribed on September 16, 1985, which is typewritten with blank spaces that petitioner filled in with the relevant information as to the addressee (Mr. Elliot) and that S.T. is the parent of N.T., who attends Millville Senior High School. The typewritten portion of the document sets forth, among other things, legal conclusions with respect to pupil and parental rights, together with an assertion that federal regulations provide a procedure for the filing and reviewing of complaints where an alleged violation of said pupil-parent rights are abridged. Petitioner therein requests that her child/children not be involved in twenty-seven (27) enumerated school activities unless she has first been given the opportunity to review all of the materials to be used by the school authorities and, further, that she has given her written approval for their use (A-1).

3. A typewritten letter addressed to the principal from S.T., dated September 26, 1985, to supplement S.T.'s letter dated September 16, 1985. Therein, S.T. stated, in part:

> Perhaps you misunderstood my concern that my Constitutional right to the free exercise of my religion is being offended by forcing my daughter [N] to take a course which teaches what we believe is sinful.
>
> Once again I respectfully request my daughter be immediately withdrawn, without penalty, from the drug education course.
>
> [A-2]

Petitioner requested the principal to respond, in writing, within five days of receipt of this letter (A-2).

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4. A form letter, dated October 8, 1985, on which petitioner filled in appropriate blanks in handwriting to convey the intended purpose for the communication. The form letter is reproduced here with the filled-in portions and other handwriting underlined thus _____.

(omitted) Address
Oct. 8, 1985 Date

Mr. Warren Elliott
Principal
Millville Senior High School

Re: Excusal of [N.T.]
from Family Life Curriculum

Once again I hereby request my constitutional right of excusal for my son/daughter [N.T.] from that portion of the Family Life (Sex Education) Health curriculum listed in your outline as [not discernible] drug education and scheduled for the school year 1985-86 because of the scandalous material which is in it and which, potentially, may be introduced at any time therein and the teaching of which violates his/her (and our family's) religious and moral beliefs.

The authority for such request is N.J.S.A. 18A:35-4.7 and Smith v. Ricci, 89 N.J. 514, 521 where the Supreme Court of New Jersey states (under the Free Exercise Clause)

If the program violates a person's beliefs, that person is not required to participate. Where there is no compulsion to participate in this program (Family Life Education) there can be no infringement upon appellants' rights freely to exercise their religion.

It is understood that such excusal will be accomplished by the administrative and instructional staff without comment.

It is further understood that, pursuant to the above statute (N.J.S.A. 18A:35-4.7), no penalties as to credit for graduation shall result therefrom.

Please respond, in writing, within five days of receipt of this letter.

Very truly yours,

S.T.

Parent/Guardian

[A-3]

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5. The principal's response to petitioner's letter of September 26, 1985, dated October 1, 1985, wherein the principal refers to several telephone conversations concerning S.T.'s request to have N.T. withdrawn from the Board's drug education program. The letter asserts that the principal, guidance counselor and vice-principal had all advised petitioner of the process whereby petitioner was afforded the opportunity to document, in writing, her reasons for requesting N.T.'s exclusion from the drug education program. The principal advised petitioner that he would not withdraw N.T. from the program until such time that the principal was satisfied the request was reasonable, justified and within the guidelines of the state and local school administrative policies and procedures.

The principal also responded to petitioner's letter of September 16, 1985 (A-1), contending that it was too general and vague, and he asserted that he believed it to be a misapplication of the Hatch Amendment, which was alleged by petitioner in the notarized document (A-1). The principal asserted that he was willing to reconsider petitioner's request in the event petitioner followed the Board's complaint procedures (B-1).

6. The principal responded to petitioner's "form letter" of October 8, 1985 (A-3), by way of letter dated October 9, 1985, wherein the principal asserted and reiterated that the drug education portion of the Board's curriculum was not a part of its "Family Life Education" or "Sex Education" curriculum. The principal observed that under N.J.S.A. 18A:35-4.7, the statute clearly provides that a pupil ". . .shall be excused from that portion of the course where such instruction is being given. . ." (emphasis supplied in the letter). The principal, among other things, observed that petitioner refused to follow the Board's complaint and/or excusal procedures by providing an outline of those sections of the text and/or "Drug Education" curriculum to which petitioner objected and to state the reasons why such sections were objectionable to petitioner and N.T. The principal advised petitioner that if, in the opinion of petitioner, N.T. had suffered a trauma attributable to the drug education course of study, the principal was willing to establish a conference with the teacher, petitioner and N.T. to minimize or eliminate the alleged trauma by way of substituted and/or alternative assignments; however, complete withdrawal from the course was not an option (B-2).

7. A letter, dated October 15, 1985, to S.T. from the principal, which states as follows:

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. . . Contrary to the opinion which you expressed in your letter to me of 10/11/85, I have the utmost concern for the physical and emotional well-being of your daughter, [N.T.]. If your daughter suffers any spiritual, psychological, emotional, or physical problems, I suggest you look to yourself as the cause of these problems.

We operate a public high school and as such cannot make your religious standards or ethics the norm. I certainly have considered your daughter's legal rights and simply disagree with you and your attorney as to policy, procedure, and state/federal statutes involved in this case.

You continue to refuse to supply me with a written analysis of your specific objections to the 'Drug Education' program. I have offered to meet with you and the teacher to discuss the possibility of occasional alternative assignments. You have ignored the opportunity for this dialogue, even though it has been requested in writing at least three times now.

Furthermore, I am appalled that someone who professes deep religious convictions would use the kind of vulgarity and extreme profanity that was attributed to you Friday at Millville Senior High School. It was reported to me by a substitute teacher that you said to her something along the lines of 'I've had enough (expletive deleted) dealings with Mr. Elliott.' She wasn't 100% sure of the exact, literal statement, but the expletive was definitely included in your statement. If it is true, you should be ashamed of yourself. What would your daughter think if she heard such vulgar language? I hope that the language which you allegedly used was a misunderstanding or that the person who heard it was mistaken.

Please be advised that I will hold you personally accountable for any and all spiritual, psychological, emotional, and/or physical harm whatsoever done to your child as a result of your pressure on her to be removed from the 'Drug Education' class. Hopefully, she will be able to deal with her problems and face reality with emotional courage and stability, drawing on her Christian strength and stamina to sustain her.

Sincerely yours,

[signed]
Warren E. Elliott
Principal, M.S.H.S.

WEE/jlb
cc: Dr. Gene Stanley, Superintendent
Mr. G. Larry Miller, Assistant Superintendent
Mr. Frederick Jacob, Attorney - Bd. of Ed.
Mr. Paul MacLuskie, Teacher

[B-3]

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8. Note from Zae Uh Shim, M.D., dated October 4, 1985, diagnosing L.T. as having asthma. Under "Remarks" the note states:

> Emotional upset can make asthma attack. Please excuse from Drug abuse class Next wk. She was very upset after [not discernible] textbook. [C]

9. Letter, dated October 16, 1985, addressed to S.T. from the principal advising petitioner as follows:

> On October 16, 1985 I received your request to 'immediately withdrawal [N.T.] from the eleventh grade Drug Education Class until a decision is made in the courts regarding this matter.' Please be advised that N.T. will remain in the class until a decision is made in court which will officially alter her current status.
>
> Sincerely yours,
> [signed]
> Warren Elliott
> Principal, M.S.H.S.
>
> WEE/jlb
> cc: Dr. Gene Stanley, Superintendent
> Mr. G. Larry Miller, Assistant Superintendent
> Mr. Frederick Jacob, Attorney - Bd. of Ed.
> Mr. Paul MacLuskie, Teacher
>
> [D]

10. Millville Senior High School Mid-Marking Period Notice, dated October 18, 1985, executed by Mr. MacLuskie, teacher of health, concerning N.T., asserting that N.T.'s causes for difficulty include the following check-marked reasons:

> (3) Has failed to make up work missed due to absence from class;
>
> (5) Does not take advantage of available help;
>
> (8) Parent-Teacher conference needed;
>
> (14) Parent conference is recommended to clarify the need for alternative assignment. [E]

11. Letter, dated October 18, 1985, from Stephen A. Kalapos, Cumberland County Superintendent of Schools addressed to Joseph F. Shanahan, Esq., which states as follows:

> This letter is a response to your communication of October 9, 1985 regarding the request for excusal of [N.T.], a student at Millville High School, from the drug education program in that school.

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State law, N.J.S.A. 18A:4-28.7 requires that all secondary schools incorporate into their health education curricula, a drug education unit which is a minimum of 10 clock hours. I assume that this is the program from which excusal is requested.

N.J.S.A. 18A:35-4 requires a course in the nature and effect of alcoholic drinks and narcotics.

N.J.S.A. 18A:35-4.7 deals with a parent's statement of conflict with conscience with reference to instruction in health, family life or sex education.

I trust this information is helpful to you.

Very truly yours,
[signed]
Stephen A. Kalapos
County Superintendent of Schools
SAK/pw
CC: Mr. Warren Elliott, Principal
Millville High School
Dr. Gene Stanley, Superintendent
Millville Public Schools
[F]

12. Letter, dated October 9, 1985, from Joseph F. Shanahan to Chairman, Millville Board of Education, Re: Request for excusal from Drug Abuse Program in Millville High School, with attachments (G).

This completes the recital of those documents stipulated by the parties.

LEGAL ARGUMENTS OF THE PARTIES

Petitioner's Position

POINT ONE

THE REFUSAL OF THE RESPONDENTS TO EXCUSE N.T. FROM THE DRUG EDUCATION CLASS OF THE MILLVILLE SENIOR HIGH SCHOOL IS AN ATTEMPT TO CIRCUMVENT THE INTENT OF N.J.S.A. 18A:35-4.7 AND TO RESTRICT PETITIONER'S RIGHT OF FREE EXERCISE OF RELIGION

N.J.S.A. 18A:35-4.7. Parent's statement of conflict with conscience states:

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> Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.
>
> [emphasis added]

In Smith v. Ricci, 89 N.J. 514 (1982), the Supreme Court of New Jersey upheld the state law mandating a family life education program on the basis that it did not violate the free exercise of religion clause of the First Amendment because of the excusal policy contained in the statute, N.J.S.A. 18A:35-4.7, which is referred to in note 1 at 520. The case states at 521:

> . . . We do not question that this argument is sincerely made. Whether or not it is well reasoned we need not now decide, for we believe that the simple fact that parents can remove their children from any objectionable part of the program is dispositive. If the program violates a person's beliefs, that person is not required to participate. Where there is no compulsion to participate in this program, there can be no infringement upon appellants' rights freely to exercise their religion. . . .
>
> [emphasis added]

It is clear from the above statute and case citation that the matter of the above excusal policy is closely involved with the constitutional right of the free exercise of religion. The fact that a person is not required to participate in such courses on the ground of conscience is the basic reason why the constitutional argument against such mandate did not prevail in this case. N.J.S.A. 18A:35-4.7 was the linchpin in legitimatizing the regulation.

Petitioner states that in the face of the plain meaning of the statute that a conflict of conscience is the sole criterion for excusal, the actions of the respondents, Warren Elliott, the principal and the Millville Board of Education in refusing to honor petitioner's request can only be interpreted as a deliberate attempt to circumvent the intention of the statute and to restrict the constitutional rights of the citizenry. This is evidenced by the following excerpts from the various letters of the principal in reply to petitioner's requests:

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First, in his letter of 1 October 1985 (Petition, Att B1):

> I will not withdraw her until I am completely satisfied that your request is reasonable, justified and within the guidelines of our state and local school administrative policies and procedures.

Next, in his letter of 9 October 1985 (Att B2):

> You still refuse to follow Millville School District procedure whereby you are required to furnish me with a written outline of those sections of the text and/or 'Drug Education' to which you object and why they are objectionable to you and your daughter.

And finally, in his letter of 15 October 1985 (Att B3):

> You continue to refuse to supply me with a written analysis of your specific objections to the 'Drug Education' program.

The statute says nothing about any request for excusal having to pass a test of being reasonable, justified or within any state or local guidelines, or to furnish the principal with a written outline or analysis of specific objections to any program. And if the State Board of Education and the Commissioner have published such guidelines they are without statutory authority for doing so.

In the letter of 9 October 1985, the respondent principal makes use of specious reasoning in his discussion with the petitioner on this subject saying:

> Again, I reiterate that the 'Drug Education' portion of our curriculum has nothing to do with the 'Family Life Education' or 'Sex Education' portion of the curriculum.
>
> Furthermore, N.J.S.A. 18A:35-4.7 states clearly that the child. . . 'shall be excused from that portion of the course where such instruction is being given. . .' This means that you have no basis for your daughter to be withdrawn from the entire course.

As to the former, it makes no sense because there is no dispute as to the drug education class having anything to do with family life education or sex education courses at Millville High School. It has to do with the health course which is listed in the statute and included in the request for excusal.

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As to the latter, it is a denial of petitioner's request for excusal on the ground of the "portion of the course" argument. A comparison of the statement in the reply to that in the request establishes the sophistry in respondent's argument because the fact of the matter is that the petitioner did specify that portion of the course from which she has a right to be excused, saying, "I hereby request . . . excusal for my daughter . . . from that portion of the Family Life (Sex Education) Health curriculum listed in your outline as Eleventh Grade Drug Education. . . ."

Petitioner contends that all of the above reasons given by the principal smack of administrative harassment since they ignore the plain meaning of the statute and have the effect of restraining American citizens from exercising their right to have their children excused from mandated public school classes that offend their consciences.

In Bates v. Little Rock, 361 U.S. 516, 4 L. Ed. 2d 480, 80 S.Ct. 412 (1960), where defendants were convicted by a state court for refusing to furnish names of members of the NAACP to city officials, it is stated at 523:

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.
>
> [emphasis added]

And in Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S.Ct. 705 (1972), it is stated at 155:

> Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest, . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . .
>
> [emphasis added]

Petitioner argues that 'fundamental rights' are involved in this controversy, and one of the legitimate state interests flowing from the legislative enactment (N.J.S.A. 18A:35-4.7) has to be the protection of the state from the possibility of having its Family Life Education mandate declared unconstitutional, which was the implication in the decision of the Smith case. Without the statute to protect fundamental rights, the mandate might have been declared unconstitutional.

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Petitioner asserts that if the Millville Board of Education is setting forth an interpretation of the statute such as that given by the principal in his first letter of reply (Att B1) — "I will not withdraw her until I am completely satisfied that your request is reasonable, justified and within the guidelines of our state and local school administrative policies and procedures" — and it is ratified by the State Board of Education, it might result in the complete sabotaging of the statute's effectiveness, with the consequent result of exposing the state's regulations of Family Life Education to a charge of violating the constitutional right of the free exercise of religion. Since the above statement by the principal reflects his reasons for refusal as given in the first letter with no reference to the "that portion of the course" argument until the second letter, it is only logical to conclude that the first reasons given are the main and real ones. Such a policy has to result in chilling and stifling the assertion of constitutional rights by parents with spiritual values by making them subject to complying with difficult and arbitrary administrative guidelines set up outside the purview of the statute. Petitioner further asserts that the published Board policy of calling for a written outline of identification of the objectional "portion of a portion", as stated in the second letter (Att B2), is the mechanics by which the excusal policy can be circumvented. Since no one can possibly know or predict with certainty all the possible instances or times when scandalous material can be introduced into these courses (as listed in the statute), as could be done in the now-vacated reading of the Old Testament which was always at the opening of the school session, compliance with the "portion of the portion" plan is a practical impossibility. Petitioner states that this plan can be compared with the "pound of flesh" collateral in Shakespeare's Merchant of Venice that a "pound of flesh" could not be collected because "no jot of blood" was to be included. (The understanding being that no flesh could be obtained without blood.) Similarly, it is obvious that the objectionable parts cannot be excised so completely from the offending classes that the remainder is not tainted by the existence of the moral improprieties complained of which permeate such class or course. The use of such policy to implement the statute has to result in the presentation of an insignificant number of requests to the Board which, in effect, negates the intent of the statute.

As further evidence that petitioner's request for excusal should be based on a narrow interpretation in her favor, in McCabe v. Director, N.J. Lottery Commission, 143 N.J. Super. 443 (Ch. Div. 1976), which had to do with a lottery winner trying to assign his winnings to a finance company, it is stated at 447:

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[1,2] Legislation enacted pursuant to a specific exception to the general prevailing rule should be strictly construed and not extended beyond that which its wording will reasonably bear. [emphasis added]

For the above reasons, petitioner contends that the continued refusal of respondents to excuse N.T. from the drug education class in Millville Senior High School based on the policies stated is an attempt to circumvent the intent of statute and to restrict petitioner's constitutional right of free exercise of religion.

POINT TWO

PETITIONER HAS MET THE EXCUSAL REQUIREMENTS FROM THE BOARD'S DRUG EDUCATION PROGRAM AS PROVIDED IN N.J.S.A. 18A:35-4.7

Petitioner made request that her daughter be excused from the Board's drug education program by letter of 8 October 1985 (Att A3) which conformed to the requirements of the statute in that it was a signed statement indicating the particular portion (Eleventh Grade Drug Education) of the course (Health) for which excusal was requested. It was denied erroneously and negligently by respondent principal who evidenced a certain unreasonableness in ignoring and refusing to honor a medical request for excusal from the same class by Dr. Shim (Att C) because of N.T.'s traumatic symptoms brought on by her forced attendance at certain of the drug education classes.

POINT THREE

THE BOARD MAY NOT PENALIZE N.T. BY THE ISSUANCE OF A FAILING GRADE DUE TO HER ABSENCE FROM THE DRUG EDUCATION PROGRAM

Petitioner has complied with the requirements of the statute in requesting the excusal of N.T. as indicated in Point Two above and having done so, the statute expressly states in pertinent part, ". . . and no penalties as to credit or graduation shall result therefrom."

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POINT FOUR

THE BOARD IS REQUIRED TO ESTABLISH AN ALTERNATIVE PROGRAM OR ADJUST THE CURRENT ONE FOR PETITIONER N.T. WHICH IS EXCLUSIVE OF AND NOT ASSOCIATED IN ANY MANNER WITH HEALTH, FAMILY LIFE EDUCATION AND/OR SEX EDUCATION CURRICULA

N.J.S.A. 18A:36-20. Discrimination, prohibition states as follows:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study in the school by reason of race, color, creed, sex or national origin.

In Robinson v. Cahill, 69 N.J. 449 (1976), which had to do with the ratification of the idea of a thorough and efficient system of education in New Jersey, it is stated at 459, 460 that:

> . . . 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.
>
> [emphasis added]

Petitioner states that in view of the above, it is essential that a plan be put in place in which N.T. and other excusees may be transferred to classes of comparable credit with a minimum of comment by fellow students or staff members. Otherwise, it would be in derogation of the above statute and case citation to send N.T., because of her sincerely held beliefs, to the conventry of a library or extra study period (there to write some inconsequential essay on a subject dreamed up on the spur of the moment by a surprised teacher). This would be punishment, not teaching. She has not caused the problem. Petitioner argues that the State Board of Education is responsible since it had mandated the curriculum that caused the problem in the first place. It would have been only good prior planning to have allowed for such an added administrative inconvenience since it was common knowledge at the time that there was great public objection to the mandate.

And as for its possible increase in cost, reference is made to Detainees of Brooklyn House of Detention v. Malcolm, 520 F. 2d 392 (2d. Cir. 1975), where claim was

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made of unconstitutional deprivation of due process because of overcrowding in a federal house of detention. It is stated at 399: "Inadequate resources of finances can never be an excuse for depriving detainees of their constitutional rights."

For these reasons, peititioner contends that she should be allowed to transfer to another class of her choosing, having comparable credit and not associated with the offending courses.

POINT FIVE

PETITIONER HAS COMPLIED WITH THE STATUTORY PROVISIONS WITH REGARD TO N.T.'S EXCUSAL FROM THE BOARD'S DRUG EDUCATION PROGRAM

The preceding four points of petitioner are hereby incorporated as the supporting argument for this point five, including the addition that board policy, as determined from the facts stipulated, is in error.

POINT SIX

THE EXCUSAL OF N.T. FROM THE DRUG EDUCATION PROGRAM IS PROPER AND WILL HAVE LITTLE EFFECT ON THE OBJECTIVES OF THAT MANDATE

Petitioner's preceding five points are hereby incorporated in this as supporting argument that N.T.'s excusal was proper according to the excusal statute and takes precedence over N.J.S.A. 18A:4-28.7. The question that comes to mind here is what difference does it make to the state whether or not N.T. goes to a drug education class, particularly when her mother wants her to be withdrawn on grounds of conscience. This should indicate to the state that a mother is reclaiming her prerogative to educate her daughter in this field herself. She wants to guarantee that her daughter does not use drugs and knows nothing at all about the occasion of sin caused by knowing the technical details about how to use drugs. On the basis that it has just gained a dedicated "volunteer" teacher in the prevention of drug taking by students, the state should be pleased by such excusal and its probable effect.

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Conclusion

For the above reasons, petitioner respectfully requests that the Commissioner construe the provisions of N.J.S.A. 18A:35-4.7 and declare that petitioner be granted the relief sought in accordance with the prayer as requested in the Petition for Declaratory Judgment.

Respondent Board's Position

N.J.S.A. 18A:35-4 mandates that a course on "the nature of alcoholic drinks and narcotics and their effects upon the human system shall be taught in all schools. . . Each board of education shall make provisions in its annual education program to fulfill this requirement. . ." The Legislative history shows compelling reasons for the enactment of the statute:

> An important aspect of the problem of alcohol abuse by children and youths concerns the education provided to them on the nature and effects of alcoholic beverages and alcoholism and the handling of alcohol-related problems in the schools. If children and youths are to develop responsible attitudes and habits relative to use of alcoholic beverages in a society where such use is widespread and misuse is encouraged to some extent, then effective instructional programs on the use of alcoholic beverages and all dangers of their misuse are essential. Since school attendance is required for children and youths, schools provide an ideal place for identifying poor habits or attitudes for alcohol-related problems in children and youths, and for attempting to provide for early remedies for these habits, attitudes or problems to the extent possible in the educational environment.

The statute makes the course required. School officials must, therefore, exercise caution when permitting withdrawal from the course.

N.J.S.A. 18A:35-4.7 is known as the "excusal clause" and provides: "Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family education or sex education is in conflict with his conscience or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom" (emphasis added). This statute permits a parent to withdraw a child from any portion of a course which is in conflict with conscience or sincerely held moral or religious beliefs.

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School officials must comply with the requirements of both statutes. It is their responsibility to determine if withdrawal of a student from a drug education course required by statute meets the criteria which allows the withdrawal.

The purpose of the drug education course is to make the child aware of the dangers associated with alcohol and drug abuse and to help them avoid these dangers. Drug education is not like the area of sex or religious education. Moral views and religious belief play a large part in the education of a child in the areas of family life or sex. Moral views do not vary when it comes to drug or alcohol abuse: everyone agrees it is wrong. It is, therefore, difficult to see how teaching a child that drug and alcohol abuse is wrong can be in conflict with "his conscience or sincerely held moral or religious beliefs."

The New Jersey Supreme Court case of Smith v. Ricci, 89 N.J. 514 (1982), dealt with the constitutionality of the State Board of Education regulation requiring local school districts to develop and implement a family life educational program. In upholding the regulation, the Court referred to an excusal clause which is analogous to the excusal clause contained in N.J.S.A. 18A:35-4.7. The Court stated, "under the excusal policy people will receive instruction in all aspects of the family life education program unless a parent or guardian objects. In such case, people will be excused, but only from those parts of the program that the parent finds morally, conscientiously, or religiously objectionable." This indicates that there must first be a finding of what specific part of the material that is being taught is offensive. This also indicates that it must be determined why it is morally, conscientiously or religiously objectionable so that, thereafter, it can be determined what portion the child should not be exposed to.

In petitioner's own brief, it [is] stated that "the principal evidenced a certain unreasonableness in ignoring and refusing to honor a medical request for excusal from the same class by Dr. Shim because of traumatic symptoms brought on by her forced attendance at certain of the Drug Education classes." This is also an indication that perhaps not the entire program was having an effect upon the child. The medical excuse from Dr. Shim, moreover, provided an excuse for only one week.

Respondent Board states that S.T. has made statements that "research has shown these courses are permeated with the philosopy of secular humanism, which is diammetrically [sic] opposed to the Judeo-Christian principles to which we ascribe"; "the

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course teaches what we believe is sinful"; and the course contains "scandalous material." These statements do not provide any basis for withdrawal from the drug/alcohol abuse classes based on a conflict with conscience or "sincerely held moral or religious beliefs." It was impossible for the school to determine from the general reasons given by S.T. if the entire drug class was offensive or if there was some way the offensive portions of the class could be remedied and the school could still fulfill its obligation under the statute to provide the mandated drug/alcohol course. The concern, as expressed by the appellants in Smith regarding a required family life educational program, was that children would be exposed to attitudes, goals and values that are contrary to their own and to those of their parents and will thereby be inhibited in the practice of their religion. It is hard to see how this concern could apply to teaching drug/alcohol prohibitions.

Respondent Board further asserts that there has been no showing whatsoever by S.T. that the material in the drug education class violates her constitutional rights. The fact that the films made her daughter sick is not sufficient. She must show that the reasons asserted are applicable to the drug education program; this she has not done.

The school officials have requested on several occasions that S.T. provide them with the specific portions of the drug program she finds offensive. This she has refused to do. Parents are given the right to examine textbooks and materials used in connection with these courses, but S.T. has not chosen to review the materials and indicate which are offensive. Mr. Elliott has provided S.T. with numerous opportunities to discuss the matter with him, but S.T. has chosen to ignore these opportunities.

N.J.S.A. 18A:36-15 permits the Board of Education to excuse a child from school for a religious holiday. In a recent case, the judge found that the statute itself permitted inquiry as to the sincerity of religious beliefs and such an inquiry was not prohibited by the First Amendment. Carlin v. Bd. of Ed. of the Union Co. Reg. H.S. Dist No. 1, OAL DKT. EDU 3309-85 (October 29, 1985).

Likewise, the statute in the present case, N.J.S.A. 18A:35-4.7, permits an inquiry as to whether there is a conflict with a "sincerely held moral or religious belief." School officials were entitled to make this inquiry and to receive a response. It is not unreasonable for school officials, when attempting to fulfill their obligations under the law, to request information vital to their decision. Previous requests by S.T. for

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withdrawal of N.T. from non-required courses have been honored by Mr. Elliott. However, the school cannot ignore a statute which requires that drug/alcohol abuse courses be taught without first determining if there is a legitimate reason based on a moral or religious belief for doing so.

Conclusion

For the above-stated reasons, respondents respectfully request that the Commissioner deny the relief sought in the Petition for Declaratory Judgment and require petitioner to provide the specific portions of the drug education program to which she objects and the reasons for her objections so that appropriate determinations can be made by respondents.

DISCUSSION, CONCLUSIONS AND ORDER

Petitioner invokes N.J.S.A. 18A:35-4.7 to demand that the statutory excusal policy embodied therein be applied to remove and withdraw her daughter, N.T., from the Board's statutorily required drug education program, as mandated by N.J.S.A. 18A:35-4 and, more specifically, N.J.S.A. 18A:4-28.7. The mandatory drug education program was enacted by the New Jersey Legislature under Chapter 85, Laws of 1970 and codified as N.J.S.A. 18A:4-28.4 et seq. The pertinent parts of the statute are recited hereinbelow as follows:

> N.J.S.A. 18A:4-28.4 Definitions
>
> As used in this act:
>
> a. 'Drug education program' means a factual presentation of the problems of drug abuse involving young people prepared so as to be effective and appropriate for student consumption.
>
> b. 'Secondary school' means grades seven through 12 and shall include high school grades, junior high school grades and any other classification of grades designated in a particular school to include grades five and above.

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c. 'Recommended drug education unit' means the subject matter of the drug education program to be presented to the students.

d. 'Drugs' means and includes narcotic drugs, dangerous drugs, and controlled dangerous substances, as defined in the laws of the State of New Jersey and the laws of the United States.

e. 'School district' means public school districts and shall include regional and vocational school districts.

N.J.S.A. 18A:4-28.5, summer workshops and training programs, authorized and directed the Commissioner of Education to establish summer workshops and training programs to train selected teachers to teach a drug education program to secondary school teachers. The purpose of the section was the development of a curriculum and to incorporate the recommended drug education unit into the ongoing health education curriculum of students in the state's secondary schools. The statute continues to provide that: ". . .The programs shall contain basic content on the history, pharmacology, physiology and psycho-social aspects of drugs generally abused by young people, treatment and rehabilitation programs, the legal aspects of drugs and the extent of drug abuse in New Jersey."

Section 4 of L. 1970, c. 85, codified as N.J.S.A. 18A:4-28.7, Drug education unit; secondary school health curriculum, provides that:

> On and after January 15, 1971, each school district having secondary school grades shall incorporate into its health education curriculum the recommended drug education unit provided for in section 2 hereof during a minimum of 10 clock hours per school year as part of the ongoing health education curriculum for secondary school grades.

The Legislature made no provision to excuse secondary school pupils from the drug education program. Rather, the Legislature explicitly requires the Board to provide, without exception, a minimum of 10 clock hours of drug education to each secondary school pupil under the Board's direction and control. As was said by the Court in Rice v. Union Cty. Reg. H.S. Bd. of Ed., 155 N.J. Super. 64, 72 (App. Div. 1977), "We must presume that the Legislature knew what it was doing and did not intend to establish a useless procedure (citations omitted)."

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The statute upon which petitioner relies and invokes as the basis to remove N.T. from the Board's mandatory drug education program, N.J.S.A. 18A:35-4.7, was enacted by the Legislature under Chapter 428, Laws of 1979, and was effective approximately ten years subsequent to the enactment of N.J.S.A. 18A:4-28.7. It is known as the "Parents Rights to Conscience Act of 1979," N.J.S.A. 18A:35-4.6, providing for pupil excusal from certain instruction at N.J.S.A. 18A:35-4.7 as follows:

> Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from the portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.

A historical review of the statute, N.J.S.A. 18A:35-4.7, reveals that the Legislature considered the inclusion of the mandatory drug education program as a portion of instruction for which a pupil might be excused if in conflict with his/her conscience or sincerely held moral or religious beliefs. The Legislature rejected this notion, however, and omitted drug education as a program from which pupils can be excused under N.J.S.A. 18A:35-4.7.

The bill, formally introduced on January 25, 1979, by Senator Yates and identified as Senate No. 3071, was subsequently referred to the Senate Law, Public Safety and Defense Committee (Senate Committee). On April 5, 1979, the Senate Committee issued its Statement to Senate, No. 3071, with senate committee amendments, which stated:

> This bill would permit parents to submit a signed statement excusing their children from any portion of instructions on health, family life education or sex education which is in conflict with their conscience or their moral or religious belief, and under certain circumstances allowing them to be excused from medical examinations or treatment they find offensive to such principals. The committee amended the bill to eliminate drug education from the list of courses from which the children could be excused. (emphasis added)

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Subsequently, on November 26, 1979, "The Assembly Education Committee favorably reports this bill and endorses the statement of the Senate Education Committee" (Assembly Education Committee, Statement to Senate, No. 3071, Dated November 26, 1979).

On February 2, 1980, Senate Bill No. 3071, was enacted into law by the Legislature as amended by the Senate Committee. The legislation was codified as N.J.S.A. 18A:35-4.6; N.J.S.A. 18A:35-4.7; and N.J.S.A. 18A:35-4.8, effective immediately without reference to the mandatory drug education or instruction or a pupil excusal provision therefrom. It is presumed that the Legislature knew what it was doing. Rice, supra.

Given these historical facts and circumstances, this administrative tribunal can apply no other construction to the statute than that intended by the Legislature. In construing a statute, the initial task of the court is to seek the legislative intent, and to that end it must consider any history which may be of aid. Roman v. Sharper, 53 N.J. 338 (1969), State v. Madden, 61 N.J. 377 (1972). Generally, a court's duty in construing a statute is to determine the intent of the Legislature. AMN, Inc. of N.J. v. So. Brunswick Tp. Rent Leveling Bd., 93 N.J. 518 (1983). Having considered the statute, N.J.S.A. 18A:35-4.6, together with its legislative history, I **FIND** and **CONCLUDE** that the Legislature did not intend to include the statutorily mandated drug education program as one to which pupils may be excused therefrom. The Legislature clearly and explicitly manifested its intent, through the adoption of the amendment to "eliminate drug education from the list of courses from which the children could be excused." Senate Law, Public Safety and Defense Committee, Statement to Senate, No. 3071, April 5, 1979.

Therefore, I **FIND** and **CONCLUDE** that N.J.S.A. 18A:35-4.6 is inapplicable to warrant an excuse from any portion of the Board's drug education program as mandated by N.J.S.A. 18A:4-28.7.

No opinion is expressed, nor decision made, on the question of whether or not petitioner's rights to freedom of religious expression have been violated or abridged, under the First Amendment to the United States Constitution, as alleged.

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Accordingly, it is hereby **DECLARED** that the Board of Education of the City of Millville is under a duty to comply with the statutory provisions of N.J.S.A. 18A:4-28.7 and to provide a minimum of ten (10) clock hours of drug education per year to the pupils under its direction and control, pursuant to its adopted and approved health education curriculum.

It is further **DECLARED** that pupil excusal from certain portions of the Board's health curriculum, under N.J.S.A. 18A:35-4.7, is inapplicable to the statutory requirements as mandated by N.J.S.A. 18A:4-28.7.

Consequently, it is hereby **ORDERED** that all pupils under the Board's direction and control who are subject to N.J.S.A. 18A:4-28.7 be required, without exception, to complete successfully a minimum of ten (10) clock hours of instruction in drug 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.

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

16 January 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JAN 17 [illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 21 1986
DATE

Ronald J. Cook
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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S.T., on behalf of her minor child, N.T.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY AND WARREN E. ELLIOTT, PRINCIPAL OF MILLVILLE SENIOR HIGH SCHOOL,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

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

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

Petitioner's exceptions argue four points:

First, petitioner avers that the initial decision is erroneous and incomplete. Petitioner states in exceptions that it is not necessary to construe a statute for legislative intent if it is clear on its face and that N.J.S.A. 18A:35-4.7 requires no interpretation as to the courses from which pupils may be excused. Petitioner avers that the statute does not need to be construed as to whether the drug education program was included in the statute because the health course, as mandated by N.J.S.A. 18A:4-28.7, clearly includes drug education. Even assuming arguendo, that the statute does require some interpretation, petitioner argues that the conclusion of the ALJ that:

> The legislature clearly and explicitly manifested its intent through the adoption of the amendment to 'eliminate drug education from the list of courses from which the children could be excused.'

Petitioner suggests that the course in drug education might have been omitted to eliminate a minor tautology in the statute since the drug education program was already included, having been mandated in the health education curriculum by N.J.S.A. 18A:4-28.7. Further, since the Governor's announcement of the bill's enactment did not mention exceptions to the bill, petitioner strongly disagrees with the ALJ that the Legislature manifested an intent which in any way contradicts the express wording of the statute.

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Petitioner further argues the decision is incomplete in that it fails to rule on the possible violation of a federal constitutional question raised by petitioner which "cries out to be settled." (Exceptions, at p. 4) Petitioner avows that the question of a citizen's constitutional right under the Federal Constitution should take precedence over an erroneous and unnecessary interpretation of the statute in question. Petitioner posits that the drug education course must have been omitted in error and she again raises the issue to be settled as she sees it, to wit: "Does the mandating of the factual presentation of the problems of the vice of drug abuse to a class of immature young students violate the free exercise of religion where there is objection for reasons of conscience based on the scandal inherent in the subject matter." (Exceptions, at p. 5)

Petitioner also faults the ALJ for failing to discuss the connection between N.J.S.A. 18A:35-4.7 and the decision in Smith v. Ricci, 89 N.J. 514 (1982), which, she avers, legitimatized the State law mandating sex education in the public schools in the face of its possible violation of the right to free exercise of religion. Petitioner argues that where there is a claim of a constitutional right about a drug education class of the health curriculum and there is a statutory basis for it, the pupil must be excused or, if not, the issue must be addressed by the tribunal, giving reasons therefor.

Petitioner's second point of exception is that respondents' argument that school officials must comply with the requirements of both statutes -- the drug education program and the parents' right to conscience act, the latter of which calls for some further determination before excusal will be allowed -- is erroneous. Petitioner avows that since the right to conscience act was enacted after the mandatory drug education program, under the statutory rules of construction (N.J.S.A. 1:1-1), it takes precedence. Therefore, petitioner avers, respondents are relieved from their difficult task of trying to comply with both statutes in regard to the excusal provision or lack thereof and need to look only to the later statute for their excusal criteria.

Petitioner's third point of exception states that respondents' claim that, before excusal, there must be a specific finding and determining relative to the religious offensiveness of the teaching of drug education is erroneous and smacks of excessive entanglement between government and religion.

Petitioner contends that respondents are implying from the statute an administrative religious test that is not there; that is, that a part of the portion of the program must be dissected in detail and a secular determination be made as to what are proper religious objections. Petitioner reiterates that she has met all statutory requirements and to inquire into why any specific part of the portion is objectionable can only be perceived as a circumvention of the spirit and letter of the law which was enacted to protect individual constitutional rights. Petitioner further reiterates that the statute is silent as to the requests for excusal

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having to pass any specific tests by local or state bureaucracies prior to excusal and for respondents to require that petitioner show why the material is morally objectionable would go a "long way down the road toward excessive entanglement between government and religion which is impermissible under the United States Constitution." (Exceptions, at p. 9) Petitioner cites Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed. 2d 745, 91 S.Ct. 2105 (1971).

Finally, relative to petitioner's Points Three and Four of her post-hearing brief, since no argument was offered to them and they were not addressed in the initial decision, it is petitioner's position that they stand uncontroverted. Petitioner requests that the Commissioner deny the recommended decision and grant the relief sought in the Petition of Appeal for Declaratory Judgment.

Upon review of the record in this matter, the Commissioner concurs with the judge's determination that "pupil excusal from certain portions of the Board's health curriculum, under N.J.S.A. 18A:35-4.7, is inapplicable to the statutory requirements as mandated by N.J.S.A. 18A:4-28.7" (Initial Decision, ante) for the following reasons.

While the Commissioner concurs with petitioner that drug education, as part of the health education program, would appear to be one of the portions of the program for which a student may be excused because it is in conflict with the parent's moral or religious beliefs under N.J.S.A. 18A:35-4.7, the Legislature, in its wisdom, intended otherwise. The Senate Committee's Statement to Senate No. 3071, which accompanied the amended bill later enacted as N.J.S.A. 18A:35-4.7 states:

> ***The committee amended the bill to eliminate drug education from the list of courses from which the children could be excused.

The Commissioner finds no merit in petitioner's argument that the omission of drug education from among the list of courses for which a student may be excused "might have been omitted to eliminate a minor tautology in the statute since the drug education program was already included, having been mandated in the health education curriculum by N.J.S.A. 18A:4-28.7." (Exceptions, at p. 3) Had this been the Legislature's intent it could have indicated that such excusal should take place notwithstanding the mandate of N.J.S.A. 18A:4-28.7. Since no such statement was included in the Senate Committee's Statement, "we must presume that the Legislature knew what it was doing and did not intend to establish a useless procedure. (citations omitted)." Rice v. Union Cty. Reg. H.S. Bd. of Ed., 155 N.J. Super. 64, 72 (App. Div. 1977)

In further support of the ALJ's determination, the Commissioner takes note of the passage of the legislation entitled, "Course in nature and effect of alcoholic drinks and narcotics", N.J.S.A. 18A:35-4, which became effective one month before N.J.S.A. 18A:35-4.7, which includes Assembly Judiciary, Law, Public Safety

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and Defense Committee Statement, Assembly No. 3260 - L.1979, c.263, which states, in pertinent part:

> ***If children and youths are to develop responsible attitudes and habits relative to use of alcoholic beverages in a society where such use is widespread and misuse is encouraged to some extent, then effective instructional programs on the use of alcoholic beverages and on the dangers of their misuse are essential. Since school attendance is required for children and youths, schools provide an ideal place for identifying poor habits or attitudes or alcohol-related problems in children and youths, and for attempting to provide early remedies for these habits, attitudes or problems to the extent possible in the educational environment.

This legislative statement makes it entirely clear that children shall be educated regarding the dangers of alcohol and narcotics abuse. So strong a mandate, coupled with the exclusion from N.J.S.A. 18A:35-4.7 of drug education language, which bill was enacted just one month after N.J.S.A. 18A:35-4, leaves no doubt whatsoever in the Commissioner's mind that the Legislature fully intended that children and youths in the public schools of New Jersey shall be provided a course in drug education without excusal.

As to petitioner's argument that "the Decision is incomplete in that it fails to rule on the possible violation of a federal constitutional question" (Exceptions, at p. 4), the constitutionality of a statute may not be decided by the Commissioner. See George B. Thorp v. The Board of Trustees of Schools for Industrial Education - Newark College of Engineering, 1949-50 S.L.D. 61, 62, aff'd St. Bd. 1959-51 S.L.D. 70, aff'd 6 N.J. 948 (1951). See also Frank Giandomenico v. Board of Education of the Township of Winslow, 1975 S.L.D. 258, 260.

Further, the Commissioner notes that Smith v. Ricci, supra, is inapposite to the instant matter in light of the Legislature's clear intent to exempt drug education from the courses for which a pupil might be excused because of conscience. To analogize that because the Court in Smith held that exemptions are available pursuant to N.J.S.A. 18A:35-4.7 in the areas of sex education and family life, that similar exemption is required in the area of drug education is irrelevant when the Legislature has stated that drug education is not a course for which such an excuse is available.

Accordingly, for the reasons stated herein, as well as for those recited by the ALJ, the Commissioner affirms the findings and conclusions of the initial decision. The Commissioner finds that the Board of Education of the City of Millville is under a duty to comply with the statutory provisions of N.J.S.A. 18A:4-28.7 and to provide a minimum of ten (10) clock hours of drug education per year

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to the pupils under its direction and control, pursuant to its adopted and approved health education curriculum.

The Commissioner further finds that pupil excusal from certain portions of the Board's health curriculum under N.J.S.A. 18A:35-4.7, is inapplicable to the statutory requirements as mandated by N.J.S.A. 18A:4-28.7. Finally, the Commissioner hereby directs that all pupils under the Board's direction and control who are subject to N.J.S.A. 18A:4-28.7 be required, without exception, to complete successfully a minimum of ten (10) clock hours of instruction in drug education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 25, 1986

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S.T., on behalf of her minor child, N.T.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, AND WARREN E. ELLIOT, PRINCIPAL OF MILLVILLE SENIOR HIGH SCHOOL,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, February 25, 1986

For the Petitioner-Appellant, Joseph F. Shanahan, Esq.

For the Respondents-Respondents, Jacob and Robinson
(Frederick A. Jacob, Esq., of Counsel)

This case involves the issue of whether the Parents Rights to Conscience Act of 1979, N.J.S.A. 18A:35-4.6 et seq., applies to a district board's drug education course mandated by N.J.S.A. 18A:4-28.7 so as to require a student's excusal from the course where the parent presents that the course conflicts with his conscience or sincerely held moral or religious beliefs. The Petitioner in this case is the mother of a high school student, who requested of the Principal that her daughter be immediately withdrawn from the drug education course[1] because

> ...research has shown that these courses are permeated with the philosophy of secular humanism, which is diametrically (sic) opposed to the Judeo-Christian principles to which we ascribe...

A-1.

Petitioner supplemented this request with a letter reiterating her concern that her "...constitutional right to free exercise of [her] religion is being offended by forcing [her] daughter to take a course which teaches what we believe to be sinful." A-2. This letter was followed by a form letter again expressing Petitioner's objection that drug education violated her religious and moral beliefs. A-3.

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[1] Petitioner also requested withdrawal from psychology. However, attendance at that course is not at issue in this case.

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The Principal declined to excuse Petitioner's daughter from the course, observing that Petitioner had refused to follow the Board's procedures by providing an outline of those sections of the text and/or the drug education curriculum to which she objected and the reasons why those sections were objectionable. On October 18, 1985, the County Superintendent responded to Petitioner's request by setting forth the statutory provisions applicable to the situation. Petitioner then filed a Petition for Declaratory Judgment with the Commissioner of Education.

The matter was transmitted to the Office of Administrative Law as a contested case. Before the pre-hearing conference was held, the parties entered a consent agreement whereby Petitioner's daughter would be excused from the second semester of drug education if the Commissioner had not rendered his decision when the semester started.

The Administrative Law Judge (ALJ) then considered the merits of the case. In his Initial Decision, he found that when the Legislature mandated that each school district incorporate into its health program the recommended drug education unit for a minimum of ten hours per school year, it made no provision to excuse pupils from the program. He further concluded that N.J.S.A. 18A:35-4.7, which provides for pupil excusal from certain instruction and which had been enacted ten years after drug education was mandated by the Legislature, did not apply to the drug education course. In reaching this conclusion, the ALJ relied on the Senate Committee's Statement, which stated that the Committee had amended the bill to eliminate drug education from the list of courses from which children could be excused. Although expressing no opinion concerning whether Petitioner's rights to religious expression under the United States Constitution had been violated, the ALJ declared that the Board was under a duty to provide a minimum of ten hours of drug education a year to its students as part of the health curriculum, and that all of those students are required without exception to successfully complete a minimum of ten hours of instruction in drug education.

The Commissioner concurred with the ALJ's determination that N.J.S.A. 18A:35-4.7 is inapplicable to the drug education course mandated by N.J.S.A. 18A:4-28.7. Although he agreed with Petitioner that, since it is part of the health program, drug education would appear to be one of the portions of the program from which students could be excused pursuant to N.J.S.A. 18A:35-4.7, the Commissioner, like the ALJ, relied on the Senate Committee's Statement to conclude that the Legislature did not intend that the Parents Rights to Conscience Act of 1979 apply to the drug education course. In reaching this conclusion, the Commissioner placed further reliance on the Committee Statement accompanying amendment to N.J.S.A. 18A:35-4 (amended 1980), which mandated the Commissioner to update curriculum in the area of drugs and alcohol. That Statement, which was approved by the Legislature, see N.J.S.A. 18A:35-4, emphasized that effective instructional programs on the use of alcoholic beverages are essential to the development of responsible attitudes and habits in the use of such beverages. Based on the two Committee Statements, the Commissioner concluded

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that the Legislature fully intended that children in the public schools shall be provided a course in drug education without excusal.

Like the ALJ, the Commissioner declined to resolve the constitutional claim involved in this case, determining that he did not have the authority to decide the constitutionality of a statute. He, however, found that the courts' holding in Smith v. Ricci, 89 N.J. 514 (1982), was inapposite in resolving such claims since, in contrast to sex education and family life, the Legislature had stated that excusal from drug education is not available.

In sum, the Commissioner found that the Board was under a duty to provide ten hours of drug education per year and that pupil excusal pursuant to N.J.S.A. 18A:35-4.7 was inapplicable to the drug education course. He therefore directed that all students subject to N.J.S.A. 18A:4-28.7 be required without exception to successfully complete a minimum of ten clock hours of instruction in drug education. For the reasons that follow, we reverse the Commissioner's decision.

The threshold question in this case is whether N.J.S.A. 18A:35-4.7 is applicable to the District's drug education course, which is mandated by N.J.S.A. 18A:4-28.7. N.J.S.A. 18A:35-4.7, which is part of the Parents Rights to Conscience Act of 1979, provides that

> Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from the portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.

Thus, the words of the statute mandate that, upon presentation of a signed statement that any part of the instructions in health, family life or sex education conflicts with a parent's conscience or beliefs, the student must be excused from that part of the course without penalty.

In turn, N.J.S.A. 18A:4-28.7 mandates that each district having secondary school grades must incorporate into its health education curriculum the recommended drug education unit for a minimum of ten hours per school year as part of the ongoing health education curriculum for secondary school grades.[2] Thus, the

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[2] The recommended unit includes the following components: information about chemical substances, skill development aimed at establishing personal priorities, promotion of personal identity, coping skills, attitudes and values that influence a student's decisions about a choice of behavior, interpersonal skills, alternative activities, group skills and a healthy school climate. NEW JERSEY DEPARTMENT OF EDUCATION, DESK REFERENCE MANUAL OF STUDENT DRUG AND ALCOHOL USE: A COMPREHENSIVE PLANNING GUIDE (1985).

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words of the statute mandate that the drug education unit be included as part of every district's instruction in health, and preclude offering the unit as part of any other area of instruction. Further, although mandating that every district provide drug education, the words of the statute do not require that every student without exception complete the unit.

It is well established the meaning of a statute first must be sought in the language of the statute. Sheeran v. Nationwide Mut. Ins. Co., Inc. 80 N.J. 548 (1979). If the language of a statute is clear and unambiguous on its face, we may not go beyond the words of the statute in order to devine the Legislature's intent. State v. Butler, 89 N.J. 220 (1982). In such cases, the language of the statute is the full expression of what the Legislature intended, and, although legislative history may be utilized to provide reassuring confirmation of literally apparent meaning, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), extrinsic materials may not be used to create ambiguity or to determine that the Legislature intended something other than that which it actually expressed. Safeway Trails, Inc. v. Furman, 41 N.J. 467, (1964), appeal dismissed and cert. denied, 379 U.S. 14; Gauntt v. City of Bridgeton, supra. We find that the words of the statutes involved here are clear and unambiguous, and that application of the language of each neither results in conflict between them nor leads to absurd or anomalous results. Robson v. Rodriguez, 26 N.J.. 517 (1958).

On its face, N.J.S.A. 18A:35-4.7 mandates excusal as specified in the statute from any part of the instruction in health, and there is no provision in the statute exempting any part of the health curriculum from the terms of the statute. As stated, N.J.S.A. 18A:4-28.7 clearly mandates that the drug education unit be as part of the health education curriculum. Thus, the language of N.J.S.A. 18A:35-4.7 would require excusal from the drug education unit mandated by N.J.S.A. 18A:4-28.7 under the conditions prescribed by N.J.S.A. 18A:35-4.7 if no exception was made for drug education. Our review of the statutory language fails to reveal such exception. As stated, N.J.S.A. 18A:4-28.7 mandates only that each district provide the drug education unit, but does not require that each student complete the unit.

Nor does consideration of the legislative history of the applicable statutes alter our conclusion that N.J.S.A. 18A:35-4.7 requires excusal of a student from the drug education part of the health curriculum where the parent presents that this part of the instruction in health conflicts with his conscience or sincerely held moral or religious beliefs. The Committee Statement that accompanied the bill that was enacted as N.J.S.A. 18A:35-4.7 stated that the Committee had amended the bill to eliminate drug education from the list of courses from which children could be excused. However, since N.J.S.A. 18A:4-28.7 mandates that the drug education unit be incorporated as part of every district's health curriculum and since instruction in health was specified as subject to excusal by N.J.S.A. 18A:35-4.7, it was not necessary that the Legislature specifically list the drug education unit in the statute in order

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for that statute to apply to drug education. We therefore can not read the Committee's Statement to eliminate drug education from the courses specifically listed in the statute as an unambiguous statement that it intended to exempt drug education from the N.J.S.A. 18A:35-4.7.

Nor does the Committee Statement accompanying amendment to N.J.S.A. 18A:35-4 (amended 1980) conflict with the application of N.J.S.A. 18A:35-4.7 to drug education. As set forth above, that statement emphasizes the importance of effective instructional programs on the use of alcoholic beverages to the development of responsible habits and attitudes in the use of such beverages. Although the State Board shares the Legislature's view concerning the importance of instructional programs on alcoholic beverages, and endorses the Legislature's committment, as expressed in N.J.S.A. 18A:4-28.7, to insure the provision of similar instructional programs on drugs, we can not construe either the Committee Statement accompanying amendment to N.J.S.A. 18A:35-4 or the statutes mandating that each district provide instruction on these subjects as a clear expression that, despite the words of N.J.S.A. 18A:35-4.7, the Legislature intended to exempt drug education from the application of that statute. In the absence of clear and unambiguous indication that the Legislature intended to exempt the drug education unit from excusal pursuant to N.J.S.A. 18A:35-4.7, we may not legislate such exception. c.f., Department of Environmental Protection v. Franklin Tp., 181 N.J. Super. 309 (Tax Ct. 1981).

As set forth above, we conclude that the language of N.J.S.A. 18A:35-4.7 requires that upon presentation of a signed statement by the parent or guardian of a student that the part of the instruction in health designated as drug education conflicts with his conscience or sincerely held moral or religious beliefs, the student must be excused from that instruction without penalty. Petitioner's request for the excusal of her daughter from drug education meets the requirements of N.J.S.A. 18A:35-4.7, and we therefore find that, pursuant to the statute, the District must excuse Petitioner's daughter from the drug education part of its health curriculum without penalty.

In so finding, we emphasize that the State Board is committed to fulfilling the mandate of N.J.S.A. 18A:4-28.7, and strongly holds that participation in the mandated instruction on the subject of drugs and their abuse is essential in order that each student may develop the ability to avoid drug abuse. However, we reiterate that we may not alter the applicable statutory provisions as they were enacted by the Legislature, and that we may not utilize the legislative history to create ambiguity in the otherwise clear language of the statute. e.g., Guantt v. City of Bridgeton, supra. We further emphasize that our application of N.J.S.A. 18A:35-4.7 may not be colored by the fact that we may not share the beliefs of a parent seeking excusal pursuant the statute.

Finally, we, like the Commissioner, emphasize that we do not have jurisdiction to determine the constitutional claim made by Petitioner. Reed by Through Reed v. Attorney General, 195 N.J.

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Super. 172 (App. Div. 1984); Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1879). However, in light of our conclusion concerning the applicability of N.J.S.A. 18A:35-4.7 to drug education as mandated by N.J.S.A. 18A:4-28.7, we need not consider the question of whether Petitioner's right to the free exercise of religion under the United States Constitution would be violated had the Legislature required that all students in the public schools complete the mandated drug education unit without exception.

For the reasons set forth above, we reverse the Commissioner's decision. In doing so, we find that oral argument is not necessary in order for us to arrive at a fair resolution of this case and, therefore, deny the Board's motion for oral argument, which it filed after it submitted its exceptions to our Legal Committee's Report in this matter.

Attorney exceptions are noted.
December 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4233-85
AGENCY DKT. NO. 309-8/83A
(ON REMAND) EDU 7342-83

LOUIS PARISI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
Respondent.

Mark J. Blunda, Esq., for the petitioner (Oxfeld, Cohen & Blunda, attorneys)

J. Peter Sokol, Esq., for the respondent (McOmber & McOmber, attorneys)

Record Closed: December 16, 1985 Decided: January 17, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner filed this appeal with the Commissioner of Education on August 26, 1983, alleging that the Board of Education of the City of Asbury Park (Board) violated his tenure and seniority rights when it terminated his employment. Petitioner alleges also that the Board's action in this regard is wrongful and malicious.

The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The Board thereafter filed a Motion to Dismiss with supporting letter brief stating that petitioner had failed to state a claim. Petitioner filed letter briefs in opposition to the Motion. The record in this

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matter was closed after receipt of the Board's letter dated November 22, 1983, requesting dismissal of this complaint on the papers for failure to state a claim. The Board's motion was **GRANTED** and the Petition of Appeal was dismissed on December 8, 1983, as being untimely filed. The Commissioner of Education affirmed the Initial Decision on January 23, 1984. However, by decision entered October 24, 1984, the State Board of Education reversed the Commissioner's decision and remanded this matter for decision on the merits.

A prehearing conference was conducted in the Office of Administrative Law, Mercerville, on August 26, 1985. Hearings were conducted on November 1 and 4, 1985, in the Keyport Boro Municipal Building, Keyport. Seventeen documents were admitted as evidence and nine witnesses testified. Letter briefs were filed after the hearing, at which time the record closed on December 16, 1985.

STIPULATION OF FACTS

1. Mr. Parisi received his instructional certificate on June 19, 1974, as a teacher of music with a comprehensive endorsement.

2. Mr. Parisi was employed by the Board of Education on September 1, 1974.

3. Mr. Parisi taught vocal music and music appreciation from September 1, 1974 to June 1983, at the high school level and at the departmentalized middle school.

4. Mr. Parisi acquired tenure in the position of teacher.

5. Mr. Parisi received notice of the Reduction in Force on April 22, 1983, through a letter from R. Thomas Jannarone, Jr., Superintendent of Schools, directed to Mr. Parisi.

6. Mr. John Milici was employed by the Board of Education on December 16, 1968.

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7. Mr. Milici received a provisional certification as a teacher of music with an instrumental endorsement in March 1972. Mr. Milici received a regular certification as a teacher of music with an instrumental endorsement in January 1974.

8. Mr. Milici, from 1968 to 1978, taught instrumental music and band to the grades of kindergarten through fourth grade, and from 1978 to the present, Mr. Milici has taught vocal music to the grades of kindergarten through fourth grade.

9. Mr. Milici received a certification in February 1978 as a teacher of music with a comprehensive endorsement.

10. Mr. Milici acquired tenure.

SENIORITY

Petitioner asserts that he has greater seniority than John Milici; consequently, if the Board's Reduction In Force (RIF) is valid, it is Milici who must be RIFfed. Thus, the threshold issue of seniority requires initial determination because if decided in petitioner's favor, the merits in this matter would become moot.

The record shows that petitioner was RIFfed at the end of June 1983, at which time a seniority determination had to be reached. Therefore, the seniority determination here must be made under the old State Board of Education rules prior to September 1983. This is so because the new State Board of Education rules were amended (R.1983 d.255, effective June 20, 1983, operative September 1, 1983). See: 15 N.J.R. 464(a), 15 N.J.R. 1017(a).

Seniority for teaching staff members is a right triggered whenever a RIF is necessary. The State Board of Education has enacted rules and regulations governing RIFs pursuant to N.J.S.A. 18A:28-9 et seq. The standards set forth in N.J.A.C. 6:3-1.10(k) are particularly pertinent to the matter here in dispute. These standards as applied to the facts in this matter are set forth in relevant part below.

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As stated by the Commissioner in Howley and Bookholdt, Jr. v. Bd. of Ed. of the Tp. of Ewing, OAL DKT. EDU 3664-82, decided by the Commissioner December 20, 1982; aff'd. State Bd. of Ed. June 1, 1983, seniority is accrued in "categories" of service relative to the certification held by the employee. There are three kinds of regular certificates issued by the State Board of Examiners: (a) Instructional; (b) Administrative and Supervisory; and (c) Educational Services. In the instant matter, both Mr. Parisi and Mr. Milici held instructional certificates. Mr. Parisi's regular certificate is as a teacher of music with a comprehensive endorsement, which he held from the time of his employment by the Board on September 1, 1974. Mr. Milici's provisional certificate was as a teacher of music with an instrumental endorsement, which he acquired in March 1972. He had been employed by the Board since 1968 as a teacher of music. He received his regular certificate in January 1974. However, the regulation then in force, N.J.A.C. 6:3-1.10(d) reads as follows:

> (d) The holder of a provisional certificate shall be entitled to seniority rights but not over the holder of a standard certificate. The holder of an emergency certificate shall not be entitled to seniority rights but, when he becomes the holder of a provisional or standard certificate, the years of employment under the emergency certificate shall count toward seniority under the provisional or standard certificate, as the case may be. (Emphasis added.)

(See: Trowbridge v. Bd. of Ed. of the Tp. of Edgewater Park, OAL DKT. EDU 3083-79, decided by the Commissioner March 17, 1980). Because Mr. Milici has held a provisional certificate since March 1972, his seniority as a teacher of music accrues from that date forward. The stipulations do not state whether he held any certificate prior to 1972; nevertheless, he has at least two years and three months greater seniority than Mr. Parisi as a teacher of music.

Both teachers were employed in the category of teacher of music. The Commissioner stated in Howley, supra, as follows:

> "Categories" are not synonomous with "positions," although sometimes they happen to be the same, e.g., superintendent of schools; nor are they necessarily the same as endorsements, although they may be, under N.J.A.C. 6:3-1.10k(30) which creates additional categories of "specific certificates." 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. Williams v. Plainfield Bd. of Ed., 1979 S.L.D. 220, decided September 6, 1979, slip opinion pp. 8-9, aff'd 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 306 (1981).

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Accordingly, seniority is accrued by teaching service within a category while holding a valid certificate with an endorsement appropriate for the assignment. (Edison Tp. Ed. Assoc. et al. v. Bd. of Ed. of the Tp. of Edison, OAL DKT. EDU 9457-82, decided by the Commissioner December 29, 1983).

The Commissioner decided a case similar to this matter in Popovich v. Bd. of Ed. of the Borough of Wharton 1975 S.L.D. 737. In that case, the Commissioner held that Popovich held the specific certificate of teacher of music and was therefore entitled to teach vocal music or instrumental music in any grade K-12. The matter herein is similar. The endorsements on both teachers' certificates were appropriate for their assignments. (N.J.A.C. 6:11-6.2 and 6.3).

Based on the foregoing Stipulation of Facts the regulations then in effect and the relevant case law, I **CONCLUDE** that Mr. Milici has at least two years and three months greater seniority than Mr. Parisi. Accordingly, the Board's seniority determination in that regard is correct.

BAD FAITH

Petitioner asserts alternatively that the Board's determination to terminate his employment is arbitrary and capricious. Evidence of its arbitrary action, according to petitioner, is listed as follows:

1. The Board developed the pretext that budget constraints caused his dismissal.

2. The Board of Education's destruction of the tapes of its public meetings and its failure to form the committee which it promised to the community further establish its bad faith motivation in terminating petitioner.

3. The Board's claim regarding lessening of need for music instruction and preliminary pupil scheduling was false and used as a pretext to justify petitioner's termination.

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4. The Board's capriciousness is demonstrated by the fact that it resolved to terminate petitioner's employment despite the fact that it was unsure of his seniority status.

Initially, it must be remembered that this is not a tenure case where the Board must prove charges against a tenured teacher. Consequently, petitioner has the burden to show by the preponderance of the evidence that (1) he has greater seniority than a fellow teacher, or, as stated in the Prehearing Order; (2) the Board's failure to reemploy petitioner was an arbitrary, capricious and unreasonable exercise of its authority. Having determined that petitioner was in fact the least senior music teacher, the remaining contentions will be analyzed. However, we must first review the relevant statutes.

In that regard, N.J.S.A. 18A:28-11 states in part that when a RIF is necessary

> the board of education shall determine the seniority of the persons affected . . . and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion. . .(Emphasis added).[1]

Petitioner argues that the Board sought an advisory opinion from the Commissioner which it never received, then terminated his employment without being certain of his seniority status. The record does not support that allegation. The Board followed the statutory prescription which mandates that it determine the affected teachers' seniority (N.J.S.A. 18A:28-11). And although the Commissioner did not render the sought after advisory opinion (See: R-12) the Board complied fully with its statutory obligation. Petitioner was given written notice on April 22, 1983, that a more senior music instructor would return for the 1983-84 fall term, and that its Magnet School would close because of the loss of funding. Petitioner and his father testified that they were advised by the Superintendent after the Board's April meeting that the Magnet School would close because of the loss of federal funds. Included in its notice to petitioner is a list of the affected teachers. Also attached is a Board Resolution which indicates that the least senior person will be RIFfed. Petitioner's name appears last on that list (R-1). The Board needed one less teacher and petitioner was RIFfed pursuant to the above statute.

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[1] An advisory opinion is not binding on the Board or the Commissioner (N.J.S.A. 18A:28-11).

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When a board of education acts within its statutory authority, its determination may not be set aside absent a showing of bad faith, i.e., being arbitrary, capricious or unreasonable.

This principle was enunciated in Boult and Harris v. Passaic 1939-49 S.L.D. 7, affirmed State Board of Education, September 13, 1946; affirmed, 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948) as follows:

> . . . it is not a proper exercise of a 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 the local boards. (1939-49 S.L.D. at 13).

Petitioner contends that the Board had tried to terminate him for several years and finally developed the sham of budget considerations as a ruse to terminate his employment (R-3, R-4).[2] The record shows otherwise. The Board's proposed budget was reduced by more than $500,000 in the spring of 1983. This reduction caused termination notices to be issued to 28 non-tenured teachers (R-9), 26 of whom were reemployed after the Commissioner restored to the budget the entire amount which had been reduced by the city governing body. But petitioner was not a non-tenured teacher. The record shows that petitioner's position was affected by a funding loss of federal monies for the Board's Magnet School and the resultant return from the Magnet School of a more senior music teacher (R-1).

Petitioner and all of his witnesses testified that the only reason given publicly for his termination was the loss of funding, ostensibly caused by the governing body's reduction of the Board budget. Petitioner asserted that the Board president and the Superintendent promised at the meeting on April 21, 1983, that a committee would be established to see if his position could be saved. In preparation for this hearing, petitioner and his attorney attempted to acquire or listen to the tape of that Board meeting so that

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[2] It should be noted that in 1979, petitioner was notified that he was the least senior music teacher. He was not RIFfed at that time because a more senior music teacher opted to go to a regular classroom assignment.

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he could prove that such a commitment had been made. The Board secretary denied petitioner access to the tape and erased it prior to the hearing. Petitioner asserts that this is further evidence of the Board's caprice and that his use of the tape could have further established the Board's bad faith motivation.

The Board secretary testified that he considered tapes of Board meetings his personal worksheets and that he believed that petitioner had no right to review them. He used the tapes to prepare the minutes of the Board meetings which he considered the official record after the minutes were adopted at the Board's next meeting. At that time he would erase the tapes.

Petitioner contends, without contradiction, that the April meeting tapes were available for inspection when requested; therefore, their erasure is evidence of the Board's bad faith. However, accepting petitioner's statements as fact, he merely asserts the tapes would show he was promised that a committee would be established to see if his position could be saved. I will assume that petitioner's contention is absolutely true and accurate in that he was promised that a committee would be established to see if his position could be saved. However, such a finding does not lead to the conclusion that the Board was acting dishonestly when it failed to carry out its promise.

Another of petitioner's contentions is that a music position became available after his RIF and that he was not notified (P-12, P-13, P-14) pursuant to his right on the preferred eligibility list (N.J.S.A. 18A:28-12). This statement is true and when brought to the Superintendent's attention, petitioner was offered the position in writing two months later (P-13). Petitioner declined the offer.

Petitioner asserts also that the Board's claim that it had a lesser need for music instruction is not borne out by the facts. Petitioner argues that the record will show that the Board did not even have information concerning enrollment in music courses when it terminated his employment. Petitioner concludes that the record reveals a growing need for music instruction for the 1983-84 school year. According to petitioner, this summary is also evidence of the Board's pretext to justify his termination.

Irrespective of petitioner's assertions, the record shows clearly that he was notified in writing on April 22, 1983, that the district had more music instructors than it needed and because of reduced funding, one music instructor would be eliminated (R-1).

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Several of petitioner's witnesses testified that the source of the funding was not identified, and the record shows that both local funding (reduced budget) and federal funds were involved.

Finally, two witnesses testified that the Board wished to get rid of petitioner. The first witness, a teachers' association representative, based his conclusion on three meetings he attended where petitioner's employment was discussed and the Board president's alleged statement that if the budget were restored, all jobs would be restored. This witness testified also that the Superintendent had stated to him that if the Magnet School were lost, petitioner would be terminated. He also testified that the high school principal and the supervisor of music wanted to get rid of petitioner. Therefore, it is his belief that the Board wanted to terminate petitioner's employment.

Another former colleague testified that he observed friction between petitioner and his supervisor. The example cited was petitioner's lateness to class on one day which his supervisor reported to the principal. The principal later gave petitioner a letter reminding him of his lateness.

The testimony of these two witnesses does not establish that the Board was "out to get" petitioner. Neither does the documentation indicate that his immediate supervisor was dissatisfied with his performance. In that regard, petitioner's Appraisal of Teacher Performance dated May 11, 1982, rated him as meeting Asbury Park standards in every category. His supervisor then wrote the following:

> Mr. Parisi has extended himself this year with many concerts for the sending districts and other school systems and excellent reports have come back on his performances.
>
> The mixed chorus is moving toward the popular style of music and has grown in interest with increased numbers of students.
>
> The spring concert was an outstanding program.
>
> (P-8)

This is not the kind of evaluation or the language one would use if trying to "get" a tenured employee.

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Accordingly, I **FIND** as **FACT** that petitioner was notified in writing on April 22, 1983, that a position was being eliminated and that he was the least senior person in the music department. He admitted that the Superintendent advised him that the Magnet School was being abolished.

Based on all of the above, I **CONCLUDE** that petitioner has failed to show by a preponderance of the evidence that the Board's determination to terminate his employment was based on any bad-faith motivation. The statute sets forth a procedure for a RIF when a board of education finds it necessary to economize. As set forth above, the Board followed that procedure (N.J.S.A. 18A:28-11).

For all of the above reasons, the Petition of Appeal is **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.

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

January 17, 1986
DATE

AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

JAN 21 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 23 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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LOUIS PARISI,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, : DECISION ON REMAND

RESPONDENT. :

:

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c and are summarized below.

Petitioner contends, inter alia, that:

1. The Administrative Law Judge (ALJ) misstates the circumstances surrounding the Board's destruction of the relevant tape recordings and the crucial evidence that was destroyed in the process;

2. The ALJ conveniently fails to mention that seven eyewitnesses, newspaper reports and official Board resolutions completely contradicted the testimony of the Board's only witness, the Superintendent of Schools;

3. The ALJ erroneously failed to make a finding on petitioner's claim that the Board's stated reason for his termination, a lessening of need for music instruction, was pretextual;

4. The ALJ erroneously failed to comment on the non-appearance of the Board President;

5. Contrary to the ALJ's finding, the Respondent Board was uncertain of petitioner's seniority status at the time that it terminated him; and

6. Seniority regulations were amended effective June 20, 1983, prior to petitioner's termination. Consequently, the new rules control and petitioner is more senior.

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The Board contends that the ALJ's decision is sound both legally and factually, asserting that the exceptions are the same arguments repeatedly made during the hearing and in petitioner's post-hearing brief.

Petitioner's argument that the amended seniority regulations (N.J.A.C. 6:3-1.10 effective June 20, 1983, operative September 1, 1983) control in this matter is without merit. The reduction in force in this case occurred April 21, 1983; thus, the regulations in effect on that date determine what seniority rights petitioner possesses. This very issue was addressed in Edison Township Education Association v. Bd. of Ed. of the Township of Edison, decided by the Commissioner June 18, 1984, aff'd State Board December 7, 1984, aff'd N.J. Superior Court, Appellate Division, February 11, 1986 wherein the Commissioner stated "***seniority is only triggered by a reduction in force which the Board accomplished at its meeting in April 1983. To claim that seniority determinations may be set aside to some later date *** simply has no authority in law.***" (Slip Opinion, at p. 12) See also State Board decision in Marshall v. Bd. of Ed. of Township of Neptune, decided by the Commissioner April 8, 1985, rev'd State Board January 8, 1986.

Further, as regards petitioner's other exceptions, the Commissioner finds no substantive argument presented to persuade him that the ALJ erred in his conclusion that petitioner has failed in his burden of proof that the Board's action herein was arbitrary, capricious or in bad faith. The ALJ had before him during and after the hearing virtually all of the arguments presented in petitioner's exceptions. As expressed by the State Board in Paternoster v. Bd. of Ed. of Leonia, decided by the Commissioner November 9, 1982, rev'd State Board March 7, 1984, "*** due regard should be given to the opportunity of the ALJ to judge the credibility of the witnesses. One who hears conflicting testimony is charged with the duty of judging the credibility of witnesses.***" (Slip Opinion, at p. 3) This statement is consistent with the words of the Appellate Division Court in Parker v. Dornbierer, 140 N.J. Super. 185 (1976) which read as follows:

> We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility.*** (emphasis in text)(at 188)

In the instant matter, the ALJ concluded, based on the evidence, testimony and credibility of the witnesses before him, that the Board's reasons for abolishing petitioner's position were not pretextual, nor was its action motivated by bad faith. Petitioner's exceptions do not demonstrate that the ALJ failed in his duty as the trier of fact and the judge of credibility in this matter.

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Accordingly, the recommendation of the Office of Administrative Law dismissing the Petition of Appeal with prejudice is adopted as the Commissioner's final decision in this case.

COMMISSIONER OF EDUCATION

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LOUIS PARISI,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 23, 1984

Remanded by the State Board of Education, October 24, 1984

Decided by the Commissioner of Education, February 25, 1986

For the Petitioner-Appellant, Oxfeld, Cohen and Blunda
(Mark J. Blunda, Esq., of Counsel)

For the Respondent-Respondent, McOmber and McOmber
(J. Peter Sokol, Esq., of Counsel)

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

Deborah Wolfe abstained

July 2, 1986

Affirmed N.J. Superior Court June 4, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1905-85
AGENCY DKT. NO. 47-3/85

JAMES DOWD,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF EAST ORANGE,
Respondent.

Nancy Iris Oxfeld, Esq. (Oxfeld, Cohen & Blunda, attorneys), for Petitioner

Melvin Randall, Esq. (Love & Randall, attorneys), for Respondent

Record Closed: December 28, 1985 Decided: January 13, 1986

BEFORE LEON S. WILSON, ALJ:

James Dowd, a teacher in the employ of the East Orange Board of Education, appeals to the Commissioner of Education from a resolution of his employer fixing his salary. Mr. Dowd claims the Board reduced his salary in violation of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

The Commissioner transmitted this matter to the Office of Administrative Law for disposition as a contested case and it was, in due course, heard by me on September 26, 1985. Memoranda to the issues were filed by counsel for the parties; however, the record was held open until January 2, 1986 at which time copies of the exhibits first offered and

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marked at trial, were replaced by counsel after they were discovered misplaced and presumably destroyed in the Office of Administrative Law.

FACTS AND PROCEEDINGS

The record consists only of the testimony of Dr. Kenneth D. King, Assistant Superintendent for Personnel for the East Orange Board of Education and documents presented as joint exhibits by the parties. Specifically, Mr. Dowd did not testify. From this evidence I make the following **FINDING OF FACTS:**

James Dowd has been a long-term member of the teaching staff of the East Orange Board of Education and was, by the school year 1982-83, receiving the maximum salary allowed by the Salary Guide then in effect. See, Agreement between the East Orange Education Association and the Board, effective for the years 1980 through 1983 (J-1, p. 57). Over the years Mr. Dowd had accumulated some eight years service as chairman of his department (Industrial Arts); he was not, however, so serving during the school year 1982-83. On August 31, 1983, as a result of a unit clarification proceeding before the Public Employment Relations Commission, (PERC) department heads for the East Orange schools were to be redesignated "Department Chairpersons" and recognized as a bargaining unit apart from other teaching staff members. They were represented from that time by the East Orange Department Chairpersons' Association (EODCA).

Earlier in 1983, the Board of Education and the East Orange Education Association entered into their current agreement. (J-2). In consideration of the PERC Order of August 31 that year, the then department heads were not bound by that agreement. Rather, it was understood, a separate contract between the board and the EODCA would be necessary to establish the terms of their employment. Those parties, however, had not reached agreement by the beginning of the school year 1983-84, and indeed have not settled upon a contract to the present time.

As indicated, Mr. Dowd had been regularly assigned as a classroom teacher prior to and during the school year 1982-83. His salary in accordance with the 1980-83 contract

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then in effect was computed as follows: To the twenty-first step on the "MA plus 32" schedule ($30,761) (J-1; page 56) was added a variable differential in recognition of "the special and growing demands put upon the classroom teacher" of .0066 ($203) (J-1; page 57), or a total salary of $30,964.

Prior to April 30, 1983, in due course, Mr. Dowd was notified of his reappointment for the 1983-84 school year. His salary apparently was calculated in accordance with the new Teachers Salary Guide (J-2; page 46): $32,469. During the 1983-84 school year, Mr. Dowd discharged his classroom duties in due course.

In the spring of 1984, he again was duly offered reemployment for the following school year, 1984-85. Again, it would appear that his salary was to be paid in accordance with the new Teachers Salary Guide: $34,395 (19th step on the "MA plus 32" teachers salary schedule; J-2, at page 47).

As indicated, during 1983, the several department heads of the district initiated a unit clarification proceeding before the Public Employment Relations Commission. The Commission's order of August 31 that year, designating them a separate bargaining unit, apparently was accompanied by a mutually understood and accepted, but never formalized, agreement that members of the new bargaining unit would continue on salary in accordance with the now expired 1980-83 Teachers Salary Guide (J-1). The previous contract had provided for a stipend, in addition to the salary fixed by the Teachers Guide, based upon number of years service as department head. Thus, a department head's salary was calculated by adding to the salary determined by the teachers schedule the variable differential (.0066) and the stipend calculated in accordance with the number of years service as department head.

On August 4, 1984, Mr. Dowd applied to the board for appointment to the position of "Chairperson, Related Arts Department." He began the 1984-85 school year as a classroom teacher. However, on September 18, 1984 the board acted by resolution to accept his application for additional service. Its resolution read:

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"E. Appointment of Department Heads for East Orange High School -

RECOMMENDED MOTION: That the following appointments be approved effective September 19, 1984-June 30, 1985 at a salary to be determined.

Ms. Jane Perry-Guidance Department Head

Mr. James Dowd-Related Arts Department Head." J-4.

The board refrained from fixing Mr. Dowd's salary in the new position because of the pending negotiations between it and the EODCA which were then entering their second year. Nevertheless, Mr. Dowd undertook his duties for the new school year (as classroom teacher/department head). The board continued to pay him at the salary rate stipulated the previous spring when he was reappointed under the (new) Teachers Guide: $34,395 per annum.

Meanwhile, the EODCA continued the apparently difficult negotiations with the board that had begun July 1, 1983. Claiming that "incremental increases due on or about September 1, 1984 to department chairpersons" and "longevity increases due selected members of the unit" had been withheld for the 1984-85 school year, the EODCA filed an unfair practice charge with the Public Employment Relations Commission on October 9, 1984. The next week, on October 15, 1984, obviously in response to the September 18 actions of the board (when it appointed Mr. Dowd and one other as "department heads"), the EODCA filed a second unfair practice charge complaining of the higher salaries paid to the "newly appointed" department chairpersons. Sometime between that date (October 15, 1984) and November 19, 1984, while the matters were pending further proceedings, the parties were invited to enter into an LAP (Litigation Alternative Procedure) under the auspices of the PERC. This resulted in a voluntary agreement that, pending the outcome of negotiations, newly designated department heads would be paid in accordance with the old Teachers Salary Guide (as they would have been had the PERC unit clarification order not issued, and no new teachers contract concluded). In effect, the department heads agreed (perhaps for other consideration, which in any event, was not established before

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me) that their salaries would be frozen at 1983 levels (except for previously negotiated increments) pending adjustment to conform to their eventual agreement.

This interim agreement was implemented by the board immediately. Apparently however, no memorandum of that agreement was executed until the following January (January 22, 1985). A handwritten memorandum, signed by Dr. King for the board on that date, and by Anthony Bostwick (?) (partially illegible) for the "East Orange Department Heads Association" bears no caption or preamble. It recites:

> The parties hereby enter into this settlement agreement whereby the respondent, East Orange Board of Education agrees to pay increments and salary differentials, pursuant to the 1980-83 agreement between the East Orange Association and the East Orange Board of Education, Article XXVI and Article XXVII respectively, to all department chairperson, which were otherwise due on September 1, 1984.
>
> The Board further agrees to pay all newly hired department chairpersons on the salary schedule of the 1980-83 contract identified above.
>
> The provisions of this agreement will remain in effect until the parties sign an agreement.
>
> The Association further agrees as part of this settlement agreement that it hereby requests the withdrawal of charges CO-85-87 and CO-85-92 currently filed with the Public Employment Relations Commission.
>
> The East Orange Board of Education /s/Kenneth King 1-22-85
>
> The East Orange Department Heads Association /s/Anthony Bostwick."
> [Attachment number 3 to affidavit of Dr. Kenneth King submitted as an addition to the record on October 1, 1985 by stipulation of the parties.]

Shortly after the terms of this agreement were settled (though obviously long before the memorandum recording its terms was subscribed) Dr. King met with Mr. Dowd to discuss his salary.[1] Mr. Dowd was then informed that his 1984-85 salary would be recalculated in accordance with the interim agreement. It was obvious to both Mr. Dowd

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1 It was as a result of this discussion that the board recognized Mr. Dowd's prior service as eight years, and not the six years it had originally calculated.

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and Dr. King that the recalculated salary would be less than the rate at which Mr. Dowd was then being paid.

On December 18, 1984, in accordance with the LAP agreement and the discussion between Mr. Dowd and Dr. King, the Board of Education confirmed its action of September 18, 1984, and its assignment of Mr. Dowd as department head. The salary awarded him in that position and which it agreed to pay him "effective September 19, 1984," was $231 less than that which he had been receiving as a teacher.

Dr. King fully understood that his implementation of the EODCA interim agreement meant a reduction in salary for Mr. Dowd. As indicated, he brought it up in their discussion of November 19. While he did not expressly offer Mr. Dowd an option to reject the recalculated salary and return to his classroom assignment, Mr. Dowd clearly had that alternative available to him. Indeed, the other teacher assigned as guidance department head by the same action of the board resigned as department head and returned to the classroom. Dr. King believed she did so in order to avoid the reduced salary necessitated by the interim agreement. In any event, the board later filled her assignment as department head with another.

Both the Board's action of December 18, 1984 (J-6), whereby Mr. Dowd's salary for that school year was finally determined, and its notification to him on December 19, 1984 (J-7) are characterized by the board itself as "salary adjustment, from $34,395 p/a to $34,164 p/a effective September 19, 1984 to June 30, 1985 by reason of new position."

Mr. Dowd appeals this action to the Commissioner, seeking the restoration of his salary to that paid in accordance with the board's notice to him of April 1984, and the practice it had established in September 1984 and continued the three and one-half months thereafter until December 18. The board resists restoration of that salary to the higher level, contending its actions were lawful in the circumstances.

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DISCUSSION

The Tenure Employees Hearing Law (N.J.S.A. 18A:6-10) mandates that:

> "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, or
>
> (b) [not pertinent here]:
>
> except for inefficiency, incapacity, unbecoming conduct or other just cause . . . " N.J.S.A. 18A:6-10.

This statutory prohibition is imposed upon boards of education, initially, to protect professional employees from adverse treatment motivated by non-educational concerns and, ultimately, to advance the public interest in education by assuring to professional staff members protection in their positions from any interference unrelated to their professional competence. To this end, their tenure rights have been characterized as unwritten provisions in every employment contract, provisions which cannot be waived by the protected teacher. Lange v. Bd. of Ed. of the Borough of Audubon, Camden Cty., 26 N.J. Super., 83 (App. Div. 1953).

The prohibition is mitigated by the right of a board of education to effect a reorganization or reduction in force which may, in consequence, necessitate a dismissal or reduction in compensation. Ibid; see also, N.J.S.A. 18A:28-1 et seq., esp., -9.

Thus, the law's protection of a teacher's salary against reduction is not absolute. Inherent in the concluding paragraph is the clear public policy that boards of education shall not be restrained, by that law, in the exercise of their managerial prerogative to redistribute, from time to time, professional responsibilities of one kind or another among the several members of its staff, and to pay their employees in accordance with service

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actually performed, and not necessarily the highest salary earned by an employee on the basis of service performed in the past and no longer. Wexler v. Bd. of Ed. of Hawthorne, 1976 S.L.D. 309 (C.D., March 1976), aff'd, 1976 S.L.D. 314 (St. Brd, 1976). See also, Ross v. Bd. of Ed. of Elmwood Pk., 1978 S.L.D. 784 (C.D. March 1978), Dedrick v. Bd. of Ed. of Hammonton, 1977 S.L.D. 1043 (C.D., October 5, 1977) and Williams v. Bd. of Ed. of Plainfield, 176 N.J. Super. 154 (App. Div. 1980), certif. den., 87 N.J. 306 (1981).

While these competing policy interests, salary protection and board authority, are readily recognized, and as easily stated, the Department of Education through the years has been presented with a variety of factual circumstances to which their application has not been so obvious.

The settings in which these issues have arisen include three categories that appear to be not uncommon: (1) transfers or changes in duties; (2) erroneous calculation or payment of salary; and (3) interposition of newly adopted contract provisions. The present dispute appears to present characteristics of all three categories of circumstance.

A. Transfer or Reassignment

In Lange, the principle was established that an employee under tenure may relinquish a position but may not waive tenure rights while keeping his position. There, it was held that a teaching employee holding the title "Supervisor to Supervise Grade Schools" or "Supervisor of Elementary Education," was properly accorded the status of a teacher only. His assignment did not constitute appointment to a different position (from "teacher") and did not support tenure rights either to position or salary.

Even where tenure rights are clear and unquestioned, they may be affected by board action, so long as that action properly reflects general, legitimate, public (educational) policy. In Mishkin v. Bd. of Ed. of the Borough of Mountainside, OAL Dkt. No. EDU 1262-81 (January 19, 1983), reversed on other grounds, 1983 S.L.D. __ (C.D., March 4, 1983), it was held that a tenured teacher's refusal to accept reduction of her position from five to three days constituted a "waiver" of all her tenure rights. The board was deemed to have,

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in effect, abolished Ms. Mishkin's former full-time position, created a new part-time position and, having offered the new position to her, fully satisfied its obligations under the law. See, Dedrick.

Even absent a claim of reorganization, a "downward salary adjustment" has been permitted on reassignment. Thus, where successive assignments are not recognized as distinct positions under the tenure law, and one provided a higher salary than the other, then where the difference could be characterized as a "stipend" and not integral to the protected salary, it could be withheld upon reassignment without violating the law. Stiles v. Bd. of Ed. of Ringwood, 1974 S.L.D. 1170 (C.D., December 3, 1974); Wilson v. Bd. of Ed. of New Brunswick, 1977 S.L.D. 555 (C.D., May 6, 1977)

Absent tenure charges, teachers are protected from involuntary demotion. If the board's action cannot be justified as a reorganization or reduction in force, its mere preference that another teacher perform more lucrative services is insufficient justification to reduce a salary where no part of it is reasonably characterized as a mere stipend. Nevertheless, the realignment of duties may be permissible. Wilson v. Bd. of Ed. of Florham Pk. 1977 S.L.D. 823 (C.D., July 12, 1977); Ross.

B. Excess Payments in Error

Where boards of education have either established a teacher's salary incorrectly, or calculated it so, the Commissioner has generally held the higher salary is protected, and cannot be corrected (i.e., reduced) unless:

a. The error resulted from a mistake in fact for which the board was not responsible (Larsen v. Bd. of Ed. of East Windsor, 1978 S.L.D. 948 (C.D., December 22, 1978));

b. The inflated salary payment was made without official board action (Buehler v. Bd. of Ed. of Ocean Tp., 1970 S.L.D. 436, 441 (C.D., December 17, 1970), aff'd, 1971 S.L.D. 660 (St. Brd, June 2, 1971), aff'd, 1972 S.L.D. 664 (App.

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Div. 1972)); or,

c. The board notified the teacher that the higher salary to be paid was contingent upon some future unknowable event or that it was otherwise conditional. (McCabe v. Bd. of Ed. of Scotch Plains-Fanwood, OAL Dkt. No. EDU 0854-80 (June 30, 1980) aff'd 80 S.L.D. __ (C.D., August 15, 1980); Tripp v. Bd. of Ed. of South Orange-Maplewood, OAL Dkt. No. EDU 6615-83 (December 20, 1983), aff'd, 1984 S.L.D. __ (C.D., February 6, 1984).

Even where a higher salary is deemed protected, despite its origination in error, the board is prohibited only from recouping excess payments already made and from reducing current payments to the "proper" level, at least for the balance of the contract year. Galop v. Bd. of Ed. of Hanover, 1975 S.L.D. 358 (C.D., May 16, 1975), aff'd, 1975 S.L.D. 366 (State Board, 1975); Anson v. Bd. of Ed. of Bridgeton, 1972 S.L.D. 638 (C.D., December 5, 1972). It remains free, if not required, to withhold any further increases in salary in future years (i.e., to "freeze" the protected salary) until time in service, periodic increments or other circumstances warrant the payment of an even higher salary.

C. Intervening Contract Negotiations

It has been affirmatively held that even without express agreement to this effect, the provisions of an expired collective bargaining agreement remain in effect until settlement upon a replacement agreement. In re Bd. of Ed. West New York, 6 N.J. P.E.R. 11139 (PERC, May 22, 1980). All provisions of the expired contract regarding annual increments attributable to time in service and the like must continue to be honored by the board; however, the negotiating employees can claim no benefit from the provisions of contracts settled with another bargaining unit, even where that other unit formerly covered the still-negotiating employees. Ibid.

Similarly, the Commissioner has expressly held that an employee who was formerly paid in accordance with individual negotiation, independent of any bargaining unit, but who is subsequently recognized as part of a new bargaining unit which negotiates a lesser

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salary, can suffer no reduction. She may be held at the "excess" salary until it is warranted under the contract, but the board cannot reduce her salary to that which the new contract calls for. Shteir v. Bd. of Ed. of Bound Brook, OAL Dkt. No. EDU 2414-79 (February 4, 1979), aff'd, 1980 S.L.D. _ (C.D., March 24, 1980), aff'd, Dkt. No. A-4774-79 (App. Div., March 6, 1981) (unreported).

In Shteir, the ALJ held, and the Commissioner affirmed, that "[the fact] that the new labor agreement established compensation at that step to be less than petitioner then was receiving, grants the board no power to reduce her compensation except as set forth in N.J.S.A. 18A:6-10." Shteir, OAL, at page 5. There a school psychologist in her fourteenth year of service was paid "between 1 and 1.2 times the salary paid a teacher at the equivalent guide step" according to her private negotiation with the administration. During that year a new collective bargaining agreement provided, for the first time, that psychologists were to paid "on the salary guide." The contract signed in February 1979 was retroactive to July 1 the previous year. The board's mid-year attempt to reduce petitioner's salary to the contract level (a reduction of $474 per year) was prohibited by the Commissioner, and the board was required to continue payment at the established rate (which exceeded the contract rate) until that contract called for a salary equal to or greater than the one at which she was held.

Conclusion

In the matter before me, petitioner was offered, and he accepted, continued service as a teacher for the East Orange School Board for the year 1984-1985 at a mutually understood and agreed upon salary. His salary was fixed by official board action in accordance with its then recent teachers' contract. He was duly paid that salary for several months after that time. That there was pending, on September 1, his application to the board for its assignment to him of additional responsibilities (department head), cannot alter these facts.

When it acceded to his request and approved his appointment as department head, the rights and obligations of the parties under the tenure law remained undisturbed. The

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Board did not employ Mr. Dowd in a "new position" under that law, and its use of that phrase in its resolution of September 18 and December 19, 1984 mischaracterizes the change sought by Mr. Dowd. Absent a formal hiring by the board and a job description incorporating supervisory responsibilities foreign to the tasks of a classroom teacher, appointment as a department head confers neither additional nor lesser rights under the tenure law than those available to any other teaching staff member. It may be that, in the future, the title "department chairperson" will acquire a status independent of the teaching staff and thus constitute a "new position." Such a position will be attainable only through a new hiring, and will warrant (additional) tenure protection only after appropriate time and service. In September and December 1984, and at the present time, this is not yet the case. Until then, it cannot be said that Mr. Dowd sought, nor that the board appointed him to, a new position; rather, he was given a new assignment in his position as a teaching staff member.

The sole justification for the board's attempt to reduce Mr. Dowd's salary in mid-year (December 1984) is its clearly bona fide desire to conform to the provisions of its interim agreement with the East Orange Department Chairpersons' Association. The effect of such an agreement, however, can be no greater than that of a final negotiated contract. As has been seen, were such a final contract to affect adversely the salary of an individual member of the unit, the contract nevertheless can confer no rights upon the board to reduce that member's salary. It would merely empower the board to hold that member at the former salary until the accumulated negotiated increments equal or exceed it. Shteir.

In consideration of the foregoing, then, I **CONCLUDE** that the East Orange Board of Education is prohibited by the express terms of the Teacher Tenure Law from altering the salary to which James Dowd was entitled in accordance with the Teacher Salary Guide in effect for the year 1984-85, which salary he was in fact paid for the period from September 1 through December 19, 1984. By its actions of December 19, 1984, the Board sought nothing less than the reduction of the salary of a teaching staff member, without tenure charges or other lawful justification, upon his assignment to other, and in fact additional, duties. That its motivation was "pure," deriving as it did from the provisions

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of an agreement made in good faith with the department chairpersons' bargaining unit, reduces not at all the effect of its actions upon Mr. Dowd. It is precisely that effect which the law declares illegal. The terms of the interim agreement must be interpreted to avoid that illegal effect. Thus, the phrase "newly hired department chairpersons" as it appears in the memorandum of agreement of January 22, 1985, is properly limited to those without prior existing tenure rights in the district.

For the foregoing reasons, therefore, I **DIRECT** that the resolution of the East Orange Board of Education dated December 19, 1985, insofar as it purports to reduce the salary of James Dowd from that to which he had been properly and lawfully entitled at the time, be deemed a nullity and void. I **FURTHER DIRECT**, that Mr. Dowd continue to receive salary while employed by the East Orange Board of Education, for the balance of the school year 1984-85, at that rate, to wit: $34,395 per annum; I **FURTHER DIRECT** that pending adoption of a negotiated agreement between the East Orange Board of Education and the East Orange Department Chairpersons' Association, Mr. Dowd continue in future years to receive salary at that same rate, until such time as his proper salary under such contract shall exceed his present salary, at which time he shall be entitled to the benefit of such salary increase or increments as it may provide.

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

January 13, 1986
DATE

LEON S. WILSON, ALJ

JAN 15 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 16 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

am/e

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APPENDIX

WITNESSES

Dr. Kenneth King, Assistant Superintendent of Personnel, East Orange Board of Education

EXHIBITS

J-1 Agreement between the East Orange Education Association and East Orange Board of Education, 1980-1983

J-2 Agreement between the East Orange Education Association and East Orange Board of Education, 1983-1985

J-3 Letter, from James M. Dowd to Dr. Kenneth King dated August 4, 1984

J-4 East Orange Board of Education, Resolution, dated September 18, 1984

J-5 Letter, from Kenneth D. King, Assistant Superintendent for Personnel, to Mr. James Dowd dated September 29, 1984

J-6 East Orange Board of Education, Resolution, dated December 18, 1984

J-7 Letter, from Kenneth D. King, Assistant Superintendent for Personnel to Mr. James Dowd dated December 19, 1984

- Affidavit, Dr. Kenneth D. King, with Interim Agreement dated January 22, 1985 attached

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JAMES DOWD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. It is noted that timely exceptions were not filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Based on a careful review of the record herein, the Commissioner affirms the findings and determination as rendered in the initial decision herein and adopts them as his own based on the language of Shteir v. Bd. of Ed. of Bound Brook, decided by the Commissioner March 24, 1980, aff'd State Board July 2, 1980, aff'd N.J. Superior Court March 6, 1981. It bears noting that petitioner's predicament is the result of the fact that the contract negotiations regarding salaries for members of the "new" bargaining unit, that of Department Chairpersons, was not finalized at the time of the reduction in his salary in compliance with that bargaining unit's interim agreement. It is assumed that when negotiations are finalized, if they have not been already, and the contract for Department Chairpersons is effective, his salary will be higher than that which petitioner is currently earning as a classroom teacher, commensurate with the additional duties he performs in his capacity as both a classroom teacher and department chairperson.

Accordingly, the Commissioner finds and determines, as did the ALJ, that the resolution of the East Orange Board of Education dated December 19, 1985, insofar as it purports to reduce the salary of petitioner from that of classroom teacher, to which he had been properly and lawfully entitled at the time, be deemed a nullity and void. It is hereby directed that petitioner continue to receive salary while employed by the East Orange Board of Education, for the balance of the school year 1984-85, at the rate of $34,395 per annum. It is further directed that, pending adoption of a negotiated agreement between the East Orange Board of Education and the East Orange Department Chairpersons' Association, petitioner continue to receive salary at that same rate, until such time as his proper salary under such contract shall exceed his present salary, at which time he shall be entitled to the benefit of such salary increase or increments as it may provide.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 26, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4555-85
AGENCY DKT. NO. 201-7/85

HUNTERDON CENTRAL HIGH SCHOOL EDUCATION ASSOCIATION, MARTEN BONNEMA, JEFF BURNS, JACOB BUSH, HAROLD CLAWSON, JOYCE D'AMICO, GINGER DeMARIS, GEORGE DEY, ELWOOD EDMONDS, ADRIAN FULCHER, JOHN GAYNOR, FRANK GELEGONYA, ROBERT HAILES, GLEN HARMON, JAMES HARTSTALL, ROBERT HAY, GEORGE HICHMAN, JAMES MASTERPOL, WILLIAM SMERECYNSKY, GEORGE TITUS, JOHN TOTH, and DEBORAH WAITE,

Petitioners,

v.

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Robert A. Fagella, Esq., on behalf of petitioners, (Zazzali, Zazzali & Kroll, attorneys)

James P. Granello, Esq., on behalf of respondent (Murray & Granello, attorneys)

Record Closed: December 12, 1985 Decided: January 16, 1986

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BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE

The individual petitioners are former custodial staff personnel employed by respondent Board of Education of the Hunterdon Central Regional High School (the Board) until June 30, 1985. On the latter date and as a consequence of Board action taken in April 1985, the respondent determined to terminate the employment of the individual petitioners and to subcontract to an outside independent contractor substantially the same responsibilities which they had performed as employees.

The individual petitioners, through their collective bargaining representative, the petitioner, Hunterdon Central High School Education Association, assert that pursuant to N.J.S.A. 18A:17-3 they are tenure employees, entitled to continued employment under good behavior, and as a consequence, the termination of their employment by the Board contravenes their tenure status and is in violation of statute.

The Board denies that the individual petitioners ever acquired tenure status and assert further that even if arguendo it were determined that the petitioners did acquire tenure, the Board's action in terminating their employment was taken in good faith, for reasons of efficiency and economy and is thus fully consistent with its statutory obligation in respect to laying off tenured employees and/or effecting a reduction in their force. During the course of prehearing discussions it was accordingly agreed that the two fundamental issues to be addressed in the matter are:

1. Did the individual petitioners acquire tenure as custodial staff employed by respondent Board?

2. If tenure was achieved by the petitioners, can they demonstrate that the action of respondent Board in terminating these employees was undertaken in bad faith and for reasons other than efficiency and/or economy?

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PROCEDURAL HISTORY

On July 10, 1985, the petition of appeal in this matter was filed with the Commissioner of Education. The respondent's answer was timely filed before the Commissioner on July 19, 1985. On July 30, 1985, the appeal was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted at the Office of Administrative Law, Trenton, New Jersey, on September 5, 1985. During the course of the conference, the issues were joined and the burden of proof in respect to establishing the tenure status of the individual petitioners was expressly and without dispute placed upon the petitioners. The matter was then scheduled to be heard on various dates in early December 1985; thereafter however, and pursuant to a request by Robert A. Fagella, Esq., counsel for petitioners, the hearing schedule was revised.

Pursuant to the agreement of counsel, the threshold issue to be addressed at hearing related to the issue of tenure. Accordingly, on December 2 and December 3, 1985, both sides rested on the issue of tenure, having presented all testimony as well as moving into evidence all documentary submissions relating to the question. On December 3, 1985, at the conclusion of the petitioners' case on the issue of tenure, counsel for respondent moved for involuntary dismissal. That motion was denied from the bench. I concluded that because of my obligation to the Commissioner of Education to develop a full and coherent record on all issues and because all facts and reasonable inferences derived from those facts should be interpreted so as to favor the party opposing the motion for involuntary dismissal, the respondent Board should come forward to develop its proofs in support of its assertion that tenure was never awarded the petitioners.

At the conclusion of the respondent's case on the issue of tenure, Mr. Granello, counsel to the Board, formally moved for summary decision in the matter. I directed both counsel to submit legal memoranda on the issue and it was agreed that in order for me to properly address the motion, the scheduled hearing dates of December 6, 9, and 10, 1985 would be cancelled. It was further agreed that upon arriving at a determination on the motion, I would apprise counsel whether the additional hearing dates of December 16 and 17 would be required.

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Counsels' initial submissions were received concurrently at the Office of Administrative Law (OAL) on December 9, 1985. Thereafter and pursuant to his request, Mr. Granello provided a reply brief on December 11, 1985. On the following day, December 12, 1985, the date on which the record in this matter closed, Mr. Fagella submitted a letter memorandum in response to the last submission of Mr. Granello.

After carefully reviewing the evidence presented, as well as appreciating the standard under which a motion for summary decision should be granted, I determined on December 13, 1985 to grant respondent's motion for summary decision. Accordingly, my office notified both counsel of this determination and advised them that as a consequence, the remaining hearing dates would be cancelled.

THE BURDEN OF PROOF AND THE STANDARD GOVERNING THE MOTION FOR SUMMARY DECISION

The standard governing a motion for summary decision is set forth at N.J.A.C. 1:1-13.1. It provides in pertinent part that "the decision sought shall be rendered if the papers and discovery which have been filed together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

The general principle which adheres is that the motion should be denied if the evidence together with all legitimate inferences which may flow from that evidence could sustain a judgment in the plaintiff's behalf. Bell v. Eastern Beef Company, 42 N.J. 126 (1964); Bozza v. Vornado, Inc., 42 N.J. 355 (1964). Further, all inferences of doubt are to be drawn against the moving party and the papers supporting the motion are to be "closely scrutinized and the opposing papers indulgently treated." Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 61 (1980); Judson v. People's Bank and Trust Company of Westville, 17 N.J. 67, 75 (1954).

For purposes of granting the motion as well, I have relied upon the unequivocal principle that the burden of proof in respect to the tenure issue rests exclusively with the petitioners: they must establish by a preponderance of the relevant credible evidence that

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they acquired tenure. Moreover, I have also relied upon the acknowledgement of counsel for petitioners that, absent a finding of tenure, the petitioners do not state a cause of action upon which any relief can be granted.[1]

THE FACTS

Based upon the entire record in this matter, as well as the stipulations entered into by the parties, and interpreting the evidence in a manner most favorable to the petitioners, I **FIND:**

On April 22, 1985, the respondent Board, by motion, terminated the services of its entire custodial staff effective June 30, 1985. As an incident to this determination, it also entered into a contract with a private company, Service Systems, Inc., effective July 1, 1985, in which the latter agreed to perform essentially and substantially the same services which were previously rendered by the custodial staff. The individual petitioners are a significant segment of what had been the Board's custodial staff. Many of them have gone on to employment with Service Systems, Inc. Some have since left that company; others may still be employed by it.

Tenure

The evidence offered to support the assertion by the petitioners that they acquired tenure within respondent district was questionable at best, strongly disputed by the witnesses called by the Board, based almost exclusively upon a purported oral representation made by a former mid-level management employee of the Board without any demonstrable authority, and flies in the face of the written record and the petitioners' own collective bargaining agreements.

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[1] There are, of course, circumstances under which even non-tenured school employees may state a cause of action. See N.J.S.A. 10:5-13, allowing school custodial staff employees to assert civil rights violations. See also 42 U.S.C.A. 1983, allowing for the assertion of a federal civil rights claim. In the current matter, however, it is clear from the stipulation of counsel and from the entire record in this matter that there is no claim of any civil rights violation in this case. The matter rests exclusively upon an assertion that the reduction in force effected by respondent Board was not posited upon reasons of economy and/or efficiency. In order to be successful upon such assertion, it is unequivocal that the petitioners' case rests exclusively upon establishing that tenure status was achieved.

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I shall first review and address the evidence offered by the respondent in support of its assertion that at no time, neither by conduct nor words did the Board of Education of Hunterdon Central Regional High School expressly or impliedly confer a tenure status upon any of the designated individual petitioners or any other custodial staff employees. Only four of the 21 individual petitioners appeared at the hearing and gave testimony.[2] It did become clear, however, that in respect to all designated petitioners, at the time of the commencement of their employment they were governed by the collective bargaining agreement entered into by the Board and the petitioners' representatives. Three of these collective bargaining agreements were introduced into evidence (R-1 governed the terms of employment for the period July 1, 1979 through and inclusive of June 30, 1981; R-2 covered the period July 1, 1981 through and inclusive of June 30, 1983; and R-3 governed the period July 1, 1983 through and inclusive of June 30, 1986). Each of these written collective bargaining agreements explicitly sets forth the definitive period of the petitioners' employment: R-1, the agreement entered into between respondent and secretaries and custodians, explicitly, provides at page 23: "the work year of employees shall be as follows: full-time employees shall be employed on an annual 12-month basis." R-2 and R-3 are identical in their language: "the work year of custodial employees shall be as follows: full-time custodians and/or maintenance workers shall be employed on an annual 12-month basis." R-2 at 16; R-3 at 16.

Petitioners introduced into evidence exhibits P-1 through P-20 (including exhibit 5A) inclusive. Each of these exhibits is a "packet," containing a confirming memorandum addressed to each of the designated individual petitioners indicating the step and salary of the individual employee for the following 12-month period. These were usually issued to the employees in June of the academic year, indicating what their new salary would be effective July 1st of that same year through and inclusive of the following school year.

In addition to these confirming memoranda, the exhibits introduced by the petitioners also contain the appropriate minutes of the meeting of the respondent Board of Education, reflecting the vote taken to rehire the individual petitioner custodial staff employee, the salary step upon which he would be rehired, and his new starting salary.

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[2] Joyce D'Amico, John Toth, Ginger DeMaris, and William Smerecynsky.

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Thus, it is clear from the exhibits offered by the petitioners themselves that not only did the collective bargaining agreement reflect that each of them was employed for a determinative and fixed period of time—12 months—but in addition the Board, by its collective action by motion on an annual basis, voted to rehire, where appropriate, these petitioners for an additional one-year's employment. This action is consistent with the Board's contractual obligations under the collective bargaining agreement entered into between it and the petitioners' collective bargaining representative, and--most importantly—provides in my judgment indisputable proof that the petitioners were indeed employed for a fixed term which, as will be fully developed in the analytic portion of this decision, exempts them from acquiring tenure under N.J.S.A. 18A:17-3. Thus, the minutes reflecting the action of respondent board of education during the applicable periods of time, the only proof offered in this matter that legitimately bears upon measuring and evaluating the conduct of respondent Board as it relates to tenure, unambiguously establishes that these petitioners were not "at will" employees nor were they subject to a contractual agreement under which tenure would be achieved outside of the statutory framework of N.J.S.A. 18A:17-3.

In addition to the harmonious relationship between the collective bargaining agreements mandating the terms of the petitioners' employment and the minutes of the meetings of the Board governing their reappointment, the testimony of the respondent's witnesses—particularly those privy to enunciated or articulated Board policy—fully corroborates the proposition that, during the applicable time frame, there was not in existence any definitive, reliable, or articulated policy of the Board that was contrary to its formalized action. Moreover, there was also proof offered through the testimony of these witnesses that neither through words nor conduct did the Board at any time either have knowledge of or ratify any purportedly unauthorized representation by any Board employee which could have reasonably resulted in a determination that a contrary tenure policy existed.

Fred Wolsiefer is and has been the superintendent of schools employed by the Hunterdon Central Regional High School Board of Education since 1979. Mr. Wolsiefer has held other positions within the district for some 24 years. Superintendent Wolsiefer unequivocally indicated that at no time was he ever aware of any action of the respodent Board to in any way confer upon any custodial employee, through word or conduct, tenure

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status. Moreover, Mr. Wolsiefer indicated that at no time did he ever recommend that any of the individual petitioners, former custodians, or any other custodians, be awarded tenure by the Board. As will be discussed in more detail hereafter, Mr. Wolsiefer also noted unequivocally that at no time and on no occasion did he ever instruct Mr. Ted Staniewicz, whose purported statements form the nucleus of the petitioners' case, that he should ever articulate any policy in respect to tenure to any custodial staff employee. Thus, Fred Wolsiefer, the highest ranking school official employed by respondent Board, unequivocally and unambiguously offered testimony which fully confirmed that the action of the Board was manifested only by the minutes of its meetings as well as the express terms of the collective bargaining agreements and was never contravened by Board action, policy, or conduct. Moreover, he explicitly contradicted the statements offered by various witnesses testifying on behalf of respondent which led to the erroneous conclusion of perhaps some petitioner employees that a tenure status might accrue.

Norma Leclair has been secretary to respondent Board since 1976. Part of her responsibilities include maintaining the minutes of its meetings, compiling lists of employees and their salaries which form the basis of annual reappointment decisions, and preparing and sending out the various notices to custodial and teaching staff members apprising them of their next year's salary as well as the salary guide upon which the salary is based. (See P-1 through P-20 inclusive). Ms. Leclair indicated that to the best of her recollection she at no time discussed the potential for custodial staff tenure with anyone; it was never an issue with her. In response to the hypothetical question asked of her as to how she would have responded had she been queried about the custodial staff's potential for tenure, Ms. Leclair asserted that she would have been unable to provide an answer.

It is against this evidential and testimonial background, having as its nucleus minutes taken at appropriate meetings of the Board in which each of the custodial staff employees was the subject of a one year contract, confirmed consistently by three successive collective bargaining agreements, and harmonized by the testimony of the superintendent of schools and the Board secretary, that the petitioners assert that they are able to establish by a preponderance of the relevant credible evidence that they were indeed tenured custodial staff employees. The petitioners' case rests almost exclusively upon their own unsupported, uncorroborated, and disputed hearsay testimony. Notably, Joyce D'Amico, a former night supervisor and evening custodian asserted, contrary to the testimony of Norma Leclair, that the latter informed her when she had commenced

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employment (on or about April 8, 1977) that she would receive tenure. Ms. D'Amico testified that it was her understanding that she would receive tenure after she had been employed for three years and one day—presumably her notion of tenure is tied in with that accorded teaching staff members. Her memory may very well be colored by her experience in the school district in which she had been employed prior to her employment with respondent: Ms. D'Amico acknowledged that it was her judgment that in the former district custodial staff employees were tenured after the completion of the three-year period. On closer questioning, Ms. D'Amico also acknowledged that Ms. Leclair never delineated to her the circumstances under which tenure would be awarded.

In 1980, Ms. D'Amico's immediate supervisor was Ted Staniewicz. Mr. Staniewicz left the employ of respondent Board in February 1985, having served as director of support services from 1979 through his departure. It is the purported statements of Mr. Staniewicz testified to by Ms. D'Amico that serves as the exclusive and, in my judgment, dubious basis for the argument that tenure was awarded the petitioners. Ms. D'Amico testified that sometime in 1980, when she became the night supervisor of a segment of the custodial staff, part of her responsibilities, as delegated by Mr. Staniewicz, was to orient and train new custodial employees. She testified that Mr. Staniewicz informed her that as an incident to this orientation and training, she was to inform these new employees about various fringe benefits they would be receiving and that at the expiration of three years and one day of continuous employment, they would be awarded tenure. She indicated that of the custodial staff commencing their employment from 1980 onward, she informed approximately 15 of these persons of this tenure information.

John Toth, Jr. and Ginger DeMaris, two other petitioners, rely upon purported oral representations made—not by Ted Staniewicz—but by Janice D'Amico, a co-employee, as the exclusive basis upon which they assert that they received tenure. The fourth and final petitioner testifying in this matter, William Smerecynsky, asserted that when he was hired in July 1981, he discussed tenure directly with Mr. Staniewicz, who purportedly informed him that it would be awarded after three years and one day.

Ted Staniewicz, although no longer employed by respondent Board, appeared at the hearing and testified on behalf of the petitioners. Mr. Staniewicz, while serving as director of support services from December 1979 through to the conclusion of his

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employment in February 1985, was responsible for the management of all non-instructional activities within the respondent school district. As part of his duties he would frequently interact both with the Board secretary and the superintendent of schools. Mr. Staniewicz unequivocally and unambiguously asserted that at no time and under no circumstances did the superintendent of schools, Fred Wolsiefer, the Board secretary, Norma Leclair, or the Board itself ever apprise him of a policy in respect to the granting of tenure to custodial staff members. Mr. Staniewicz candidly acknowledged that for a considerable period of time it was his assumption that custodial staff employees would be treated as other employees and that as a consequence, a period of longevity would determine tenure. Moreover, Mr. Staniewicz unequivocally asserted that at no time did he ever tell any potential or current custodial staff employee that he would receive tenure. All the information that he provided employees was in the subjunctive tense—he specifically indicated that at best he informed custodial staff employees that there was a "possibility" of tenure. He emphasized in his testimony that the word "might" was used. Further, Mr. Staniewicz unequivocally testified that under no circumstances and at no time did he ever advise Joyce D'Amico in respect to tenure or did he ever apprise her that she should inform employees about tenure or fringe benefit matters. Her only role was to orient employees to the work place after they were hired. Under no circumstances did she ever conduct interviews of prospective employees or was she directed or authorized to provide them with personnel information.

Moreover, and perhaps most importantly, Mr. Staniewicz is an articulate and presumably well educated school administrator, versed in the procedures that are employed in New Jersey in respect to conferring or denying various entitlements on employees. He unequivocally and unhesitatingly asserted that the only way that the issue of tenure can be resolved in a school district was through Board resolution. He further recollected unequivocally that at no time did the Board ever issue any statement or policy in respect to the award of tenure to custodial staff persons. This is directly in accord with the collective bargaining agreements entered into, R-1, R-2, and R-3, and convinces me as well that Mr. Staniewicz knew full-well that the Board had never enunciated a tenure policy. Accordingly, for petitioners to ascribe to him the issuance of such policy in light of his knowledge as well as his understanding of how local school board policy is enunciated and formulated is untenable. Notwithstanding Ms. D'Amico's recollection, Ted Staniewicz would not have articulated such a policy.

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In addition to the purported oral representation made by Mr. Staniev .ez about which he himself in his direct testimony as a witness on behalf of the petitioners denies making, the petitioners assert that the conduct of the Board in respect to the administrative hearing conducted in, In the Matter of the Tenure Hearing of Robert Hay, Hunterdon Central Regional High School District, Hunterdon County, OAL DKT. EDU 5312-81, decided May 28, 1982, affirmed, Commissioner of Education June 1, 1982, (Hay), establishes that the Board did indeed deem custodial staff employees to be tenure employees and further that even if it did not, Hay should result in estopping the Board from now asserting that tenure did not accrue to these employees.

Robert Hay is a petitioner in the current proceeding; he did not testify nor did he appear. I take official notice of the Hay decision pursuant to N.J.A.C. 1:1-15.3. On June 8, 1981, Fred Wolsiefer, acting in his capacity as superintendent of schools, preferred tenure charges against Mr. Hay seeking his removal based upon his consumption of alcoholic beverages and intoxication and concomitant alleged misbehavior. On the basis of the charges and a review of the evidence presented at the hearing, the administrative law judge concluded that Mr. Hay did exhibit a pattern of recurring intoxication while employed and that as a consequence of his repeated failure to rectify the circumstances of his intoxication, he was guilty of conduct unbecoming a school custodian. However, the administrative law judge, in addressing the penalty for Mr. Hay's conduct, concluded that dismissal would be excessive; instead, he ordered that Mr. Hay be reinstated after serving a 120-day suspension. These determinations were affirmed by the Commissioner and the State Board of Education.

At first blush it might appear that the institution of tenure charges against a designated individual petitioner in the current matter is patently inconsistent with the position of the Board that tenure did not attach to any of the designated petitioners. Such inconsistency, however, does not, in my judgment, adhere on closer scrutiny. The explanation for this divergence was offered and in my judgment was justified. Superintendent Wolsiefer indicated that the school administration perceived for a period of time that Mr. Hay suffered from what was described as a drinking problem. After a series of incidents, he was suspended without pay. Thereafter, subsequent to consultation with the attorney representing the Board, charges were filed against Mr. Hay under the tenure laws. The reason, however, for such decision had nothing to do with an acknowledgment by the Board that Mr. Hay had acquired tenure or that any other

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employee in a custodial capacity had acquired tenure; the choice was pragmatic. Mr. Wolsiefer explained that the Board had the alternative of instituting arbitration proceedings pursuant to the collective bargaining agreement or instituting tenure charges. To the degree that there was such a choice and to the degree that prior decisions issued by the Commissioner of Education involving intoxicated employees comported with the Board's position, it was the latter's decision, based upon advice of counsel, to proceed before the Commissioner of Education rather than take the arbitration route. This choice was also based upon the perception that arbitration would be more protracted and thus more costly. Mr. Wolsiefer indicated that it was the Board's view that it wanted to "get it over with". Moreover, it was also believed that once under the jurisdiction of the Commissioner, should the Board assert that tenure was not forthcoming, even within that litigation, the issues would be more time consuming and more costly and potentially would beg the question of the ultimate position of the Board which was that regardless of tenure, Mr. Hay's actions and conduct was so far removed from the standards accorded employees that he should be terminated under any circumstance.

It is obvious from a review of the administrative law judge's decision in Hay that tenure was never raised as an issue or addressed by anybody--not even in a tertiary fashion; tenure was merely assumed. From the perspective of the Board, such assumption was to its advantage in that the litigation would not address the question of tenure but would go directly to the substantive issues of intoxication and its effect on performance. That the Board was subsequently hoisted by its own pitard in that Mr. Hay was reinstated, and that the decision would be raised by Mr. Fagella in his assertion that indeed tenure was awarded, was an irony never anticipated.

In retrospect, perhaps the strategy employed in Hay was ill-chosen; that is not however, material to the current proceeding. As will be more fully developed in the analytical portion of this decision, that the Board from a practical point of view chose to institute what ostensibly and nominally were considered tenure charges so as to, in its judgment, expeditiously and expediently terminate what it perceived to be an inebriated employee, cannot serve as the basis for a successful argument that as a result the Board should now be estopped from denying tenure to the named petitioners. Based upon the entire record in this matter, I am convinced that the Board never and under no circumstances by action, conduct or words, took collective action which conferred tenure upon any of the petitioners.

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Presumably as a consequence of Hay, the respondent in 1983 determined to issue individual written one-year contracts to its custodial staff employees. Superintendent Wolsiefer indicated that as a result of his perception that there may have been uncertainty in respect to tenure following Hay, he advised Mr. Staniewicz to draft a one-year contract to "clarify the issue one way or another." Thereafter, Mr. Wolsiefer testified, he informed the personnel committee of the respondent Board of his intention to issue such contracts. However, a policy under which individual written contracts would issue, Mr. Wolsiefer continued, was never officially approved by the Board of Education. After several of the custodial staff members were offered written contracts and, on the advice of their negotiating representative, declined to sign them, the idea was eventually abandoned. Counsel for the petitioners posits his argument on tenure in part on his determination that by offering the employees written one-year contracts commencing in 1983, one could post hoc argue that pre-1983 and the requirement of executing one-year written contracts, the petitioner employees worked for an indeterminate and indefinite period. I respectfully disagree with this argument.

Mr. Wolsiefer explicitly testified that as superintendent of schools, his perception was that offering the employees written one-year contracts in 1983 was not a change of prior practice or policy in the district. As a consequence of the ongoing collective bargaining agreements and a failure of the Board to in any sense declare the contrary, custodians were always employed for a fixed period of one year. The concept of a one-year written contract was merely designed to formalize an ongoing practice. Moreover, he acknowledged, as a result of the Hay decision and the apparent ambiguity that may have existed with some, the 1983 decision to offer written contracts sought to clarify that tenure for custodial staff employees was unavailable. The mere fact that some employees were offered one-year written contracts in 1983 cannot establish that because they were not compelled to sign one year contracts prior to 1983 they were anything but one year employees. This in my judgment is overwhelmingly established by the existence of the Board minutes in which each of the petitioner employees were awarded successive one year contracts at appropriate Board meetings, as well as by the three collective bargaining agreements which were in place during the relevant time periods in question.

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As a consequence of the various foregoing findings of fact, I **EXPLICITLY FIND** that during the relevant periods at issue, the individually designated petitioners were all employed by respondent Board of Education for successive one-year periods. I further **FIND** that the evidence failed to establish that by word or conduct, the respondent Board took action contrary to the foregoing determination.

ANALYSIS

Tenure rights for custodial staff employees is governed by N.J.S.A. 18A:17-3. It provides as follows:

> 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. . . .

In the recent Supreme Court decision of Wright v. Board of Education of East Orange, 99 N.J. 112 (1985), the foregoing statute was construed to permit the exercise of board discretion in determining whether custodial staff employees do or do not receive tenure. As the Wright court indicated, a janitor who is employed for a fixed term does not derive inchoate tenure rights. Where, however, a custodial staff employee is employed without a fixed term, he will gain tenure immediately upon the commencement of his employment. Wright also holds that between these two parameters of the absence of statutorily mandated tenure and the award of tenure on day one of the commencement of employment, a board of education may through contract, "permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure of all custodians." 99 1 N.J. at 119. In Wright, the local board of education, pursuant to the negotiated agreement, granted tenure to custodial employees at the conclusion of three years of employment. The court, after an extensive review of the scope of public sector negotiations, upheld the validity of a negotiated provision under which tenure for custodial staff employees may be achieved after a fixed period of time, outside the scope of N.J.S.A. 18A:17-3.

In the current matter, the Hunterdon Central Regional High School Board of Education, codified in three successive collective bargaining agreements, explicitly provided for 12-month annual contracts for its custodial staff employees as the fixed term

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of their employment. These contractual provisions were complied with by Board action at the appropriate meetings wherein the minutes of those meetings clearly reflect the reappointment of various custodial staff persons for successive one year periods. This action was further confirmed by memoranda issued to the petitioner employees advising them in June of the prior school year of their salary rights for the following school year, the step on the salary guide at which they would be placed, the specific salary that they would be receiving, and the number of sick and vacation days they had been allotted. It is indisputable that the collective action of the respondent Board of Education in addressing the terms of employment for each of the petitioners in this matter reflects beyond peradventure that they were employed for a one year fixed term. It was clearly intended that these employees be governed by the explicit terms of N.J.S.A. 18A:17-3. Specifically, it was the Board's intent as manifested by objective criteria that these employees be appointed to a "fixed term" and thus not be tenure tracked.

Set against the evidential proofs offered by the Board, which clearly confirm that the petitioners were employed for a fixed term, is the argument offered by petitioners' counsel that the purported oral representations of a mid-level employee that the custodial staff would be awarded tenure on the commencement of the first day of their fourth year of employment is sufficient to impute to the Board an obligation to accord those employees tenure. Initially, it must be reiterated that the nucleus upon which all of the other arguments offered by the petitioners are based--that Mr. Staniewicz indeed made this oral representation--has been seriously challenged by Mr. Staniewicz himself as well as by the superintendent of schools, Mr. Wolsiefer. It will be recalled that Mr. Staniewicz affirmatively stated in his testimony that at no time did he ever counsel employees that they would be receiving tenure after any particular period of time. He did acknowledge, however, that by use of the subjunctive tense he indicated that in his judgment they might be accorded tenure. He reiterated, however, that he was always aware that the only manner in which a custodial staff employee could be accorded tenure was through the collective action of the local board. This, of course, never occurred.

Assuming, however, arguendo, that Mr. Staniewicz did make this erroneous statement that the petitioner employees would be accorded tenure after a period of time, such statement would not be imputable to the respondent Board nor would the latter be bound by erroneous promises or representations made by an individual school

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administrator or employee. Dorrington v. Board of Education of Township of North Bergen, 1982 S.L.D. 91-82 (Comm't of Ed., March 24, 1982); Brennan v. Board of Education of City of Pleasantville, 1977 S.L.D. 1059; Vandenbree v. Board of Education of School District of Wanaque, 1967 S.L.D. 4, aff'd, State Board, January 3, 1980, Cullum v. Board of Education of North Bergen, 15 N.J. 285 (1954). In Dorrington, the petitioner claimed that she could properly rely on individual board members or any agent of the board as having authority to hire or set her salary as a teacher. Dorrington, 1982 S.L.D. 91-82 at 11. The Commissioner cited Brennan v. Board of Education of the City of Pleasantville in which he stated:

> An examination of the record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of the Board's administrators in concluding that a committment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action . . . It is well established that boards of education may not delegate the appointment of school personnel to committees or school officials. Cullum v. Board of Education of North Bergen, 15 N.J. 285 (1954). Id.

N.J.S.A. 18A:17-3 dictates that only the school board has authority to grant or withhold tenure to custodians. Accordingly, a board of education may not be bound by the statements of its middle management concerning the tenure status of custodians.

The petitioners contend that, in addition to the statements in question, the respondent's position on tenure for a custodial employee in In the Matter of the Tenure Hearing of Robert Hay, OAL DKT. EDU 5312-81 (May 28, 1982) should estop it from denying the existence of tenure in the case sub judice. Assuming that an agency relationship exists, to "ratify" the unauthorized act of an agent means to approve and sanction, and presupposes knowledge or at least some altering circumstantial information on the part of the principal of the unauthorized action of the agent. Capano, 530 F. Supp. at 1267 citing MacLeod v. Ajax Distributing Co., 22 N.J. Super. 121 (App. Div. 1952). "Although ratification may be implied by conduct, before ratification may estop a claim it must be shown that the officials acted with full knowledge of the material facts, either actually or as a matter of law." Id., citing Board of Educ. of Asbury Park v. Hoek, 38 N.J. 213, 241 (1962).

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The essential principle of the policy of estoppel is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct. Summer Cottager's Ass'n of Cape May v. City of Cape May, 19 N.J. 494, 503 (1955). Estoppel is ordinarily not applied against public entities except to prevent manifest wrong or injustice. Department of Environmental Protection v. Ventron, 182 N.J. Super. 210, 244 (App. Div. 1981) aff'd as mod. 94 N.J. 473 (1983). A governmental entity will not be bound by ordinary errors or omissions in the conduct of its employees because there is generally a prevailing public interest in correcting erroneous interpretations of policy. Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1267 (D.N.J. 1982). Further a governmental entity may not be bound by erroneous advice or by the entry into an agreement which is not in accordance with the law. Capano, 530 F. Supp. at 1267.

Generally, apparent authority exists if "the principal knowingly permits" the party with whom the agent deals to "reasonably believe that the agent has power to bind the principal." United States v. General American Transportation Corp., 367 F. Supp. 1284, 1289 (D.N.J. 1973) (emphasis in original). However, our appellate division has adopted a stricter application of the apparent authority doctrine in holding that a municipality is not bound by acts of its agents unless they have been expressly authorized or necessarily implied from authority directly conferred upon them. Bianchi v. City of Newark, 53 N.J. Super. (App. Div. 1958).

In light of the foregoing, it becomes apparent that the petitioners must demonstrate that the respondent's actions were intended to sanction or were made in full knowledge of the statements made by its middle management. In the Hay case, the respondent never litigated the issue of tenure. Further, the administrative law judge neither deliberated nor made a factual finding regarding the issue of Mr. Hay's tenure status. The respondent's strategy in Hay merely intended to conserve public tax revenues by avoiding costly and time-consuming litigation. Most importantly, there is no record in the minutes that the Board intended to authorize, ratify or even referred to the statements in question when deciding upon its legal strategy in the Hay case. Accordingly, the petitioners have failed to demonstrate that the respondent's strategy in Hay was intended to approve and sanction or was made with full knowledge of the statements made by its middle management.

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As a consequence of the foregoing analysis, it is apparent that even when the evidence and testimony in this matter is interpreted most favorably to the petitioners under statute, case law, and applicable regulation, there has been nothing offered which would justify a determination that the petitioners are tenure employees. Accordingly, I **CONCLUDE** that pursuant to N.J.S.A. 18A:17-3 the individual petitioners were employed for a fixed term by respondent Board. I further **CONCLUDE** that as a consequence of the terms of their employment, the petitioners have no statutory tenure status. Accordingly, it is **ORDERED** that the respondent's motion for summary decision be and is hereby granted. It is further **ORDERED** that the petition of 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.

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

January 16, 1986
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

JAN 17 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 22 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

lj

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WITNESSES

On behalf of Petitioners:

Joyce D'Amico
John Toth, Jr.
Ginger DeMaris
William Smerecynsky
Carolee Zak
Vicky Fox
Ted Staniewicz

On behalf of Respondent:

Fred Wolsiefer
Norma Leclair

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HUNTERDON CENTRAL HIGH SCHOOL EDUCATION ASSOCIATION ET AL.,

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION, HUNTERDON COUNTY, : DECISION

RESPONDENT. :

:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. These exceptions are summarized below.

The Association (petitioner) excepts to the ALJ's determination that the custodial employees in the instant matter were not tenured. It contends, inter alia, that all custodial staff labored under the assumption they were tenured and that the evidence indicates that all employed for more than three years were, in fact, tenured. Further, it asserts that the Board should be estopped from denying tenure status at this late date.

Petitioner argues strenuously that In re Robert Hay, supra, demonstrates that custodial staff were tenured and characterizes as incredible the ALJ's statement that the Hay decision did not adjudicate the issue of tenure because tenure was merely assumed. (Initial Decision, ante) Petitioner reiterates that each individual herein was employed without a fixed term after three years' employment; they signed no contracts of employment indicating termination at the end of any given year.

As to the terminology of the collective bargaining agreement between the parties relied on in part by the ALJ to determine the existence of a fixed term, namely that custodians are employed "on an annual 12-month basis" (Initial Decision, ante), petitioner submits that such terminology "is highly ambiguous, was not the subject of interpretive testimony by any of the parties who negotiated it, and was never intended to mean that custodians were not tenured despite the overwhelming evidence to the contrary." (Exceptions, at p. 5) Petitioner contends, inter alia, that the contractual language could just as easily be interpreted to mean custodians work on a 12-month basis rather than a 10-month basis. Further, it suggests a number of options available to, but not taken by, the Board if the Board wanted to ensure custodians would not receive tenure.

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Further, petitioner points to the annual notifications received by all custodians employed for more than three years (P-1 to 20) which merely confirmed their salary for the subsequent year. It contends that such notification did not constitute "contracts of employment" nor were they indicative of a "fixed term" of employment. Moreover, petitioner asserts that the testimony was undisputed that the notification procedure was the same followed by the Board for tenured teachers.

Petitioner acknowledges that the contracts which the Board attempted to compel custodial staff to sign following the Hay decision were employment contracts specifying a beginning and termination date. However, it states that:

> ***It is instructive to note that neither the ALJ nor respondent disputes that none of the petitioners were willing to sign these documents, because it was understood within the school district that this was an effort to limit or abrogate the tenure rights that the custodians had. Indeed, when the custodial staff refused to sign the proferred (sic) employment contracts, respondent did not press the matter any further. In short, the Board was well aware that these individuals were already tenured and the Board could not rescind tenure rights which the custodians had already obtained. (emphasis in text)
> (Exceptions, at p. 7)

Lastly, petitioner asserts that the ALJ erred in determining that the doctrine of estoppel need not be enforced in this matter because of its failure to demonstrate that the Board's legal strategy in Hay "was intended to approve and sanction or was made with full knowledge of the statements made by its middle management." (Initial Decision, ante) It avows that the only logical conclusion to be drawn from the Board's filing of tenure charges in Hay is that the Board knew that the custodial staff and Hay were tenured and they were relying on that fact.

The Board rejects the arguments advanced in petitioner's exceptions, contending, inter alia, that the ALJ was correct in determining that the collective bargaining agreements (R-1 to 3) set custodians' employment at a fixed term of 12 months. It cites Wright, supra, in support of contract terms controlling in this matter. It states that petitioner is incorrect in its assertion that the contract terminology is ambiguous and designed to define the work year. Regarding this, the Board argues that the primary purpose of the contract language is to define the custodial appointment term and only secondarily to define the custodial work year. Further, it contends that, if the language were merely to define work year, the provision would have been worded similarly to that for other personnel such as for secretaries which reads as follows:

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The secretarial work year shall be 211 days during the secretaries contract period with the exception of scheduled personal vacation days granted by the Board on the school calendar as vacation periods. (Article IX, Section A; R-2 and 3)

The Board argues that its annual motions reappointing custodial staff to 12-month terms preclude them from acquiring tenure, contending that each year as they served out their terms, the Board, by Motion, reappointed them to new 12-month terms. It cites Lang v. Bd. of Ed. of Twp. of Holmdel, decided July 22, 1983 in support of the proposition that a board motion approving the reappointment of a custodial employee for the upcoming school year is an "appointment for a fixed term" within the meaning of N.J.S.A. 18A:17-3.

In addition, the Board contends that neither the Board nor its administration took any action or made any statements to contradict its formal policy of nontenure articulated in the collective bargaining agreements and annual Board Motions. Moreover, it avows that petitioner has failed to produce sufficient competent evidence to establish the existence of any Board policy granting automatic tenure to custodial staff after three years and one day of employment and it seeks affirmance of the ALJ's order because petitioner has failed to establish by a preponderance of the evidence that the custodians are tenured.

Upon a careful and comprehensive review of the record of this matter and the parties' exceptions, the Commissioner cannot accept the ALJ's determinations and recommended order for the following reasons.

The Commissioner is in complete agreement with the ALJ's finding that even if a middle manager did erroneously state that custodians would be accorded tenure after a period of time, such statement would not be imputable to the Board or bind it in any way. He does not concur, however, that the record in this matter substantiates the existence of a "fixed term" with regard to their employment.

Contrary to the ALJ's conclusion, the Commissioner does not find that the disputed contract language, namely, "***shall be employed on an annual, 12 month basis" (R-1 at 23; R-2 and 3 at 16) specifies a "fixed term" of employment. In the Commissioner's judgment, such language does not define the beginning and ending dates of fixed term employment. The language could easily be read to mean that custodial staff are employed on an annual 12-month basis as opposed to a 10-month or other basis, despite the Board's arguments to the contrary.

The record does not support that the Board took formal action to set fixed term employment either. Exhibits P-1 through P-20 demonstrate that yearly notification of salary was provided but, other than specifying a July 1 effective date for said salary,

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no fixed term of employment is set forth. Such notifications apparently do not differ from those given to tenured teaching staff. Further, the Board minutes for April 8, 1985 merely speak to salary and guide step and do not set a fixed term of employment. The document headed "1984-85 Employees for Approval" likewise speaks only to salary and guide step for custodial and maintenance staff listed and does not affix any dates of employment. Even Board minutes of new or temporary custodial staff, such as for George Hickman (P-14) and Jeff Burns (P-2) merely set salary and do not affix a specific term of employment.

The aforementioned Board minutes are distinguishable from the circumstance in Lang, supra, wherein the board resolution in that matter stated "CUSTODIAL/GROUNDS/MAINTENANCE PERSONNEL-1981-1982 SCHOOL YEAR July 1, 1981-June 30, 1982" (Slip Opinion, at p. 5) which was deemed to meet the requirements of N.J.S.A. 18A:17-3 for appointment for a fixed term. Said minutes are more analogous to the circumstances in John Gilliam v. Bd. of Ed. of Toms River Regional, 1974 S.L.D. 540, 541-542.

Frank Giandomenico v. Bd. of Ed. of Twp. of Winslow, 1975 S.L.D. 258 states well the issue of tenure for custodial staff. It reads:

> Petitioner's claim to a tenure status is contrary to a long series of decisions rendered by the Commissioner, the State Board of Education, and the New Jersey Courts. Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors may be employed without term, in which case they may not be dismissed without a showing of good cause. If, however, as in this instance, a janitor is appointed for a specific term, and he accepts the employment on that basis, no rights survive the expiration of the fixed term.
> [citations omitted]
> (emphasis supplied)(at 259)

The record in this matter simply does not support that custodial staff were appointed for a specific, fixed term and that employment on a fixed term basis was accepted by them. The record documents without dispute that the Board attempted to issue fixed term contracts to custodians in 1983 following the Hay, supra, tenure decision. Said contracts remained unsigned by such staff, however, and the Board did not attempt this strategy in 1984 or 1985. Rather, according to the Board's reply exceptions "[o]n or about April 22, 1985, the Board in response to the custodians' refusal to sign the proferred (sic) employment contracts and in order to improve the efficiency and effectiveness of the janitorial work within the District, awarded a janitorial services contract to Service Systems, Inc***." (at pp. 4-5)

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In the Commissioner's judgment, the Board's attempt to issue fixed term contracts subsequent to the filing of and Commissioner's decision with respect to the tenure charges in the Hay case was a post facto strategy to impose fixed term employment when none had previously existed. The Commissioner cannot accept the Board's rationalization that tenure charges were filed against a nontenured custodian as a legal strategy to avoid costly and time-consuming litigation. By their very nature, it is clear that tenure charge cases are invariably costly and time-consuming as undoubtedly attested to by the Hay case itself. Frankly, in the Commissioner's opinion, the rationalization provided by the Board as to the Hay strategy stretches the bounds of credibility. Notwithstanding this opinion, he cannot accept at this belated time any argument that Hay was not a tenured custodian. The Board's action must stand on its own. Simply stated, when a board of education invokes the Tenure Employees Hearing Law, specifically N.J.S.A. 18A:6-10 et seq., tenure is not merely "assumed" as characterized by the ALJ -- tenure is undisputed.

Given the factual circumstances of the instant matter, the Commissioner reverses the initial decision of the Office of Administrative Law granting summary judgment to the Board and determines that the custodial staff herein are tenured employees. Accordingly, the matter is remanded to the Office of Administrative Law for further proceedings on the merits of the case with respect to the abolishment of positions brought about by the Board's action of April 22, 1985 to determine if such action comports with the requirements of N.J.S.A. 18A:28-9.

COMMISSIONER OF EDUCATION

February 28, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1447-86
(ON REMAND EDU 4555-85)
AGENCY DKT. NO. 201-7/85

HUNTERDON CENTRAL HIGH SCHOOL EDUCATION ASSOCIATION, MARTEN BONNEMA, JEFF BURNS, JACOB BUSH, HAROLD CLAWSON, JOYCE D'AMICO, GINGER DeMARIS, GEORGE DEY, ELWOOD EDMONDS, ADRIAN FULCHER, JOHN GAYNOR, FRANK GELEGONYA, ROBERT HAILES, GLEN HARMON, JAMES HARTSTALL, ROBERT HAY, GEORGE HICHMAN, JAMES MASTERPOL, WILLIAM SMERECYNSKY, GEORGE TITUS, JOHN TOTH, and DEBORAH WAITE,

Petitioners,

v.

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Robert A. Fagella, Esq., on behalf of petitioners (Zazzali, Zazzali & Kroll, attorneys)

James P. Granello, Esq., on behalf of respondent (Murray & Granello, attorneys)

Record Closed: October 24, 1986 Decided: November 17, 1986

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BEFORE STEVEN C. REBACK, ALJ:

STATEMENT OF THE CASE

The individual petitioners are former custodial staff personnel employed by respondent, Board of Education of the Hunterdon Central Regional High School (the Board), until June 30, 1985. On the latter date and as a consequence of Board action taken in April 1985, the respondent terminated the employment of the individual petitioners and subcontracted substantially the same responsibilities which they had performed as employees to an outside independent contractor.

The individual petitioners, through their collective bargaining representative, the petitioner, the Hunterdon Central High School Education Association, assert that pursuant to N.J.S.A. 18A:17-3 they are tenure employees, entitled to continued employment under good behavior, and that the termination of their employment by the Board contravenes their tenure status and is in violation of statute.

The Board denies that the individual petitioners ever acquired tenure status and asserts further that even if arguendo it were determined that the petitioners did acquire tenure, the Board's action in terminating their employment was taken in good faith, for reasons of efficiency and economy and is fully consistent with its statutory obligation in respect to laying off tenured employees and/or effecting a reduction in their force.

During the course of prehearing discussions it was accordingly agreed that the two fundamental issues to be addressed in the matter are:

1. Did the individual petitioners acquire tenure as custodial staff employed by respondent Board?

2. If tenure was acquired by the petitioners, can they demonstrate that the action of respondent Board in effecting their termination was undertaken in bad faith and for reasons other than efficiency and/or economy in contravention of N.J.S.A. 18A:28-9?

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PROCEDURAL HISTORY

On July 10, 1985, the petition of appeal in this matter was filed with the Commissioner of Education (the Commissioner). The respondent's answer was timely filed on July 19, 1985. On July 30, 1985, the appeal was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted at the Office of Administrative Law, Trenton, New Jersey, on September 5, 1985. During the course of the conference, the issues were joined and the burden of proof in respect to establishing the tenure status of the individual petitioners was expressly and without dispute placed upon the petitioners. The matter was then scheduled to be heard on various dates in early December 1985; thereafter, however, and pursuant to a request by Robert A. Fagella, Esq., counsel for petitioners, the hearing schedule was revised.

Pursuant to the agreement of counsel, the threshold issue to be addressed at hearing related to the issue of tenure. Accordingly, on December 2 and December 3, 1985, both sides rested on that question, having presented all testimony as well as moving into evidence all material documentary submissions. On December 3, 1985, at the conclusion of the petitioners' case on the issue of tenure, counsel for respondent moved for involuntary dismissal. That motion was denied from the bench. I concluded that because of my obligation to the Commissioner to develop a full and coherent record on all issues, and because all facts and reasonable inferences derived from those facts should be interpreted so as to favor the party opposing the motion for involuntary dismissal, the respondent Board should come forward to develop its proofs in support of its assertion that tenure was never awarded the petitioners.

At the conclusion of the respondent's case on the issue of tenure, Mr. Granello, counsel to the Board, formally moved for summary decision in the matter. I directed both counsel to submit legal memoranda on the issue and it was agreed that in order for me to properly address the motion, the scheduled hearing dates of December 6, 9, and 10, 1985 would be cancelled. It was further agreed that upon arriving at a determination on the motion, I would apprise counsel whether the additional hearing dates of December 16 and 17 would be required.

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Counsels' initial submissions were received concurrently at the Office of Administrative Law (OAL) on December 9, 1985. Thereafter and pursuant to his request, Mr. Granello provided a reply brief on December 11, 1985. On the following day, December 12, 1985, the date on which the record in this matter closed, Mr. Fagella submitted a letter memorandum in response to the last submission of Mr. Granello.

On January 16, 1986, I issued an Initial Decision granting respondent's motion for summary judgment, concluded that the individually designated petitioners did not have statutory tenure status but were employed for a fixed term by respondent Board pursuant to N.J.S.A. 18A:17-3. As a result of that determination, the issue of whether the action of the Board in terminating the petitioners was undertaken in bad faith for reasons other than efficiency and/or economy did not have to be addressed and the appeals were accordingly dismissed.

On February 28, 1986, the Commissioner reversed this Initial Decision, concluding that the individual petitioners were in fact tenure employees. Accordingly, he remanded the appeal to the Office of Administrative Law for further proceedings on the merits. The singular issue left to be resolved was whether the Board's action of April 22, 1985, abolishing the custodial staff positions held by the individual petitioners, comports with the requirement of N.J.S.A. 18A:28-9.

Once the OAL was apprised of the remand, a telephone prehearing discussion with counsel was scheduled and conducted on April 22, 1986; the issue as framed was agreed upon; and the matter was set down for additional hearing dates for July 28, 29, 30, 31 and August 1, 1986, at the Office of Administrative Law, Mercerville, New Jersey. The appeal was heard as scheduled on July 28 and 29, 1986; at the conclusion of testimony on the 29th, the matter was continued to August 19, 1986 as a consequence of the need for the testimony of an additional witness called by the respondent in rebuttal. The testimonial phase of the proceeding was concluded on this latter date, August 19, 1986. Thereafter, on that date, a briefing schedule was agreed upon. Counsel requested the opportunity to review the transcripts of the proceeding in advance of submitting their legal argument. Moreover, I was scheduled to be away on vacation from September 22 through October 14, 1986. As a result of counsel's request I permitted the attorneys to submit legal argument after the transcripts were received so long as their briefs were submitted to my office so that I would be able to review them immediately upon my return. Mr. Granello's submission was received by the Office of Administrative Law on

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October 7, 1986; Mr. Fagella's was received on October 10, 1986. Thereafer by letter memorandum of October 15, 1986, which was received by the Office of Administrative Law on October 21, 1986, Mr. Granello submitted a reply brief on behalf of the respondents. Mr. Fagella submitted his letter reply on October 24, 1986, the date on which the record closed.

ISSUE AND BURDEN OF PROOF

The singular issue to be resolved in this remanded proceeding is the following:

> Was the action of respondent Board in terminating the petitioner employees undertaken in good faith, for reasons of efficiency and/or economy, and thus consistent with the requirement of N.J.S.A. 18A:28-9?

The burden in respect to resolving this issue rests exclusively upon the petitoners: they must establish respondent's purported failure to comply with these statutory standards by a preponderance of the relevant credible evidence.

THE FACTS

Significant facts presented in this matter are not in dispute; where, however, a factual disagreement occurs, I shall set forth its adversarial basis, the opposing testimony, my reconciliation of the disagreement and reasons in support of it. Accordingly, I **FIND:**

From 1979 through to his retirement effective June 30, 1986, Fred Wolsiefer, was the Superintendent of Schools for Hunterdon Central Regional High School (Hunterdon Central). For the past several years, he had been generally dissatisfied with the "uneven" level of cleanliness and maintenance throughout the school; he characterized it as unsatisfactory. Most of this dissatisfaction related to the cleaning staff employees: the custodial staff within which each of the petitioners had been employed was divided into the cleaning, groundskeeping and maintenance staffs. Mr. Wolsiefer noted that on any given day, the performance of up to 10 cleaning staff employees was a cause for concern. He perceived the problem as one relating not only to the individual members of the custodial staff but to those responsible for their supervision, for the products that were being utilized, and for the equipment available to the school.

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As a result of his perception that the staff was not meeting the standards of cleanliness required, Mr. Wolsiefer, in late 1984, met with the then Director of Support Services for Hunterdon Central, Ted Staniewicz, to discuss possible alternatives to the existing situation. Mr. Wolsiefer at that time made the suggestion that the private sector be solicited to explore the possibilities of contracting out some or all of those responsibilities that up to then had been fulfilled by the custodial staff.

As part of his general responsibilities as Superintendent, Mr. Wolsiefer had attended numerous conventions where he had acquainted himself with the availability of private contractors who could provide custodial services on an independent basis. In the fall of 1984, he and Mr. Staniewicz solicited four or five of these custodial contracting companies to determine whether their services could be advantageous for Hunterdon Central. Two of them, Service Systems Corporation and Service Masters sent their corporate representatives to meet with Messrs. Wolsiefer and Staniewicz and as a result of discussions the former expressed interest in providing private custodial services to the respondent; several of the others which had preliminarily been contacted were apparently unable or unwilling to provide custodial services that would comport with respondent's needs.

Ultimately, the contract under which all custodial services for Hunterdon Central would be performed by an outside private source was awarded to Service Systems Inc. Service Systems is a contract management company which performs custodial, groundskeeping, maintenance and mechanical services for local school districts. Currently it holds contracts with approximately seven school districts in New Jersey besides Hunterdon Central, as well as with school districts in other states.

Ms. Laura L. Gibbons has been an account executive with Service Systems for two and one-half years and was the primary liaison person with the company in respect to its negotiations with and presentation of its services to Hunterdon Central.

In late 1984 or early 1985, as a result of Hunterdon Central's invitation, Ms. Gibbons, on behalf of Service Systems, performed a "walk-through" of the high school to assess respondent's needs and to provide the Board with information in respect to the services and costs that could be provided by the company. In addition and at about the same time, Mr. Wolsiefer visited another school district which had contracted with Service Systems, Shore Regional High School, to determine the nature and quality of the

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services there provided. He spoke with Shore Regional's board secretary and, Mr. Wolsiefer noted in his testimony, the former expressed great satisfaction with Service Systems' performance, noting that this private contractor was fulfilling its obligations in such a manner that the administrative burdens of the board secretary's office were significantly reduced.

The walk-through conducted by Service Systems spanned a two-day period in January 1985.* Accompanying Ms. Gibbons during the survey were two technical persons employed by Service Systems--a mechanical expert and a custodial person. The walk-through included a survey of the groundskeeping, custodial and mechanical operations within the district. At its conclusion, Ms. Gibbons on behalf of Service Systems, provided written findings and recommendations to Mr. Wolsiefer in a three page letter-memorandum on February 7, 1985 (J-3). The survey drew several conclusions: (a) it noted that Hunterdon Central would significantly reduce its overhead costs by transferring responsibility for the custodial operations to Service Systems. This included the assumption by the private contractor of all fringe benefit programs for the employees, including costs and administration; (b) it indicated that Service Systems would provide the professional supervisory staff for the maintenance and custodial programs—day and evening—which would oversee each phase of the operation necessary for school maintenance; (c) it represented that Service Systems would institute a preventative maintenance program covering all mechanical equipment, which would include a schedule of periodic maintenance and other forms of continuous monitoring; (d) it noted that it would institute a program of energy control and conservation; and (e) it stated that Service Systems would provide an in-depth supervisory program from several organizational levels to permit on-site supervision.

In addition to setting forth several other areas in which its expertise could be utilized to Hunterdon Central's advantage, Service Systems also noted those areas of deficiency in respect to the current status of in-house custodial maintenance: the general cleanliness of the entire Hunterdon Central facility was "poor"; the problem had been long-standing; implicit in it was the lack of proper supervision within the facility on a daily basis and the lack of any ongoing training program; several specific areas i.e., graffiti, missing door knobs, leaky faucets, were noted as requiring improvement.

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*Service Masters, the other major competitor for Hunterdon Central's contract, was also requested to perform a survey.

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After Mr. Wolsiefer received the survey (J-3), he distributed his own report, summarizing its findings to the members of the Board. Service Masters, the competing company for the contract with Hunterdon Central, also conducted a survey of the facilities and also provided the respondent with a manual, outlining the problems as it perceived them and the services which it could provide to resolve them. It was noted in testimony that the problems which were articulated by Service Masters were significantly the same as those identified by Service Systems in its February 7, 1985 report.

Subsequent to the receipt of the Service Systems report, the Hunterdon Central administration conducted a background check of the credentials and business history of Service Systems as well as its comoetitiors, and based upon the evidence presented, it discovered no information which would in any way derogate the credentials of Service Svstems or raise any questions in respect to the quality of the work it could perform.

Thereafter on March 4, 1985, the respondent Board held a public meeting at which both Service Systems and Service Masters made presentations in respect to the results of their surveys and also made formal proposals of the custodial services they could provide (See, R-1, J-4, J-5, J-6 and J-7). Ms. Gibbons and another Service Systems employee were personally present during these meetings. Service Systems represented that in addition to the information provided in its February 7, 1985 report, it would provide an on-site management team to supervise the custodial work at Hunterdon Central were it awarded the contract. It also represented to the Board that it would provide a new training program to develop both the expertise of custodial staff personnel as well as instill in them a greater motivation; provide detailed work schedules; and devise a plan to maintain the facilities during holiday periods, which could be used to greater advantage in that the facilities would be unoccupied by teaching personnel or by students. Service Systems also represented that by assuming certain maintenance, repair and consulting work, which had previously been subcontracted out to private companies by the Board, the former would significantly reduce Hunterdon Central's operating costs.

During the meeting of March 4, 1985, various Board members posed several questions to the Service System representatives, addressed to various phases of the presentation; members of the public as well were provided with the opportunity to obtain information in addition to what Service Systems presented on its own initiative. Specifically in reference to a question placed of Ms. Gibbons as to how Service Systems,

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should it be awarded the contract, planned on recruiting new employees, she responded that the company would prefer to see all its employees come from within the current operation.

At the conclusion of the public aspect of the meeting on March 4, 1985, the Board held an executive session; the consensus of the Board was to retain the current custodial in-house staff with perhaps outside supervision. Ms. Gibbons, who was present, apparently responded that such a plan would present no problems with Service Systems and that it could be built into the proposal. Eventually, Service Systems made two proposals: one for a managerial change only, with supervisors under the auspices of Service Systems and custodial staff continuing to be under the employ of Hunterdon County; the other for both management and staff to be employed directly by Service Systems.

As an incident to the March 4, 1985 executive session, respondent Board requested that Mr. Wolsiefer formulate his own in-house plan that would retain current custodial staff as Hunterdon Central employees but which would be more efficient. The meeting of March 4 concluded without any formal action taken by the Board although a general consensus was achieved among Board members that bid specifications for custodial subcontracting be drafted and that a motion be made the following week for receiving such bids (R-1).

As a result of all that had transpired up through the meeting of March 4, 1985, the Board had three options available to resolve its custodial problems: (1) it could attempt to effect positive change through an in-house management plan; (2) it could subcontract out to Service Systems, or some other company which would provide the best contractual arrangement, management and supervisory services only; or (3) it could subcontract out for a total takeover all of Hunterdon Central's custodial operations.

Bid specifications were thereafter prepared for either of the two takeover alternatives--management only or a total takeover--and as an incident to the specifications, it was required that any contractor who proposed a total takeover would agree to hire the entire Hunterdon Central custodial staff at its existing salary rate for at least 90 days and provide these employees with a health benefit package comparable to that provided by Hunterdon Central (J-1). The reason for this requirement was articulated by Mr. Wolsiefer: the Board was genuinely concerned about the economic well-being of its

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employees and did not want them suddenly and traumatically to lose their positions. Further, Mr. Wolsiefer noted that it was the judgment of the Board that its obligation to the custodial staff was moral and not legal.

The evidence established and it was not in dispute that the primary source of poor performance within the respondent's entire custodial staff operation was the cleaning crew and not groundskeeping or maintenance. The Board, however, did not wish to divide up management of its custodial staff along interdivisional lines; consequently it chose to prepare specifications for subcontracting out all three functions. It did this because in its judgment subcontracting the responsibilities for all three operations could result in improved performance within each of them.

In contemplation of receiving bids from Service Systems and Service Masters, respondent conducted background checks of each company. The Board telephoned some 16 public entities in New Jersey and elsewhere which had ongoing contractual commitments with both Service Systems and Service Masters. All but one--involving Service Masters--contracted away their custodial operations in their entirety to the private contractors. Hunterdon Central utilized the identical set of questionnaires for the clients of both prospective bidders. The questions dealt with the longevity of the contractual arrangement with Service Systems or Service Masters, the level of satisfaction experienced by those availing themselves of the custodial services, the quality and extent of communication existing between the two and the likelihood of renewing the contract with either company. In response to the latter question, the answer in all cases was in the affirmative. As a consequence of this phone survey, Hunterdon Central evaluated both Service Systems and Service Masters as very satisfactory and thereafter relayed the information that was obtained to the Board prior to its April 22, 1985 meeting. Formal bids were received from Service Systems and Service Masters in advance of this meeting as well.

On April 22, 1985, a special public meeting of the Board was convened to discuss and consider the various options available to it concerning the future of custodial operations in the district. Both Service Systems and Service Masters had submitted bids both for a management and a total takeover (J-8). Hunterdon Central's projected 1985-86 budget for a complete takeover of custodial services was $642,381. Service Systems' takeover bid was $523,890 and Service Masters' total takeover bid was $631,098. Thus the projected savings by Hunterdon Central for accepting a total takeover was in excess of

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$118,000 for Service Systems and in excess of $11,000 in the case of Service Masters. Mr. Wolsiefer noted--and I accept his assertion--that the economic aspect of the action concerning custodial services was tertiary. The Board, he stated, would "be satisfied to break even"; what it really wanted were better services and cleaner buildings.

In respect to submitting bids for management services only, Hunterdon Central's budget was for $98,285 which would result in a deficit for respondent of $27,259. Service Systems' bid for management services only was for $125,544. Service Masters' management takeover bid exceeded one-half million dollars. The major reason for the disparity between the management bid of Service Systems and Service Masters was Service Masters' guarantee that salaries, repair, and replacement of equipment as well as custodial supplies and their fees would not exceed this amount.

At its meeting of April 22, 1985, the Board discussed the various bids and their consequences. Mr. Wolsiefer explained and presented his in-house proposal as well (R-3). The essence of the latter was the creation of a new title, "building engineer," which would require the employment of an individual possessing a college degree or with knowledge and experience in building technologies and managerial experience. Because of its view that the in-house proposal would mandate that excessive administrative time be spent more on custodial operations than on curriculum, the Board chose to reject it (R-3). Moreover, since the Board had an unsuccessful track record in recruiting capable custodial managers in the past and was therefore uncertain whether it could find anyone else to fill this new title in the future, the decision to reject the idea was reinforced.

Furthermore, a "management only" delegation to independent contractors had a significant negative aspect in respect to the fundamental precept that management without control of the worker's payroll and direct responsibility for the work day has significantly less control over the worker's performance.

As a consequence of these considerations, at its April 22, 1985 meeting, the Board voted to abolish all cleaning, maintenance, and groundskeeping positions effective June 30, 1985 and to accept Service Systems' proposal for a total takeover of Hunterdon Central's custodial operations (R-3). Mr. Wolsiefer noted that the Board's approval of this action was prompted primarily by its concern to obtain cleaner buildings more efficiently and more economically. In addition it did so at a time when the projected savings to it

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from Service Systems takeover bid was $118,491. The contract incorporating the Board's bid specifications was entered into on behalf of the Board and Service Systems on June 4, 1985 (J-2).

Service Systems assumed control over the entire former custodial staff of Hunterdon Central on July 1, 1985 and commenced its independent contractual assumption of all the responsibilities of the custodial operations. It was represented without serious dispute that the former custodial employees of Hunterdon Central who commmenced their employment with Service Systems received from their new employer a starting salary that equalled what they would have received from respondent Board on July 1, 1985. They also received a salary increase 90 days after commencement of their employment, a policy which did not exist when they were employed by respondent.

Since commencing employment with Service Systems, the former Hunterdon Central employees have organized themselves into a collective bargaining unit and have successfully negotiated a new agreement which apparently has provided them with enhanced fringe benefits, improved seniority, and vacation time which has exceeded that which was given by the respondent Board.

Mr. Wolsiefer arrived at a judgment concerning the cleanliness of Hunterdon Central facilities in April of 1986, some nine months after Service Systems commenced its operations. He noted no significant difference in the facilities as they existed then and as they existed prior to the takeover. At the same time, however, Hunterdon Central administration has been relieved of the management of the custodial staff and has thus been able to devote greater energies to curricular activities. In retrospect, after reflecting upon the strengths and weaknesses of that transition, Mr. Wolsiefer would still recommend that Hunterdon Central subcontract out its entire custodial operation to Service Systems.

As an incident to the abolition of the custodial staff, Hunterdon Central and its former employees executed a memorandum of agreement on June 28, 1985, under which the respondent agreed to pay a sum of money to each of these laid-off custodial employees based upon their years of service with the school system. It also agreed that two former custodial employees, the petitioners Marten Bonnema and George Dey, remain in respondent's employ until October 1, 1985 and March 1, 1986, respectively, even though actually employed by Service Systems, apparently to permit their pension rights to vest.

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In respect to the June 28, 1985 agreement, it has been argued by the Board and it was not seriously challenged that it was undertaken by it absent any legal obligation to do so, out of a sense of moral concern for former employees.

Complaints concerning the quality of the work of custodial staff employees, particularly the cleaning staff, were confirmed by some petitioners. Joyce D'Amico, for example, recalls that the respondent Board had complained about the quality of the cleaning work of at least three or four members of the staff. She recalls complaints being made by Mr. Staniewicz as well as by Mr. Wolsiefer.

While acknowledging the existence of ongoing complaints, Ms. D'Amico and other petitioners sought to demonstrate that the various representations made by Service Systems going to the quality of custodial services to be provided were never brought to fruition. Essentially she notes that not very much has changed at Hunterdon Central concerning the custodial staff. She further asserted that no ongoing training program was provided for the custodial staff except for the showing of a film which had little if any value. Similarly, little if any instruction was provided to the staff and a minimal preventative maintenance system was set in place. She did acknowledge, however, that in respect to the maintenance of the heating and plumbing units, some improvement did occur subsequent to Service Systems entering the picture. In her judgment, however, no improvement in the cleanliness or efficiency of the custodial services has occurred since July 1, 1985, when Service Systems assumed control. Similar expressions from various petitioners concerning the dearth of instruction and training were voiced.

There seems little dispute between the litigants concerning the satisfactory performance of the maintenance and groundskeeping segments of the petitioner custodial staff as it existed before Service Systems assumed control. Respondent seemed satisfied with the performance of both crews and little if anything has been done through Service Systems to enhance what had been acknowledged to be a satisfactory program.

It was also acknowledged by various Board witnesses that subsequent to subcontracting the custodial services to Service Systems, no empirical study has been undertaken by the Board in respect to whether training and/or preventative maintenance has been instituted, whether reduced subcontracting costs have resulted, or whether the overall cleanliness of the facilities has improved.

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Lastly, it should be noted that to the extent that they are relevant, the factual findings not set aside by the Commissioner in his remand, which were arrived at in Initial Decision, OAL Docket No. EDU 4555-85, relevant to the question of tenure of the petitioners, still adhere and are incorporated into this opinion.

ANALYSIS

Pursuant to the decision which he rendered on February 28, 1986, the Commissioner of Education determined that each of the designated petitioners were tenured custodial staff employees of the Board pursuant to N.J.S.A. 18A:17-3. Accordingly, he remanded the matter for further proceedings to determine whether the action of the Board on April 22, 1985, which abolished the positions of the individual petitioners, comports with the requirements of N.J.S.A. 18A:28-9.

The foregoing statute 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 administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

The singular issue to be resolved in this matter therefore is whether the petitioners can establish by a preponderance of the relevant credible evidence that the action of respondent Board in abolishing their positions as custodial staff employees was prompted by bad faith, and not by reasons of economy, efficiency or for other good cause.

In my judgment, the evidence and the testimony presented in this matter, as well as the legal arguments offered by the petitioners do not establish bad faith. It has been well-recognized in New Jersey that the authority of the local board of education in respect to the management and control of the school system is broad and should be liberally construed. See, e.g. Downs v. Board of Education Hoboken, 12 N.J. Misc. 345 (Sup. Ct. 1934) aff'd Fletcher Ridgefield v. Board of Education Hoboken, 113 N.J.L. 401 (E. & A. 1934). Boards are delegated broad mangerial responsibility and should effectuate their charge in a manner best suited to achieving a thorough and efficient education for

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their students. Courts will broadly construe N.J.S.A. 18A:28-9 and as long as a boards' action is prompted by notions of good faith and, to some degree, economic need, the exercise of their discretion will be upheld. See, Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 156 (1978); Klinger v. Board of Education Cranbury, 190 N.J. Super. 354, 357-58 (App. Div. 1982).

The same principles adhere to the construction of N.J.S.A. 18A:17-3, conferring explicit statutory authority on a local school board to abolish a custodial or janitorial position in order to promote efficiency and/or economy: providing its conduct is motivated by good faith, its decision will not be set aside. Hardwick v. Board of Education of Town of Phillipsburg, 1980 S.L.D. ____ (Commr. of Ed. January 21, 1980); Catano v. Board of Education of Township of Woodbridge, 71 S.L.D. 448.

In my judgment the evidence and the testimony that has been presented in this matter demonstrate that the Hunterdon Central Regional High School Board of Education, the respondent in this matter, when it voted on April 22, 1985 to abolish the custodial staff positions and contractually permit Service Systems to assume full responsibility for maintenance, cleanliness, and groundskeeping at its facilities, was taken in good faith. The information which was available to the Board, which in the first instance prompted it to explore the possibility of subcontracting these responsibilities, reflected that both from an economic and an efficiency perspective, it was concerned with the best interests of the district. Further the information upon which the respondent Board relied, which was provided by both Service Systems and its major bid competitor, Service Masters, also reasonably justified the action of the Board in prospectively assuming that once custodial responsibilities were wholly delegated to an independent private contractor, it would serve the best interests of the district and would be an economic, efficient, and educationally sound decision.

While the evidence offered by the petitioners in retrospect suggests that the level and quality of the services provided by Service Systems is perhaps not what was expected and that the various representations and promises made by this corporation when it submitted its bids may not have been entirely fulfilled, this hindsight approach to determining the good faith efforts of the Board is not determinative. At the time that the Board made its decision it acted reasonably and in good faith. That one year subsequent to the action taken by the Board one can look back and say, i.e., that the bathrooms in the school are not cleaner than they once were or that the grounds are

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maintained no better is not the proper test: the test is whether the Board reasonably and properly relied upon information before it in a good faith effort and belief that its decision in respect to the custodial force would likely improve the efficiency and economy of the system. Neither the Board nor the administrative law judge has the luxury of answering that question one year after the decision was made.

An examination of the various factors that the Board considered in arriving at its decision bears out the good faith underlying the exercise of its discretion. The evidence demonstrated, particularly through the testimony of Superintendent Wolsiefer, that the general performance of the custodial employees charged with the cleanliness of the facility had been below satisfactory standards for a considerable period of time. As a consequence, the Superintendent had begun to explore the possibilities of subcontracting out for custodial services since the early 1980's. The survey which was thereafter conducted by Service Systems in January 1985, which was summarized in its letter study of February 7, 1985 (J-3), indicated that, among other things, the floors, bathrooms and offices within Hunterdon Central's facilities were improperly cared for and that the entire cleaning operation was operated at only 50% efficiency. During the course of the Board's deliberations concerning the possibility of subcontracting out the custodial work, which spanned approximately seven weeks and which was the subject of three separately held meetings, there was no evidence to indicate that the petitioners had ever challenged the Board's belief that problems in the cleanliness of the facilities persisted.

In addition to the unsatisfactory manner in which the facilities were being maintained, the evidence also indicated that the responsibility for supervising the custodial staff placed a burden upon the administration of the school system and by necessity diminished the time and energy which administrators might otherwise spend on ongoing education.

Once it became apparent that there were sufficient problems manifested in the system to make preliminary inquiry outside of the system to discover alternative solutions, respondent Board also acted responsibly and carefully in the procedures which it employed. It will be recalled that in the fall of 1984 the Hunterdon Central administration solicited four or five custodial contracting companies to ascertain the services which were available. Of these, Service Systems and Service Masters expressed genuine interest in providing services to the respondent. Once it discovered the interest that was expressed, Hunterdon Central conducted a preliminary background check of both

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prospective bidders which revealed no negative information about either. Representatives of respondent then toured the operation of both companies and concluded that each appeared competently administered. Both were then invited to conduct on-site surveys of Hunterdon Central and to present proposals for improvement. Each--Service Systems and Service Masters--then submitted comprehensive reports on the results of their surveys as well as proposals for improvement.

Three public meetings were thereafter convened by the Hunterdon Central Regional High School Board of Education in which representatives of Service Systems and Service Masters were queried about the surveys they conducted and about their proposals to remedy the perceived problems. Among the representations then made by Service Systems to respondent were, as Mr. Granello outlines in his posthearing submissions, that the cleaning, groundskeeping, and maintenance operations were functioning at 50%, 80% and 75% efficiency, respectively, and within one year after contracting with Hunterdon Central, Service Systems would increase that efficiency to 85%, 90% and 90%, respectively. Manifestly, when a local school board reasonably relies in good faith upon reports prepared by experts which cite existing inefficiencies and recommend changes, the exercise of discretion by the Board is posited upon good faith. See, e.g., Burghardt v. Passiac County Manchester Board of Education, supra, Willingboro Education Association v. Willingboro Township Board of Education, 1981 S.L.D. ____ (Commr. of Ed. February 23, 1981).

Further, as an incident to the concern of the Hunterdon Central administration to contract out to a company which had provided a proven track-record, respondent performed background telephone checks of approximately 16 public entities which had contracts in existence with both Service Systems and Service Masters; both prospective bidders received positive responses. Consequently, the concern manifested by the conduct of Hunterdon Central in reaching out to other clientele serviced by these companies is evidence of a responsible attitude for the actions thereafter undertaken.

It will also be recalled that the action of respondent Board in determining to subcontract out both the employee as well as managerial responsibilities of its custodial staff was neither taken lightly nor effected without due consideration and deliberation. The Board articulated three options which would be available to it to remedy what it perceived to be a problematical situation within its custodial staff: it could subcontract out a total takeover of the services; it could retain its custodial staff workers by

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subcontracting out only the managerial aspects of the responsibility; it could totally reorganize on an in-house basis the entire groundskeeping, maintenance, cleanliness, and supervisory operation. The ultimate determination to abolish the custodial positions and effect a total takeover by an outside independent contractor resulted only after deliberation and dialogue.

It will be recalled that the Board assured that all proposals including those for a management takeover only and an in-house reorganization were submitted for comparison and review. In arriving at its ultimate decision, respondent was prompted to make a decision which would provide the most efficient operation of the custodial staff; indeed, the economic consequences of the decision were secondary as will be recalled by Mr. Wolsiefer's testimony. The primary consideration which convinced the Board not to bifurcate management and staff is manifestly reasonable: the fundamental drawback of effecting a management takeover by an independent contractor while retaining staff under respondent's employ is that it renders significantly impotent the subcontractor's control over workers who are neither under its employ nor on its payroll. The Board ultimately eschewed the in-house option, concluding that it did not significantly differ from the status quo and would presumably increase rather than decrease the time taken by administrators to oversee custodial staff rather than curriculum and education. It would also require that the Board fill a new title, building engineer, which based upon its prior experience would reasonably present difficulties.

As a result of evaluating the three possible options and weighing their advantages and disadvantages, the Board ultimately decided that a total takeover was most advantageous; a survey of 15 public utilities, which indicated to Hunterdon Central that this procedure was an effective one, reinforced and solidified its decision.

In addition to the efficiency aspects of this operational decision, there was also, of course, the potential economic consequences. It will be recalled that Service Systems' proposal for a total takeover indicated that for the 1985-86 academic year, there would be a prospective savings of in excess of $118,000--approximately 18% of Hunterdon Central's 1985-86 budget for custodial operations. Mr. Fagella argues that the potential economic benefits derived by respondent as a consequence of its decision was to an extent effective because it was largely predicated on the cut in fringe-benefits from which

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tenured custodial staff employees suffered following subcontracting. Even if he is correct in respect to this assertion, it does not diminish the economic benefits derived by respondent; it simply points to the source of their increase.

A fundamental argument raised by the petitioners to support their assertion of bad faith is premised on hindsight observations: since Service Systems has assumed full responsibility for custodial services at Hunterdon Central, many if not all of the representations which it made in respect to training, maintenance programs, and improved efficiency have purportedly not come to pass. Further, the petitioners assert that the work performed by Service Systems' employees is neither better nor worse than the work performed when these same employees worked for respondent.

To a very real extent, these representations have not been rebutted or countered by the respondent. It will be recalled that Mr. Wolsiefer, on the basis of his own informal observations through April 1986, confirmed that it did not appear that there was a significant difference in the cleanliness of the facilities. But this conclusion, even if established, is irrelevant in and of itself when measuring the standard of the Board at the time that it entered into its decision to subcontract out its custodial responsibilities to Service Systems. At that time it reasonably and justifiably relied upon Service Systems' proven track record, its representations, its bid specifications, the study that it performed for Hunterdon Central, and the unsatisfactory state of affairs at the institution that prompted it to make the decision in the first place.

These are the criteria which must be measured to determine the reasonableness and validity of the Board's action; that action cannot be measured post hoc to determine the alleged bad faith of the Board. Similarly, if arguendo the state of affairs one year after the Board's action confirmed the wisdom of that action but if when the action was taken, it was not justified, the same argument could not work in reverse to validate the good faith efforts of the Board. Certainly the current state of affairs is evidential, to an extent, and may be used to measure in their totality the circumstances existing at the time the Board made its decision. Because, however, Service Systems may not have proven to have performed as outstandingly as it had represented does not in and of itself diminish the wisdom or invalidate the lawful intent of respondent Board.

The representatives of the Board are not fools: in a free enterprise society it is not that unusual for prospective bidders to "puff up" the quality of their product. That

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is to be expected. I infer that the Board knew that. Further and perhaps ironically, the evidence demonstrated that the Board renewed Service Systems' contract for the following year. Thus notwithstanding the flaws that may have manifested themselves in its first year's performance, Service Systems is worthy of at least one more annual contract.

Similarly, that since the award to Service Systems of the custodial contract the Board has not undertaken a formal study or analysis to review the work is also in and of itself not material to the issue of its good faith; all it could ever do is establish, again in hindsight, the state of affairs which exists more than one year after the decision at issue was made. See, Greco v. Smith, 40 N.J. Super. 182 (App. Div. 1956).

As will be recalled, in the Initial Decision rendered prior to remand (OAL Docket No. EDU 4555-85) the facts which were developed and adopted indicate that the issue of whether the petitioners did or did not acquire tenure status in their positions was seriously challenged by both sides. The Commissioner of Education in his final administrative determination concluded that based primarily upon the decision rendered in In the Matter of Tenure Hearing of Robert Hay, Hunterdon Central Regional High School District, Hunterdon County, OAL Docket No. EDU 5312-81, decided May 28, 1982, affirmed, Commissioner of Education, June 1, 1982, the custodial staff petitioners were held to be tenured employees.

The petitioners argue that a primary basis for their assertion of bad faith is that the abolition of the entire custodial staff was no more than a mere guise to dispense with the services of those several custodians (notably Messrs. Hay, Galygonya and Hartsall) without complying with the various procedural obligations attaching to tenure proceedings. Mr. Wolsiefer candidly acknowledged that the decision to explore alternatives to the existing status of the custodial staff was indeed prompted in part by the experiences that Hunterdon Central had with several of the employees in the custodial staff. There is nothing, however, to suggest or to convince me that the respondent Board through nefarious motives determined to eliminate the entire staff--including grounds-keeping and maintenance crews--for the sake of ridding itself of a handful of purportedly delinquent employees. The prevailing concern that the Board voiced and which in my judgment is substantiated by the evidence is that it judged the overall efficiency (and in a tertiary sense the economy) of its custodial operations to require improvement while at the same time reducing the demands of supervisors and management staff within this area

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so that they might devote greater attention to other more directly related educational concerns. While conceding that the decision to subcontract solved respondent's problems in respect to potentially several delinquent tenured custodial employees, the evidence does not establish that this was either the singular or prevailing motivation prompting respondent to take the action it did.

The petitioners have not demonstrated that when the Board determined to review the various alternatives available to it to cure what it perceived to be a problem with its custodial staff, it did so without integrity. The evidence did not establish nor suggest some villainous plan that the Board conspired to so as to rid itself of Messrs. Hay, Galygonya, Hartsall and others.

Furthermore, and touching upon the Board's concern for its employees (it should not be forgotten that in respect to many of the custodial staff and most if not all of the maintenace and groundskeeping staff, the Board did not level any ad hominum complaints against their performance) was the requirement which it placed in the contract with Service Systems that the latter as a prerequisite to its performance agree to hire in toto for a minimum of 90 days all of the Board's custodial employees and to provide them with various fringe benefits similar to those with which they had been provided while employed by Hunterdon Central. In addition, the Board provided the employees with sums of money at the time of their termination based upon seniority; it also maintained two employees on the Board's payroll for a period of time so that their pension interests could vest.

The respondent asserts, and there was no evidence to the contrary, that it undertook this effort out of a sense of moral concern and while under no legal obligation. This action does bear in my judgment upon the concern and good faith efforts that the Board manifested towards it former employees. Of course, one could argue that if the Board was really concerned, the employees should have been retained. However, the Board's primary concern is for the quality of education and performance within the district and it made a considered judgment based upon the cumulative circumstances existing that it would be in the best interests of Hunterdon Central for the custodial component to be subcontracted away.

The final argument offered by the petitioners is that as a matter of law, the abolition of their positions is invalid if the Board seeks to receive substantially the same

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services by the wholesale subcontracting out of their responsibilities. Mr. Fagella relies principally upon the decisions rendered in Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949), and Cochran v. Board of Education of Watchung Regional School District, 1983 S.L.D. ____ (Commr. of Ed., September 26, 1983), affirmed, State Board, December 4, 1985, in support of this proposition.

In Viemeister, the position of principal was abolished by resolution of the local school board, ostensibly in the interests of economy. At the same time a new position, entitled "teaching principal" was established and another employee was appointed to fill it. Eventually the employee who was removed as principal was reinstated to his position and the administrative action was upheld by the appellate division. The court concluded that the position of principal was never in fact abolished and continued within the local school district under a different title and occupied by a different district employee. In Viemeister the "abolition" of a position was held to be a mere guise to serve, as the appellate division notes, as a "simple expedient of transferring . . . duties to a member of the teaching staff." Viemeister, 5 N.J. Super. at 219. In Viemeister there was neither a de facto nor a de jure abolition of any title; rather, the Board effectively sought to rid itself of the individual occupying it and transferred the duties to another.

Under those circumstances Viemeister is inapposite to the current matter. Here there is no doubt that the Board in fact and in law abolished the positions at issue and the responsibilities and duties of those positions were subsumed by a private independent corporation operating through contract with the Board. Lastly, in respect to Viemeister it should be noted that while not directly articulated by the court, the action of the local school board was presumptively undertaken in bad faith by the very nature of its failure to effect a bona fide abolition of the principal position.

Like Viemeister, Cochran does not support the argument set forth by Mr. Fagella, which seeks to vitiate the action of Hunterdon Central. In Cochran, the Commissioner of Education, in affirming the findings and conclusions of the administrative law judge, determined that the action of the local board in reducing its child study team from full to part-time staff did not comply with the requirements of N.J.S.A. 18A:28-9. This ruling was based to a great extent on the Commissioner's perception that the needs of the district compel full-time child study teams. He notes: "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

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regulation with a half-time team." Cochran, Commissioner's decision at 21. He then reinforces this determination by drawing upon the conclusions which were derived by the Department of Education, Division of Special Needs-Handicapped, whose report of June 1983, "raised serious questions relative to the legality of contracting for services as did the Board herein without the written approval of the County Superintendent." Id. at 22.

Thus, in Cochran the Commissioner relies significantly, as did the administrative law judge, on what they both perceived to be the legal obligation of a local board of education in providing professional services to its students only by means of district employees. See N.J.S.A. 18A:16-1; N.J.A.C. 6:28-1.3. In part at least, as a matter of statutory and regulatory provisions, the Cochran ruling was based on a determination that providing a child study team is a statutory/regulatory requirement, inuring to Board employees and may not as a matter of law be delegated away to a private contractor. In the current matter, no argument or evidence has been offered to in any way indicate or suggest that a similar prohibition adheres against subcontracting away to a private independent contractor the maintenace, groundskeeping, and custodial services of a local school district.

Thus, based upon the foregoing, any argument addressed to the purported prohibition of a local school board to delegate away entirely to a private contractor a support service such as custodial and maintenance lacks legal authority or justification.

The final argument raised by the respondent in this matter is that by their actions in negotiating and executing a memorandum of agreement on June 28, 1985 with the Board, the petitioners have effectively waived their right to challenge the former's conduct in this proceeding.

It will be recalled that as an incident to this June 28, 1985 agreement, certain economic benefits were provided by the Board to the petitioners in exchange for which the latter had agreed to withdraw all other proposals. Counsel for respondent appears to posit his waiver argument on the assertion that "the petitioners have not shown any damage as resulting from the Board's abolition of these positions." Respondent's post-hearing brief at 30. Contrary to this assertion the testimony generated indicates that in respect to fringe benefits, other working arrangements and the loss of tenure (since the Commissioner has ruled that these petitioners did in fact acquire tenure), the reasonable conclusion to be derived is that there is a prima facie showing that the petitioners were in

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fact injured by the action of the Board in abolishing their positions. Accordingly, the argument that they have effectively waived their rights to litigate these issues is rejected.

Based upon the foregoing, I **CONCLUDE** that the petitioners have failed to establish by a preponderance of the relevant credible evidence that the action of the respondent, the Board of Education of Hunterdon Central Regional High School, taken at its meeting of April 22, 1985, which abolished the positions the petitioners occupied while in its employ, and which transferred responsibility for custodial services to a private independent contractor was underaken in bad faith or was in any way in contravention of the provisions and requirements of N.J.S.A. 18A:28-9. Accordingly, it is **ORDERED** that the appeal of the petitioners 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.

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

November 17, 1986
DATE

STEVEN C. REBACK, ALJ

NOV 1 [illegible] 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

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HUNTERDON CENTRAL HIGH SCHOOL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. The legal arguments presented in petitioner's (Association's) exceptions and the Board's reply are essentially those presented during the course of the hearing and considered by the ALJ. A summary of the exceptions is provided below.

Petitioner excepts to the ALJ's determination that the Board acted in good faith when it decided to abolish its custodial positions and engage a subcontractor to perform the custodial work. It contends the ALJ gave no reason to support the Board's rejection of the Superintendent's in-house reorganization proposal and avows that the ALJ erred in affording a board of education virtually unlimited latitude to abolish tenured positions and subcontract the work, an action it asserts is statutorily infirm for the following reasons:

> ***First, even assuming "economy" and "efficiency" are factors to be considered, the background of this matter indicates the Board acted in bad faith. The predominant reason for its actions was not to obtain more "efficient" operations, but rather to rid itself of tenured employees with whom it was dissatisfied. Second, its "economy" was effected only by having reduced benefits paid to the same employees for doing the identical work they performed previously. Third, there was no real "reduction" in the number of custodians, because the identical individuals performed the identical work both before and after the subcontracting.
>
> (Petitioner's Exceptions, at p. 3)

Petitioner avows that the "vision and meaning of tenure" embodied in the ALJ's recommended decision presents grave consequences for tenure if approved by the Commissioner for

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> No case has previously concluded that a board acts in "good faith" when it terminates tenured employees, transfers their functions intact to other employees (albeit through subcontracting) who then continue to perform the identical services but at lower costs solely because of the reduced benefits they receive.***
>
> (Petitioner's Exceptions, at p. 6)

Moreover, petitioner argues that the Board's actions are illegal pursuant to applicable precedent and it alleges that the ALJ's efforts to distinguish the Viemeister and Cochran holdings are unconvincing. With respect to this it contends:

> ***The ALJ claims that in Viemeister, the duties were merely "transferred" to another employee, while here the duties were actually abolished and "subsumed" by a private independent corporation. Surely this is a distinction without a difference. Whether a board "abolishes" a position and transfers the responsibility to another individual, or "abolishes" a position and asks a private contractor to perform that same work, the substance of the illegality is the same. It is an end-run effort around the tenure laws, designed to eliminate tenure in the position while continuing the duties of that position intact.
>
> The efforts to distinguish the holding of the Commissioner in Cochran are similarly unpersuasive. That case does not hold merely that child study team members must be directly employed by the board of education. That is a merely corollary ramification. Cochran's primary conclusion is that unless there is an actual reduction in the amount of work of the tenured employee, that employee's position cannot be "abolished" and the duties transferred or in other ways assigned to another individual. (emphasis in text)
>
> (Petitioner's Exceptions, at p. 10)

The Board's reply to petitioner's exceptions rebuts each of the points raised, avowing that the ALJ was correct in finding that its abolishment of custodial positions and subcontracting out for custodial services was a good faith attempt to obtain more efficient and economical custodial operations. It reiterates that it chose the "total takeover" v. "in-house proposal" because it was the most efficient of the three options considered because mere "management takeover" would give a subcontractor rather weak control over workers not on its payroll and the "in-house" proposal would divert more of Hunterdon Central's administrative staff time away from curriculum. Further, it argues that the ALJ was correct in finding that the good faith of a board must be determined by whether the

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board, at the time of its decision to abolish, actually had the motivation to accomplish efficiencies and/or economies, and not by whether in hindsight the decision actually accomplished such desired results. It again denies that its actions were taken to avoid going through tenure proceedings to remove inefficient employees, stating that although it was dissatisfied with the performance of several particular cleaning employees, it was moreover dissatisfied with the entire cleaning operation.

With respect to this latter point the Board contends that when an entire office is functioning inefficiently, New Jersey Law gives the public employer the right to abolish the inefficient office even if it is occupied by "protected" individuals and cites inter alia, Greco, supra; Burghardt et al., supra, and N.J.S.A. 18A:28-9.

The Board rebuts petitioner's contention that a board may not abolish a tenured position if it merely intends to transfer the duties of that position to another position or to a subcontractor. Of this it states:

> ***First of all, the Board, in subcontracting out with Service Systems, did not intend for Service Systems to provide the same custodial duties that the Board had beforehand, since this would be futile in solving its inefficiency problem. The Board contracted for new supervision, new training, new work organization, a new preventive maintenance program, and restructured custodial tasks, among other items. The fact that Service Systems may have failed to restructure custodial duties at Hunterdon Central is irrelevant, since the Board required such restructuring of duties in its specifications and contracted with Service Systems on the expectation of receiving such restructuring--all with the good faith motive to achieve more efficient cleaning.
>
> (Reply Exceptions, at p. 6)

Moreover, it avows that petitioner misstates the relevant law, arguing, inter alia, that (1) Viemeister, supra, and Cochran, supra, are distinguishable from the instant matter and (2) petitioner fails to articulate the basic legal principle underlying these two cases and others, namely, that a board cannot abolish a tenured position and transfer the duties to another if the actions are not actually motivated in good faith to resolve real inefficiences. With respect to the former point, it contends that in neither of the two cases did the court find the board had a real inefficiency or economic problem nor that the abolishment action was motivated by a desire to solve a real inefficiency or budgetary problem.

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This matter arises under the authority of N.J.S.A. 18A:17-3[1] and N.J.S.A. 18A:17-4 which read:

> 18A:17-3. Tenure of janitorial employees
>
> 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 and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.***
>
> 18A:17-4. Reduction in number of janitorial employees
>
> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments.

The February 26, 1986 decision of the Commissioner in this matter rejected the Board's arguments that the petitioning custodial staff were untenured because they were appointed for fixed terms and reversed the ALJ's recommended decision to dismiss the case. The reasons for reversal bear repeating here for, as stated by the State Board in Cochran, supra, the entire course of events must be examined when abridgment of tenure rights is alleged.

---

[1] N.J.S.A. 18A:28-9, reduction of teaching staff members, was inadvertently cited in the remand language of the February 26, 1986 Commissioner decision in this matter. The erroneous cite of this statute does not, however, pose a detrimental effect on the hearing of the matter.

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Firstly, the Commissioner rejected the argument that collective bargaining contract language which said custodial staff "***shall be employed on an annual, 12 month basis" (R-1 at 23; R-2 and 3 at 16) constituted a "fixed term" of employment as it did not specify the beginning and ending dates of fixed term employment and concluded it could easily be read to mean employment on an annual 12-month basis as opposed to a 10-month academic year or other basis.

Secondly, the record did not support that the Board took formal action to set fixed term employment. Exhibits P-1 through P-20 demonstrated that yearly notification of salary as opposed to individual contracts was provided but, other than specifying a July 1 effective date for said salary, no fixed term of employment was set forth. The notifications were apparently no different from those given to tenured teaching staff.

Thirdly, it was not until 1983, subsequent to the litigation of tenure charges against Petitioner Hay, that the Board attempted to issue fixed term contracts. The Commissioner rejected this post facto strategy of the Board to set fixed term employment and flatly set aside the Board's belated argument that Petitioner Hay was not tenured. He emphasized that when a board invokes tenure charges, tenure is not merely "assumed," it is undisputed.

Fourthly, it was found that for 1984-85 and 1985-86 Board minutes and documents spoke only to salary and guide step for custodial staff with no fixed term of employment set and accepted.

As a result of the Commissioner's examination of the record, it was concluded that the petitioners had achieved the legislative status of tenure pursuant to N.J.S.A. 18A:17-3. Thus, the matter was remanded for a full hearing on the merits of the dispute to determine if the reduction in force effectuated by the Board had violated those tenure rights. Petitioners are challenging the Board's action in reducing the number of janitorial/custodial staff pursuant to N.J.S.A. 18A:17-3 and 17-4. The case presents the issue of whether a board of education may, consistent with applicable law, abolish the positions of its tenured custodial staff and subcontract with a private entity for custodial services which (by Board specification) continues to employ those individuals without the protection of tenure.

N.J.S.A. 18A:17-3 mandates that tenured janitors may not be dismissed, suspended or reduced in compensation except as the result of a reduction in the number of janitors in accordance with the provisions of Title 18A, Education, or by way of the Tenured Employees Hearing Law, 18A:6-10 et seq. It has been long established that a board of education or other public body may reduce/abolish positions of tenured or protected personnel when such action is taken for reasons such as economy or greater efficiency. N.J.S.A. 18A:28-9; Viemeister, supra; Catano, supra As expressed by the State Board of Education in Phillip Capodilupo v. Bd. of Ed. of West Orange, decided by the Commissioner May 3, 1985, rev'd State Board September 3, 1986. Although boards of education have great discretion in reduction in force situations, that discretion is not

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without limits. (Slip Opinion, at p. 14) Citing Viemeister, the State Board articulates that tenure rights are important expressions of legislative policy and the rights they confer are accorded vigorous protection. Further, it states that abridgment of tenure rights is not countenanced if it is found that the duties of an abolished position have, in fact, been transferred to another position so as to defeat the rights of an employee who is tenured in the abolished position. (at pp. 14-15)

Although Viemeister, supra, and Capodilupo, supra, interpret N.J.S.A. 18A:28-9, reduction of teaching staff members, the principles articulated in those cases are no less applicable to tenured custodial staff when assessing a board's action pursuant to N.J.S.A. 18A:17-3 and 4. Viemeister is relied upon in Catano v. Bd. of Ed. of Woodbridge, 1971 S.L.D. 448 to reverse a board's impermissive action in dismissing a tenured janitor wherein the abolishment was found to be in name only. In turn, that case and Viemeister are frequently cited as examples of the standard of review in cases alleging violation of tenure rights as a result of reduction in force action.

In the Commissioner's judgment, there is a need to scrutinize cases interpreting N.J.S.A. 18A:28-9 in order to review applicable standards related to alleged violation of tenure rights.

Integral to any determination on abridgment of tenure rights, be it teachers, principals or janitors, is the issue of actual abolishment versus abolishment in name only. Viemeister, supra, stands for the proposition that, even if a board of education is not motivated by bad faith, this in and of itself does not make a reduction action under school law immune from reversal if the position has not been abolished. Viemeister reads in part:

> ***It is not necessary to impugn the motives of board members or to impute to them ulterior purposes to hold that an illegal procedure cannot be followed to accomplish a purpose however good the motives.*** (1939-49 S.L.D. 115, 118)

Even where a reduction in force occurs for a bona fide reason, i.e. decline in the number of students and despite the absence of a purported economic gain, a board's action will be reversed if it is determined that actual abolishment of position has not occurred. Eugene Sampietro v. Bd. of Ed. of Ridgefield Park, decided by the Commissioner March 11, 1985, rev'd State Board November 5, 1986. The following portion of the State Board's decision bears repeating here:

> ***[T]he record in this case clearly indicates that the Board's decision to reduce its staff was based on declining student enrollment *** and it is undisputed that the business department in fact experienced a decline in student enrollment.*** If the Board's action had been otherwise proper, we would not set it aside

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merely because it did not result in economic benefit. However, for the reasons that follow, we conclude that the Board's action in this case did not constitute a valid reduction in force under N.J.S.A. 18A:28-9.

Although boards of education have great discretion when acting pursuant to N.J.S.A. 18A:28-9, that discretion is not without limits. Tenure rights consistently have been accorded vigorous protection. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 219 (App. Div. 1949); Catano v. Woodbridge Bd. of Ed., 1971 S.L.D. 448, 458-9. Because reductions in force often necessarily implicate tenure rights, the decision making process and its consequences are closely scrutinized whenever an allegation is made that tenure rights have been impermissibly compromised by board action taken pursuant to N.J.S.A. 18A:28-9. Vogel v. Board of Education of the Borough of Ridgefield, decided by the State Board, June 5, 1985. Further, it is settled that abridgment of tenure rights is not countenanced if it is found that the duties of the position abolished under the authority granted by N.J.S.A. 18A:28-9 have in fact been transferred to another position so as to defeat the tenure rights of an employee who is tenured in the abolished position. Viemeister, supra. In such cases, the substance of the board's actions rather than the form controls. Id. at 218. Our examination of the record indicates that, in this case, in substance, the position of coordinator was transferred to the Department Head, but continued in fact to exist. Id.

(Slip Opinion, at pp. 7-8)

Upon examination of the record in this matter, it is the conclusion of the Commissioner that the custodial positions in this matter were not in actuality abolished but were rather abolished in name only and, thus, the Board's action is found to be contrary to the prohibition articulated in Viemeister, supra; Catano, supra; and Sampietro, supra. Contrary to the belief of the ALJ and the Board, the Commissioner does not find Cochran, supra, inapposite. Notwithstanding the fact that child study team personnel are mandated to be board employees and that subcontracting of services is permitted under certain circumstances pursuant to N.J.A.C. 6:28-1.1 et seq., the matter is quite analogous to the instant matter in that it calls into question the issue of actual abolishment. Further, it also brings into play the issue of subcontracting services. The following passage from the State Board's decision is particularly instructive in light of the issues raised in the instant matter. It reads:

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> ***[T]he Board's intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider. Under these circumstances the Board action taken here falls squarely within the prohibition of Viemeister v. Prospect Park Bd. of Ed., supra. The Commissioner and the ALJ correctly concluded that the integrity of the reduction in force decision was vitiated by the virtually contemporaneous decision to contract for additional CST services that the team, as originally constituted, would otherwise have performed. That being the case, the reduction in force decisions were properly voided.***
>
> (Slip Opinion, at pp. 5-6)

In the Commissioner's judgment, the integrity of the Board's action is even further vitiated when the tenured employees, whose positions were "abolished" by specification of Board contract to the private entity, continued to perform the custodial services of the district. That the private contractor was supposed to provide staff training, restructured duties, supervision and the like does not serve to render the Board's reduction action proper when viewed from the Viemeister standard.

Accordingly, the action of the Hunterdon Central High School Regional District Board of Education to abolish its custodial positions is voided. Petitioners are to be reinstated to their former positions with all benefits and emoluments associated with those positions less mitigation.

It is recommended that the Board determine a course of action to address its efficiency concerns that results in less erosion to the rights of its entire tenured custodial staff. Lingelbach v. Hopatcong Bd. of Ed., decided by the Commissioner June 9, 1983, rev'd/rem'd State Board May 2, 1984, aff'd Superior Court, Appellate Division, A-4783-87T1 May 17, 1985, cert. denied, 101 N.J. 333 (1986)

Notwithstanding the above, the Commissioner emphasizes that the determination in this matter does not impact on a board's right to eliminate positions of nontenured staff and subcontract for services such as occurred with food services statewide. The critical factor in this matter was the protection of tenure rights pursuant to school law.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6160-85
(OAL DKT. NO. EDU 2183-85
on remand)
AGENCY DKT. NO. 51-3/85

CITY OF PERTH AMBOY
BOARD OF EDUCATION,
Petitioner,
v.
CHRISTINE THOMPSON,
Respondent.

Alfred D. Antonio, Esq., for petitioner

Lennox S. Hinds, Esq., for respondent (Stevens, Hinds & White, P.C., attorneys)

Record Closed: January 30, 1985 Decided: February 7, 1986

BEFORE DANIEL B. MC KEOWN, ALJ:

PROCEDURAL HISTORY

On September 26, 1985 the Commissioner of Education rejected a voluntary settlement entered between the Perth Amboy City Board of Education (Board) and Christine Thompson (respondent) which provided that in return for the Board consenting to a dismissal with prejudice of 36 administrative tenure charges it certified to the

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Commissioner on March 12, 1985[1] against respondent, a tenure teacher in its employ for 22 years and presently assigned to teach first grade pupils, she would waive all claims to 120 days' salary withheld by it under N.J.S.A. 18A:6-14 upon its certification of such charges; that she would be returned to her teaching duties for 1985-86 subject to regular performance evaluation as all other teachers; and, that she would tender a resignation from her employment if the superintendent concluded at the end of 1985-86 that her total performance was unsatisfactory based on her performance evluations throughout the year. The Commissioner determined that respondent could not voluntarily waive a claim to salary withheld under N.J.S.A. 18A:6-14, that she could not legally be required to submit a resignation, and that the settlement, aside from the perceived violations of the Tenure Employees Hearing Law, violated "* * * the Commissioner's decision in re: In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, decided on remand April 7, 1982; aff'd State Board (Aug. 4, 1982)." The Commissioner remanded the matter to the Office of Administrative Law for further proceedings.

Following the remand, a prehearing conference was conducted October 30, 1985 at which time certain procedural matters were decided including motion dates, discovery, and coordinating the calendars of counsel, the parties, witnesses, and the undersigned so that once the plenary hearing commenced on the 36 tenure charges it would continue on consecutive days for at least two weeks in order to avoid sporadic hearing dates. Consequently, the plenary hearing was scheduled to commence March 3, 1986 and proceed through at least March 14, 1986. In the meantime, respondent's motion to dismiss on the grounds the Board failed to specifically charge her with incapacity, unbecoming conduct, or other just cause or, alternatively, that the charges are of inefficiency and must be dismissed for failure of the Board to have granted her 90 days to improve, was briefed by the parties. The motion was denied by written ruling on December 16, 1985. Respondent was granted leave to renew her motion to dismiss on inefficiency grounds at the conclusion of the Board's case-in-chief.

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[1] The Commissioner transferred the matter on April 18, 1985 to the Office of Administrative Law as a contested case. A prehearing conference was conducted May 3, 1985 and a plenary hearing was scheduled to commence July 8, 1985. The settlement papers were filed July 1, 1985; the hearing was cancelled; and, an initial decision issued August 13, 1985 in which the proposed settlement was endorsed.

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Once again, the parties entered settlement negotiations upon the guiding principle that any agreement reached would be subject to the approval of the Commissioner of Education and that the agreement must, in all respects, be consistent with the law governing settlements of administrative tenure charge cases.

On January 29, 1986, counsel to the parties and respondent personally appeared and submitted a written stipulation of settlement and spread the terms of the settlement on the record. Respondent testified that she has full knowledge of the terms of the settlement, that she has knowledge of her rights under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. and that she has full knowledge of her tenure rights under N.J.S.A. 18A:28-5. Respondent testified that the terms of the settlement are agreeable to her, she voluntarily and knowingly embraces the terms of the settlement, that the settlement terms are a full and fair disposition of the 36 tenure charges brought against her in light of her tenure protection and, that she has not been coerced, harassed, nor subjected to any form of pressure to accept the terms of settlement. Furthermore, respondent admits counsel informed her of the Commissioner's duty at N.J.A.C. 6:11-3.7(b)1.1. to forward to the State Board of Examiners for possible revocation of one's teaching certificate in ". . . cases contested before the Commissioner of Education, resulting in loss of tenure or dismissal of a teacher . . . for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause . . .". The settlement document, in material part, is reproduced here:

> WHEREAS, the parties, recognizing that litigating the thirty-six (36) certified charges against petitioner to finality most likely would be protracted and costly in terms of toll of human resources, money, emotional strain and not to mention, the proof problems and
>
> WHEREAS, the parties concede that respondent has been a teacher with at least twenty-two (22) years experience and the pending charges filed within the past two (2) years represent the only charges lodged against petitioner and for the foregoing reasons that parties agree that it is in their respective best interests and that of the public to settle this matter; and
>
> WHEREAS, the parties have agreed to settle upon the following terms:
>
> NOW, THEREFORE, IT IS AGREED:
>
> 1. That the charges filed by petitioner, PERTH AMBOY BOARD OF EDUCATION is [are] withdrawn with prejudice pending final approval by the Commissioner.

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2. That the petitioner PERTH AMBOY BOARD OF EDUCATION pay respondent CHRISTINE THOMPSON for the one hundred and twenty (120) days' pay withheld from her during her suspension from work pending a final approval by the Commissioner.

3. That respondent CHRISTINE THOMPSON submit her resignation forthwith, pending a final approval by the Commissioner * * *

The foregoing constitutes the procedural history and procedural facts of the matter.

Administrative Policy Governing the
Settlement of Tenure Charges Brought Under the
Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq.

When the Commissioner rejected the earlier settlement as being in violation of his earlier decision in Cardonick, he quoted the following from that decision:

> "* * * While not precluding his approval of such settlements, the Commissioner wishes to make clear that he will carefully examine the factual circumstances surrounding each settlement so proposed, both as to the nature of the charges involved in such matter as well as to the exact terms of the settlement. The Commissioner deems such careful scrutiny to be essential to the maintenance of the integrity of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) and to preserve both his statutorily conferred and judicially defined responsibility for rendering determinations in tenure matters and his responsibility for ensuring that determinations reached serve not only the interest of the parties but also the broader public interests. * * * "

It is clear that the Commissioner's approval of settlements entered in tenure charge cases depends upon "* * * the nature of the charges involved* * * [and] * * * the exact terms of the settlement * * *" to ensure that the interests of the parties are served and that the public interest is served by allowing a tenure charge case to be settled. The State Board of Education, as head of the Department of Education, affirmed the Commissioner's ruling in Cardonick and it said:

> We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendent terms and conditions should be submitted to the Commissioner of Education for his prior scrutiny

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> and approval. The proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his [her] rights, and that the agreement is consistent with the public interest. [citation omitted] In this case there is no indication that the teacher was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.7(b)1.i. to refer tenure determinations to the State Board of Examiners for possible revocation. We believe that disclosure should be part of agreement which results in loss of position.

Following the dictates of the Commissioner and the State Board of Education as recited above, the nature of the charges shall be examined. It is noted that the analysis of each charge, agreed to by the parties, was spread on the record January 29, 1986.

> Charge 1 alleges respondent violated Board policy and certain school rules as set forth in the superintendent's affidavit which, in turn, relies upon a letter from the school principal to respondent on September 20, 1983.
>
> > The substance of the charge is that the principal was to have told respondent he observed her pupils leaving the classroom to go to the bathroom or to get a drink of water. He observed her pupils causing a disturbance in the hallway. He notes that a school guard told him he observed the same thing happening. The principal reminds respondent that school policy allows one child to leave the room at a time. The principal also complains respondent did not send her students for math and that the math teacher had to come to respondent's room to get the children. Finally, the principal says that while he was in her classroom he noticed while she was speaking so, too, were pupils speaking and that respondent "permitted this to happen."

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Charge 2 alleges respondent violated Board policy as stated in the superintendent's affidavit which in turn, relies upon a professional staff observation report dated October 6, 1983.

> The substance of the charge is that the supervisor who prepared the professional staff observation report on October 6, 1983 made six "no" comments thereon in regard to class discipline. The observation report is not part of this record and there is no further documentary explication as to this charge.

Charge 3 alleges respondent violated Board policy and school rules as set forth in the superintendent's affidavit which, in turn, relies upon a letter of the principal to respondent on October 6, 1983.

> The substance of the charge is that on October 3, 1983, the principal could not locate respondent's lesson plan book nor record book in her classroom. In addition, the principal asserts that on October 4, 1983, he was advised by some unidentified person that respondent was "* * * yelling in the hall for [B.S.] while the students were coming into the building."

Charge 4 alleges respondent violated Board policy and school rules as set forth in the superintendent's affidavit which, in turn, relies upon a letter from the principal to respondent on October 11, 1983.

> The substance of this charge is that respondent was sending too many pupils to the office for discipline instead of disciplining the pupils herself.

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Charge 5 alleges respondent violated Board policy as set forth in the superintendent's affidavit which, in turn, relies upon a professional staff observation report of a supervisor other than the one referenced in Charge 2.

> The substance of this charge is that this supervisor prepared the professional staff observation report and made six "no" comments in regard to classroom discipline. There is no date asserted when this observation was to have been made nor when the report was to have been prepared, nor is the report itself part of this record.

Charge 6 alleges respondent violated Board policy as set forth in the superintendent's affidavit which, in turn, relies upon his own letter to respondent on October 18, 1983.

> The substance of this charge alleges the superintendent observed respondent's in class performance on September 27 and October 18, 1983 and found a lack of discipline by the pupils and that he, in the presence of respondent, developed a lesson with her pupils.

Charge 7 alleges respondent violated Board policy as set forth in the superintendent's affidavit which, in turn, relies upon a letter he sent the principal.

> The substance of this charge alleges that the superintendent advised the principal that a parent, who was allowed to observe respondent's class for American Education Week, complained to him of the lack of respondent's control of her pupils.

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Charge 8 alleges respondent violated Board policy and school rules as set forth in the superintendent's affidavit which, in turn, relies upon a letter complaint he received from a parent.

> The substance of this charge is essentially the same as the substance in Charge 7, whereby the parent, in writing, filed a complaint in which she asserts respondent lacked control in the classroom. It is noted that the parent, having set forth her conclusion that she observed chaos in respondent's classroom, concluded "Mr. Sinatra [the superintendent] in plain english [sic] it was terriable [sic]."

Charge 9 alleges respondent violated Board policy and school rules as set forth in the superintendent's affidavit which, in turn, relies upon a letter of the principal.

> The substance of this charge alleges that the principal complained to the superintendent of respondent's rule infractions and pupil discipline. No further explication of this charge is in the record. It should be noted that the asserted rule infractions are more likely than not those as are set forth in these charges.

Charge 10 alleges respondent violated a statute as set forth in the superintendent's affidavit.

> The substance of this charge is best illuminated by repeating the relevant portion of the superintendent's affidavit:
>
> > j. On November 28, 1983, I made formal charges against Ms. Thompson, one

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for inflicting corporal punishment on student L.V. and the other for inflicting corporal punishment on student J.N. Said charges were duly served upon Ms. Thompson and she filed an answer denying these charges and the matter came before the board on January 5, 1984. A determination and resolution was made by the board, a copy of which is annexed hereto and made a part hereof and marked Schedule A-7. [The relevant portion of Schedule A-7 states that while the Board found probable cause to credit the evidence in support of the two charges of corporal punishment, the charges were not sufficient to warrant a dismissal or reduction in salary of respondent.] As a result of negotiations had between myself, the Board Attorney and Ms. Thompson's attorney, it was agreed that she would take a leave of absence without pay effective February 1, 1984, through June 30, 1984, and that she would attempt to mend her ways. A copy of her letter dated January 5, 1984, is annexed hereto and marked Schedule A-8.[2] [Schedule A-8 is

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[2] There is no basis in this record to infer that respondent's leave of absence without pay was in any sense a discipline imposed upon her by the Board despite what may appear upon a cursory reading of Charge 10. It is reasonable to infer that Charge 10 is not intended to charge respondent with corporal punishment under N.J.S.A. 18A:6-1 because the Board, pursuant to its authority at N.J.S.A. 18A:6-11, already determined on January 5, 1984 that while probable cause existed to credit the evidence, the charges were not sufficient to warrant a dismissal or reduction in salary even if proven true. Charge 10 is intended, I infer, to be another in a series of allegations by the Board to show respondent's alleged lack of pupil discipline skills.

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respondent's letter to the superintendent requesting a leave of absence, without pay, between February 1, 1984 through June 30, 1984.]

Charge 11 alleges respondent violated school rules as set forth in the affidavit of the principal of the school to which respondent was transferred in September 1984.

The substance of this charge is that this principal, while "making my rounds" observed six pupils standing in respondent's classroom and three other pupils standing at the pencil sharpener. Later in the day, the principal advised respondent that "the students standing around her classroom were a violation of class rules and procedures."

Charge 12 alleges respondent fails to have "class under control" based on the evidence in support of all other charges against her.

The substance of the charge is incorporated within the charge itself.

Charge 13 alleges respondent suffers a "Physical inability to attend to classroom situations and excess use of bathroom, as set forth in numerous occasions in Affidavits annexed hereto."

For the substance of this charge see Charges 17, 25, 26, 31, and 32.

Charge 14 alleges respondent violated school rules in regard to lesson plans and discipline policies as set forth in the affidavit of Kun which, in turn, relies upon a report of an

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observation performed November 2, 1984 and a meeting he had with respondent on November 13, 1984 at which time Kun gave respondent a folder entitled "Glasser's Approach to Discipline."

> The substance of the charge is that respondent's approach to classroom discipline and instruction needed improvement.

Charge 15 alleges respondent violated school rules as set forth in Kun's affidavit.

> The substance of this charge is that on November 7, 1984, while making his rounds, Kun observed a group of pupils at a table in the back of respondent's classroom. He further observed two pupils were standing and the rest were doing art work. Kun says that at that precise time, and ostensibly on that precise day, the "schedule" called for language arts to be taught. Kun further attests that later that day, he advised respondent "* * * not to have any more art until further notice because [you are] devoting too much time to art and not enough to Language Arts and Math."

Charge 16 alleges respondent violated school rules in regard to discipline by sending pupils to the office on unspecified occasions without a referral slip.

> The substance of the charge is set forth in the charge itself.

Charge 17 alleges respondent violated school rules as set forth in Kun's affidavit.

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The substance of this charge is that on November 16, 1984, Kun learned from an unidentified source that respondent asked a teacher's aide to cover her classroom while she, respondent, went to the bathroom.

Charge 18 alleges respondent violated school rules as set forth in Kun's affidavit which, in turn, relies upon a report of a professional observation done and prepared November 26, 1984.

The substance of this charge as can best be discerned from the observation in support of the charge may be that the evaluator noted some "student restlessness".

Charge 19 alleges respondent violated school rules as set forth in Kun's affidavit.

The substance of this charge is that Kun, while making his rounds on November 29, 1984, observed one of respondent's pupils alone on the stairway without a pass and without a note. The pupil explained he had gone to the bathroom. Kun escorted the pupil back to the classroom, called respondent's attention to the fact she should have given him a pass.

Charge 20 alleges respondent violated "general teacher responsibility" as set forth in Kun's affidavit.

The substance of this charge is that on November 29, 1984, Kun attests that he discovered one of respondent's pupils crying and wandering around in the lunchroom and that respondent was to have explained she left the

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pupil in the bathroom because the pupil would not come out. On another day Kun attests respondent was to have left the student in the classroom while the other pupils went to the bathroom.

Charge 21 alleges respondent violated school rules set forth in Kun's affidavit.

The substance of this charge is that Kun attests that two different teachers discovered two of respondent's students in the corridors and escorted the students to Kun. Respondent, according to the attestations of Kun, explained that the students had run out of the room without permission. A meeting followed at which time respondent became so upset that she wished to go to the bathroom. Kun gave respondent a brochure entitled "Five Ways to Manage a Classroom".

Charge 22 alleges respondent violated school rules as set forth in Kun's affidavit which, in turn, relies upon a professional staff observation report he made.

The substance of this charge is that respondent's classroom management needs improvement.

Charge 23 alleges respondent violated school rules as set forth in Kun's affidavit.

The substance of this charge is that Kun had to assist respondent in the classroom to stop three of her students from fighting over a toy. Kun assisted respondent and then concluded the fight should not have occurred because respondent should have taken the toy away from the student who brought it into the classroom in the first place.

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Charge 24 alleges respondent violated school rules as set forth in the affidavit of Kun.

> The substance of this charge is that one of respondent's students kicked another student in the classroom and that the parent of the student who was kicked complained to Kun.

Charge 25 alleges respondent violated an oral directive of Kun.

> The substance of this charge is that respondent had a pupil place material in her mailbox located in the teachers' room which is assertedly a violation of the rules; that respondent asked a school custodian to cover her class without prior approval of the office; and, that respondent used the nurses' room bathroom instead of the teachers' bathroom for an emergency.

Charge 26 alleges respondent violated school rules as set forth in Kun's affidavit.

> The substance of this charge is that respondent asked a teacher to cover her class without prior approval of the office, so that respondent could go to the bathroom.

Charge 27 alleges respondent violated school rules as set forth in Kun's affidavit which, in turn, relies upon a letter he sent respondent on January 10, 1985.

> The substance of this charge is that respondent asks persons to cover her classroom without prior approval of the office and that respondent relies too much on the office for pupil discipline.

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Charge 28 alleges respondent violated school rules as set forth in Kun's affidavit which, in turn, relies upon a report of an observation performed January 7, 1985.

> The substance of this charge is that the evaluator, while noting respondent's lesson plans and her teaching were satisfactory, also noted that the class did not appear prepared for the lesson.

Paragraphs 14 and 30 of Kun's affidavit address in some explanatory fashion the charges regarding respondent's asserted frequent use of the ladies' room. Paragraph 14, which has already been referenced in Charge 17, and paragraph 30, which is not referenced in the charges, provide as follows:

> 14. On November 16, 1984, I learned that Ms. Thompson had used a teacher's aide to cover her class while she went to the bathroom. I left a note for Ms. Thompson in her mailbox reading as follows: "'Under no circumstances are you to leave your room without an emergency and consultation with me. Any questions, see me immediately." (Emphasis added)
>
> 30. Whenever we discussed her visits to the bathroom, she indicated that they were occasioned by "'woman's trouble'". It was not until January 14, 1985, when she spoke with me did she mention that she had a problem with diarrhea as well as woman's trouble. This is the only time she eluded to diarrhea.

Charge 29 alleges respondent violated school rules and Board policy as set forth in the affidavit of Joan Maldony, a resource and math teacher in the Board's employ.

> The substance of this charge is that Maldony attests that during 1984-85 she observed respondent's students "to be out of control and I

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> would say that this has averaged 50% of the visits I have made to her classroom. As a result, it takes quite a length of time to get these students to settle down so that they can be taught."

Charge 30 alleges respondent violated Board policy as set forth in Maldony's affidavit.

> The substance of this charge is that Maldony discovered two children sitting in respondent's classroom while the rest of the class were supposed to be having their pictures taken in the library. Respondent was to have insisted to Maldony that she had, in fact, all her classroom pupils with her.

Charge 31 alleges respondent vioalted school rules as set forth in the affidavit of Carole Watkins, a school nurse in the Board's employ.

> The substance of this charge is that respondent went to Watkins' nurses' room and asked her to watch her classroom because respondent had diarrhea. Watkins complied with respondent's request and respondent used the nurses' bathroom. The essence of the charge appears to be that when respondent left the bathroom Watkins "smelled cigarette smoke" and that another teacher told her she had seen a cigarette butt in the toilet bowl.

Charge 32 alleges respondent violated school rules as set forth in the affidavit of Barbara Murphy, a third grade teacher in the Board's employ.

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> The substance of this charge is that Murphy heard respondent ask Watkins, the nurse, to watch her class because she had diarrhea. Murphy estimates respondent was in the bathroom ten to 15 minutes and that upon her departure she, Murphy, went into the bathroom and "smelled cigarette smoke and saw cigarette butt in the toilet bowl."

Charge 33 alleges respondent violated school rules as set forth in the affidavit of R.B., a parent of the pupil who had been kicked.

> The substance of this charge is that R.B. proffers the opinion that from her observations respondent "* * * has no control over her class and the incidents that are happening there are because of her lack of direction and control of the pupils."

Charge 34 alleges respondent violated school rules as set forth in the affidavit of Miguel A. Ponce, a school social worker employed by the Board.

> The substance of this charge is that respondent wanted to discuss problems regarding five pupils with him on a particular date when Ponce was not there to discuss all five students. Otherwise, Ponce attests since that date his "* * * meetings with Ms. Thompson have been very professional respecting confidentiality and she showed that she cared about the students and tried to get help for them."

Charge 35 alleges respondent violated school rules as set forth in the affidavit of Maryann Zolota, a librarian employed by the Board.

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The substance of this charge is that respondent checked out 17 books from the school library and that the librarian had difficulty getting respondent to return them.

Charge 36 alleges respondent manifested a "Failure and incapacity to maintain discipline, as set forth in numerous reports, observation reports, numerous evaluations, numerous individual observations, all as set forth in affidavits annexed hereto." It is noted that each of the documents referenced in Charge 36 has been thoroughly discussed in Charges 1 through 35.

DISCUSSION AND FINDINGS

A review of the substance of these charges reveals 17 address respondent's alleged lack of pupil discipline or pupil discipline skills of, or with, her first grade pupils (Charges 1, 2, 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 18, 27, 28, 29, and 33); two charges address respondent's lesson planning (Charges 3 and 14), but only Charge 14 alleges a need for improvement; five charges address the alleged need for respondent to improve classroom management; five charges address respondent's alleged use of ladies' lavatories and her use of various adults to oversee her pupils during such times but without prior approval of the principal; one charge addresses respondent's return of library books; one charge addresses respondent's alleged recitation of certain pupil deficiencies with a social worker and it may be the recitation occurred in hearing range of other pupils; and, four separate charges contain no substance other than being a recapitulation of other charges.

It is fair to say that no one charge standing by itself would warrant respondent's dismissal, while an affirmative finding on more than one charge may warrant dismissal. It is equally fair to say, that the result of a plenary hearing could be, in light of respondent's denial of the factual allegations, no one of the charges would be proven true in fact. It may also be, if the evidence is heard, that the charges are of inefficiency which would require an Order of Dismissal for failure of the Board to grant respondent 90 days within which to improve. Regardless of the result achieved if the matter proceeded to a plenary hearing, no one of the charges nor combination thereof allege the egregious

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kinds of illegal, immoral, abusive or outrageous conduct which, if proven true, would trigger an effort by the State Board of Examiners to seek revocation of respondent's certificate to teach. I find the charges against respondent are of the nature which, if proven true, sufficient to cause this employing Board concern but insufficient on their face to infer that respondent could not function effectively as a teacher in another school district. The charges do not allege the kind of conduct, by omission or commission, which on prior occasions caused the State Board of Examiners to initiate certificate revocation proceedings. See, as examples, In re Gregory Yencarelli, OAL DKT. EDE 1824-84, aff'd St. Bd. of Examiners, Sept. 13, 1984, wherein initiation of revocation of certificate proceedings followed criminal convictions on burglary and theft; In re Ralph Guma, OAL DKT. EDE 1823-84, aff'd St. Bd. of Examiners, Feb. 21, 1985, wherein revocation of certificate proceedings followed an administrative finding of misappropriation of student activity monies for personal use; In re David C. Rowlands, OAK DTK. EDE 7363-84, aff'd St. Bd. of Examiners, April 25, 1985, wherein certificate revocation proceedings followed federal convictions of conspiring to obstruct and delay interstate commerce by extortion and obstruction of a United States Grand Jury investigation; and, In re Ronald M. Yanky, OAL DKT. EDE 2692-85, wherein an administrative hearing was conducted following the initiation of revocation of certificate proceedings following Yanky's plea of guilty to three counts of criminal sexual contact.

Respondent obviously believes she needs to sever her employment relationship with the Board, otherwise she would not voluntarily submit her resignation. The Board obviously desires to terminate the employment relationship with respondent. These two goals are served by the settlement entered.

Should the Board be required to prosecute this case it will not only expend sizeable legal fees, it will endure the hardship of having its personnel taken away from their assigned duties to testify at the hearing. Fourteen persons, it should be noted, most of whom are school personnel, are listed as potential witnesses for the Board. The Board will endure the potential divisiveness in the school community tenure cases tend to inflict. And, a prosecution of this case, despite the consistent good faith efforts of the parties to settle the matter on mutually agreeable terms, can only divert the attention of the Board from its mission of affording its pupils a thorough and efficient program of education. The time, money, effort and other negative elements of divisiveness and diversion which would be expended by the Board to prosecute far exceed in human and financial resources

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the 120 days' pay the Board would tender respondent in return for her resignation. Respondent would be spared the emotional stress of having to endure being the subject of a tenure proceeding, not to mention her being spared sizeable legal fees. As noted above, it may well be respondent can function as an effective teacher to the satisfaction of her supervisors in a different environment. For these reasons, I **FIND** the settlement of this case to be in the public interest.

For all the foregoing reasons, I **FIND** the settlement to be an agreement entered by both parties in full recognition and understanding of their rights, that the settlement has been entered by the parties voluntarily, and that the settlement is in and serves the public interest.

Accordingly, the 36 tenure charges certified by the Perth Amboy Board of Education against Christine Thompson are hereby deemed withdrawn, with prejudice, and the Board is directed to tender Christine Thompson the 120 days' salary withheld from her, in return for which Christine Thompson shall tender her resignation from the employ of the Board to be effective upon this initial decision becoming a final decision.

A final note. Both counsel represented on the record that they were assured by a representative of the Commissioner of Education this initial decision would receive prompt attention in the event this initial decision is reversed so that the hearing would commence, as earlier scheduled, on March 3, 1986.

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

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

February 7, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

FEB 7 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 11 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF CHRISTINE THOMPSON, SCHOOL DISTRICT OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The Commissioner concurs with the amicable resolution of this controverted matter evidenced by the filing of a joint stipulation of settlement and consent order of dismissal. The parties shall conform with the terms of the settlement. The matter is accordingly dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 28, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3903-85
AGENCY DKT. NO. 150-5/85

PATRICK RYAN,
Petitioner,
v.
MILLVILLE BOARD OF EDUCATION,
Respondent.

David Solomon, Esq., for petitioner (Schneider, Cohen & Solomon, attorneys)

Frederick A. Jacob, Esq., for respondent (Jacob & Robinson, attorneys)

Record Closed: December 2, 1985 Decided: January 15, 1986

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

Patrick Ryan (petitioner) alleges he was dismissed from the employ of the Millville Board of Education (Board) as a result of a reduction in force effected in bad faith and in derogation of his tenure and seniority rights.

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

The matter was heard on October 28 and 29, 1985, at the Millville Municipal Building, Millville.

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STIPULATIONS

On October 8, 1985, the parties submitted the following joint stipulation of facts:

On March 18, 1985, the Millville Board of Education, by a vote of 5-2, approved the elimination of the vocational welding program at the Millville Senior High School. Said vote approved the recommendation of Superintendent of Schools Dr. Gene Stanley. The elimination was to become effective at the end of the 1984-1985 school year.

The individual who taught the vocational welding classes at the time of their elimination was the petitioner, Patrick Ryan. Mr. Ryan was the only teacher to teach those classes from the time of his initial employment in January 1971. Through the years, the program taught by Mr. Ryan has been termed, "Metal Shop," "Metals and Welding," and "Welding." All of these terms have traditionally been used interchangeably and to mean the same thing.

RELEVANT TESTIMONY

The petitioner was the only teacher who taught welding classes at the high school from the time of his employment in January 1971. The classes had been referred to by the titles set forth in the stipulation above.

The petitioner contended that his welding and metals curriculum was virtually the same as the machine shop curriculum. This testimony, however, was contradicted by several persons who served at the high school during the petitioner's term of service there.

William Puzak was principal of the high school from 1971-1977. He frequently observed and evaluated both the welding and metals course and the machine shop course. He testified that the two courses were, and had been, totally separate while he was principal. The petitioner's welding and metals course had an objective of teaching welding skills and foundry-type skills. These skills were not taught in the machine shop class. Although some lathe work and cutting, drilling and grinding was done in the welding and metal shop, those skills were only incidental to the making of projects that emphasized welding or metal-pouring skills.

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G. Larry Miller, presently assistant superintendent for curriculum, was principal at the high school from 1977-1982, following Puzak. Miller stated that he did not personally evaluate the petitioner. However, he reviewed the petitioner's evaluations and he had the opportunity to observe what was going on in the petitioner's shop. Miller also testified that that the welding and metals course was separate and distinct from the machine shop course.

Rodger D. Setser also testified. He has been director of vocational education in the district since 1983. Prior to that he was assistant principal in charge of vocational education from 1974-1983. When the school applied for Local Area Vocational School status, he had to serve full-time in the vocational area. As an assistant principal he had other duties. This witness had also taught distributive education. In addition to his other present functions he is also department head of vocational education.

In 1974-75 and 1975-76, a Mr. Hoffman taught machine shop and the petitioner taught metals and welding. This witness made many observations of the petitioner. He stated that the petitioner did a lot of foundry work. There was also much metal softening and bending work. The use of an oxyacetylene welder was also part of the course. The witness emphasized, however, that the two courses were distinct and separate. Funding always had been applied for both courses. However, the courses have always been funded separately.

At one point, certain state regulations prompted the district to drop the word "Metals" from the title of the course.

In the mid-1970's, the petitioner dealt with oxyacetylene welding a great deal. The pupils in machine shop were building small tools and using other machines. The petitioner had six to eight welding stations constantly in use. The machine shop class, by contrast, had one welding station that was not used for instructional purposes.

In or around 1979, the district began to get equipment money from the state. This led to new equipment in the shops but not to new emphases, except to the extent that problems with certain foundry equipment caused a de-emphasis of that part of the program.

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The present teacher of the machine shop course testified. He has taught the course since 1978 and is tenured in the position. He described some of the sophisticated projects performed in his course. He testified as to use of a computer-controlled lathe. He testified that he taught no welding whatsoever in his course. The one welding station in his shop is used primarily for heating metals in preparation for various machine shop projects.

According to this witness, the machine shop course and the welding and metals course had entirely different curriculums from the time he was employed in 1978. He stated further that he is not qualified to teach welding.

The petitioner testified that he was hired in January 1971 under an emergency certificate. He was hired to teach "Metals and Welding." In rebuttal testimony he emphasized the types of projects his pupils did and the fact that they required the use of tools commonly associated with machine shop courses.

The witness candidly stated that there is presently no comparison between the welding and metals course and the machine shop course. Nevertheless, he insists that his experience earlier in his term of service is such as to qualify him as a machine shop teacher.

DISCUSSION, FINDINGS AND DETERMINATION

The Board introduced documents tending to show that the machine shop and welding courses have always been separate and distinct. The personnel records of Robert Langley, a predecessor of the petitioner, were introduced (R-6). The records show that Langley taught machine shop during the 1965-66, 1966-67 and 1967-68 school years. During the summer of 1968, Langley took a course in welding (R-7a). He then was assigned to the metal working course, which he taught in 1968-69, 1969-70 and 1970-71 until his resignation in December 1970 (R-8, R-9).

In December 1970, the metal shop course was taught by Donald Bauman (R-10, R-11). The petitioner took the position of metal shop teacher effective January 4, 1971. From that time through the 1984-85 school year, records show the course taught by him as "Metal Shop" (R-16, R-17, R-19, R-21, and, particularly, R-22). The latter document indicates Metal Shop to be the petitioner's only grade or subject taught.

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The petitioner's own outline for his 1971 metals and welding course shows emphasis in the areas of making holes, making straight lines, fusing and fastening, shaping and molding, and changing the characteristics of metal (J-1). Obviously, there is some overlap here with some of the primary skills taught in machine shop courses. The documents indicate, however, many more differences than similarities. The machine skills in the machine shop course are significantly more sophisticated than those that appear in the metal shop. In addition, many foundry-type projects were performed in the metal shop in the early and mid-1970's. This is consistent with the testimony of Mr. Puzak. Such projects are not those that would be performed in a machine shop. As the course evolved from a metals and welding course in the early and mid-1970's to a pure welding course by 1983, the foundry projects gradually fell away.

By the 1980's, the amount of overlap between the courses seems to have been reduced even further. The March 1983 course of study for Welding I and Welding II (R-35) when placed against the Machine Shop I curriculum (R-5) shows contrasts and not similarities. Although machines and tools found in each of the two shops may be similar, and even in some cases identical, their mere presence is of no moment. It is what the teacher does in the classroom with the pupils that counts. This is a function of the approved curriculum.

Having reviewed all evidence in this matter and having observed the witnesses as they testified, I FIND:

1. Patrick Ryan was employed by the Millville Board of Education from January 1971 - June 1985.

2. Throughout his term of service, he taught Metal Shop.

3. Throughout his term of service, Machine Shop was taught by other persons.

4. There is some incidental overlap of activities and tools peculiar to the two courses.

5. The emphases and an overwhelming number of the activities in the two courses are clearly distinguishable.

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6. The petitioner holds a Teacher of Industrial Arts certificate issued in January 1972 and a Skilled Trades certificate issued in December 1972.

N.J.A.C. 6:3-1.10 sets forth the standards for determining seniority. These standards were revised in September 1983. Pertinent to this case is the language found at N.J.A.C. 6:3-1.10(l)15 which, in pertinent part, states:

> (l) The following shall be deemed to be specific categories.
>
> ....
>
> 15. Secondary.
>
> ....
>
> Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsements under which he or she has actually served.

Since the petitioner taught only the metals and welding course, I **FIND** that he has accrued seniority in that secondary category only.

The petitioner cites Popovich v. Bd. of Ed. of the Borough of Wharton, 1975 S.L.D. 737. That matter involved a teacher of music, who had taught only vocal music, and who bumped another instructor who had taught only instrumental music. The case turned on the seniority regulations cited above. However, the section concerning seniority in secondary schools is the precise section that was changed by the 1983 amendments. Popovich is inapposite to the present matter.

The petitioner also cites Camilli v. Bd. of Ed. of the Northern Highlands Reg'l High School Dist., OAL DKT. EDU 5752-84 (Nov. 14, 1984) mod., Comm'r of Ed. (Jan. 3, 1985). In that case the teaching staff member holding a Physical Science endorsement, who had to that point taught only chemistry, was permited to bump a nontenured physics teacher. The petitioner prevailed because N.J.A.C. 6:11-11.4(b)(14) authorizes the holder of a Physical Science endorsement to teach "physics, chemistry and earth and space sciences other than geography." This particular language allowed Camilli to successfully argue that he had accrued his seniority in physical science rather than chemistry.

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As the Board points out, the analogy between the petitioner's situation here and Camilli's must fail. N.J.A.C. 6:11-6.2(a)(28) states "The title of teacher of skilled trades authorizes the holder to teach a designated skilled trade in all public schools." Thus, a Skilled Trades certificate or endorsement entitles the holder to teach only the course for which the certification was requested. In the petitioner's case, the certification was requested so that he could teach metals and welding. The contrast with Camilli is immediately apparent. Where Camilli could show a regulation making clear that her Physical Science endorsement entitled her to teach physics, chemistry or earth and space sciences, the petitioner here can point to nothing in regulation that states his Skilled Trades certificate qualifies him to teach anything other than welding. The highest court of this state has already endorsed the proposition that "actual experience in particular positions should be the critical determination in awarding seniority." Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983).

In consideration of the foregoing facts, I **CONCLUDE** that Patrick Ryan has not carried the burden of persuasion in this matter. He has not shown either that the duties he performed were substantially those of a machine shop teacher or that his certification is broad enough in scope to qualify him under the reasoning in Camilli to assert bumping rights over the person presently teaching the machine shop course.

Accordingly, 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.

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

15 JANUARY 1986
DATE

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JAN 16 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 16 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ks/e

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PATRICK RYAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the findings and conclusions reached by the ALJ in the initial decision and argues that his seniority is that of a teacher of skilled trades rather than in the classification of welding. Although petitioner concedes that during his employment by the Board he has taught courses alternately entitled "Metal Shop", "Metals and Welding" and "Welding," the content of the courses was actually that set forth in the "Machine Shop" curriculum. In this regard petitioner relies on the provisions of N.J.A.C. 6:3-1.10(g) which read in pertinent part as follows:

> Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title.***

Thus, it is petitioner's contention that the facts of this matter establish that the ALJ's conclusion that his seniority accrued in the narrow classification of "Welding" rather than the "Skilled Trades" category endorsed on his teaching certificate (P-2) is in error. Petitioner relies on Camilli, supra, to support his contention that a teaching staff member's seniority entitlement extends to the broadest reach of the endorsement on his certificate for which employment service is rendered.

Petitioner also points out that he obtained his certificate to teach skilled trades by virtue of the fact that he established his journeyman experience in a machine shop as a machinist in accordance with the provisions of N.J.A.C. 6:11-8.3(a)4. He argues that the record will show that he had no prior experience in welding which

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would qualify him in that particular classification for the purpose of certification.

Alternatively, however, petitioner argues further as follows:

> ***The Administrative Law Judge relies upon N.J.S.A. 6:3-1.10(1)15(i) to conclude that Petitioner could only accumulate seniority in welding since it is the only "subject area endorsement" under which Petitioner has actually served. That provision does not apply since Ryan's certificate in skilled trades does not contain a subject area endorsement. When he obtained his Skilled Trades Certificate, the certificates were not limited to a particular skilled trade. As noted previously, N.J.S.A. 6:3-1.10(g) is controlling. The duties performed by Petitioner were that of a teacher of machine shop and perhaps, also, a teacher of welding, but certainly, a teacher of machine shop. As set forth in Point II hereof, over 90% of Petitioner's classroom work was devoted to teaching machine shop, and not more than 10% was devoted to welding. Thus, Petitioner's seniority is in the general category of skilled trades, and if it is necessary to look at any designated skilled trade, the evidence discloses that Petitioner's duties were performed in the area of teaching machine shop.***
>
> (Petitioner's Exceptions, at p. 4)

Petitioner's exceptions in Point II have been addressed in detail in the initial decision with reference to his claim that the curriculum taught in Machine Shop and Metal Shop/Welding are virtually identical. Therefore, they are incorporated by reference herein.

The Board, in rejecting petitioner's arguments that he taught the same curriculum as was offered in Machine Shop, urges the Commissioner to adopt those findings of fact in the initial decision specifically for those reasons reached by the ALJ.

The Board further rejects petitioner's claim by way of his exceptions and relies on the relevant provisions of N.J.A.C. 6:3-1.10 as amended in pertinent part:

> ***These standards were substantially revised in September of 1983. Both Petitioner [Metals and Welding Teacher] and Louis Tice [Machine Shop Teacher] are in the "secondary" category. The relevant language concerning that category is as follows:

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(1) The following shall be deemed to be specific categories

....

15. Secondary.

....

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

It would seem clear from this language, that, since Petitioner taught only the Metals and Welding course, he has seniority only in that course.*** (Board's Reply Exceptions, at p. 10)

In addition to those cases cited in the initial decision, the Board also relies on the pertinent language of the decision rendered by the State Board of Education in Rudolph-Nachtman v. Board of Education of Middletown, Monmouth County, December 5, 1984, aff'd N.J. Superior Court, Appellate Division, December 6, 1985 which reads in part as follows:

It is, therefore, now settled that certification is not the sole criteria for determining seniority rights to a particular position. Lichtman, supra, Flanagan, supra. Rather, such rights accrue only when: (1) a claimant serves in a particular position for which he is certified, (2) is certified for the position he seeks and (3) a substantial identity exists between the nature and the duties of the position he has held and the position he seeks.
(Slip Opinion, at p. 6)

Upon review of the record and the arguments advanced by the parties in support of their respective positions in the instant matter the Commissioner finds and determines that the ALJ properly concluded that the facts of this matter do not support petitioner's claim to seniority in the designated classification of Machine Shop under the Skilled Trades endorsement on his teaching certificate.

It is observed that such designations on Skilled Trades endorsements were not issued by the State Board of Examiners until 1976 pursuant to the provisions of N.J.A.C. 6:11-6.2(a)28. Consequently, petitioner was certified in 1972 under the generic classification of "Skilled Trades." A further review of petitioner's Application for Certification (R-21) reveals that the grade or

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subject in which he desired designation for certification was "Metals." Though there is no such designation presently set forth in the above-cited regulations, it appears to be beyond question that the activities in which petitioner engaged as a teacher were primarily those of welding. Therefore, in order to reach a determination with respect to the designated area within the "Skilled Trades" classification in which petitioner's seniority accrued, the Commissioner observes that the only designated area in which he served or had actual experience in the Board's employ was "Welding." (N.J.A.C. 6:11-6.2a(28)xxxiv) The Commissioner so finds and determines herein.

Accordingly, the Commissioner recommends that the State Board of Examiners issue an endorsement to petitioner in Skilled Trades with the designated classification of Welding endorsed upon it for seniority purposes.

In all other respects, however, the Commissioner finds and determines petitioner's claim to seniority in any other designated area under the Skilled Trades endorsement (P-1) which he currently possesses to be misplaced and without merit.

Accordingly, the Commissioner hereby affirms the initial decision as modified above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 28, 1986

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PATRICK RYAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 28, 1986

For the Petitioner-Appellant, Schneider, Cohen, and Solomon
(David Solomon, Esq., of Counsel)

For the Respondent-Respondent, Jacob and Robinson
(Frederick A. Jacob, Esq., of Counsel)

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

June 4, 1986

Affirmed N.J. Superior Court April 7, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 2892-85
AGENCY DKT. NO.115-5/85

ALEXANDRA V. SPIZZIRI,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

Andrew Mainardi, Jr., Esq., for respondent
(Mainardi & Mainardi, attorneys)

Record Closed: January 3, 1986 Decided: January 22, 1986

BEFORE **JAMES A. OSPENSON, ALJ:**

Under OAL Dkt. No. EDU 9003-83, by final decision of the Commissioner of the Department of Education on January 25, 1985, it was determined that Alexandra V. Spizziri, a tenured teaching staff member employed by the Board of Education of the Borough of Franklin Lakes, Bergen County, who was not then on active employment

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service by reason of extended illness, had not abandoned and was still entitled to her tenured employment position but that her rights to reinstatement thereto were conditioned upon compliance with an agreement between her and the Board on September 3, 1982, which provided generally that prior to her return to employment she must submit to a psychiatric evaluation by a psychiatrist selected by the Board. The agreement provided that if she had bona fide objection to the psychiatrist chosen, the Board would chose another examiner. In the present second petition of appeal, petitioner alleged she had bona fide objection to a Board-chosen examiner for reasons advanced in writing to the Board on March 11, 1985. The Board's declination to appoint another examiner, it was alleged, contravened her rights under the agreement. She sought judgment directing the Board to enter into a procedure by which an impartial examiner might be chosen to determine her competency to return to active classroom teaching service. The Board admitted its obligation to select another examiner if petitioner registered bona fide objection to the examiner first chosen by the Board but denied petitioner's objections as put were bona fide within the meaning of the agreement. The Board denied timeliness of petitioner's registering of objections, alleging that they were insubstantial and insufficient, and that even if such objections were timely, her tenured position had expired.

The second petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on April 30, 1985. The Board's answer was filed there on May 15, 1985. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on May 21, 1985 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, a prehearing conference was conducted in the Office of Administrative Law on June 27, 1985 and an order entered, establishing inter alia, a hearing on October 16, 1985. At request and/or with consent of the parties that date was adjourned until December 3, 1985. As directed by prehearing order, the parties submitted at that time stipulations of all relevant and material propositions of fact, including documentation. The matters at issue were addressed and resolved as if on cross-motions for summary decision, on pleadings, admissions, documentation, stipulations and

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memoranda of law, pursuant to N.J.A.C. 1:1-13.1 et seq. Posthearing submissions having been made, the record closed.

As appeared from a prehearing conference order, paragraphs 2, 5, 6, and 8 of the petition of appeal were admitted by the Board. Paragraphs 3, 4, 7, 9 and 10 were admitted in part and denied in part. At issue in the matter generally are the following:

A. Whether petitioner's objections to the Board's examiner were timely under the agreement;

B. Whether the objections were bona fide within the meaning of language of the agreement;

C. Whether pursuant to N.J.S.A. 18A:16-4, petitioner's tenured employment had ended; and/or

D. Whether, and in what form, petitioner is entitled to relief.

STIPULATIONS AND FINDINGS OF FACT

Essential facts in the matter are not disputed and are but consequent upon facts found and determined in prior litigation under OAL Dkt. No. EDU 9003-83. Briefly, petitioner was granted a sick leave of absence with pay for the school year 1982-83. Thereafter, she requested an extension of the leave for the school year 1983-84 but was denied it. The prior judgment of the Commissioner was that petitioner had not abandoned her tenured employment position but that any rights to reinstatement thereto were conditioned upon compliance with an agreement between her and the Board on September 3, 1982, which provided in paragraph 3:

> I understand and agree that prior to returning to any teaching position in Franklin Lakes in September of 1983 or any time thereafter, I must submit to a psychiatric evaluation and receive a

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satisfactory evaluation from the psychiatrist relative to my health and relative to my ability to be a teacher in the Franklin Lakes system. I also understand and agree that the psychiatrist who will conduct the evaluation will be selected by the Board of Education. If I have a bona fide objection to the psychiatrist chosen by the Board, I understand the Board will chose another doctor. The basis for any objection by me shall be specifically explained, in writing, and delivered to the Board, within five days of receipt of said notification. [J-2].

By letter on June 23, 1984, the Board attorney notified petitioner's attorney it was pointed out the Board had previously selected Dr. Jerome D. Goodman to examine petitioner and that Goodman's selection by the Board would allow him to compare his present observations with those made in the Spring of 1983, time of an earlier examination by Goodman, and likely to produce a more valid diagnosis and prognosis. Petitioner at that time was directed through her attorney to submit for examination by Goodman as a pre-condition of her return to work for the school year commencing September 1984. Subsequent to final judgment in the earlier litigation, that is, January 25, 1985, petitioner's attorney notified the Board on March 11, 1985 of petitioner's objections to the Board's selection of Goodman as examining psychiatrist [J-7]:

1. Mrs. Spizziri has professional contact with Dr. Goodman at an earlier time when her name was Mrs. Eichler.

2. During the course of her original examination by Dr. Goodman, a number of disagreements arose in connection with the fact that Dr. Goodman did not have Dr. Rutkowski's letter explaining Mrs. Spizziri's prior illness and hospitalization. [J-1]. Dr. Goodman apparently communicated to Mrs. Spizziri that it was her obligation to supply these reports not his to obtain initially, and that the failure to supply such reports indicated some kind of conscious deficiency. While Dr. Goodman may not have intended such communication, the affect [sic] was unfortunate.

3. As you know, whether as a result of confusion or not, Dr. Goodman and Dr. Papowitz during the course of this litigation, agreed on a neutral third psychiatrist

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recommended by Dr. Goodman, to wit: Dr. Myerhoff. Mrs. Spizziri is perfectly willing to abide by Dr. Myerhoff's report; we understand from prior communications that is unsatisfactory to the Board; nevertheless, the very fact that Dr. Goodman's participation in that selection would seem to us to make him ineligible just as much as if we were insisting on Dr. Papowitz.

4. There is some question with respect to the release of Dr. Goodman's prior reports without the written authorization from Mrs. Sprizziri.

Petitioner's attorney assured the Board attorney at that time [J-7 at 2] that the above feelings were deeply held by petitioner and were of sufficient moment to pose difficulty with Goodman's further participation in the proceedings, without, nevertheless, any reflection on his "competence or professional performance."

In addition, the parties having so stipulated, I make the following supplemental Findings of Fact:

1. Petitioner's leave of absence commenced on September 2, 1982, for reasons expressed in a report to the Board by Leon S. Rutkowski, M.D., on September 1, 1982. [J-1]. She has not since returned to work in the district.

2. When the parties and their attorneys met at the Office of Administrative Law to try the predecessor action, petitioner for the first time advised that her health was restored to the point where she wished to return to work, and she submitted in support of that request a report of her treating physician, Eugene B. Papowitz, M.D., dated April 29, 1984 [J-4]. On the basis of that report a settlement of the predecessor action was proposed but failed of ratification by the Board.

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3. Although petitioner indicated during the period from May 11, 1984 until eve of her attorney's notice to the Board of her refusal to accept Dr. Goodman as examining psychiatrist on March 11, 1985, that she wished to return to work in the district, she refused to present herself for examination by Goodman during that entire period, nor did she furnish the Board any reason why she would not submit herself to his examination before her attorney did so on March 11, 1985 as in J-7.

4. In a letter to its attorney on April 1, 1985 (exhibit B annexed to the petition of appeal), the Board affirmed its determination that petitioner should be seen by Goodman in order to comply with the terms of the contract she entered into with the Board.

DISCUSSION

Law of the case, it would seem, is judgment of the Commissioner that petitioner has not abandoned her tenured employment and that any rights to reinstatement to active employment service are conditioned upon her compliance with the agreement of September 3, 1982, which as above spells out those pre-conditions necessary for fulfillment before her return to any teaching position in the district in September of 1983 "or any time thereafter." Because of the history of litigation between the parties, it is my view that N.J.S.A. 18A:16-4 is not applicable herein despite passage of more than two years since beginning of her leave of absence. Instead, and because of the express agreement of the parties, I believe petitioner's right of reinstatement is not circumscribed thereby but instead continued to survive, if contingent upon compliance with agreement,

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until filing of the second petition when the limiting period of the statute was tolled. In like manner, under circumstances as they have developed, I do not believe petitioner is barred from reinstatement by passage of more than five days before she registered objections to examination by Goodman. The five-day notification requirement should not fairly be invoked without express notification to her that such bar would result without timely registering of objections.

At bottom, therefore, in my view, what is fundamentally at issue here is determination of the bona fides of petitioner's objections as put by her attorney to the Board in J-7. The issue to be resolved is less whether those objections abstractedly are bona fide than whether the Board's determination the objections were not bona fide was arbitrary, unreasonable or contrary to law under the agreement. Her principal objections were that she had had professional contact with Goodman at an earlier time when her name was Mrs. Eichler and that during the course of an original examination by Goodman, disagreements arose between them stemming from the fact that Goodman did not have Dr. Rutkowski's letter explaining her prior illness and hospitalization. Petitioner objected because Goodman told her it was her obligation to supply those reports and not his to obtain initially. No suggestion of professional impropriety, bias or unethical conduct was intimated. While it may be conceded petitioner is serious about her objections for those reasons, and to that extent they do not detract from her good faith, construction and interpretation of the words "bona fide" require a determination whether petitioner's objections though well-intended bear sufficient weight and consequence objectively to be credited as reasonable. In my view, they do not. It is difficult to conceive that the professional relationship of psychiatric examiner and examinee, absent any suggestion of bias, prejudice or impropriety, is one that necessarily and sufficiently requires absolute accord between the two. The relationship is not that of treating physician and patient where rapport and accord are critical. It is difficult to presume a professional examiner of recognized credentials would be so unfaithful to obligations of his profession as less than fairly and ethically to assess the signs, symptoms, history and complaints presented and so report his conclusions to the entity commissioning the examination. By terms of

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agreement generally petitioner already agreed to forego any initial right of selection. An unsupported perception the examiner chosen is "objectionable," standing alone, is not sufficient to render the perception valid enough to require the Board to credit it. Board selection of Goodman, on the other hand, is logical and consistent with a previously announced preference for continuity. And though petitioner may later elect to challenge his re-examination, one cannot now anticipate it will be adverse to her interests.

CONCLUSION

Accordingly, based on the foregoing, I hereby **CONCLUDE** petitioner's objections to selection of Jerome D. Goodman, M.D., as Board-selected examining psychiatrist, though well-intended and presumably sincere, but without a showing of impropriety, bias or unethical conduct, are insufficient and not "bona fide" in the sense of carrying sufficient weight to require those objections to be honored under the agreement of September 3, 1982. The Board's offer of proof through testimony by Gooodman that petitioner's objections are weightless is unnecessary under the circumstances to a determination her objections by themselves bear no weight sufficient for relief under the agreement. The issue is not truth of implied criticism but rather whether critical objections by themselves are sufficient. Board rejection thereof was reasonable and is **SUSTAINED**. The petition of appeal seeking judgment directing the Board to enter into a procedure by which an "impartial" psychiatrist is chosen to examine petitioner to determine her competency to return to classroom teaching, therefore, is **DISMISSED**.

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

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

January 22, 1986
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 27 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ALEXANDRA V. SPIZZIRI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful review of the record in this matter, the Commissioner agrees with the findings and determination of the Office of Administrative Law that petitioner's objections to selection of Jerome D. Goodman, M.D., as Board-selected psychiatrist, while well-intended and presumably sincere, but without a showing of impropriety, bias or unethical conduct, are insufficient and not "bona fide" in the sense of carrying sufficient weight to require those objections to be honored under the agreement of September 3, 1982.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4386-85
AGENCY DKT. NO. 185-7/85

KATHLEEN DARDEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Respondent.

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

Edwin J. Nyklewicz, Esq., for respondent

Record Closed: December 10, 1985 Decided: January 17, 1986

BEFORE STEPHEN G. WEISS, ALJ:

This is a challenge by petitioner to the respondent's withholding in April 1985 of her 1985-86 salary and adjustment increments. Petitioner, who is a tenured teaching staff member employed by the Butler Board, timely filed an appeal to the Commissioner of Education. Following the filing of the Board's answer, the case was transmitted to the Office of Administrative Law for hearing, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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The case was preheard before the undersigned administrative law judge on August 19, 1985, and a hearing was conducted on December 9 and December 10, 1985, in Hanover, New Jersey.

Prior to commencement of the testimony, the parties filed a Joint Stipulation of Facts to which were attached several exhibits (Exhibits J-1 through J-15). The Stipulation set forth the following uncontested facts:

1. Petitioner is a tenured teacher of English and Latin in respondent's school district, and has been so employed since 1966. She is certified as a teacher of English and Latin, grades 7 through 12.

2. Her salary and adjustment increments have never been withheld previously.

3. She received a series of evaluations during the 1984-85 school year.

4. On or about April 29, 1985, the respondent Board of Education voted to withhold the employment and adjustment guide increments of petitioner for the 1985-86 school year.

Attached, as noted, to the Stipulation were several exhibits. They included formal observation reports prepared with respect to petitioner during 1984-85, relevant memoranda respecting the evaluation process, and certain written responses which petitioner had prepared with respect to the observations made of her.

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TESTIMONY ON BEHALF OF PETITIONER

The petitioner, Kathleen Darden, has taught English and Latin at Butler High School since September 1966. She holds a bachelor's degree from Montclair State College and masters degrees from William Paterson College in both English and Communication Arts. According to petitioner, prior to the 1984-85 school year, she had never experienced any problems with respect to her teaching performance. At no time had she ever been subjected to any threat that her increment might be withheld. Indeed, at the end of the 1983-84 school year, Ms. Darden received a final, summary evaluation from her immediate supervisor in which it was noted that petitioner had performed in a satisfactory manner in all areas (Exhibit P-1).

During the latter part of the 1983-84 school year, petitioner, who taught only English at Butler High School at that time, was told by her principal, Joseph DiPasquale, that she would be teaching a new subject to incoming freshman in September 1984 called "study skills." Petitioner was pleased with the idea, although she believed that someone else should teach that course since her background seemed to her to be more suitable to other areas. However, since it was decided that she should teach the new course, she accepted that assignment. During the summer of 1984, petitioner prepared materials for the new course of study, which anticipated 16 sessions. She left it at the high school for review by an assistant principal, Mr. Wendel Kralovich. She did not receive any response from him and assumed that it was acceptable. In late August 1984, when petitioner received her schedule for the upcoming school year, she learned that she was to teach the study skills course every day and therefore there would be 40 sessions rather than only 16. She said that she had no prior indication of this increase.

Petitioner began her teaching assignment in September 1984. It included six daily teaching periods, one class in English I, four classes in study skills, and one class called "Latin for Better English." All of her students were high school freshman.

In October 1984, petitioner's immediate supervisor, Marie Liddicoat, conducted a "formal observation." This meant that the evaluator would remain in the classroom for

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the entire period, and would then give a prescribed form used in the district to the teacher upon which there were places for comments both by the evaluator and the teacher. The particular class observed by Ms. Liddicoat was the seventh period English I class. On the day in question, petitioner was teaching a grammar lesson. According to Darden, she felt that the class went "reasonably well," particularly since grammar is a difficult subject. At some point after the class observation, Liddicoat left the observation report for petitioner to review (Exhibit J-1). When petitioner saw it, she was "quite shocked" and was especially unhappy about seeing "I"s on it. An "I" stands for "needs improvement" and petitioner did not understand why she was marked in that manner. The observation report had 11 separate lines where a rating could be inserted, divided into three major areas — preparation, teaching skills and class climate. In the area of "preparation," Ms. Liddicoat rated petitioner as "needs improvement" in the subarea of "organization and planning." In the area of "teaching skills," Liddicoat noted a need for improvement in the subarea of "use of time." In the "comments" section on the report, Ms. Liddicoat observed that the students seemed confused at various times during the lesson, and that examples on a worksheet brought in too many concepts for one lesson. The evaluator concluded with an observation that had petitioner followed the grammar textbook, this might have lent itself to less confusion among the students. The second page of the report contained room for the evaluator's suggestions and for the teacher's comments. In the suggestion space, Ms. Liddicoat recommended that the grammar textbook should be followed more closely and that too many concepts not be taught at once, since this confuses the students. Also, the evaluator suggested that the teacher should not begin to teach the subjunctive, indicative, and imperative moods just four minutes before the end of the period, as the result of a question raised by one of the students relating to a worksheet.

Petitioner responded in her section by noting that none of the material was new and that the students should have been competent to handle all that took place that day. She attributed any confusion to the "unusual slowness with which this class has accepted the responsibility and rigor of high school work. After many weeks of regular patterns and assignment sheets, they are still forgetting to bring the proper book and to do homework." She also commented that she believed herself to be a careful and

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conscientious teacher and said she would be happy to stick to the regular grammar book, since she had "no desire to be recalcitrant when given direction by a supervisor."

For the next few months, there were no further "formal" observations of petitioner's classes. However, there were a number of "informal" observations whereby an administrator "would drop" in for 10 or 15 minutes in order to observe what was going on in class. These visits would not be followed up with any written reports, as such. According to petitioner, one of those informal observations occurred in December 1984, after which she received a request to meet with Mr. DiPasquale, the principal, about it. She said she did not know in advance what the meeting was for, but when she attended, the principal told her that he and other administrators were "seriously displeased with my work" and were even considering a withholding of her increment. At that same meeting, the principal told Darden that she seemed to have problems of organization and was not using her time in class well. She disagreed with the perception and complained to him about the number of different classrooms that she had been moved to for her study skills classes.

DiPasquale gave petitioner a memorandum, prepared by him, which summarized the conference. In it he noted that petitioner was advised that the administration was unhappy with her classroom performance, and that they discussed certain areas of concern. As a result, it said, petitioner agreed to contact parents of students who were not doing their home preparation, and she also agreed to deliver a plan weekly to the administration setting forth each one of her daily lessons. For its part, the administration agreed to change her room location if that would improve the educational program. The memorandum concluded with the comment that the petitioner was informed that if she did not improve, a recommendation that her increment be withheld "would, in fact, be a real possibility" (Exhibit J-2).

Following her receipt of the memorandum, petitioner prepared a lengthy document commenting upon and rebutting what had occurred (Exhibit J-2A). This was prepared over the 1984-85 Christmas vacation period and submitted to the administration sometime in January 1985. In that rebuttal, petitioner set forth, at length, her own

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perceptions regarding what she had been told and took issue with all of the criticisms leveled against her.

During the latter part of January 1985, petitioner requested a meeting with the senior administrators, at which she was accompanied by the then president of the Butler Education Association, as well as an NJEA Uniserve representative. The purpose of the meeting was to clarify what was expected of her and to be informed what it was she had to do in order to "obviate the horror of having my increment withheld." Essentially, she was directed to improve in various areas, and especially to be more rigorous teaching the Latin for Better English class and, perhaps, be less demanding in English.

A second "formal observation" was conducted in petitioner's class on February 4, 1985 by the assistant principal, Mr. Kralovich (Exhibit J-3). The class was an English I section — the same class observed by Liddicoat in October 1984. According to petitioner, while she did have some anxiety during the course of that class, since she was not using her own materials, she was generally pleased with the way the class went since it was dealing with a difficult exercise at the time. The written report prepared by Kralovich noted, however, that petitioner needed improvement in the subareas of "use of time" and "learning atmosphere." In the narrative portion, Kralovich stated that too much time was spent on the exercise completed, and students were calling out answers, some with the intention of creating confusion and delay. He felt that more structure and productivity was desirable. He further noted that students were not held accountable for doing the exercises, and the length of time it took to cover an exercise resulted in loss of interest by some of the students. With respect to suggestions for improvement, Kralovich observed that a review exercise "requires structures and order," and not every answer can be considered correct. He recommended that students should raise their hand and be recognized before giving an answer and commented that having them simply calling out answers created confusion and delay.

In a reply to the comments made by Kralovich, the petitioner took issue with them. In the first place, she was distressed that the formal observation did not take place until February 4, 1985, which was later than she had expected. She believed that

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she had covered the material in class at a pace that was reasonable and having students call out answers was a legitimate technique called "chorusing," which was perfectly appropriate as a period is ending. She noted, however, that she would avoid using the technique in the future. Also, since she had planned specifically for the lesson by carefully producing, arranging and stapling materials into folders for the students, she was surprised when several possible arrangements revealed themselves with one of the exercises. This occurrence, she said, intimidated her, and she explained to Kralovich the following day that she would share her insights with the class. As she also noted, "confusion can occur in any class, but Ms. Darden felt she handled the situation in the best way by consulting and reporting back to students."

A third "formal observation" took place on February 21, 1985. On that date, Liddicoat, who is the English Department chairperson, again observed petitioner's class. The report prepared by her rated the petitioner "satisfactory" in every area, except that of "student involvement." In that respect, Liddicoat noted that the class involved a lesson on the novel Lord of the Flies, and although petitioner's questions were thought-provoking, most of the students "were not involved in the discussion, as evidenced by their lack of participation." Responses, she said, were limited to a few students. According to the evaluator, petitioner should have allowed students to do more of the thinking and discussing during the lesson. In her reply, Darden said that she would try to involve students more and to prod them into doing more of the thinking (Exhibit J-4). During her testimony at the hearing, petitioner also observed that the lack of student involvement on this occasion was due, as well, to the fact that this was the third formal observation of the same class and the students became passive when the supervisor was there.

During the remainder of February 1985 and for most of March 1985, a number of "informal" observations took place of the petitioner's classes. At no time was she ever given any "feedback" with respect to them. Then, on March 29, 1985, petitioner was the subject of two "formal observations" on the same day, one in the Latin for Better English class (conducted by DiPasquale), and the other in one of the study skills sections (conducted by the high school guidance head) (Exhibits J-5 and J-6). DiPasquale's report

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rated petitioner satisfactory in every area, except "classroom methods." In this respect, he noted in the narrative portion that "I would caution you that a good lesson always lends itself to a summary at the conclusion. That appeared to be missing in this lesson." The formal report prepared by the guidance head, Timothy J. McGovern, rated petitioner "satisfactory" in every area. He concluded that during this period, he observed that the students worked quickly and efficiently on an open-book test assignment, which was comprehensive, and it was apparent to him that they understood the material needed to complete the test. Darden, he said, did "an acceptable job."

Two more "formal observations" were conducted of the petitioner. One on April 1, 1985 by Liddicoat in the English I section, and the other on April 2, 1985, by an assistant principal, Edward Bolcar, also in the English I section (Exhibits J-7 and J-8). In her observation report, Liddicoat rated petitioner as needing improvement in the main areas of both "technique" and "pupil reaction." In particular, she felt that improvement was needed insofar as "pupil involvement," "evaluation," "pupil participation," "rapport" and "self-discipline" were concerned. In the narrative portion of the comment section, she observed that some students did not understand some of the material, and others were not involved in the lesson at all. In the "suggestions for improvement" section, she said that the particular worksheet handed out by petitioner was confusing in that numbers were changed, notes were added, and a concept not included in the textbook was on the sheet. She suggested that petitioner retype material when taking it from another source (Exhibit J-7). In a three-page reply to the observation narrative, petitioner pointed out that among the reasons for the responses by students was that they never exhibited enthusiasm or excitement about a grammar lesson — that the most a teacher could hope for when teaching such a lesson was "polite, quiet tolerance of the teacher's plans," and that she felt that she had fulfilled her expectations in this respect. As she put it, "the class gave her as much cooperation and interaction as they reasonably could, considering their interest in the material and the emotional climate in the room." The petitioner went on to take issue with the criticisms made by the evaluator; and particularly noted the fact that the students were undoubtedly reacting to her negative feelings because of the stress and anxiety she had experienced since the previous December, with observers constantly in the room. The students, she said, "reacted to the tension by becoming more quiet and

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withdrawn each time they were observed." Petitioner also objected to the rating of "needs improvement" in the various areas, and essentially resisted accepting the rating. She concluded her response with the observation that in her opinion "the lesson had been well planned and was carefully executed," and that Liddicoat's comments did little to help her teach more effectively.

The observation report prepared by Bolcar noted that petitioner was satisfactory in every area, except "classroom methods" (Exhibit J-8). In this respect, it turned out that the criticism had to do with Bolcar's belief that the classwork and the quiz given during the period was too easy for the particular level of students. In her response to the evaluator, petitioner pointed out that the methods that she used in that class were in direct response to directives given her by the department head, and the drill and quiz which Bolcar observed had been developed in conference with that person. Thus, noting that she always worked diligently to comply with directions, she expressed a problem with the difficulties caused by inconsistent directions from different administrators.

During mid-April 1985, petitioner received a memorandum from DiPasquale advising that he was recommending to the Superintendent that her increment for the 1985-86 school year be withheld because of "the negative evaluation that you have received this year." In that memorandum, he noted that five administrators had been involved in the evaluation process and had concurred unanimously in the decision. The specific reasons for the recommendation to withhold petitioner's increment were set forth as follows:

> To be more specific, this action is being taken as a direct result of your ineffectiveness in a classroom setting. The evaluations demonstrate poor teaching techniques, lack of pupil participation, and, in general, confusion on the part of students in your classes. Though some progress has been made in your Study Skills program, your lack of effectiveness in the English I and Latin I programs make this recommendation a necessity (Exhibit J-10).

At the same time DiPasquale notified the Superintendent, Mr. Frank Stranzl, that he would be recommending a withholding of Ms. Darden's increment for the 1985-86 school year (Exhibit J-9).

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In a letter dated April 25, 1985, petitioner was advised by Superintendent Stranzl that the Board of Education intended to take official action on DiPasquale's recommendation at a meeting to be held on April 29, 1985, and that she would have an opportunity, if she wished, to be present at an executive session to discuss the matter with the Board (Exhibit J-11). Petitioner met with the Board in executive session on April 29, 1985, in the company of the new Butler Education Association president, Mr. James Kelly. At that meeting, they went through the various observation reports and urged the Board not to accept the recommendation. Nevertheless, following a caucus, the Board determined to accept the recommendation made to it for withholding the increment. On May 6, 1985 a formal letter advising petitioner of the Board's action was sent to her by the Board Secretary. In that letter it was noted that the Board had adopted a resolution on April 29, 1985, setting forth that in accordance with N.J.S.A. 18A:29-14, the Board had voted to withhold Darden's employment and adjustment increment for the 1985/86 school year because of her "less than satisfactory teaching performance during the 1984/85 school year, including but not limited to: "ineffectiveness in your English I and Latin I classes: (a) "poor teaching techniques"; and (b) "lack of pupil participation" and "general student confusion" (Exhibit J-12).

At the end of May 1985, petitioner received her "final summary evaluation" prepared by Liddicoat. In it, Darden was rated as needing improvement in the general areas of "preparation," "technique" and "pupil reaction." In that final evaluation, Liddicoat particularly noted that petitioner demonstrated a need to improve in the classroom, that her lessons were confusing to students and disorganized, that too many concepts were included in a single lesson and that there was a need to improve plans for substitutes when petitioner was absent (Exhibit J-13). Petitioner then prepared a response to that summary evaluation, which was attached thereto, in which she agreed that she would work toward improvement.

The only other witness offered on behalf of petitioner was James Kelly, the current president of the Butler Education Association. Kelly teaches 8th grade social studies and has been employed in the school district for 13 years. He said that some time during the spring of 1985, he had occasion to see Mr. McGovern in the high school parking

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lot and asked him about petitioner's increment. Kelly said he expressed concern to the guidance department head over the fact that McGovern had presumably joined in the recommendation by the administrators to withhold the increments, even though his own "formal observation" (Exhibit J-6) rated petitioner satisfactory in every area. McGovern, said Kelly, replied that he was "a team player" and was "just going along with it."

On cross-examination, Kelly conceded that although he represented petitioner at the Board hearing at the end of April, he never mentioned the alleged comments made by McGovern. Also, it was pointed out that the withholding of Darden's increment related to her performance in the English and Latin classes, not the study skills area which was the class McGovern observed.

TESTIMONY FOR RESPONDENT

Testimony on behalf of the Butler Board was presented by the three administrators most directly connected with the evaluation of the petitioner, the principal of the high school, DiPasquale; the assistant-principal, Kralovich; and the English Department head, Liddicoat.

DiPasquale has been the high school principal since September 1983 and has been employed in Butler for 17 years. He holds a masters degree plus 60 credits. In early October 1984, DiPasquale observed the "Latin for Better English" class taught by petitioner because there had been phone calls from parents concerning that class. Apparently, some students were seeking to get out of the class and several had asked, through their parents, to leave.

In December 1984, DiPasquale observed one of the study skills classes on an informal basis and noted there was much confusion in the classroom. He said he was surprised by it and that was what led to his conference with Darden that month. Although he informed Darden of the possibility that he might have to recommend that her increment be withheld unless she improved, this information stemmed not only from his own observation, but from reports he had received from others concerning her classes.

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DiPasquale testified that although there are three possible ratings on the evaluation forms, "satisfactory," "needs improvement" and "unsatisfactory," he only uses the first two, since, in his opinion, there are no unsatisfactory teachers at Butler High School. Accordingly, giving a teacher an "I" would be equated with the need to withhold his/her increment. DiPasquale said he conveyed this notion to his supervisors soon after becoming principal and was aware that they had then imparted this information to teachers.

DiPasquale explained that the evaluation process as followed by him involved three formal observations, with at least one conducted by the principal. If, however, an "I" is given by an adminstrator, other than the immediate supervisor, there then must be a total of seven observations. This, he said, is what occurred in petitioner's case.

Following the completion of all of the observations in early April 1985, the principal met with his administrators, Kralovich, Bolcar, McGovern and Liddicoat. They all read the various observation reports and concluded they should recommend to the Superintendent that petitioner's increment be withheld. The general belief of all was that Darden had been ineffective during the 1984-85 school year.

On cross-examination, DiPasquale noted that he and the two assistant-principals, Bolcar and Kralovich, had assumed their new positions in September 1983, and he was determined to upgrade the evaluation process to be sure that classroom performance was closely noted. As a result, the frequency of observations was increased. Previously, there had been no "informal" observations under normal circumstances, and only one "formal" observation of a tenured teaching staff member was ever made. Now, "informal" observations often occur and at least four, and as many as seven, formal observations could take place.

According to DiPasquale, the increment withholding in petitioner's case was the first such incident that he could recall since he had been at Butler High School. In his judgment, a "needs improvement" or "I" rating means that students are not learning, that

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a serious problem exists which interferes with the educational process. At a meeting held by DiPasquale with the other administrators, in mid-April 1985, they all discussed the observation reports and unanimously concluded that a Recommendation should be made to the Superintendent for a withholding of the petitioner's increment. DiPasquale said he asked each person to speak concerning the matter, and that all of them felt that this action should be taken because of petitioner's ineffectiveness during the school year.

DiPasquale said that when he took over as high school principal in September 1983, with Bolcar and Kralovich joining him as assistant-principals, it was determined that there ought to be a change in the evaluation process primarily because teachers felt that the administration did not do enough in terms of classroom evaluation. Accordingly, the frequency of visits was increased. Based upon his informal observation of Darden in the beginning of the 1984-85 school year, DiPasquale came to the conclusion that, in her case, "we have problems." The purpose, then, of the meeting in mid-December 1984 was to make Darden aware that the administrators were "quite concerned about her performance." During that conference, he did describe those concerns and pointed out to her that the confusion which seemed to mark some of her classes was due to her not sticking to her lesson plan.

Although there is no reference in any written policy manual with respect to the consequences of receiving an "I," DiPasquale believes that all the teachers knew that receiving this rating meant an increment would likely be withheld unless the improvement was made. He informed his supervisors to advise the teaching staff of this, and believed that they were. Again, as the result of his independent review of the observation reports regarding Darden, and in consultation with the other administrators, a unanimous decision was made in April 1985 to recommend that the increments be withheld.

The next Board witness was the English Department chairperson, Marie Liddicoat. She is presently in her fourth year as the chairperson, having served in the school district for 16 years altogether. She holds a master's degree and is certified as a supervisor, a reading specialist and a principal. Liddicoat personally conducted six

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"informal" and three "formal" observations of the petitioner during the 1984-85 school year, and concluded that Darden's increment should be withheld because of her ineffective performance. According to Liddicoat, all of the teachers in her department were aware, as a result of departmental meetings, that receiving an "I" during an evaluation, meant that the teacher "could possibly have an increment withheld." On cross-examination, Liddicoat said that as a result of her observations of Darden's performance, she saw repeated problems of student confusion. This confusion was more pronounced than she had ever seen before with respect to Darden's work. Liddicoat recalled a meeting in January 1985 with petitioner, following the administration's receipt of Darden's lengthy reply to the December memorandum from DiPasquale. According to Liddicoat, Darden did mention her belief that she was receiving conflicting signals from the administration about being too difficult on the one hand, but no going fast enough on the other. Liddicoat said that she then told petitioner that it was not a case of her going too quickly — it was simply that she was trying to cover too many concepts.

On redirect examination, Liddicoat pointed to the April 1985 evaluation which she conducted, and stressed that it again revealed the absence of the needed improvement. Liddicoat also observed that Darden's rebuttal to that report blames the makeup of the class for the rapport problems. Liddicoat also confirmed DiPasquale's testimony that the administrators unanimously agreed to recommend the withholding of the increments.

The next witness, Wendel T. Kralovich, is an assistant principal at Butler High School and has been employed in the district for 13 years. He is certified to teach social studies, English and Latin, and to be a supervisor and a principal. Kralovich evaluated Darden during the 1984-85 school year and had conducted a "formal" observation in February 1985. He observed a number of interrelated deficiencies involving the use of class time, methodology, class control and quality of material. He, too, voted to withhold her increment on the basis of his observations.

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On cross-examination, Kralovich conceded that he had never taught Latin for Better English and, indeed, had not taught any Latin class for 15 years. However, he felt that Darden's Latin for Better English class was one which was specially selected and she should not have had the problems in it. With respect to the use of an "I," Kralovich believed that the policy concerning its meaning was expressed orally to faculty many times, and they all know what the ratings mean. In his opinion, the major cause of Darden's problem was the fact that she did not always demonstrate good judgment in her choice of methodology.

FINDINGS OF FACT

Based upon my review and consideration of the evidence in this case, including the testimony and the documentary items, I herewith make the following Findings of Fact:

1. Petitioner, Kathleen Darden, is a tenured teacher of English and Latin, employed by the respondent school district.

2. Darden has been employed in Butler since 1966 and is certified as a teacher of English and Latin, grades 7 through 12.

3. At no time prior to April 1985 had any recommendation ever been made to the Board to withhold her salary and/or adjustment increments.

4. During the 1984-85 school year, Darden was the subject of a series of "informal" and "formal" observations made by several of her administrators. Following each "formal" observation, a report was prepared by the evaluator and shared with Darden.

5. On October 29, 1984, Darden was formally observed by Marie Liddicoat, the English Department chairperson, involving an English I class dealing with

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grammar. In an observation report dated October 31, 1984, Liddicoat noted that Darden demonstrated a need for improvement in the areas of "organization and planning" and "use of time." Accordingly, in those two areas she gave her a rating of "I" (Exhibit J-2).

6. In the comment section of the October 31, 1984 observation report, Liddicoat noted that the students seemed confused at times during the lesson, and that examples on a certain worksheet brought in too many concepts. She thought that the teacher, perhaps, should have followed the grammar textbook in order to avoid the confusion. Also, Liddicoat noted that teaching the subjunctive, indicative and imperative moods to such a class should not begin just four minutes before the end of the period, and as a result of a question from one of the students relating to the exercises on the worksheet.

7. In her reply comments on the observation report, Darden maintained that none of the material covered during the class was new to the students — they should have been prepared and competent to deal with what was done that day. In her judgment, "much of the confusion is caused by the unusual slowness with which this class has accepted the responsibility and rigor of high school work," and that some of the students are still neglecting to bring the proper book to class and to do homework.

8. Sometime during mid-December 1984, an "informal" observation of Darden's class was conducted by the high school principal, Joseph DiPasquale. As a result of that observation, he sent a memorandum to Darden (Exhibit J-2), which summarized what he had observed and the discussions which he had with her at a meeting held on December 14, 1984. In that memorandum, Darden was advised by DiPasquale that "if improvement did not take place, the recommendation for withholding of an increment would, in fact, be a real possibility."

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9. Darden then prepared a lengthy rebuttal memorandum to the principal's observations, and maintained that someone with her background and experience, including the receipt of excellent evaluations, who has consistently demonstrated serious concerns for students, should not be threatened with loss of an increment because of one evaluation which contained two "I"s. She went on to point out a variety of other areas which she felt were not her fault, but which were causing the concerns.

10. On February 4, 1985, a second "formal" observation was conducted of Darden. The evaluator, Wendel Kralovich, an assistant principal, rated her as needing improvement in the areas of "use of time" and "classroom control." In a comment section on the report (Exhibit J-3), Kralovich pointed out that too much time was spent on the exercises and that students were calling out answers, some with the intention of creating confusion and delay. In his opinion more structure and productivity was desirable. Kralovich then gave Darden certain suggestions for improving her performance. In a reply memorandum attached to the observation report the petitioner expressed concern over the timing of the observation and the evaluation process as it applied to her generally. With respect to the particular class which Kralovich attended, she pointed out that the material was covered at a reasonable pace and that she had used "chorusing" because the period was ending. With respect to a problem which arose with regard to one of the exercises, she noted that she had been "intimidated by having this happen during a formal observation" and would check the exercise again. In short, she noted that while "confusion can occur in any class," she believed that she had "handled the situation the best way."

11. On February 21, 1985, another "formal" observation was conducted of Darden's class by Liddicoat. All areas were rated as satisfactory except that of "student involvement." In this respect, Liddicoat noted that the lesson involved a discussion of the novel Lord of the Flies and that while petitioner's questions were thought-provoking, most of the students were not involved in the discussion, and responses were limited to a few.

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12. On March 29, 1985, two more "formal" observations were conducted of petitioner — one by principal DiPasquale in a Latin for Better English class, and one by Timothy J. McGovern, the guidance department head, in a study skills class.

13. DiPasquale noted that Darden was satisfactory in all areas except that of "classroom methods." In this respect, he pointed out in the comments section of the observation report that "a good lesson always lends itself to a summary at the conclusion. That appeared to be missing in this lesson" (Exhibit J-5).

14. McGovern's report rated petitioner as satisfactory in every area (Exhibit J-6). He felt that the students were working quickly and efficiently on a test assignment and it was apparent that they understood the material. He concluded with a comment that the petitioner "did an acceptable job."

15. On April 1, 1985, Liddicoat conducted her third formal observation of the petitioner and rated her as needing improvement in the areas of "pupil involvement," "evaluation," "pupil participation" and "rapport." She commented that some of the students did not seem to understand certain of the problems and others were not involved in the lesson at all. A sheet had been handed out during the class to students, which was supposed to have been a quiz, but the teacher decided that the class needed more practice and the sheet was then used as a review lesson. Liddicoat noted that while it was not a good idea not to use the quiz, the sheet handed out by petitioner confused them since it was taken from the workbook and had several changes and additions (Exhibit J-7).

16. In a reply to Liddicoat's observation, petitioner pointed out that the particular class dealt with a grammar lesson, which in Darden's experience

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was an area which did not evince enthusiasm or excitement. As she put it "the best response to a lesson based on this abstract study of language that any teacher could hope for is polite, quiet tolerance of the teacher's plans," and that the petitioner had filled her own expectations during the class. Darden further pointed out that in her judgment the class gave her as much cooperation and interaction "as they reasonably could considering their interest in the material, and the emotional climate in the room."

17. In her response, Darden also took occasion to again point out what she believed to be an adverse impact on her English I class because of the number of observations conducted in it. As she put it in her response, "despite the teacher's concerted effort to contain and suppress the great stress and anxiety she has experienced since December, students undoubtedly perceived negative feelings on her part when observers were in the room writing notes, which happened many times this year." Indeed, Darden went on to observe that this particular class had been visited on eight occasions, and that the students "reacted to the tension by becoming more quiet and withdrawn each time they were observed." Darden went on in her reply to respond to other areas where she had been marked as needing improvement, and felt that she did not deserve that rating. For example, with respect to the area of "self-discipline," she asked how a teacher could be responsible for controlling this area where, in particular, this "freshman class has many young people with serious patterns of immaturity." Darden concluded her response with the observation that in her opinion the lesson had been well planned and carefully executed.

18. On April 2, 1985, a formal observation was conducted of petitioner's English I class by Edward Bolcar, an assistant principal. In his observation report (Exhibit J-8), Bolcar rated petitioner satisfactory in every area except "classroom methods." He apparently felt that the class work and a quiz given to the students was not up to their particular level and, in his

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suggestions for improvement, noted that Darden should "alter her technique to better meet the needs of high school students. In her reply comments, Darden stated that she had changed her methods for this class in direct response to directions given to her from Liddicoat to make the work "more accessible to students" and that the drill and quiz observed by Bolcar "were developed in conference with the department head." She concluded her reply with an observation that she was "troubled by the difficulty caused by inconsistent directions from different administrators."

19. On April 18, 1985, DiPasquale sent a memorandum to Darden informing her that he was going to recommend to the Superintendent of Schools that the Board of Education be asked to withhold her 1985-86 increment, as a result of negative evaluations she had received during the 1984-85 school year. DiPasquale further noted that all five of the administrators dealing with her evaluation had concurred in the decision (Exhibit J-10). The memorandum stated that the action was being taken as a direct result of "your ineffectiveness in the classroom setting," and that the evaluations revealed "poor teaching techniques, lack of pupil participation, and, in general, confusion on the part of the students in your classes."

20. Thereafter, the Superintendent of Schools advised petitioner that she would have an opportunity to discuss the proposed increment withholding with the Board of Education at an executive session (Exhibit J-11). Such a meeting was held, at which time petitioner was represented by the president of the Butler Education Association, James Kelly.

21. Following the conference with Darden, the Board voted to withhold her 1985-86 increment, and a resolution to that effect was passed by the Board at its April 29, 1985 meeting (Exhibit J-12). The resolution noted that both her employment and her adjustment increments for the 1985-86 school year were to be withheld because of a "less than satisfactory teaching

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performance" which included, "ineffectiveness in your English I and Latin I classes," "poor teaching techniques" and "lack of pupil participation and general student confusion."

22. In a summary evaluation prepared at the end of May 1985, petitioner was rated as needing improvement in the areas of "preparation," "technique" and "pupil reaction" (Exhibit J-13). In a comment section, the evaluator, Liddicoat, noted that Darden's performance demonstrates a need to improve in the classroom.

DISCUSSION

In considering whether or not the action of a Board of Education to withhold a teaching staff member's increment can be sustained, it is necessary for the teacher to demonstrate by a preponderance of the credible evidence that the action was arbitrary, capricious or unreasonable. See, Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). Where the proofs do not rise to a level sufficient to make that finding, the challenge must be rejected. It is not the province of an administrative law judge nor even the Commissioner to substitute their judgment for that of the Board. Thus, mere disagreement with the Board's rationale for the withholding of an increment cannot justify setting it aside.

Based upon my review and consideration of the evidence and the testimony in this case, and in light of the foregoing Findings of Fact, I must CONCLUDE that the petitioner has failed to carry her burden in this case. There is in this record an abundance of evidence which points to the fact that the several evaluators who participated in the process of gauging Darden's performance during the 1984-85 school year had acted entirely in good faith and had followed the dictates of their professional judgment. Without doubt, there were several points upon which the parties had legitimate disagreements. Nevertheless, the various and sundry visits made by DiPasquale, Bolcar, Kralovich and Liddicoat all involved aspects of Darden's performance

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which raised valid concerns in their minds with respect to her entitlement to the increments. There was confusion observed in the classroom and there were instances of a lack of pupil participation where it was expected to take place. The fact that Darden had performed in a totally satisfactory manner for her entire teaching career in Butler, prior to 1984-85, does not mean that her performance was at that level during the period in question. Indeed, the Commissioner has held that even a satisfactory summary year-end evaluation does not necessarily preclude a Board from acting to withhold an increment related to activities which took place during that school year. See, Dumansky v. Leonia Board of Education, 1982 S.L.D. _____ (dec'd by the Commissioner June 4, 1982). The point is that the determination to withhold an increment is often inescapably a subjective one, and that is why there must be a demonstration by the employee of arbitrary action stemming from some improper motive before he or she can prevail. In this case, Darden failed to carry this burden. Accordingly, the petition should be dismissed.

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

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

January 17, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

JAN 22 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 23 1986
DATE

Mailed to Parties:
Ronald L. Parke, A.S.
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Kathleen Darden
James Kelly

For Respondent:

Joseph DiPasquale
Marie Liddicoat
Wendel T. Kralovich

LIST OF EXHIBITS

J-1	Observation Report, dated October 31, 1984
J-2	Memorandum of December 14, 1984
J-2A	Rebuttal to Memorandum
J-3	Observation Report, dated February 5, 1985
J-4	Observation Report, dated February 22, 1985
J-5	Observation Report, dated March 28, 1985
J-6	Observation Report, dated April 2, 1985
J-7	Observation Report, dated April 2, 1985
J-8	Observation Report, dated April 2, 1985
J-9	Memorandum of April 18, 1985
J-10	Memorandum of April 18, 1985
J-11	Letter of April 25, 1985
J-12	Letter of May 6, 1985
J-13	Summary Evaluation, dated May 29, 1985
J-14	Rebuttal to observation, dated December 1984
J-15	Rebuttal to observation, dated January 11, 1985
P-1	Summary Evaluation, dated May 10, 1984
R-1	Excerpt from Manual, pages 36 to 37

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KATHLEEN DARDEN,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY, : DECISION

RESPONDENT.

The Commissioner has reviewed the record of the controverted matter herein including the initial decision rendered by the Office of Administrative Law, Stephen G. Weiss, ALJ.

It is noted that exceptions were filed by the parties in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions argue that a review of the evidence submitted in the instant matter clearly justifies the conclusion that there was not sufficient cause to withhold her increment for the 1985-86 academic year. In support of this proposition, petitioner avows that she had never had her increment withheld in any of the seventeen years during which she previously taught for the Board. Further, petitioner cites to the seven formal evaluations of her teaching during the 1984-85 school year and notes that she did not receive a single rating of unsatisfactory on any of them. She admits receiving a sprinkling of "I"'s (denoting a need for improvement) and a satisfactory rating in every other category during 1984-85. She notes that no teacher in the history of the Butler School System has ever had an increment withheld, although numerous teachers have received "I"'s. She also notes that she remained cooperative and diligently attempted to comply with all the instructions received from her evaluators during the course of the numerous formal and informal evaluations of that year. Petitioner contends strongly that she continually received conflicting signals from the various evaluators concerning what was necessary to improve her teaching performance. In many instances, petitioner argues, she was found to be satisfactory by one evaluator in identical categories which another evaluator the next day found to be in need of improvement. Petitioner complains that she received four formal evaluations within a four-day period and that this negatively affected the performance of her students, which, in turn, negatively impacted on her evaluations.

Petitioner further avers that evaluator T. McGovern rated petitioner satisfactory in his observations of her, and yet allegedly agreed that her increment should be withheld for the 1984-85 school year. Petitioner challenges this "team-player" action (Petitioner's Exceptions, at p. 5), but she acknowledges, however, that Mr. McGovern did not testify at the hearing in the instant matter.

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Petitioner submits that it is, in fact, arbitrary and unreasonable to withhold an increment on the basis of evaluations which never found her unsatisfactory in any area. Petitioner asks that the Commissioner take note of the fact that "virtually all teachers (and all professionals) in some way can use improvement in some area within the entire spectrum of their teaching skills.***" (Petitioner's Exceptions, at p. 6) Petitioner further submits that the standard of review under Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960), although difficult to surmount, should not be made impossible. She suggests her case is a prime example in which "***the subjective lattitude (sic) often accorded to the decision of a board of education will run roughshot (sic) over the rights of a teacher if not reversed." (Petitioner's Exceptions, at p. 7) She prays the Commissioner reverse the recommended finding of the ALJ and conclude that her 1985 salary and adjustment increments should be reinstated.

The Board states in reply exceptions that there was an abundance of evidence which justified the withholding of petitioner's increment. The Board avers that the principal had made it clear to supervisors and teachers that receiving an "I" meant that the teacher could possibly have an increment withheld and, further, that he had warned petitioner of the possibility that her increment could be withheld. The Board further notes that petitioner was the only teacher who received "I"'s at the conclusion of the evaluation process for the 1984-85 school year.

The Board further avers that petitioner was given every opportunity to improve and did not, and the fact that she had performed satisfactorily in previous years has no bearing on the withholding of this increment as stated by the ALJ.

The Board avows in reply exceptions that on January 23, 1985, a meeting was held with petitioner, and she was not promised frequent evaluations. The Board also notes that between January 23 and February 5, 1985, there were only three school days when observations could have been made since this was the exam period. For petitioner to assume that her classes became passive because of the evaluations is highly speculative, the Board argues, and not based on any evidence. The Board adds that the classes observed were different classes made up of different students.

The Board cites the ALJ's thorough review of the matter as evidenced by the initial decision and prays the Commissioner concur with the finding of the ALJ that its action in withholding petitioner's increment for the 1985-86 school year was not arbitrary, capricious or unreasonable.

The Commissioner has carefully reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law containing those recommended findings and conclusions of the increment withholding inquiry conducted herein.

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The Commissioner concurs with those findings reached in the initial decision which support the conclusion that petitioner failed to carry her burden of proving the Board's decision to withhold her 1985-86 increment was arbitrary, capricious, or unreasonable. While the record before him does not include a transcript of the hearing, the Commissioner notes, as did the ALJ, that even a satisfactory summary year-end evaluation does not necessarily preclude a Board from acting to withhold an increment related to activities which took place during that school year. See Dumansky v. Leonia Board of Education, 1982 S.L.D. 613. The majority of her evaluators found need for improvement in more than one area of petitioner's performance on more than one occasion observing different classes and different pupils. Further, the Commissioner notes that failure to maintain discipline is in itself good cause for withholding an increment. See Barbara Rosenblum v. Bd. of Ed. of the Borough of Waldwick, Bergen County, decided on remand by the Commissioner May 17, 1982. The ALJ found there was "***confusion observed in the classroom and there were instances of a lack of pupil participation where it was expected to take place.***" (Initial Decision, ante) Finally, it is noted that the Commissioner will defer to the hearer of the case on questions of credibility where there is conflicting evidence and the findings are reasonably supported. See Nicholas Campanile v. Board of Education of the Township of Middletown, Monmouth County, decided by the Commissioner March 2, 1982.

Accordingly, the Commissioner hereby adopts the findings and conclusions set forth in the initial decision as his own. The Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3691-85
AGENCY DKT. NO. 148-5/85

YVONNE MELI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOLS, BURLINGTON COUNTY,
Respondent.

Douglas B. Lang, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for respondent

Record Closed: December 12, 1985 Decided: January 23, 1986

BEFORE LILLARD E. LAW, ALJ:

Petitioner, a teaching-staff member with tenure status in the employ of the Board of Education of the Burlington County Vocational-Technical Schools (Board), contests its action to withhold her salary adjustment and increment for the 1985-86 school year alleging, among other things, that such action was arbitrary, capricious, unreasonable, and in violation of the terms and conditions of the existing collective bargaining agreement, and that it violates petitioner's rights guaranteed under the First and Fourteenth Amendments of the United States Constitution, the comparable provisions of the New Jersey State Constitution and the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985. The Board denies any violation and requests dismissal of the Petition of Appeal.

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The Commissioner of Education transmitted the instant 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 conducted on November 12, 1985; however, the record remained open, at the request of petitioner's counsel, until after December 6, 1985, the date the State Board of Education rendered its decision in Yvonne Meli v. Bd. of Ed. of the Burlington Co. Vo-Tech Schls, Burlington Co. (OAL DKT. EDU 4515-84, Commissioner's Decision, March 15, 1985). The record closed upon receipt of the State Board's decision on December 10, 1985.

ISSUE

The single issue, as agreed to by the parties, is whether the Board had a reasonable basis upon which to withhold petitioner's salary adjustment and increment for the 1985-86 school year.

Petitioner neither pressed nor argued the Board's alleged violations of her Constitutional First and Fourteenth Amendment rights or the alleged Civil Rights violations. Consequently, these issues will not be considered here.

BACKGROUND FACTS

The instant matter is the fourth in a series of disputes within the last three years between petitioner and the Board, three of which were as a result of the Board's taking action to withhold petitioner's annual salary adjustment and increment, pursuant to N.J.S.A. 18A:29-14. In the three separate actions by the Board to so withhold, each was grounded upon petitioner's annual record of absenteeism, to which petitioner perfected her separate petition of appeal before the Commissioner, pursuant to N.J.S.A. 18A:29-14.

The first proceeding concerned the withholding for the 1984-85 school year based upon petitioner's prior absences from duty during the 1983-84 school year. The administrative law judge (ALJ) who heard the matter determined that petitioner's allegations were without merit and dismissed the Petition of Appeal. The Commissioner adopted the findings and conclusions as set forth by the ALJ and sustained the initial decision (OAL DKT. EDU 6361-83, Commissioner's decision, April 6, 1984). No appeal was taken.

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In the second action, petitioner herein appealed the Board's determination to withhold for the 1984-85 school year. There, the ALJ found, among other things, that: (1) the Board's Superintendent and principal had recommended to the Board to grant petitioner's increment for 1984-85; (2) the Superintendent did not change his position or recommendation in view of subsequent information concerning petitioner's absence; (3) the Board, by way of appropriate resolution, withheld petitioner's 1984-85 salary adjustment and increment; and (4) petitioner had not been absent from duty in excess of any sick or leave days to which she was entitled during the 1983-84 school year. The ALJ concluded that petitioner had met her burden of proof and that the Board's action to withhold was unreasonable. The ALJ reversed the Board's action and ordered it to restore petitioner's withheld increment. (OAL DKT. EDU 4515-84, Initial Decision, issued January 28, 1985.) The Commissioner set aside the findings and determinations in the ALJ's initial decision, making his independent finding that the Board may discipline a teaching-staff member for incidents of high absenteeism even where there are legitimate reasons for such absences. The Commissioner, therefore, on March 15, 1985, dismissed the Petition, and petitioner subsequently perfected her appeal of the Commissioner's decision before the State Board of Education. On appellate review, the State Board reversed the decision of the Commissioner and restored petitioner-appellant to her proper place on the salary guide for the 1984-85 school year, together with compensation for all monies withheld as a result of the Board's action. (Meli v. Bd. of Ed. of the Burlington Co. Voc.-Tech Schls., State Bd. of Ed. decision, December 6, 1985.)

With respect to the instant matter, the Board, on April 29, 1985, passed Resolution No. 15 to withhold petitioner's employment increment and adjustment increment for the 1985-86 school year (P-1). Resolution No. 15 did not set forth the Board's reasons for its action; however, it did advise petitioner that she would be furnished with the reasons in writing within ten days of its adoption (P-1).

FINDINGS OF FACT

Having carefully reviewed and considered all of the testimony and other evidence offered in this matter (See: Inventory of Exhibits) and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I Find the Facts in this matter to be as follows:

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1. Those Background Facts set forth hereinbefore are hereby adopted, by reference, as Findings of Fact.

2. The Board's leave of absence policy is set forth in the collective bargaining agreement between it and the local Education Association at Article XII, LEAVE (R-2) which provides, in pertinent part, as follows:

A. Sick Leave

1. All ten-month employees shall be allowed sick leave with full pay for ten (10) school days in any school year. All twelve-month employees shall be allowed sick leave with full pay for twelve (12) days in any one year.

Unused sick leave days shall be accumulated from year to year with no maximum limit.

. . . .

B. Emergency Absences. This policy shall cover absences not chargeable to sick leave, or professional or semi-professional assignment directly beneficial to the school system.

1. Deaths in the immediate family - all employees will be entitled to three (3) days each occurrence. Immediate family includes:

(a) Parents
(b) Legal guardians(s)
(c) Spouse
(d) Children
(e) Siblings
(f) Parents-in-law
(g) Grandparents
(h) Member of the employee's immediate household

2. Death of a relative, not in the immediate family, allows one (1) day.

3. Category B employees in addition to the above are entitled to one (1) day for the death of a close friend.

C. Personal Days

1. The Board will provide for three (3) days of personal leave at full pay during any one school

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year (no unused days shall be accumulated as personal days but one unused day can accumulate a part of sick leave) for personal family matters that cannot be cared for during non-school hours.

. . . .

G. Procedural Items

1. For sick leave, the appropriate form must be completed and submitted to the administration as indicated.

2. Requests for temporary leaves of absence shall be submitted in writing (in advance, when possible) to be recommended by the division head and approved by the superintendent.

3. Notification for personal leave shall be made to the division head as soon as possible before the date(s) requested. It is agreed that some items of urgent personal business do not allow for three (3) days notice.

H. Other Leaves of Absence

Good cause - other leaves of absence with pay may be granted for other good reason. [R-2]

3. For the 1984-85 school year, petitioner was absent nine (9) days for illness, two and one-half (2 1/2) days for personal reasons and two (2) days for the deaths of relatives (P-3). Petitioner used nine (9) of eleven (11) sick-leave days entitlement, therefore leaving her a balance of two (2) accumulated unused sick days at the conclusion of the 1984-85 school year. N.J.S.A. 18A:30-3.

4. A schedule of petitioner's absences and reasons therefore for the 1984-85 school year is as follows:

1984	1985
October 4, Illness	January 9, Illness
October 22, Illness	January 25, Personal - 1/2 day
October 23, Illness	February 5, Illness
December 5, Death in Family	February 22, Personal

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1984	1985
December 18, Illness	March 28, Death in Family May 3, Personal May 20, Illness (P-3)

5. For each absence due to illness, petitioner testified and proffered documentation of a medical prescription and/or a physician's note of care (P-25, P-26, P-27, P-28, P-29, P-30, P-31).

6. No agent of the Board inquired of petitioner as to any of the reasons for the thirteen and one-half (13 1/2) days of absence during the 1984-85 school year.

7. Each of petitioner's "Employee's Absent Report and Request for Approved Absence" was processed by the Board's agents for which petitioner received pay for said absences (P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18, P-19, P-20).

8. On or about December 3, 1984, Dolores M. Szymanski, assistant principal, observed petitioner's eighth-period Typing/Recordkeeping classroom for the purpose of evaluating petitioner's teaching performance. Szymanski's Narrative Report lists six "positive items" with one "area of concern." No mention of petitioner's attendance or absentee record appears thereon (P-24).

9. On or about January 25, 1985, the Board's high school principal communicated with petitioner, by way of memorandum, as follows:

TO: Yvonne Meli

FROM: Don E. Schreiber

RE: Letter of Concern

DATE: 1/25/85

The item listed below is of concern:

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1. Attendance

The above concern is to be corrected. Thank you for your attention to this matter.

Feel free to contact me if you have any questions, or if I can be of assistance. [R-1]

10. On February 27, 1985, the Board's Superintendent, by way of letter, advised and informed petitioner that it was his plan to recommend to the Board that petitioner's salary for the 1985-86 school year ". . . should remain exactly the same as your salary for 1984-85." The Superintendent further advised petitioner that the Board was scheduled to meet on March 26, 1985, and if petitioner wished to meet with the Board, she was responsible to make the appropriate and necessary arrangements (P-21). The Superintendent's letter did not indicate to petitioner the grounds upon which he based his recommendation to withhold her salary and adjustment increment for the 1985-86 school year.

11. On or about February 28, 1985, petitioner acknowledged receipt of the Superintendent's letter of February 27, 1985 (P-21), with a request that the Superintendent provide petitioner, in writing, the reason(s) for his recommendation to withhold (P-22).

12. By way of memorandum dated February 28, 1985, the Superintendent responded to petitioner's inquiry for reasons (P-22) by one word, "Attendance" (P-23).

13. Subsequent to the Board's adoption of Resolution No. 15, on April 29, 1985, the Board Secretary advised petitioner of the Board's action by way of letter dated April 30, 1985, with a copy of Resolution No. 15 attached (P-1).

14. On April 30, 1985, the Superintendent communicated with petitioner as follows:

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TO: Miss Yvonne Meli

FROM: Benjamin V.P. Verdile

The Board of Education, at its April 29th, 1985 meeting, made the decision that your salary for 1985-86 will remain the same as your salary for 1984-85.

Reason:

1. Attendance.

If you have any questions, please let Mrs. Martini or me know.

BV/emj

cc: John E. Queenan, Jr., Esq.
Mrs. Sonia L. Martini
Mr. Don E. Schreiber [P-2]

15. Neither the Board's Superintendent nor its high school principal testified at hearing.

TESTIMONIAL EVIDENCE

The testimony proffered by petitioner is summarized in the Findings of Fact set forth hereinbefore and need not be repeated here.

Two witnesses were called on the Board's behalf, the first being Dolores M. Szymanski, assistant principal and petitioner's immediate supervisor. Szymanski testified that she had conducted the observation and evaluation of petitioner on December 3, 1984, and found petitioner to be an effective teacher (P-24). She asserted that petitioner's attendance was not a consideration within the parameters of her observation and/or evaluation criteria. Szymanski did not, nor does she, make recommendations as to whether a teaching-staff member under her direct supervision is to be awarded an annual salary increment nor does she recommend its withholding. The assistant principal testified further that she had no conversation with the principal with respect to or concerning her observation and evaluation of petitioner's performance.

The Board's second and final witness was Kenneth E. Papale, teacher of business occupations and petitioner's department head. Under voir dire by this tribunal,

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Papale asserted, among other things, that he was uncertain as to the specific issues of the herein proceedings; that departmental personnel did not report their absences to him nor did he report such absences to the school's administration; that he was not familiar with petitioner's absence record for 1984-85; that he did not supervise, observe or evaluate petitioner's teaching performances; and that he did not make recommendations as to salary increments for personnel in his department.

DISCUSSION AND CONCLUSIONS

Petitioner proffered candid and forthright testimony as to her periodic absences during the 1984-85 school year asserting, among other things, that her nine days of absence were because of illness. Petitioner testified, without contradiction, that at no time or manner did the Board's school administrators make any inquiry as to the circumstances of her absences, whether for illness or other reasons provided by the Board's policy. Petitioner further testified, with no evidence to the contrary, that she was never questioned, counseled or advised by the Board's administrators that her absences were unacceptable, unjustified, excessive or illegal. Based upon these facts, I **FIND** and **CONCLUDE** that petitioner's testimony is entirely credible. Close v. Kordulak Bros., 44 N.J. 589 (1965); Jackson v. Concord Co., 54 N.J. 113 (1969); Garden State Farms, Inc. v. Mathis, 61 N.J. 406 (1972); DeAngelo v. Alsan Masons, Inc., 122 N.J. Super. 88 (App. Div. 1973), aff'd, 62 N.J. 581 (1973).

It has been held, absent a showing of arbitrary, capricious or unreasonable action by a local board of education, that a record of excessive absenteeism is sufficient grounds for a board to withhold a teacher's salary increment even where legitimate medical reasons existed for such absences. Trautwein v. Bound Brook Bd. of Ed., 1978 S.L.D. 445, aff'd with mod., State Bd. of Ed., 1979 S.L.D. 876, rev'd., 1980 S.L.D. 1539 (App. Div., unreported, April 8, 1980), cert. den., 84 N.J. 469 (1980). However, the Appellate Division of Superior Court in Montville Twp. Ed. Assoc. et al. v. Montville Twp. Bd. of Ed. (App. Div., unreported, December 6, 1985) adopted those principles relied upon by the State Board of Education in its decision in Kuehn v. Bd. of Ed. of the Tp. of Teaneck, OAL DKT. EDU 1077-81, Commissioner's Decision, November 25, 1981; State Bd. of Ed. decision, February 1, 1983), 1983 S.L.D. ____ (decided February 1, 1983), where

> it was concluded that an employee increment could not be withheld from a teacher on the basis of her absences, because of serious illness, of more than 90 school days during a single year. The State Board in Kuehn held that a teacher who was ill was statutorily

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> entitled to use annual and accumulated sick leave provided for by N.J.S.A. 18A:30-1 and 18A:30-3, and, consequently, that the exercise of that statutory right could not justify the local board's adverse action against her. Id. (Slip op. at 5.)

In a decision by the State Board of Education dated the same day (December 6, 1985), as the Appellate Division decision in Montville, the State Board in Meli v. Bd. of Ed. of the Burlington Cty. Vo-Tech Schls., Burlington Cty. (OAL DKT. NO. EDU 4515-84, Commissioner's decision, March 15, 1985, State Bd. of Ed. decision, December 6, 1985), stated, in part, that:

> The reasonableness of the Board's action must be evaluated in the context of the relevant law. Kuehn . . . relying on the standards of review pursuant to Kopera v. West Orange Bd. of Ed. 60 N.J. Super. 288, 296 (App. Div. 1960)
>
> The requirement that a board consider the circumstances of the teacher's absences, as well as the number, before acting to withhold an increment was reaffirmed by the State Board in Montville. . . .
>
> . . . .
>
> Moreover, the record in this case demonstrates that Ms. Meli's absences during 1983-84 were legitimate and within the limits established by statute and contract. . . . Further, nothing in the record reveals circumstances indicating that her absences in that year disrupted the educational process. We, therefore, can only conclude that the circumstances of Ms. Meli's absences during 1983-84 did not justify withholding her increment based on her absences in that year. [Meli, State Board Slip op. at 4-5]

The facts in the instant matter differ from those facts in the former action (Meli, OAL DKT. EDU 4515-84). In the previous matter the Superintendent had recommended the granting of petitioner's salary increment for the 1984-85 school year while in the matter sub judice, the Superintendent recommended the withholding of petitioner's 1985-86 salary increment (P-21). Upon receipt of the Superintendent's memorandum so advising, petitioner requested the Superintendent to suppply her with the reasons for his intended recommendation (P-22). The Superintendent's response to petitioner's request for his reasons was by way of a handwritten note which stated "Absence," without more (P-23). The same one-word reason was given to petitioner by the Superintendent (P-2) subsequent to the Board's action to withhold on April 29, 1985 (P-1).

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There is nothing in the herein record to demonstrate that the Board, or its agents, ". . . consider[ed] the circumstances of petitioner's absences, as well as the number, before acting to withhold an increment . . . Montville" (Meli, State Board decision, December 6, 1985, Slip op. at 4). In addition, and notwithstanding the principal's "Letter of Concern" regarding petitioner's "Attendance" (R-1), the herein record is devoid of any circumstance indicating that petitioner's absence disrupted the educational process. In fact, the record is to the contrary where petitioner's immediate supervisor found petitioner to be an effective teacher (P-24) and that no conversation or discussion was conducted between the supervisor and principal with regard to petitioner's evaluation and performance. The record thus shows that the only consideration given by the Board and its agents was solely petitioner's absence for the 1984-85 school year, without any consideration of the circumstances of those absences.

Having carefully considered and weighed the evidence:

I **CONCLUDE**, therefore, that petitioner's absences for the 1984-85 school year were legitimate, within the scope and protection of statutory guarantees of N.J.S.A. 18A:30-2, 18A:30-3 and the Board's policy pursuant to Article XII, Leave, of the collective bargaining agreement.

I further **CONCLUDE** that the Board failed to consider the circumstances of petitioner's absences as required by Kuehn.

Consequently, I **FIND** and **CONCLUDE** that the Board's action to withhold petitioner's salary increment and adjustment increment for the 1985-86 school year was arbitrary and unreasonable and, therefore, must be reversed.

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the Burlington County Vocational-Technical Schools immediately restore petitioner to her proper place on the salary guide, with compensation for all monies withheld for the 1985-86 school year.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who

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by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

23 January 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

JAN 2 : 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 28 1986
DATE

Ronald J. Parker /s
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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YVONNE MELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a thorough review of the record and factual circumstances surrounding this matter, the Commissioner cannot accept the recommended decision of the Office of Administrative Law for the following reasons. Such action is not undertaken lightly and comes only after extensive deliberation of the pertinent statutes and case law relevant to this complex and sometimes ambiguous issue of absenteeism and increment withholding which requires the weighing of:

(1) an individual's statutory entitlement to sick leave;

(2) his or her due process protections against arbitrary, capricious or unreasonable decision-making by a board of education; and

(3) a board's need to compel regular attendance of staff in meeting its obligation to provide a thorough and efficient education to its pupils.

This weighing of multiple responsibilities confronting a board with respect to staff absenteeism is well-stated in Gilchrist v. Bd. of Ed. of Twp. of Livingston, 1959-60 S.L.D. 90, aff'd State Board 1961-62 S.L.D. 203 wherein the Commissioner stated:

> ***On the one hand, [the board] has the obligation to be patient and to show consideration and kindness and, on the other hand, it must ever be mindful of its obligation to maintain the efficiency of school work. Eventually the latter obligation becomes paramount. At what time this obligation becomes paramount is a matter of the board's judgment, honestly and fairly exercised.*** (at 94)

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That frequent absences of teachers from regular classroom learning experiences disrupt the continuity of instruction and may serve as a reasonable basis for increment withholding, nonrenewal of nontenured staff, and dismissal of tenured staff, even if an individual is evaluated as good or excellent or absences are not in excess of statutory entitlements, has been well established in case law. In re Catherine Reilly, 1977 S.L.D. 403; Angelucci et al. v. Bd. of Ed. of West Orange, 1980 S.L.D. 1066, aff'd State Board 1981 S.L.D. 1386; Trautwein v. Bd. of Ed. of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd N.J. Superior Court 1980 S.L.D. 1539; DiRicco v. Bd. of Ed. of West Orange, 1979 S.L.D. 619, aff'd State Board 1980 S.L.D. 1487, rev'd N.J. Superior Court 1981 S.L.D. 1415; In re DeKrafft, 1981 S.L.D. 1308, aff'd State Board 1982 S.L.D. 1470, aff'd N.J. Superior Court, May 4, 1983

This is exemplified in Angelucci et al., supra, which states, "***Irrespective of the legitimate reasons for these absences, frequent absences of the regular teacher inevitably have an adverse effect on the learning which takes place in the classroom." (at 1074) and in Meli v. Bd. of Ed. of Burlington County Vocational-Technical Schools, decided May 21, 1984, aff'd State Board October 3, 1984 which states:

> Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress.***
> (Slip Opinion, at p. 8)

The crucial question before the Commissioner in this matter is whether the Board's action is deemed arbitrary, capricious, unreasonable or in any way constituted an abuse of its legislatively vested discretion. Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288 (App. Div. 1960) A mere difference of opinion between a local board of education as to what is excessive is an insufficient basis for the Commissioner's reversal of the board's decision to withhold. Trautwein, supra, at 1542 Rather, a teacher must demonstrate the decision to be improper pursuant to the above-cited standard in Kopera. Further, the burden of proof may not be shifted to the board to make a showing that teaching performance was lessened by absenteeism because "***this improperly [places] the burden of proof on the board rather than on the teacher, where it [belongs].***" Trautwein, supra, at 1542

In determining whether a board's action in withholding an increment is reasonable, the standard articulated by the State Board in Kuehn v. Bd. of Ed. of Teaneck, 1981 S.L.D. 1290, rev'd State Board February 1, 1983 must be considered. Such standard mandates that a board must take into account the nature of absences and that the decision to withhold not be based solely on the number of absences. This standard served as one of the bases for reversal by the State Board of the action of the Board herein to withhold petitioner's increment for the 1984-85 school year. Meli v. Bd. of

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Ed. of Burlington County Vocational-Technical Schools, decided March 15, 1985, rev'd State Board December 4, 1985.

In the Commissioner's judgment, there are circumstances in the current matter which distinguish it from both Kuehn, supra, and Meli, supra (1985). In Kuehn, the number of absences were for one year with no pattern of chronic absenteeism occurring. In Meli, the Board's action followed on the heels of an increment withholding the prior year whereby petitioner's previous attendance history had already been considered and disciplinary action taken. What we have herein represents, however, a circumstance not yet addressed in case law, namely, the several years of persistence absenteeism being deemed unacceptable by a board despite disciplinary action having been previously applied to a teacher.

That petitioner had a chronic pattern of excessive absenteeism worthy of increment withholding was affirmed by the Commissioner and State Board in Meli, supra (1984). That the Board did not deem her attendance worthy of an increment in the two years following this withholding is evidenced in the 1985 Meli, supra, decision (notwithstanding reversal by the State Board) and in the present matter.

A review of the various cases cited herein with respect to petitioner's absenteeism reveals the following absentee record:

Year	Total Absences
1971-72	10
1972-73	11
1973-74	11
1974-75	13
1975-76	14
1976-77	13
1977-78	14
1978-79	22
1979-80	34
1980-81	43.5
1981-82	28
1982-83	30*
1983-84	16**
1984-85	13.5***

*Increment withheld for 1983-84, affirmed by Commissioner and State Board in Meli, supra (1984)

**Increment withheld for 1984-85, affirmed by Commissioner, reversed by State Board in Meli, supra (1985)

***Increment withheld for 1985-86; matter disputed herein

While petitioner's absenteeism has improved since the prior increment withholding, it is clear that for 1985-86 the superintendent and Board did not consider such improvement acceptable enough to warrant "the reward" an increment represents. That an increment is a reward for meritorious service, not a statutory

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entitlement, has been articulated twice by the New Jersey Supreme Court. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Assoc., 79 N.J. 311 (1979) and North Plainfield Ed. Assoc. (Koumjian) v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984)

As previously stated, the crucial question herein centers on whether the Board's determination to withhold petitioner's increments was arbitrary, unreasonable or an abuse of its legislatively authorized discretion. In the Commissioner's judgment, petitioner has failed in her burden of proof that the withholding action was indeed such, notwithstanding the fact that her absences did not exceed her statutory entitlement. In arriving at this determination, the Commissioner has carefully considered the reasons upon which petitioner's increment withholding was reversed by the State Board in Meli, supra, (1985) and finds distinguishing facts in the instant matter. In the prior matter, the Board acted contrary to the superintendent's positive recommendation for granting an increment. Further, petitioner bore the burden of proof that the Board contravened the Kuehn, supra, standard by failing to consider the circumstances of her absences. This was achieved by the superintendent's own testimony that the Board's sole consideration in making its decision was the number of absences. Such is not the case herein.

In the present matter, the superintendent recommended increment withholding based upon her attendance. (P-2; P-23) The record demonstrates that the reasons for each of petitioner's absences were documented to the Board by way of absence reports. (P-4 through P-20) The superintendent's recommendation must be accorded the presumption that he reviewed said reports and that such review is reflected in his recommendation unless proven to be otherwise by petitioner for it is she who has the burden of proof. Kopera, supra; Trautwein, supra Further, there is no testimony by the superintendent or any other individual that sheer number served as the basis for the Board's decision to withhold petitioner's increment herein.

Even granting the fact that the reason for the withholding provided to petitioner was reduced to one word, "Attendance" (P-2), this does not, in the Commissioner's judgment, justify reversal of the Board's action. It would stretch the bounds of credibility to claim that petitioner did not understand the significance, import or meaning of the reason given, in view of the history of litigation with respect to her attendance. Further, the January 25, 1985 memo to petitioner from the principal (R-1) clearly identifies attendance as an area of concern which "is to be corrected." In no way could it be said that the mere statement of this one word served to deprive petitioner of her due process rights.

The State Board also reversed the withholding action in Meli, supra, (1985) because (1) petitioner's absences for illness were legitimate and not in excess of statutory entitlement and (2) nothing in the record revealed circumstances indicating that said absences disrupted the educational process. Notwithstanding this, the Commissioner concludes that the fact her absenteeism is not in

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excess of statutory entitlement does not serve as a bar to withholding. Angelucci et al., supra; Trautwein, supra; Kulik v. Bd. of Ed. of Montclair, decided October 3, 1983, aff'd State Board May 2, 1984; Virgil v. Bd. of Ed. of West Orange, 1981 S.L.D. 1, aff'd State Board 13

Further, as previously stated herein, the Trautwein, supra, decision clearly states that a board need not demonstrate that teaching performance was lessened by absenteeism because this improperly shifts the burden of proof from petitioner to the Board.

A board of education is under a heavy obligation to assure that teachers are in regular attendance. As expressed in Reilly, supra, just as students are required to be in regular attendance, "***[n]o less a requirement should be made upon the teachers who are to serve the pupils required to be in attendance***." (at 414)

It is apparent that petitioner has yet to achieve an attendance level the Board deems to be acceptable. The fact that a prior increment has been withheld should not serve as an impediment to consider the continued existence of a chronic absenteeism pattern and to take such action again if attendance remains unacceptable in the Board's judgment. In the Commissioner's opinion, the Board cannot be faulted for its intolerance of petitioner's continued high absenteeism and it should not be thwarted in its attempt to bring about more acceptable attendance on petitioner's part. When chronic absenteeism persists following a prior disciplinary action, a board should be allowed to invoke its powers under N.J.S.A. 18A:29-14 so long as such action is not deemed arbitrary or unreasonable. To determine otherwise would tie the hands of a board from taking disciplinary action until a "new pattern of chronic absenteeism" is established for the years following the initial withholding action. Moreover, to determine otherwise could impede a board in its duty to establish what measures it has taken to deal with an employee's persistent chronic absenteeism before invoking the more extreme measure of tenure proceedings. In re Tenure Hearing of Patricia Marsden, School District of Toms River, decided by the Commissioner October 10, 1985.

Accordingly, the Commissioner determines that the Board's action herein was a reasonable exercise of its discretionary authority, given the totality of the circumstances which document persistence of high absenteeism. Therefore, the Petition of Appeal is hereby dismissed due to petitioner's failure to bear the burden of proof that such action was arbitrary, unreasonable or an abuse of its legislated discretionary authority.

COMMISSIONER OF EDUCATION

March 10, 1986

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YVONNE MELI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 10, 1986

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner (Ezra D. Rosenberg, Esq., of Counsel)

For the Respondent-Respondent, John E. Queenan, Jr., Esq.

This marks the third consecutive year that the Board of Education of the Burlington County Vocational-Technical Schools has acted to withhold Yvonne Meli's employment and adjustment increments because of her attendance. We upheld the propriety of the Board's action for 1983-84. Meli v. Board of Education of the Burlington County Vocational-Technical Schools, decided by the Commissioner, May 21, 1984 aff'd by the State Board, October 3, 1984. Without making a substantive judgment concerning whether Ms. Meli's attendance in 1983-84 reasonably could have warranted withholding her increments for 1984-85 had the Board considered the circumstances of her absences, we found the withholding for that year unreasonable because, in the face of the Superintendent's positive recommendation and an increment withholding the year before, the Board did not fulfill its obligation under Kuehn v. Bd. of Ed. of the Twp. of Teaneck, decided by the State Board, February 1, 1983, to consider the circumstances of Ms. Meli's absences, but rather had acted solely on the basis of the number of absences. Meli v. Board of Education of the Burlington County Vocational-Technical Schools, decided by the State Board, December 4, 1985.

In contrast to its action for 1984-85, in acting to withhold Ms. Meli's increments for 1985-86, the Board had before it the Superintendent's recommendation to withhold the increments, which had been made only after Ms. Meli had been notified that her attendance for the year was of concern. Moreover, in making its determination for 1985-86, the Board was provided with the absence reports, which specified the reasons for each absence, and, in contrast to the previous year, there is no indication that the Board acted solely on the basis of the number of absences. Therefore,

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based on the record we have before us, we conclude that Petitioner-Appellant has not shown that the withholding of her increment for 1985-86 was arbitrary or capricious. Accordingly, we affirm the decision of the Commissioner of Education substantially for the reasons expressed in that decision.

July 2, 1986

Reversed N.J. Superior Court May 21, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2455-85
AGENCY DKT. NO. 113-4/85

CAROLE AND PETER FULLEN,
DOROTHY AND PETER PARIL, and
PATRICIA AND STEVEN WALKER,
Petitioners,
v.
MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioners (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

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

Record Closed: December 31, 1985 Decided: January 27, 1986

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

Petitioners are residents and taxpayers of the Township of Middletown, Monmouth County. They are also parents of children who are enrolled in the public schools operated by the Middletown Township Board of Education (Board). Petitioners challenge a pupil redistricting plan (plan) regarding school assignments adopted by the Board effective September 1, 1985. Petitioners claim the Board's action to adopt the plan, and the plan itself, is an abuse of Board discretion and that the action to adopt the plan is an arbitrary, capricious and unreasonable exercise of its authority. The Board denies petitioners' allegations and contends that its action to adopt the controverted plan

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is a proper exercise of its legislative authority to make, amend and repeal rules for the government of its schools.

The Commissioner of Education transferred the matter, along with petitioners' application for a stay of the plan pending a determination on the merits, to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. Oral argument on petitioners' application for a stay was heard July 26, 1985 and, by written ruling dated September 5, 1985, a copy of which is attached and incorporated herein as if set forth in full, was denied. A plenary hearing was conducted November 27, 1985 at the Edison Township Municipal Court. The record closed December 31, 1985, following receipt of the Board's brief and petitioner's letter memorandum in support of their respective positions.

STATEMENT OF THE CASE

Petitioners are residents of a section of Middletown Township known as Rolling Knolls. Prior to the adoption of the plan, their children and all 37 children from Rolling Knolls attended Nut Swamp Elementary School after which they were then scheduled to attend the Thompson Junior High School and, finally, Middletown South High School. Because of the plan, the children now attend the Middletown Village Elementary School, will continue to attend the Thompson Junior High School, but then they will attend the Middletown North High School. Petitioners assert that their children, and by inference all 37 children from Rolling Knolls, were subject to an arbitrary reassignment of elementary and high school because of the following reasons. One, the reassignment is contrary to the Board's own policy on attendance areas (P-12) in that natural boundaries are replaced by artificial boundaries for school attendance purposes and that, in fact, children who live in homes with adjoining backyards attend different elementary schools. Two, the plan has a unique effect upon Rolling Knolls children in that they will attend schools different from their friends in the immediate neighborhood area of Rolling Knolls the social consequences of which include not being able to attend church with their classmates; not being allowed to participate on little league baseball teams or soccer teams with their classmates because school boundaries do not determine eligibility for such teams; and, their children will be deprived of the camaraderie in school of having their neighborhood friends in attendance with them. Three, the plan itself is an arbitrary exercise of Board discretion because the plan, as implemented, was formulated by the superintendent less than 30 days after the Board impliedly rejected a pupil redistricting

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plan submitted by a consulting firm it engaged. Moreover, within 30 days of the superintendent's plan being adopted by the Board, the superintendent himself modified a portion of the plan which the Board accepted. Thus, petitioners contend that rather than the controverted plan being "* * * a well thought out and thoroughly discussed plan * * * it is an eleventh hour decision likely to be marked with arbitrary and expedient conclusions" (Petitioners' memorandum, pp. 3-4). Finally, petitioners contend that notwithstanding the legitimate goals the Board intended the plan to achieve, the 37[1] children from Rolling Knolls can and should be returned to the Nut Swamp School because their return will not have a deleterious affect upon the plan's goals and objectives.[2]

BACKGROUND FACTS

The background facts of the matter not in dispute between the parties and as established by the testimony of witnesses at the plenary hearing, in conjunction with affidavits filed on behalf of the parties, are as follows. Middletown Township covers an area approximately 40 square miles and has a population in excess of 65,000. The Middletown Township school district is the largest school district in Monmouth County with a pupil enrollment of more than 10,000. The schools are presently organized kindergarten through grade six, elementary; grade seven through grade nine, junior high school; and, grade ten through grade 12, high school. As of September 1986, the grade level organization shall be kindergarten through five, elementary; grade six through eight, junior high school; and, grade nine through 12, high school (R-4). The Board operates 17 schoolhouses: Middletown North High School and Middletown South High School; Bayshore Junior High, Thorne Junior High School, and Thompson Junior High School; Lincroft, Middletown Village, Nut Swamp, River Plaza Elementary, East Keansburg, Harmony, New Monmouth, Port Monmouth, Bayview, Fairview, Leonardo and Navesink elementary schools.

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1 While the actual numbers of children from Rolling Knolls who attended Nut Swamp and the numbers of children removed from Nut Swamp seem to be in dispute and the range of dispute is from 33 to 37 and from 88 to 94 respectively, the superintendent's testimony is persuasive that the valid numbers are 37 and 94.

2 Rolling Knolls is not the only area whose children were removed from the Nut Swamp School attendance area because the superintendent testified that when the plan was implemented in September 1985, 94 pupils were reassigned from Nut Swamp.

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Middletown South High School was opened in 1976 and is the most recent new school facility constructed by the Board. It is located in the southern portion of the Township. Middletown North High School is located in the northern portion of the Township. State Highway 35, a four-lane roadway divided by a concrete barrier, runs in a northerly-southerly direction through the Township. Community perception is that generally those at the upper end of economic means tend to reside in the southern portion of the Township, or west of Route 35, while those of lesser economic means tend to reside in the northern portion of the Township, or east of Route 35. This perception, according to the Board secretary's affidavit, is based on the fact that[3]

> 7. There are five elementary schools in the Middletown Township School District which qualify for and receive funds as Title I schools. All of these elementary schools are located on the east side of State Highway 35. There are no such elementary schools on the west side of State Highway 35. (Board secretary's affidavit, at p. 3)

When Middletown South High School was being constructed, the concern expressed was that the facility not become the high school for the wealthy, and that the then existing Middletown North High School be reserved for the less wealthy. To avoid its high school enrollment patterns from perpetuating the community perception of Route 35 dividing the community on an economic basis, the Board drew high school attendance lines by dividing the community geographically east to west rather than north to south along Route 35. Consequently, students from both the east and west sides of Route 35 attend Middletown South High School and students from the east and west sides of Route 35 attend Middletown North High School. Prior to the construction of Middletown South, all Middletown pupils attended the one Middletown high school. With the opening of Middletown South High School, decisions had to be made regarding the allocation of pupils from the three junior high schools to the two high schools.

For close to 20 years, the Board considered its 12 elementary schools to be feeders to its three junior high schools. Prior to and after September 1, 1985, the date the controverted plan was implemented, feeder elementary schools to the Thompson Junior High School were Lincroft, Middletown Village, Nut Swamp, and River Plaza and

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[3] See also R-3, Citizens Advisory Committee Report, at p. 3, which reports that "From the 1983 graduating class 150 students from North and 210 from South elected to go to a four year college."

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with the exception of those in Middletown Village School, these pupils attended and continue to attend Middletown South High School. Pupils from the Middletown Village Elementary School attended and continue to attend Middletown North High School. Thorne Junior High School was and continues to be fed by pupils from the East Keansburg, Harmony, New Monmouth and Port Monmouth elementary schools. These pupils also attended and continue to attend Middletown North High School. Bayshore Junior High was and is fed by pupils from the Bayview, Fairview, Leonardo and Navesink elementary schools. Before the controverted plan, pupils from these elementary schools, with the exception of pupils from the Bayview Elementary School, attended Middletown South High School. Pupils from Bayview attended Middletown North High School and continue to attend that facility. After the controverted plan, pupils from Fairview Elementary School and Bayview attend Middletown North High School. The pupils from Leonardo and Navesink continue to attend Bayshore Junior High and Middletown South.

The Board's feeder system before and after the controverted plan is graphically represented in the following chart:

Elementary School	to	Junior High School	to	High School	
				Before Plan	After Plan
Lincroft		Thompson Junior		South	South
Middletown Village		Thompson Junior		North	North
Nut Swamp		Thompson Junior		South	South
River Plaza		Thompson Junior		South	South
East Keansburg		Thorne Junior		North	North
Harmony		Thorne Junior		North	North
New Monmouth		Thorne Junior		North	North
Port Monmouth		Thorne Junior		North	North
Bayview		Bayshore Junior		North	North
Fairview		Bayshore Junior		South	North
Leonardo		Bayshore Junior		South	South
Navesink		Bayshore Junior		South	South

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The 40 square miles of Middletown are arranged by school boundaries for purposes of pupil enrollment. Before the plan, the Rolling Knolls[4] section was included in the school boundary for the Nut Swamp School. The plan carves Rolling Knolls out of the Nut Swamp attendance area and assigns it to the Middletown Village Elementary School area (P-7). A section was carved from the Middletown Village attendance boundary and reassigned to the New Monmouth Elementary School boundary. Prior to the adoption of the controverted plan, New Monmouth Elementary School had four classrooms for special education, four classrooms for preschool handicapped instruction, and one special education resource room. With five of its 16 classrooms reserved for special education, it is understandable why, as the Board contends in its brief, the New Monmouth School was beginning to be perceived as the school for special education pupils. In addition to its image, the New Monmouth facility was underutilized in that pupil enrollment was at 59.3% of its capacity. These two factors combined tend to thwart the efforts of the Board to meet its obligation to provide its pupils in need of special education with a free appropriate education in the least restrictive environment.

Subsequent to the opening of Middletown South High School in 1976, the confluence of pupil overcrowding of South High School, enrollment imbalances among elementary schools, underutilization of some facilities with the overutilization of other facilities, and the identified deficiencies of lack of confidential space for child study teams[5] and a lack of resource rooms[6] in the Board's special education program facilities by the Monmouth County superintendent of schools[7] caused the Board to begin an analysis of its school attendance boundaries and pupil enrollment with the view of a more efficient use of its schoolhouses. The Board's first step in its analysis was to appoint representatives of all school communities to a Citizens Advisory Committee (Committee) during the 1983-84 school year. The Committee's task was to analyze existing school

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[4] Streets included in Rolling Knolls are Rolling Knolls Drive, Brookline Court, Jocarda Drive and Bellerive Court (P-6). See also aerial photographs, P-8, P-9, P-10. The Rolling Knolls section of Middletown Township contains approximately 66 homes. Thirty-seven children from Rolling Knolls attend public elementary school.

[5] See N.J.S.A. 18A:46-5.1.

[6] See N.J.A.C. 6:28-4.2(d)(2).

[7] The deficiencies were pointed out to the Board as part of a "Level II" monitoring activity pursuant to N.J.A.C. 6:28-9.1. While "Level II" is not mentioned in the rule, it is understood by the Board to signify a State command to remedy cited deficiencies to meet established standards.

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enrollments, pupil population trends, and to make recommendations for the efficient use of school facilities. While one of the Committee's major recommendation in its written report filed on April 24, 1984 was for the Board to engage a "* * * professional educational planner * * *" for pupil redistricting (R-3), it also presented associated findings and recommendations flowing from its analysis. The Committee found that ten of the Board's 12 elementary schools did not have a library area which could accommodate a class of 25; that most of the elementary schools did not have an available art or music room; that a shortage of space existed in the special education program for supplemental help, resource room use, and speech correction; that the Navesink and Nut Swamp schools were so overcrowded that immediate relief was necessary; and, that the New Monmouth school facilities must be more efficiently utilizied for pupils (R-3, at p. 4). While the Committee recognized the Board was then considering adopting the four year high school plan to commence in 1986-87, it offered observations but no recommendations in that regard. In addition, the Committee offered no recommendations on actual redistricting of pupils pending the Board's selection of a professional educational planner.

As a temporary solution to the overcrowding at Navesink, the Committee recommended that two sixth grade classes of pupils be reassigned to the Bayview School. This recommendation was adopted by the Board effective September 1984. The Committee offered three proposals to relieve overcrowding at the Nut Swamp School. Each of the three proposals provided that children residing in the Rolling Knolls section be reassigned to other elementary schools. Proposal One provided that the Nut Swamp children be reassigned to the New Monmouth Elementary School while Proposals Two and Three provided that the children from Rolling Knolls be assigned to the Middletown Village School. Neither one of these proposals were immediately adopted by the Board.

The Board did engage a professional education planner, the Kiernan Corporation (planner), shortly after April 24, 1984. During December 1984, the planner submitted his redistricting study and recommendations to the Board (P-11). Having considered actual September 1984 enrollment compared to possible enrollment in each of the 12 elementary schools, the planner concluded that the enrollment at the Nut Swamp Elementary School was 98.7% of its capacity, while New Monmouth Elementary School enrollment was 59.3% of its capacity. Between these two extremes fell the other ten elementary schools in regard to enrollment compared to capacity. The planner also noted that enrollment at both high schools is 2,730 while the combined functional capacity of both facilities is 4,373. From these data, the planner concluded that the high schools

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were being used at 62% of their capacity which had already led the Board to the decision to revise its grade level organization to include a four year high school. With these considerations in mind, the planner stated that realignment of school attendance areas should accomplish three major objectives:

> 1. The re-alignment of the elementary school attendance areas so as to provide a more balanced utilization of the existing facilities in an approach which would contribute to the elimination of sub-standard instructional areas and the availability of space which could be utilized for special education, music, art, small group instruction, and the expansion of school libraries.
>
> 2. The establishment of a middle school program for Grades 6 through 8 to be housed in the three facilities currently operating as Junior High Schools.
>
> 3. The establishment and implementation of a four year high school program. (P-11, at p. 9)

The planner attempted to establish elementary school boundaries "* * * by using natural barriers such as major roads, railroad tracks, and the like, in order to avoid dividing discrete sections of the Township between two schools * * *" (Id. at p. 9). He observed that

> The greatest deviation in the level of utilization among the elementary schools clearly occurs at the Nut Swamp and New Monmouth schools. A map of the Township points to an obvious approach in that the attendance area of these two schools are separated by a third, the Middletwon (sic) Village School. The over-crowding at Nut Swamp, and the under-utilization of New Monmouth can both be addressed by a re-alignment of the attendance area boundaries of these three schools. (at p. 10)

Accordingly, the planner recommended that the southern boundary of the Middletown Village School be extended to include the then northern boundary of the Nut Swamp School identified as "...north of Bamm Hollow Road from Red Hill Road to Route #35, including the Applebrook and McGuire's Grove areas" (P-11, at p. 11). This design allowed for Rolling Knolls to remain within the Nut Swamp attendance boundary.

In regard to high school attendance areas, the planner recommended that Middletown North High School serve those elementary schools located on the east side of State Highway 35 and Middletown South High School serve those elementary schools

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located on the west side of State Highway 35. This recommendation, it is noted, is in direct conflict with the effort by the Board not to perpetuate a widely held perception that State Highway 35 divides the community on an economic basis.

On January 7, 1985, the Board conducted a public meeting to discuss the planner's proposed recommendations on redistricting. Approximately 1,000 persons attended that meeting, 30 to 40 of whom spoke. There is no disagreement between the parties that the overwhelming view of 38 of the 40 speakers at the meeting was that the planner's recommendations must be rejected. While the record lacks evidence to establish the various reasons why the public opposed the planner's recommendations, the principal reason why the Board opposed the recommendations was the planner's use of State Highway 35 as a dividing line for pupil attendance at its high schools. The use of Highway 35 as a boundary line would perpetuate, in the Board's view, the separation of the perceived economic disparity between the northern and southern residents of the community. The Board directed its superintendent to prepare and submit recommendations for pupil redistricting. The superintendent, who was employed by the Board during July 1984, was aware of the need for redistricting prior to his employment and, in fact, had met with the planner on several occasions after his employment. During the middle of January 1985, the Board conducted a public workshop meeting to discuss possible alternatives to the redistricting. Approximately 300 persons were present.

At a public Board meeting conducted February 4, 1985, the superintendent, along with other recommendations, urged that the attendance boundary of Nut Swamp School be circumscribed by reassigning pupils from the Rolling Knolls section, Deepdale Drive, and Red Hill Road[8] to Middletown Village School. The reassignment of Rolling Knolls pupils from Nut Swamp to Middletown Village is consistent with the recommendation of the Citizens Advisory Committee but contrary to the recommendation of the planner. The superintendent accordingly urged that the Middletown Village School attendance southern boundary be adjusted to include Rolling Knolls, Deepdale and Red Hill Road which, in turn, would occasion a further adjustment to the Village northern attendance boundary resulting in some then present pupils being transferred from Middletown Village to the New Monmouth School to more effectively use the latter facility. The Board approved the superintendent's recommended pupil redistricting plan which, as earlier noted, included other recommendations not relevant here. It should be

[8] Deepdale Drive and Red Hill Road are located to the west of Rolling Knolls (R-1, R-2).

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noted, however, that on February 4, 1985 the Board also approved the reorganization of its grade level structure to reflect a four year high school. Within one month of the February 4 adoption by the Board of the superintendent's recommendation regarding pupil redistricting, the superintendent recommended on March 4, 1985 that the Board adopt a revision to the approved plan (P-14). The revision recommended was that pupils residing on Deepdale Drive and Red Hill Road be returned to the attendance boundary of Nut Swamp School, rather than attending the Middletown Village School. The superintendent explained that his initial recommendation was based on an invalid assumption that the Red Hill Road and Deepdale Drive areas were

> * * * an identifiable area that might be classified as a geographical unit that constituted what we traditionally refer to as a neighborhood. I have since learned that my premise was incorrect and that Red Hill Road/Deepdale is an integrated part of the Oak Hill section of the Township, and that my [initial] proposed recommendation [would] in fact result in a disruption of a neighborhood unit. As mentioned above, this [disruption of a neighborhood unit] is contrary to what I had intended in making my recommendation. (P-14, p. 53)

It is established as fact in this record by the superintendent's testimony that parents from Rolling Knolls, Red Hill Road and Deepdale Drive met with the superintendent after February 4, 1985 to explain why their children should continue to attend Nut Swamp as opposed to Middletown Village. It is also noted that parents from the Fairview section of Middletown, a section not at all concerned with this controversy, sought similar relief but in regard to the view their children should continue to attend Middletown South High School as opposed to Middletown North High School. The Fairview parents were not successful in having their children scheduled to attend Middletown South High School.

The Board's policy governing school attendance areas in the district adopted in 1977 and still in force provides, in part, as follows:

> The primary considerations that govern the determination of school attendance boundaries shall be:
>
> (1) The educational opportunity afforded to students in all schools;
>
> (2) The efficient and educationally effective use of the capacities of each school;

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(3) The geographic location of each school in its relationship to the surrounding student population;

(4) Utilization of safe-walking conditions consistent with school transporation policy. Where possible, major traffic thoroughfares and natural barriers will be used as boundaries;

(5) Compatibility with the Middletown Township School District Master Plan. Where feasible, high school and junior high school attendance boundaries shall incorporate entire elementary school attendance areas. When enrollment growth requires deviation from this concept, the Master Plan shall, nevertheless, provide for a return to the feeder school concept when facilities can be made available.

(6) Recognition of community interest. Where possible, attendance areas shall recognize neighborhood identities
* * * (P-12)

The Board at its meeting conducted March 4, 1985, adopted the superintendent's recommended revision to the redistricting plan earlier adopted on February 4, 1985. Consequently, children residing in the Rolling Knolls section of the Township are presently attending the Middletown Village Elementary School, and shall attend Thompson Junior High School, and Middletown North High School. Children in the Red Hill Road and Deepdale Drive sections of the Township attend Nut Swamp Elementary School, shall attend Thompson Junior High School, and Middletown South High School.

Thus far, the redistricting plan has resulted in the following benefits:

1. The Nut Swamp Elementary School enrollment has been reduced by 94 thereby providing space for separate art and music rooms, in addition to two special education resource rooms. Prior to the plan, eight classrooms at Nut Swamp contained more than 30 pupils each. As a result of the plan, no classroom has more than 30 pupils. It is to be quickly noted that the number of pupils assigned any classroom is not limited by the written Board policy.

2. When the new grade level organization of K-5, 6-8 and 9-12 becomes effective in September 1986, Nut Swamp will have four additional classrooms because the present 89 grade 5 pupils will attend grade 6 at a designated junior high school. One of the four additional classrooms is presently intended to be used as a special education classroom; one is to

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be used to expand the school library; while the remaining two classrooms are presently intended to be used to further reduce class size.

3. The New Monmouth Elementary School has two fewer special education classes but 114 more non-special education pupils.

4. The foregoing benefits also create the additional benefit that pupil enrollment is balanced, though not with precision, among the various elementary schools and the Board's efforts to provide special education pupils with a free appropriate education in the least restrictive environment will tend not to be thwarted due to special education classrooms and resource rooms being created in other schools throughout the district.

5. By having pupils from the Middletown Village Elementary School, which is located on the west side of State Highway 35, attend Middletown High School North, along with pupils from Fairview Elementary School, though the latter is located on the east side of State Highway 35 which is a section generally considered affluent, Middletown North at least arguably is not being reserved for pupils from wealthy families. Nonetheless, and upon the assumption that State Highway 35 serves as an economic dividing line, exact economic integration of the high schools is not achieved.

It is noted that the children from Rolling Knolls were transported to Nut Swamp Elementary School, a distance of 1.2 miles from the northern most tip of Rolling Knolls, and it is further noted that the children are presently being transported to Middletown Village Elementary School, a distance of 1.5 miles northwest of the most northern tip of Rolling Knolls. It is further noted that the school buses must travel across railroad tracks from Rolling Knolls to arrive at the Middletown Village School. The railroad tracks are heavily used by commuter trains to Newark and New York from all shore points as is the train station and parking lot, both of which are adjacent to the railroad crossing through which the school buses pass.

Petitioners produced evidence, not sharply contested by the Board although it does question its probative value, which establishes the following additional facts:

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1. As a direct result of the redistricting plan, there are some children in Rolling Knolls whose backyard adjoins the backyard of children residing on Iler Drive, not part of Rolling Knolls. The plan requires the Rolling Knolls children to attend the Middletown Village Elementary and North High School while the children on Iler Drive attend Nut Swamp and South High School. There are no other instances of contiguous backyards serving as an elementary school boundary in Middletown Township. It is established, however, that in at least three other elementary school boundary instances, a roadway separates pupils residing on either side into different elementary school attendance.

2. The superintendent considered the direction in which the school bus travelled on Red Hill Road when he recommended to the Board on March 4, 1985 to reassign Red Hill pupils to Nut Swamp at the same time he discovered his invalid assumption that Deepdale was not part of Oak Hill. Petitioners contend that had their children remained at Nut Swamp they could have walked to school because sidewalks were recently built. The Board notes that the sidewalks are staggered on either side of the roadway the children would walk which would necessitate crossing heavily travelled Middletown-Lincroft Road. It is noted that eight pupils reside on Red Hill Road who now attend Nut Swamp.

3. The superintendent concedes that, in isolation, the immediate return of Rolling Knolls children to Nut Swamp would not presently have a substantial impact upon that facility except for the possible loss of one classroom. However, the superintendent also explained that the redistricting plan requires two years to completely take effect.

4. There may be an increased class size in grades three and five at Middletown Village School because of the plan as asserted in P-4 but even with such increased class size no classroom would have 30 pupils. Moreover, because of the plan Nut Swamp, Middletown Village and New Monmouth have a more balanced enrollment.

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This concludes a recitation of background facts not in dispute between the parties and a recitation of the facts established by petitioners' evidence. Accordingly, I find the foregoing constitutes all relevant facts of the matter.

ARGUMENTS OF THE PARTIES

Petitioners contend the facts of the matter demonstrate that the Board, to their detriment, abused its discretionary authority in its adoption of the plan because the plan is a result of the superintendent's effort in less than a 30 day period between January 7 and February 4, 1985 to correct a two year problem. Petitioners, in an effort to show the present plan is arbitrary, point to the absence of evidence that the superintendent is in any way experienced in pupil redistricting. Rather, petitioners see the proofs as demonstrating that the Board capitulated to "several dozen speakers" (Petitioners' letter memorandum, p. 2) on January 7 and disregarded the planner's proposed redistricting plan and instructed the superintendent to prepare an alternate plan. Petitioners assert the Board cannot justify adopting the superintendent's plan because the superintendent spent less than 30 days solving a problem which had existed for more than two years in the district. Petitioners also rely on the fact that within 30 days of the adoption of the plan by the Board the superintendent had to recommend a revision because the initial plan was prepared by him on an invalid assumption. Petitioners contend that the plan as presently in force has a unique effect upon their children and as such constitutes improper discrimination. Petitioners contend that the discriminatory effect upon their children may be easily corrected by ordering the return of Rolling Knolls to the attendance boundary of Nut Swamp School. Finally, petitioners contend that the plan itself is arbitrary in that the terms of the plan are in violation of the Board's own policy on pupil assignments through the use of contiguous backyards to create an artificial boundary.

The Board contends it properly exercised its discretionary authority when it adopted the plan and that such action carries with it a presumption of correctness. The Board asserts petitioners failed in their proofs to show that the plan is arbitrary, capricious, unreasonable, or in violation of law. The Board explains that pupil redistricting has been a source of concern for the Board for more than two years in regard to the underutilization and overutilization of some facilities, together with its need to improve the quality of its special education program. This plan, the Board contends, is accomplishing the need of a more balanced pupil enrollment and the improvement of its

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special education program facilities. The Board points to a series of prior decisions of the Commissioner in similar disputes involving redistricting plans by various schools throughout New Jersey, each of which affirmed the board's discretionary authority to assign pupils as it sees fit so long as such assignments are not made in bad faith, or contrary to law.

LAW AND DISCUSSION

New Jersey public school pupils, by constitutional mandate, are to be afforded a thorough and efficient program of education. N.J. Const., (1947), Art. VIII, § IV, par. 1; N.J.S.A. 7A:1-1 et seq. N.J.S.A. 18A:33-1 mandates that

> Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein * * * suitable educational facilities including proper school buildings and furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years * * * in schools within the district convenient of access to the pupils * * *

The goal of a thorough and efficient system of free public schools is "* * * to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4. To carry out its obligation to provide its pupils with a thorough and efficient program of education, boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1 to

> * * *
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government in the transaction of its business and for the government and the management of the public schools and public school property of the district * * * 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.

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State Board rules provide at N.J.A.C. 6:8-4.8(b) and (c) as follows:

> (b) Each school building and site shall provide suitable accommodations to carry out the educational program of the school, including provision for the handicapped, pursuant to law and regulation.
>
> (c) The district board of education shall insure that all school buildings shall be safe, clean, attractive and in good repair.

Petitioners essential challenge to the plan is that the Board abused its discretion in the adoption of the plan. Thus, the question presented is whether the plan, as the Board's rule, is reasonable. The standards upon which the reasonableness of a rule is to be tested was set forth by the Commissioner in 1960 in Angell v. Newark City Bd. of Ed., 1960 S.L.D. 141, 143 when it was said:

> A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious or unreasonable, overworked and difficult of precise definition as these words may be. [citation omitted] Reasonable is defined as " 'conformable to reason; such as is rational, fitting or proper, sensible.' " It imports that which is appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose.

See also, Siegfried v. Shrewsbury Borough Bd. of Ed., 1976 S.L.D. 2, 4 where the Commissioner held that the effect of a rule "* * * must be toward the maintenance and support of a thorough and efficient system of public schools." In a 1962 case, Gunsberg v. Teaneck Bd. of Ed., 1962 S.L.D. 163, 166 where petitioners sought to strike down a redistricting plan adopted by the Teaneck board of education, the Commissioner held "Absent any showing of arbitrary, capricious, or unreasonable abuse of respondent board's discretionary power to determine attendance areas, the Commissioner will not substitute his own discretion for that of the board." In 1963, a challenge by parents to a board's redistricting plan was turned down by the Commissioner despite the allegations that such plan was unlawful, unnecessary, unreasonable and arbitrary. See, Rutherford v. Maywood Bd. of Ed., 1963 S.L.D. 129. In 1965, the Commissioner had occasion to address "unlawful discrimination", in the context of a school redistricting plan. In Alnor v. Wayne Township Bd. of Ed., 1965 S.L.D. 115, the Commissioner held

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> * * * No unlawful discrimination occurs [in a pupil redistricting plan] when different categories are established on a rational basis to achieve a desired legislative design or some suitable public purpose.
>
> "'* * * But where the propriety of the division into classes or groups is fairly debateable, the local legislative judgment controls. The State and its municipalities holding properly delegated powers may legislate according to 'reasonable classification of the objects of the legislation or of the person who it effects.' [citation omitted] * * * It suffices if the classification have a rational and just relation either to the fulfillment of the essential legislative design or to some substantial consideration of policy or convenience bearing upon the common welfare.' "

These few cases demonstrate that the Commissioner of Education, in his quasi-judicial capacity to hear and determine controversies and disputes arising under school law, recognizes the long-standing view first announced in Pierce v. Union District School Trustees, 46 N.J.L. 76, 77-78 (Sup. Ct. 1884) that boards of education determine into which of its schools pupils shall be enrolled so long as such determinations are ". . . not incompatible with the laws of the United States or of this state * * * and not in conflict with the general regulations of the state board of education. . . ." The discretionary authority of boards of education to adopt, revise, amend pupil attendance areas has not been changed nor modified to the present day.

Turning to the relevant facts of this case, there is an obvious difference of opinion between petitioners and the Board in regard to school assignments of children from Rolling Knolls. Such differences of opinion are not uncommon in any district where a pupil districting plan for school attendance is revised or amended. Lines for attendance at a particular school must always be drawn somewhere and whenever lines are drawn there will always be those who fall immediately outside a desired attendance boundary line. But the existence of a difference of opinion as between petitioners and the Board does not equate with an unreasonable action of the Board in its adoption of the plan. A policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal.

It is recognized that the Rolling Knolls community was recommended to be reassigned to the Middletown Village Elementary School attendance area by the Citizens Advisory Committee and the superintendent. Petitioners agree with the recommendation

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of the planner that Rolling Knolls remain in the attendance area of Nut Swamp. The Board, being aware of both opinions, adopted the opinion of the superintendent that the Rolling Knolls community be reassigned to the attendance area of Middletown Village Elementary School. The absence of evidence in this record to demonstrate the superintendent's prior experience in redistricting is of no moment. The superintendent, had from July 1984 to become familiar with the pupil assignment problem in Middletown Township public schools. The superintendent, by virtue of his position as chief executive officer of the Board, is presumed to make significant educational recommendations to the Board based on fact, not flights of fancy. That this superintendent had to recommend a revision on March 4, 1985 to the Board does not destroy such a presumption. The revision was necessitated by an invalid assumption on his part that Red Hill Road/Deepdale was an identifiable separate neighborhood of Middletown. Such an error is minor when compared to the significant goals the total redistricting plan was designed to achieve and, in fact, began achieving during 1985-86. Moreover, petitioners' contentions regarding the superintendent's lack of experience in redistricting becomes insignificant in light of the absence of evidence relating to the planner's prior experience in pupil redistricting. With the exception of the identification of the planner as Kiernan Corporation, no other evidence is in the record to establish the credentials of the planner, the methods employed by the planner in his study, the alternatives considered but rejected by the planner, nor is there evidence to demonstrate the planner's expertise, if any, in redistricting. Nonetheless, the Board itself was obviously persuaded when it engaged the planner that the planner's recommendations would be useful to it in regard to redistricting. Such, however, was not and is not the case.

But even if expertise by the planner could be established, it remains for the Board to determine pupil attendance areas for its specific schools. It cannot be said that this Board, in its adoption of the controverted plan, acted in a vacuum nor can it be said it acted without sufficient information before it. The Board had its own knowledge with respect to the need for pupil redistricting because of pupil enrollment imbalances between and among various schools and the need for special education facilities. The Board further had the report of the Citizens Advisory Committee, the planner's report and the superintendent's recommendations. The Board made a reasoned judgment, though not agreeable to petitioners, in its adoption of the pupil redistricting plan. The plan is not an "eleventh hour" decision as petitioners claim. Thus, the Board did not adopt nor did it implement the plan in an arbitrary, capricious, or unreasonable manner.

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Petitioners challenge that the plan uses an artificial boundary of contiguous backyards and is therefor contrary to its own policy is without merit. The policy (P-12) at (4) and (6) states that major traffic thoroughfares and natural barriers will be used as boundaries where possible and attendance areas shall recognized neighborhood identities, where possible. The policy is clear on its face that natural barriers will be used as boundaries and neighborhood identities shall be recognized, where possible, for purposes of school attendance areas. In this case, the Nut Swamp School overcrowding was such that some pupils had to be reassigned. The Board, having before it recommendations to reassign Rolling Knolls children and the recommendation to continue Rolling Knolls children in Nut Swamp, elected to reassign Rolling Knolls children to the Middletown Village school. This reassignment resulted in the benefits of reducing the Nut Swamp Elementary School enrollment, providing more space at the Nut Swamp school for separate art, music and special education resource rooms. The additional results of equalizing enrollment as between Nut Swamp, Middletown Village, and the New Monmouth Elementary School is an additional benefit achieved by the reassignment of the Rolling Knolls children from Nut Swamp to Middletown Village. That there is no written Board policy requiring less than 30 pupils per classroom is of no moment. It cannot be gainsaid that more than 30 pupils in a classroom is not desirable in an elementary classroom setting. Nor is it of any moment that because of the reassignment of the children from Nut Swamp to Middletown Village that class size in Middletown Village will be increased. No classroom in Middletown Village, according to the evidence of record, shall have 30 or more pupils in it. Accordingly, the plan does not violate the Board's policy on pupil assignment nor, in light of the benefits already achieved, is the plan itself an arbitrary rule.

There is no evidence that the Board unlawfully discriminated against petitioners. True, the Board in adopting this plan, as opposed to the planner's recommendation, discriminated in its choice in the sense that discrimination, by its nature, involves choices. So long as choices made by the Board are not based on unlawful reasons proscribed by law a board is obligated to make choices and adopt plans for pupil attendance areas. While it is true the Board has an implied duty to exercise its discretionary authority in good faith, absent evidence to the contrary such discretionary actions taken carry the presumption of correctness and are not subject to interference by the Commissioner. Cf: M.P. v. Delran Bd. of Ed., 1985 S.L.D. ____ (Dec. 30, 1985). Consequently, despite the possibility that in isolation the 37 Rolling Knolls children could be returned to Nut Swamp without a present substantial impact on that facility there is no

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basis in this record to justify interference with any portion of the universal pupil redistricting plan adopted by the Board. The asserted "unique effect" of the plan upon Rolling Knolls children in regard to church attendance and soccer is not so unusual in disputed school attendance area cases to grant the relief requested.

Petitioners do not contend that the Middletown Village Elementary School is, per se, not suitable for their children to receive a thorough and efficient program of education, nor do they contend that the Middletown Village lacks furniture and equipment, or courses of study suited to the ages of their children. While petitioners' challenge may, arguably, be seen as an allegation that their children do not have "convenience of access" to the Middletown Village Elementary School, given the facts of this case where the Board provides free transportation to the children, on its own school buses operated by licensed school bus drivers, a "convenience of access" argument is wholly without merit. The statute, N.J.S.A. 18A:33-1, does not require the most convenient access; merely a convenience of access. Petitioners' contentions in regard to general roadway safety are beyond the scope of the Board's jurisdiction. Boards of education lack "authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children." Shrenk v. Ridgewood Bd. of Ed., 1961 S.L.D. 185, 187.

CONCLUSION

Petitioners have failed in their heavy burden to demonstrate that the Middletown Township Board of Education acted in an arbitrary, capricious or unreasonable manner in regard to its adoption of the controverted plan and petitioners have further failed in their burden to demonstrate that the Middletown Township Board of Education has in some manner acted unlawfully in regard to its adoption of the plan. In fact, the evidence clearly demonstrates that the Board's plan is reasonably intended to accomplish legitimate goals of providing a thorough and efficient program of education for all pupils enrolled in the Middletown Township pupil schools. While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district.

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The petition of appeal is **DISMISSED.**

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

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

January 27, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

JAN 29 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 30 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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CAROLE AND PETER FULLEN, DOROTHY AND PETER PARIL, AND PATRICIA AND STEVEN WALKER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed 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 central issue for determination is whether the Middletown Township Board of Education acted unreasonably, arbitrarily or capriciously in redistricting in such a manner as to cause the children living in the Rolling Knolls section of Middletown Township to attend elementary school not at Nut Swamp Elementary School, as they had been, but rather at Middletown Village Elementary School. Additionally, petitioners object to the fact that the redistricting requires that children from this same area attend Middletown North High School in future years, instead of Middletown South High School, as had been the case until the redistricting plan was adopted by the Board effective September 1, 1985.

Petitioners contend that the Board abused its discretionary authority in adopting the plan because the final plan is a political expedient, a result of the superintendent's effort in less than a 30-day period to correct a two-year problem. (Petitioners' Post-Hearing Brief, at p. 2) Further, petitioners contend that the plan presently in force has a unique effect upon their children and, as such, constitutes improper discrimination because the children will be shifted from one setting with one group of children to a setting with another group when they enter high school. (Petitioners' Post-Hearing Brief, at p. 5) Finally, petitioners contend that returning their children to Nut Swamp Elementary School "will not have a substantial affect (sic) on the space problem at Nut Swamp School." (Petitioners' Post-Hearing Brief, at p. 6)

The Board contends it properly exercised its discretionary authority when it adopted the plan and that such action carries with it a presumption of correctness. The Commissioner agrees with the Board and the ALJ that "***the evidence clearly demonstrates that the Board's plan is reasonably intended to accomplish legitimate

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goals of providing a thorough and efficient program of education for all pupils enrolled in the Middletown Township pupil (sic) schools." (Initial Decision, ante)

This determination is grounded on the judgment that the Board acted in a deliberate and thorough manner once faced with the overcrowding in some of its schools and the underutilization in other facilities, a condition that first became evident more than two years ago. The parties concede that such imbalance exists. Further, it is uncontested that the Board not only developed a community advisory board to consider alternatives but also employed a planner whose recommendations were also considered in the Board's ultimate choice of options. The record indicates that the Board's primary reason for rejecting the planner's report was its concern in preventing the potential racial imbalance that could result in drawing a north-south dividing line along Rt. 35. Considering the least drastic alternative for the immediate and the more distant future, the "Board made a reasoned judgment, though not agreeable to petitioners, in its adoption of the pupil redistricting plan." (Initial Decision, ante)

The decision was one made after considerable public and professional input relying on a process that, of petitioners' own admission, started on April 24, 1984, the date when the Citizens Advisory Committee on redistricting was established. (Petitioners' Post-Hearing Brief, at p. 2) The public aired its concerns after hearing the Kiernan report on January 7, 1985. The final Board vote was not taken until March 4, 1985 after two more Board reviews of the alternatives. The record reveals not one scintilla of evidence to suggest that the Board's deliberations or final determination was predicated on improper motives or patent arbitrariness. To the contrary, in agreeing with the Citizens' Advisory Committee recommendation to hire an educational professional to augment its own analysis of conditions, the Board extended itself beyond what it had to do to establish that it acted in good faith. While it is unfortunate that all members of the community were not satisfied with the ultimate redistricting plan, it is entirely clear from the record that the Board did not adopt, nor did it implement, the plan now in effect in an arbitrary, capricious or unreasonable manner.

As the Court stated in Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966):

> ***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Board

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of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962)***, (89 N.J. Super. at 332)

The Commissioner herewith determines that the Board acted properly in the instant matter within the parameters of its duties and responsibilities. N.J.S.A. 18A:11-1

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

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION DISMISSING CASE
OAL DKT. NO. EDU 7055-85
AGENCY DKT. NO. 376-11/85

BOARD OF EDUCATION OF
THE PINELANDS REGIONAL
SCHOOL DISTRICT, OCEAN
COUNTY,
Petitioner,
v.
RHONDA REHM,
Respondent.

Milton H. Gelzer, Esq., for petitioner (Gelzer, Kelaher, Shea & Novy, attorneys)

Carl W. Cavagnaro, Esq., for respondent (Reuss, Cavagnaro & Kaspar, attorneys)

Record Closed: January 30, 1986 Decided: February 3, 1986

BEFORE LILLARD E. LAW, ALJ:

This matter comes on by way of an Order to Show Cause, together with supporting affidavit filed before the Commissioner of Education by the Board of Education of the Pinelands Regional School District (Board) compelling respondent to show cause why an order should not be entered suspending respondent's teaching certificate for not more than one year, pursuant to N.J.S.A. 18A:26-10, for respondent's alleged violation of nonperformance of a duly executed employment contract with the Board and for alleged unprofessional conduct. On November 6, 1985, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a

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contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on November 21, 1985, a prehearing conference was held at the Trenton Office of Administrative Law where, among other things, the issues for determination by this administrative tribunal were set forth as follows:

1. Whether respondent was in violation of the Board's 60-day notice requirement by her submission of her resignation on September 13, 1984, effective that date.

2. Whether the Board waived its right to request revocation of respondent's teaching certificate by failing to file an Order to Show Cause within 90 days, pursuant to N.J.A.C. 6:24-1.2.

3. Whether the Board lost its rights to request revocation under the doctrines of waiver, laches and/or estoppel.

Respondent, therefore, reserved the right to move for summary disposition of the matter, grounded upon the 90-day rule, subsequent to the completion of discovery.

On January 23, 1986, the undersigned was in receipt of respondent's Notice of Motion to Dismiss the herein matter, together with a brief in support of her Motion. On January 30, 1986, the undersigned was advised by the Board's counsel that the Board would not oppose respondent's application for summary disposition.

STATEMENT OF FACTS

Respondent asserts that the material facts of this matter are undisputed as set forth hereinbelow.

Respondent holds a valid teaching certification and applied for employment with Pinelands Regional School District. On August 7, 1984, a contract was signed specifying that the respondent was to begin service on September 1, 1984, and conclude work on June 30, 1985. The agreement further provides that termination by either party required 60 days' written notice.

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As a result of difficulties respondent had in the course of her employment, and after conferences with teachers and the mathematics chairperson, respondent filed her resignation on September 12, 1984. This resignation was acted upon by the Board of Education on September 21, 1984. Board action instructed the acting superintendent to take action against respondent in order to revoke her teaching certificate for not more than one year, pursuant to N.J.S.A. 18A:26-10.

No official action was taken by the Board until an Order to Show Cause was submitted and served upon respondent due to said Order to Show Cause for September 24, 1985, having been filed with the Commissioner of Education on September 16, 1985.

RESPONDENT'S ARGUMENT

PETITION IS OUTSIDE THE 90-DAY LIMITATION IMPOSED BY N.J.A.C. 6:24-1.2

Respondent respectfully submits to the court that the petition filed by the Board is beyond the time set forth by N.J.A.C. 6:24-1.2, and that the petition should be dismissed with prejudice.

N.J.A.C. 6:24-1.2 states:

> FILING AND SERVICE OF PETITION.
>
> 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. Petitions are to be mailed to the Assistant Commissioner of Education, Division of Controversies and Disputes, New Jersey Department of Education, 225 West State Street, Trenton, New Jersey 08625.

It is undisputed that the action which gives rise to the Order to Show Cause and Petition filed by the Board was the resignation of respondent on September 12, 1984. It is also undisputed that the Board had knowledge of that action and, in fact, apparently took official action on September 21, 1984, to accept respondent's resignation. Since that

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date, no official action was taken by the Board until the Order to Show Cause was submitted in September 1985, more than one year after the initial resignation of respondent.

The Commissioner has steadfastly held that failure to comply with the time provisions as set forth in N.J.A.C. 6:24-1.2 will result in dismissal of petition. The Commissioner has held such dismissals would occur when petition was filed four months beyond the 90-day period set forth by said regulations. See, North Plainfield Ed. Assoc. v. Bd. of Ed. of the Bd. of North Plainfield, 96 N.J. 587 (1984). In the case of Selvy, Jr. v. Newark Bd. of Ed., OAL DKT. 7766-80 (Jan. 4, 1983), aff'd Comm'r (Feb. 18, 1983), petition was denied and the Commissioner held that the petitioner was not eligible for retroactive relief where he had waited one year and eight months after the employment had ceased in order to claim benefits for military credits, pursuant to N.J.S.A. 18A:29-11. See also, Rock v. Sayreville Bd. of Ed., OAL DKT. 795-82 (January 18, 1983) aff'd Comm'r of Ed. (March 4, 1983) aff'd State Bd. (Oct. 5, 1983), See also, Estate of C. Edward Lipartito, Annette Lipartito, Executrix v. Bd. of Ed. of the City of Vineland OAL DKT. EDU 7188-83, aff'd Comm'r of Ed. (Feb. 24, 1984, aff'd State Bd. of Ed. August 8, 1984) (N.J. App. Div. Nov. 21, 1985, A-126-84T7) (unreported).

Respondent submits that the petition filed by the Board requesting relief, pursuant to N.J.S.A. 18A:26-10 is out of time, pursuant to requirements of N.J.A.C. 6:24-1.2, and said petition should be dismissed with prejudice.

CONCLUSION

Having considered the entire record before me and, also noting that the Board has not opposed respondent's motion for summary disposition, I **FIND** that the Board's application for an Order to Show Cause and Petition were filed before the Commissioner more than one year subsequent to the Board's knowledge of the alleged violation committed by respondent. I **FIND** and **CONCLUDE**, therefore, that the Board failed to perfect its Petition of Appeal and Order to Show Cause before the Commissioner in a timely manner, pursuant to N.J.A.C. 6:24-1.2 and in violation thereof.

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ORDER

Accordingly, it is hereby **ORDERED** that Summary Judgment be and is hereby entered on behalf of respondent Rhonda Rehm. It is further **ORDERED** that the Board's Petition and Order to Show Cause be and is hereby **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.

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

3 February 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

FEB 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 10 1986
DATE

Ronald J. Parker /t.s
OFFICE OF ADMINISTRATIVE LAW

ks/e

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IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
RHONDA REHM, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF PINELANDS REGIONAL, OCEAN	:	DECISION
COUNTY.	:	
	:	

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

Upon review of this matter, the Commissioner accepts and adopts as his own the recommended decision of the Office of Administrative Law dismissing the Petition of Appeal for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 7379-84
AGENCY DKT. NO. 374-8/84

IN THE MATTER OF THE TENURE HEARING OF JOHN COTSAKOS, DISTRICT OF THE PARSIPPANY-TROY HILLS TOWNSHIP

Henry N. Luther, III, Esq., attorney for the Board of Education of the District of Parsippany-Troy Hills Township, (Dillon, Bitar & Luther, attorneys)

Peter N. Gilbreth, Esq., attorney for respondent
(Stephen S. Weinstein, P.A., attorney)

Record Closed: January 31, 1986 Decided: January 31, 1986

BEFORE **JAMES A. OSPENSON,** ALJ:

The Board of Education of the District of Parsippany-Troy Hills Township filed and certified, on August 23, 1984, charges of unbecoming teacher conduct against John Cotsakos, a tenured teaching staff member employed as assistant principal by the Board, as result of his involvement in an investment scheme that in its conception and/or implementation was fraudulent in nature, under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The charges certified were filed with the Commissioner of the Department of Education on August 27, 1984. It was certified by the Board the charges were of sufficient gravity, if found true, to warrant dismissal from his tenured teaching position in the district.

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Respondent filed an answer to the charges with the Commissioner on September 26, 1984 and filed, simultaneously, a motion for interim relief staying hearing on tenure charges until resolution of criminal investigations then said to be in progress through the offices of the United States Attorney and the Morris County Prosecutor, on the ground that to compel respondent to defend would be to require he risk incriminating himself.

Before resolution of the motion, the Commissioner transmitted the matter to the Office of Administrative Law on October 1, 1984, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Thereafter, by agreement of the parties, the administrative law judge entered the following order on December 5, 1984:

> There appearing no objection by the Board of Education of Parsippany-Troy Hills on respondent's application for stay of tenure charges proceeding pending completion of accompanying criminal investigations, respondent having consented to tolling of the 120-day salary resumption limitation under N.J.S.A. 18A:6-14 (see Ott v. Bd. of Ed. of Hamilton Twp., 160 N.J. Super. 333 (App. Div. 1978), certif. den. 78 N.J. 336 (1978)), and good cause having been shown, the above matter is hereby **ORDERED** placed on the inactive list for a period of six months, in accordance with N.J.A.C. 1:1-3.2(e).

Thereafter, on motion by respondent with consent of the Board the matter was **ORDERED** continued on the inactive list for a further period of six months from June 5, 1985, subject in all other respects to provisions of the previous order of December 5, 1984.

On expiration of the order of inactivity on December 5, 1985, and on inquiry by the administrative law judge, the parties advised of respondent's criminal convictions in federal court on September 24, 1985. They advised respondent purportedly resigned his teaching position on October 5, 1985 in writing, a resignation accepted by the

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Board by its official action on October 10, 1985, the resignation to be deemed effective from September 23, 1985. Respondent's attorney filed with the administrative law judge on December 10 and 12, 1985 letters containing acceptance by the Board, together with the following documents pertaining to respondent's convictions:

(1) Judgment and Probation/Commitment Order;
(2) Order of Restitution;
(3) Letter of September 17, 1985 of United States Attorney;
(4) Memorandum of July 10, 1985 of United States Attorney to United States District Court judge;
(5) Plea agreement by respondent on July 11, 1985; and
(6) Criminal information against respondent. [J-1 to 7].

Thereafter, the administrative law judge issued the following order:

> The above matter was placed on an inactive list by order expiring December 5, 1985. On inquiry by me then, the parties advised of respondent's criminal convictions in federal court on September 24, 1985 and that his purported resignation of October 5, 1985 had been accepted by the Board effective September 23, 1985. It was suggested the matter was thus moot.
>
> Because of forfeiture provisions of N.J.S.A. 2C:51-2 and the interest of the Commissioner of the Department of Education under N.J.A.C. 6:11-3.7, nevertheless, the parties are directed to show cause within 15 days hereof why the matter should not be summarily addressed and resolved by the administrative law judge on the basis of tenure charges as certified, respondent's answer, and documentary evidence submitted heretofore by respondent's attorney in his letters of December 10 and 12, 1985.

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DISCUSSION

Evidence is clear that respondent, when represented by counsel, and having waived indictment and trial by jury, pleaded guilty to a criminal information in United States District Court for the District of New Jersey on September 24, 1985, charging him with the offenses of conspiracy to commit mail fraud, contrary to 18 U.S.C.A. 1341, and knowingly having filed a false income tax return, contrary to 26 U.S.C.A. 7206. Maximum imprisonment under the former statute is five years; that under the latter is three years; maximum imprisonment for the crime of conspiracy (18 U.S.C.A. 371) is five years. Respondent was sentenced to two years on the first count of the information and three years on the second count. Execution of the term sentence on the second count was suspended and respondent was placed on probation for five years, to commence upon completion of the custodial term imposed on the first count and complete and full discharge from any parole thereafter. Respondent was ordered to make restitution in accordance with an order of the court entered on September 24, 1985.

Terms of the criminal information filed against respondent in United States District Court make it clear that respondent as a principal of the Parsippany-Troy Hills School District conspired with another school employee, neither being licensed or authorized to act as investment consultants or advisors or as broker-dealers in securities, to operate a stock market investment scheme devised and intended to defraud individuals who could and would be induced to invest money with them by means of false and fraudulent pretenses, in violation of United States laws. The circumstances charged in the criminal information, it may be seen, were precisely those circumstances made generally the subject of more broadly framed unbecoming teacher charges certified by the Board against respondent with the Commissioner of the Department of Education. Indeed, it was respondent himself who sought stay of tenure charge proceedings until disposition of the federal criminal charges against him for fear of possible self-incrimination.

N.J.S.A. 2C:51-2(a) provides:

> A person holding any public office, position or employment,

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> 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 the United States of an offense or crime which, if committed in this State, would be such an offense or crime. . .
>
> (b) The forfeiture set forth in subsection (a) shall take effect: (1) upon a 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. . . .

N.J.S.A. 2C:1-4 of the New Jersey Code of Criminal Justice provides that an offense constitutes a crime if punishable by a sentence of imprisonment in excess of six months. N.J.S.A. 2C:43-1 classifies crime, for the purpose of sentence, into four degrees: first, second, third, and fourth. N.J.S.A. 2C:5-4(a), pertaining to grading of crimes, provides that conspiracy to commit a crime of the first degree is a crime of the second degree. Otherwise, conspiracy is a crime of the same degree as the most serious crime which is the object of the conspiracy. N.J.S.A. 2C:43-6(a)(3) provides a person who has been convicted of a crime of the third degree may be sentenced for a specific term of years to be fixed by the court between three years and five years. Theft by deception not amounting to extortion is a crime of the third degree. N.J.S.A. 2C:20-4; 20-2(b)(2).

It has been expressly held in New Jersey that federal convictions for conspiring to commit mail fraud and falsely subscribing to contents of federal income tax returns are offenses to which the New Jersey public office forfeiture statute applied; that the public office forfeiture statute was not unconstitutional; that the statute disqualifying any person did not violate the equal protection clause of the federal constitution; and that the forfeiture provision is self-executing at the time sentence is imposed on convictions underlying application of the disqualification statute. State v. Musto, 187 N.J. Super. 264, 280-1 (L. Div. 1982); aff'd, 188 N.J. Super. 106, 107-8 (App. Div. 1983).

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Given respondent's federal court convictions on September 24, 1985, therefore, his after-tendered resignation to the Board of Education from his tenured teaching staff position, on October 5, 1985, said to be effective September 23, 1985, and purportedly thereafter accepted by the Board at its regular meeting on October 10, 1985, was a nullity, the position theretofore having been forfeit by operation of law at time of convictions on September 24, 1985. Since the most extreme sanction under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., looks to removal of a tenured employee from his teaching staff position, the question results, therefore, what disposition should be made of the tenure charges of unbecoming teacher conduct certified by the Board against respondent here. Respondent and the Board urged the matter is moot.

I think it important to remember the statutory interest of the Commissioner of the Department of Education in tenure charge matters under N.J.S.A. 18A:6-10 is direct and not derivative as if under his controversies and disputes jurisdiction under N.J.S.A. 18A:6-9. The State Board of Examiners, under N.J.S.A. 18A:6-38, is empowered to issue appropriate certificates to teach or to administer, direct or supervise the teaching, instruction or educational guidance of pupils in public schools and may revoke them under rules and regulations prescribed by the State Board of Education. The Commissioner of the Department of Education is a member ex officio of the State Board of Examiners under N.J.S.A. 18A:6-34. State Board of Education rules provide the State Board of Examiners may, under N.J.A.C. 6:11-3.7(a), revoke any such certificate for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, provisions identical to those in the Tenure Employees Hearing Law. N.J.A.C. 6:11-3.7(b)(1)(i) provides that cases contested before the Commissioner resulting in loss of tenure or dismissal of a teacher for inefficiency, incapacity, conduct unbecoming a teacher or other just cause shall be forwarded to the State Board of Examiners for determination of possible revocation of state-wide teaching certificate. A procedure for the State Board of Examiners thereafter, upon review of the record, is provided for determination of revocation. Though the interest of the Commissioner in possible revocation of certificate is indirect, his obligation to refer is directly mandated. Here, there would seem little point in allowing or compelling prosecution of tenure charges against respondent where

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the ultimate sanction, removal, is meaningless since the position is forfeit. Cf., generally, Kendall v. Camden City Bd. of Ed., Camden County, 1983 S.L.D. — (March 16, 1983); aff'd., St. Bd., 1983 S.L.D. — (July 6, 1983); and Tenure Hearing of Earl, Sch. Distr. of City of Trenton, Mercer County, 1984 S.L.D. — (March 2, 1984); aff'd., St. Bd., 1984 S.L.D. — (June 6, 1984). But the evidential record is now clear that necessary and sufficient grounds for referral by the Commissioner to the State Board of Examiners exist and must be recognized.

CONCLUSION

Without making any finding or determination on revocability of respondent's teaching certificates, therefore, I **FIND** and **DETERMINE** as follows:

1. Respondent's tenured teaching position in the school district of Parsippany-Troy Hills was automatically forfeit under N.J.S.A. 2C:51-2 on September 24, 1985 when respondent was convicted in United States District Court of federal crimes of conspiracy to commit mail fraud (18 U.S.C.A. 371; 1341) and knowingly having filed a false tax return (26 U.S.C.A. 7206);

2. Respondent's purported resignation thereafter from his teaching position, as well as the Board's acceptance thereof, was nugatory;

3. Pursuant to N.J.A.C. 6:11-3.7(b)(i), (ii), the evidential record herein pertaining to respondent's convictions is **ORDERED** to be transmitted to the State Board of Examiners forthwith for whatever further action is deemed necessary under N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.7(a); and

4. Accordingly, and subject to the above, tenure charges against respondent are **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.

January 5, 1986
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

FEB 4 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 5 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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LIST OF EXHIBITS

J-1 Letter of resignation of respondent to superintendent of schools, dated October 5, 1985, resigning position effective September 23, 1985.

J-2 Letter of superintendent of schools to respondent, dated October 15, 1985, informing Board at its regular meeting on October 10, 1985 had accepted respondent's letter of resignation effective September 23, 1985.

J-3 Judgment and probation/commitment order of United States District Court, dated September 24, 1985 evidencing respondent's conviction of crimes of conspiracy to commit mail fraud, 18 U.S.C.A. 1341, and knowingly filing a false tax return, 26 U.S.C.A. 7206(2); and sentencing respondent to two years imprisonment on Count I and three years imprisonment on Count II, execution of the term sentence on Count II only to be suspended and respondent placed on probation for five years to commence upon completion of the custodial term imposed on Count I and complete and full discharge from any parole thereafter.

J-4 Order for restitution, United States District Court, dated September 23, 1985.

J-5 Letter of United States Attorney to Hon. Dickinson R. Debevoise, Judge, United States District Court, dated September 17, 1985 concerning nature and extent of respondent's cooperation with prosecuting authorities.

J-6 Memorandum from United States Attorney to Hon. Dickinson R. Debevoise, Judge, United States District Court, dated July 10, 1985.

J-7 Criminal information against respondent, United States District Court, charging criminal violations of United States Code.

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IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN COTSAKOS, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PARSIPPANY-TROY HILLS, MORRIS	:	
COUNTY.	:	
	:	

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

Upon a careful review of the record in this matter, the Commissioner affirms the findings and determination of the Office of Administrative Law. N.J.A.C. 6:11-3.7(b)(1)(i) mandates that the Commissioner refer to the State Board of Examiners cases contested before him resulting in loss of tenure or dismissal of a teacher for inefficiency, incapacity, conduct unbecoming a teacher or other just cause for determination of possible revocation or suspension of statewide teaching certificates.

Accordingly, the evidential record herein pertaining to respondent's convictions is hereby ordered to be transmitted to the State Board of Examiners forthwith for whatever action is deemed appropriate under N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.7(a).

Further, by operation of law respondent's position in the employ of the school district of Parsippany-Troy Hills was forfeit at the time of convictions on September 24, 1985 pursuant to N.J.S.A. 2C:51-2. Consequently, the Commissioner finds and determines that the tenure charges filed by the Board against respondent on August 27, 1984, are hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 13,1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6759-85
AGENCY DKT. NO. 366-10/85

DAVID HARDGROVE,
Petitioner,
v.
BRIDGEWATER-RARITAN
REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION,
Respondent.

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

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Gross, attorneys)

Record Closed: January 6, 1986 Decided: February 5, 1986

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

David Hardgrove (petitioner) sought an order of the Commissioner of Education (1) determining that the Bridgewater-Raritan Regional School District Board of Education (Board) improperly terminated his employment rather than allowing him to use accumulated sick-leave days accumulated pursuant to N.J.S.A. 18A:30-3; (2) directing the Board to pay the petitioner all compensation, including salary, retroactive to the date of his termination, and directing the Board to restore any and all fringe benefits retroactive to the date of his termination. It is stipulated that the effective date of termination of the petitioner's employment was October 1, 1985. Subsequent to the filing of the petition, certain circumstances changed. These are reflected in the stipulations below.

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The matter was transmitted to the Office of Administrative Law on October 24, 1985, 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 held on November 27, 1985. At that time, it was agreed that the issue to be tried is whether a nontenured maintenance person can be nonrenewed prior to exhaustion of his sick-leave entitlements accumulated pursuant to N.J.S.A. 18A:3-30 where, on the date of his nonrenewal, he is not medically fit to perform his duties.

There being no material facts in dispute, the matter proceeded to summary disposition. The petitioner's papers were submitted on December 26, 1985, and the respondent's papers on January 6, 1986.

The following facts are stipulated for the purposes of this action:

1. The petitioner was employed by the Board from 1966 through September 30, 1985.

2. The petitioner did not enjoy a tenure status.

3. On July 17, 1984, the petitioner suffered an injury while in the course of performing his duties as a maintenance person.

4. Pursuant to N.J.S.A. 18A:30-2.1, the petitioner was paid his full salary for the period July 17, 1984 - July 16, 1985.

5. On July 17, 1985, the Board began deducting days from the petitioner's accumulated sick leave.

6. The petitioner, with the advance knowledge of the Board, underwent back surgery as a result of the job-related injury on April 3, 1985.

7. At or about that time, the petitioner's surgeon advised the Board that the petitioner's recuperation period would last until October 1, 1985, and that he expected the petitioner to be medically fit to return to work on that date.

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8. On or about May 20, 1985, the Board's director of personnel advised the petitioner that if he were not medically fit to resume his employment by October 1, 1985, his employment would be terminated as of that date.

9. A three-month contract of employment covering July, August and September 1985, was tendered to the petitioner.

10. On or about September 3, 1985, the petitioner's surgeon advised the Board that the petitioner would not be fit to return to duty until some time at, or near, November 1, 1985.

11. On or about September 18, 1985, the Board, through its director of personnel, notified the petitioner that his employment was to be terminated effective October 1, 1985.

12. On October 1, 1985, the petitioner had to his credit 177 accumulated sick-leave days.

PETITIONER'S ARGUMENTS

Based on the stipulated facts, the petitioner seeks an order of the Commissioner of Education as set forth above. He asserts that he, a nontenured employee with satisfactory service, may not be terminated under these facts, at least until his sick leave has been exhausted and he is not medically fit to return to work.

The petitioner argues that his sick leave accumulated pursuant to N.J.S.A. 18A:30-3 is a vested right which cannot be divested through termination. The subject statute provides:

> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

This clearly mandates accumulation of unused sick leave days from year to year. If this were not the situation, the Legislature would not have used the word "shall."

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The concept of vested right was defined by the New Jersey Supreme Court in Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372 (1954) at 384-385:

> The term "vested right" is not defined in either the Federal or the State Constitution; but it would seem that, generally, the concept it expresses is that of a present fixed interest which in right reason and natural justice should be protected against arbitrary state action - an innately just and imperative right that an enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny. . . .

The petitioner urges that review of the concept as applied in actual cases is necessary because the definition is amorphous. The petitioner urges that sick leave, although accrued under statute, once acquired becomes a property right. See, Buff v. North Bergen Bd. of Ed., OAL DKT. EDU 758-80, (Feb. 4, 1981), adopted Comm'r of Ed. (Mar. 19, 1981) and the United States Supreme Court decisions cited therein.

The petitioner anticipates that the Board will argue that a nontenured employee may be terminated for any reason or no reason, even if his absence was caused by a work-related injury and he has substantial accumulated sick leave at the time. This argument has been rejected by the Commissioner and State Board. DiRicco v. West Orange Bd. of Ed., 1979 S.L.D. 619, aff'd St. Bd. 1980 S.L.D. 1487.

For these reasons, the petitioner demands judgment in his favor.

RESPONDENT'S ARGUMENTS

The Board asserts that the determination in this case is controlled by two recent decisions of the Commissioner of Education; Theodore v. Dover Bd. of Ed., OAL DKT. EDU 7274-82 (Jan. 31, 1983), adopted Comm'r of Ed. (Mar. 15, 1983), and Tartivita v. Westfield Bd. of Ed., OAL DKT. EDU 7912-81 (July 23, 1982), adopted Comm'r of Ed. (Sep. 10, 1982).

Tartivita was a nontenured custodian who was injured in the course of his employment and was paid for one year under N.J.S.A. 18A:30-2.1. His contract was not renewed upon completion of the statutory disability payments. Like Hardgrove, Tartivita

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claimed he was entitled to use his accumulated, unused sick leave because it was a vested right or property right. The initial decision rejected both arguments and Tartivita's claim to exhaust or be paid for unused, accumulated sick leave. The Commissioner affirmed the findings and determination and adopted them as his own.

Theodore was a nontenured custodian who injured his back twice during the course of his employment. After judicial litigation, he was paid a second time under N.J.S.A. 18A:30-2.1. Theodore's employment contract was not renewed because he was not medically fit to perform the duties of his position. He, like Tartivita, claimed he was entitled to be paid for 42 accumulated, unused sick-leave days at the termination of his employment. The initial and final decisions denied any entitlement to payment.

Notwithstanding Hardgrove's assertions to the contrary, the right of the Board to terminate his employment "solely because of his disability and consequent inability to do the job," although unquestionably work related, has been judicially established. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 411 (App. Div. 1982). Upon the lawful termination of Hardgrove's employment by the Board, his statutory right to use or be paid for unused, accumulated sick leave terminated. Pushko v. Elizabeth Bd. of Ed., OAL DKT. EDU 7524-83 (Feb. 28, 1984), adopted Comm'r of Ed. (Apr. 16, 1984). Cf., Finnegan v. Keansberg Bd. of Ed., OAL DKT. EDU 5029-80 (June 1, 1981), adopted Comm'r of Ed. (July 20, 1981).

The DiRicco case cited and relied upon by the petitioner is inapposite. The issue addressed in that case is whether a nontenured nurse-health teacher could lawfully not be renewed because of her attendance record and incidental use of sick leave. The case is not relevant to the present issue. Rather, Theodore controls, and decision must be had in favor of the Board.

DISCUSSION AND DETERMINATION

As the Board correctly observes, DiRicco is not apposite to the present matter. The issues in the two cases are clearly distinguishable. In DiRicco, the question was whether the petitioner could lawfully be nonrenewed because of her attendance record. There was no involvement, as in the present, of N.J.S.A. 18A:30-2.1 or a question of ability to return to work. Here, petitioner's surgeon advised the Board that the

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petitioner could not return to work until some time near November 1, 1985. See, stipulation 10 above. It is also stipulated that the Board had advised the petitioner that if he were not medically fit to resume his employment by October 1, his employment would be terminated as of that date. See, stipulations 8 and 9 above.

Theodore, Tartivita, Pushko and Finnegan are precisely on point and Theodore, indeed, does control the disposition of this matter. In Theodore it was determined that a compensable accident had occurred to John Theodore, a custodian in the employ of the Dover Board of Education. Pursuant to N.J.S.A. 18A:30-2.1, Theodore was paid for one year at full salary less mitigation. The subject statute states:

> 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 Rivised 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.

Sick leave is defined at N.J.S.A. 18A:30-1:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

Persons coming under Title 18A are allowed sick leave as prescribed at N.J.S.A. 18A:30-2:

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law,

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> except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

The Legislature has also provided, at N.J.S.A. 18A:30-3, that unused sick leave shall be cumulative. The statutes states:

> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

The initial and final decisions in Theodore concluded that since he was never able to resume permanent employment, Theodore was eligible to receive one full year's salary minus workers' compensation payments and any other salary earned. Similarly, in Tartivita, a nontenured custodian alleged the Board had acted improperly when it terminated his employment. He also charged, among other things, that the Board acted improperly by denying him the benefits of his accumulated, unused sick leave.

Tartivita was a nontenured custodian employed by the Westfield Board of Education. He was injured in the course of his employment and was paid for one year under N.J.S.A. 18A:30-2.1. His contract was not renewed upon completion of the statutory disability payments. The initial and final decisions in the case found no support for the contention that the Board's action was arbitrary, capricious, unreasonable or an abuse of its discretionary authority. In Pushko, the pertinent part of the Initial Decision, which was adopted by the Commissioner of Education, concluded that Pushko was not entitled to payment for unused sick-leave days upon retirement immediately following receipt of full salary for one year under N.J.S.A. 18A:30-2.1. And in Finnegan, a seemingly more harsh result was affirmed. In that matter, a nontenured teacher met with a compensable accident arising in and out of the course of his employment on the same day he was noticed that his position would be abolished on June 30, 1979. He was temporarily totally disabled as a result of the injuries sustained in the accident. The period of disability was determined to run through July 6, 1980. The Board paid Finnegan his full salary through June 30, 1979, and was reimbursed by the workers' compensation carrier at the rate of $156 per week for that period. The carrier paid the petitioner $156 per week from June 30, 1979 through July 6, 1980. The initial and final decisions in that

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matter determined that the employment relationship lawfully ceased on June 30, 1979. Both Pushko and Finnegan make reference to public policy and the public interest. There can be no doubt of the legitimacy of the injuries to Pushko, Finnegan or Hardgrove. The fact remains that N.J.S.A. 18A:30-2.1 is a protection afforded to persons in the employ of boards of education. When the employment relationship lawfully ceases, the board's responsibility as to N.J.S.A. 18A:30-2.1 and 30-3 also ceases.

Sick leave is, in a sense, a type of insurance. It is comforting to the school employee to know that it is there. At the same time, it is hoped that it is never needed. The petitioner's assertion that his accumulated sick leave is a vested right which cannot be divested through termination does not withstand scrutiny in the light of the cases discussed above.

The New Jersey Supreme Court has stated in Nicoletta v. No. Jersey Dist. Water Supply Comm'n, 77 N.J. 145 (1978) that a property interest as contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property. However, the key concept is "entitlement," such as involved in statutory eligibility for welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); tenure employment, Slochower v. Board of Higher Educ. of New York City, 350 U.S. 551 (1955); contractual right to employment, Wieman v. Updegraff, 344 U.S. 183 (1952); a clearly implied promise of continued employment, Connell v. Higginbotham, 403 U.S. 207 (1971), or the like.

There must be a legitmate claim of entitlement as that term is used by the Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972). In Nicoletta, as in the present case, there was no "entitlement" to employment. Nor does there seem to be any attempt to circumvent some other constitutional right.

In consideration of the clear instruction in Nicoletta, the petitioner overreaches when he asserts a vested right to accumulated sick leave after lawful termination.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the employment of a nontenured maintenance person can be nonrenewed prior to exhaustion of his sick leave entitlements accumulated pursuant to N.J.S.A. 18A:3-30 where, on the date of nonrenewal, he is not medically fit to perform his duties.

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Accordingly, judgment is entered in favor of the Bridgewater-Raritan Regional School District Board of Education. 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.

5 FEBRUARY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 10 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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DAVID HARDGROVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c, a summary of which is provided below.

Petitioner excepts to the administrative law judge's rejection of his arguments with respect to accumulated sick leave, N.J.S.A. 18A:30-3, being a vested right and, although it accrues under statute, it constitutes a property right. Further, he rejects the ALJ's finding and conclusion that employment of a nontenured maintenance person can be nonrenewed prior to exhaustion of accumulated sick leave entitlement where, on the date of nonrenewal, he is not medically fit to perform his duties. Regarding this, he contends that the ALJ misses the entire point of his argument that on the day of his accident and the day of his termination he had a statutorily vested property interest in his accumulated sick leave which could not be divested without due process of law or payment of the salary equivalent.

In addition, petitioner again argues that DiRicco, supra, stands for the proposition that a nontenured employee may not be terminated for any or no reason, even if his absence was necessitated by a work-related injury and he has substantial accumulated sick leave at the time.

The Board urges affirmance of the initial decision, contending that the ALJ is correct in determining that petitioner's vested rights theory does not withstand scrutiny in light of cases such as Theodore, supra; Tartivita, supra; Pushko, supra; and Finnegan, supra. Further, it asserts the ALJ is correct in finding DiRicco, supra, inapposite.

Upon review of the record in this matter, the Commissioner determines that the ALJ's analysis and conclusions are appropriate. Firstly, DiRicco, supra, is indeed inapposite because the factual circumstances and issues therein are not similar to the present matter. Further, it is noted that the New Jersey Superior Court, Appellate Division reversed the Commissioner and State Board

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decisions in that matter. See 1981 S.L.D. 1415. Secondly, the ALJ's reliance on such cases as Theodore, supra, and Pushko, supra, is correct.

Accordingly, the recommended decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted by the Commissioner for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

March 13, 1986

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DAVID HARDGROVE,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 13, 1986

For the Petitioner-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Soriano and Gross
(Daniel Soriano, Jr., Esq., of Counsel)

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

July 2, 1986

Affirmed N.J. Superior Court March 25, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7015-85

AGENCY DKT. NO. 370-10/85

JOSEPH P. MC MANEMIN,

Petitioner

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,

Respondent

Joseph P. McManemin, Esq., pro se, petitioner

Louis C. Rosen, Esq., for respondent
(Aaron, Salsberg & Rosen, attorneys)

Record Closed: January 24, 1986 Decided: February 3, 1986

BEFORE WARD R. YOUNG, ALJ:

Petitioner, a citizen residing in the Ridgewood school district, alleged the Board abused its discretionary authority by acting arbitrarily and/or capriciously when, in response to a citizen's petition, it passed a resolution not to hold a special election pursuant to N.J.S.A. 18A:14-3. The Board denies the allegation in asserting its action was a proper exercise of that discretion. The substantive issue in dispute concerns the reorganization of the schools in the Village of Ridgewood.

The matter was transmitted to the Office of Administrative Law as a contested case on November 4, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 20, 1985 and the matter was set down for hearing on January 13 and

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14, 1986. Respondent's Motion for Relief from the Production of Documents was GRANTED and entered on January 2, 1986. Respondent filed a Motion for Summary Decision. Petitioner filed a notice under date of January 9, 1986 in the form of a Cross Motion for Summary Decision. The hearing dates were cancelled and a briefing schedule was established. On January 24, 1986, petitioner filed a letter wherein he requested the undersigned to decide the matter based only on the respondent's brief. The record therefore closed on January 24, 1986.

DISCUSSION OF LAW

The Legislature addressed its concern of school district special elections in the enactment of N.J.S.A. 18A:14-3 which states:

> The board of education of a type II district may call a special election of the legal voters of the district at any time when in its judgment the interests of the schools require it, or whenever 50 of such legal voters shall by petition so request . . . (emphasis supplied)

The general mandatory powers and duties of a board of education are codified in N.J.S.A. 18A:11-1 which states:

> The board shall —
>
> . . .
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and . . .
>
> d. Peform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

The thrust of the instant petition is to divest the Board of its discretionary authority and transmit same to the electorate in determining the reorganization of the school district. In the event the Board were to be ordered to proceed with a special election, the

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issue of whether the Board would be bound to act in accordance with the expressed consensual view of the electorate is not addressed.

The Commissioner of Education and the Courts have previously addressed the relationship of discretionary authority vested in local boards of education to its delegated powers and duties.

In Board of Ed. of Belvidere v. Bosco, 138 N.J. Super. 368 (Law Div. 1975) the Court said at 376:

> It is clear to this court that the board, as a local governmental unit, is but a creation of the State, and is capable of exercising only those powers of government granted to it by the Legislature. It is also evident that the right to referendum is strictly a statutory and not a constitutional right. See Botkin v. Westwood, 52 N.J. Super. 416 (App. Div. 1958), app. disin. 28 N.J. 218 (1958), Smith v. Livingston, 106 N.J. Super. 444 (Ch. Div. 1969), Aff'd on Opinion 54 N.J. 525. Unless defendants find support in an affirmative mandatory statute, their effort to compel the board to resubmit this issue to the electorate must fail.

The Court in Belvidere also said at 398:

> For the purpose of this action the court finds that N.J.S.A. 18A:14-3 does not provide a legislature grant of the power of initiative and referendum to the district electorate to compel the board to resubmit to the electorate the proposal approved . . . .

In Jenkins v. Tp. of Morris School Dist. 58 N.J. 483 (1971), the Court quoted from the Commissioner's decision, at 492:

> In his decision the Commissioner was highly critical of that referendum and the Board's conduct in connection therewith. Citing Hackensack Bd. of Ed. v. Hackensack, 63 N.J. Super. 560 (App. Div. 1960), and Botkin v. Westwood, 52 N.J. Super. 416 (App. Div.), **appeal dismissed**, 28 N.J. 218 (1958), he described the nonbinding referendum as "illegal and an improper abdication of the Township Board's responsibility to perform its function." And he flatly condemned the pre-vote "pledge of all but one" of the Board members to abide by the results of the nonbinding referendum, noting that it "improperly delegates the responsibility for ultimate decision" (at 492).

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The court then said at 507-508:

> Apart from whether Board members had the right to seek a nonbinding referendum at all . . . they clearly had no right to pledge themselves in advance to abandon the individual affirmative views in favor of the majority negative vote.

The Commissioner in Ronald Polak, et al. v. Bd. of Ed. of the Tp. of Woodbridge, 1981 S.L.D. ____ (decided July 28, 1981) stated in his slip opinion at 21:

> The Commissioner recognizes the strong and deep emotions co-mingled in a district faced with the marked decline in enrollment as evidence herein. The task of a board of education faced with possible school closings is a heavy one. However, the responsibility of a board to take proper action to recognize and best resolve its resultant enrollment problems while ensuring a thorough and efficient education for its pupils outweighs all other considerations.

The language of N.J.S.A. 18A:14-3 also appears to be quite clear and unambiguious. It is suggested here that the Legislative intent is not to divest local boards of education of its discretionary authority by clearly making the call of a special election permissive, and that if it intended to require such a calling upon the receipt of a petition signed by 50 legal voters of the district, it would have said so.

STIPULATION OF FACTS

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

1. The petitioner and over 50 residents of Ridgewood qualified to vote filed a Petition for a Special Election with the secretary of the Ridgewood Board of Education on August 14, 1985.

2. On September 9, 1985, at a regular public meeting of the Ridgewood Board of Education, the Board voted not to hold a Special Election as requested by the Petition.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

I **FIND** the record void of evidence in support of the allegation that the Ridgewood Board of Education abused its discretionary authority by acting arbitrarily and/or capriciously when it passed a resolution not to hold a special election pursuant to N.J.S.A. 18A:14-3.

I **CONCLUDE**, therefore, that summary decision is **GRANTED** to the Board, and **DENIED** to petitioner. The Petition of Appeal is hereby **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** this Initial Decision with **Saul Cooperman** for consideration.

3 February 1986
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

Receipt Acknowledged:

FEB 5 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 6 1986
DATE

Ronald L. Parks, J.S.
FOR OFFICE OF ADMINISTRATIVE LAW

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JOSEPH P. MC MANEMIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner accepts and adopts as his own the recommendation of the Office of Administrative Law granting summary decision to the Board for the reasons expressed in the initial decision. The matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

MARCH 13, 1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF BETSY RUBENSTEIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	ORDER
OF SOMERDALE, CAMDEN COUNTY.	:	
	:	

This matter was opened before the Commissioner by way of the certification of tenure charges against respondent for conduct unbecoming a teacher. Respondent, by way of answer and counter petition, seeks dismissal of the tenure proceedings on the grounds that (1) she has not been presented with any tenure charges pursuant to N.J.S.A. 18A:6-10 et seq.; (2) the Board has failed to comply with the procedures applicable under that statute; and (3) she has been denied procedural and substantive due process as required under N.J.S.A. 18A:6-10 et seq. as well as the New Jersey and United States Constitutions.

Further, respondent alleges that defects in the Board's procedures included but are not limited to:

1. Failure to provide Respondent with a proper Statement of Charge;

2. Failure to provide Respondent with a Statement of Evidence in that the statement of Frank A. Oehlers is not based upon first-hand knowledge nor does it conform to the New Jersey Court Rules respecting affidavits or certifications;

3. Failure to have a sufficient basis upon which to find probable cause to credit the evidence in support of any charge against Respondent in that an arrest, standing by itself, is not wrongful conduct by an employee. In re Kathleen Kunz, 1985 S.L.D. #392-85.

4. Failure to provide Respondent with a Resolution demonstrating that the Board of Education took action in conformance with N.J.S.A. 18A:6-10 et seq. (See In re Kunz, supra);

5. Improper suspension of Respondent without pay, effective November 18, 1986;

6. Failure to serve Respondent with a Certificate of Determination pursuant to N.J.A.C. 6:24-5.2; and

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7. Failure to properly transmit and/or perfect tenure charges against Respondent within 45 days, in contravention of N.J.S.A. 18A:6-13. (Respondent's Answer and Counter-claim, at pp. 2-3)

PROCEDURAL HISTORY

Tenure charges against respondent were filed with the Commissioner on December 19, 1985 and were received by the Bureau of Controversies and Disputes for processing on December 20, 1985. The material received by the Commissioner included:

1. Letter to Commissioner from the Board's attorney with respect to the filing of tenure charges against respondent with the Commissioner; and

2. A November 18, 1985 Resolution of the Board and Certificate of Determination signed by the Board secretary which lacked official seal.

Upon review of the material, the Board attorney was contacted via telephone to inform him of deficiencies in the filing but he was unable to be reached. Deficiencies included:

1. Lack of notarization or official Board seal on the Certificate of Determination of Board Resolution;

2. Lack of sworn statement of evidence in support of the charges; and

3. No proof of service to respondent.

A letter was subsequently sent to the Board attorney on December 26, 1985 enumerating the deficiencies. On December 23, 1985, respondent's attorney called to determine the status of the case and to inform the Bureau that respondent had not been served the charges. He was informed that tenure charges for conduct unbecoming a teacher were received by the Commissioner on December 19, 1985.

On January 8, 1986 the following material was submitted by the Board attorney:

1. Original and two copies of the Board Resolution/Certificate of Determination with Board Secretary seal affixed.

2. Original and two copies of sworn Affidavit of Superintendent with copy of Somerdale Municipal Court complaint against respondent attached, dated September 23, 1985.

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3. Return receipt card showing service on respondent signed for by her on October 31, 1985.

Upon review of the newly submitted material, it was determined that proof of service upon respondent for the filing of charges with the Commissioner was lacking. N.J.A.C. 6:24-5.1 et seq. As a result, a conference call was conducted with the Board Secretary, Board Attorney and a Department of Education Controversies Examiner at which time it was explained that the October 31, 1985 return receipt card demonstrated proof of service of the filing of tenure charges with the Board by the superintendent on October 22, 1985 pursuant to N.J.S.A. 18A:6-11 but that proof of service of the filing of the charges before the Commissioner was still lacking.

On January 24, 1986 when such proof of service still was lacking, a letter was sent to the Board attorney informing him that unless the situation was remedied immediately upon receipt of the letter, the matter would be transmitted to the Office of Administrative Law whereupon opposing counsel would be permitted to present argument(s) with respect to the filing of charges.

On January 28, 1986, the Board attorney submitted a copy of a letter, dated November 25 1985, sent to respondent notifying her that on November 18, 1985 the Board found probable cause to credit evidence in support of the charges filed by the superintendent and that it determined the charge, so credited, was sufficient to warrant dismissal. She was also notified that she was suspended without pay and that the charges had been certified to the Commissioner.

On January 29, 1986 respondent's attorney was requested to submit an answer. He objected strenuously to doing this, asserting that respondent had never been served properly by the Board, essentially for the reasons expressed above. Mr. Cohen was requested to submit an answer, notwithstanding his claims, so that the matter could proceed. Said answer, submitted under protest, was received on February 15, 1986.

FINDINGS OF FACT

1. On October 22, 1985 the superintendent swore an affidavit in support of tenure charges which reads:

> I, FRANK A. OEHLERS, being of full age, upon my oath depose and say:
>
> 1. I am the Superintendent of Schools for the Somerdale School District.
>
> 2. Betsy Rubenstein is a tenured teacher within this District.

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> 3. On or about September 18, 1985, Ms. Rubenstein was charged with three violations of New Jersey criminal law, and, in particular, violations of N.J.S. 2C:14-2(a), N.J.S. 2C:14-2(b) and N.J.S. 2C:24-4(a), with one T.S., a student in the Somerdale School District, aged 11 years, and she has been arrested on these charges. A copy of the Municipal Court complaint is attached hereto and made a part hereof.
>
> 4. On the basis of these charges, it is my request that the Somerdale Board of Education find probable cause, pursuant to N.J.S.A. 18A:6-10, and certify these charges to the Commissioner of Education, terminating Ms. Rubenstein's tenure and employment with the District.

2. Said charges reiterate the alleged violations of criminal law which respondent was charged with in the Somerdale Municipal Court Complaint dated September 23, 1985.

3. Respondent was served with a copy of said affidavit on October 31, 1985 (Return receipt card #169-520-071).

4. On November 18, 1985 the Board certified tenure charges of conduct unbecoming a teacher based on the sworn affidavit of the superintendent and it suspended her without pay as of that date. The sworn affidavit does not specifically charge respondent with conduct unbecoming a teacher.

5. On November 25, 1985, the Board attorney sent to respondent a letter notifying her that:

> ***At a meeting on November 18, 1985 the Somerdale Board of Education did find probable cause to credit evidence in support of the charge filed against you by the Superintendent and determined that the charge, so credited, was sufficient to warrant dismissal.
>
> Further, you were suspended without pay. These actions have been certified to the Commissioner of Education.***

6. The letter indicates that Mr. Carl Poplar, Esq. was sent a copy of the above letter.

7. The letter does not indicate any enclosures were sent to either respondent or Mr. Poplar nor does it state specifically what charges were levied against respondent.

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8. On January 8, 1986 the Commissioner received the Certificate of Determination/Board Resolution affixed with the seal of the Board Secretary and the sworn affidavit in support of the tenure charges filed by the superintendent.

9. On January 28, 1986, the Commissioner received a copy of the letter of November 25, 1985 submitted by the Board attorney as proof of service to respondent regarding the Board's action of November 18, 1985 to certify tenure charges and to suspend her without pay.

10. Respondent alleges in her answer that she did not receive the letter of November 25, 1985 until on or about December 22, 1985. The Commissioner is without knowledge as to the accuracy of this allegation.

ANALYSIS AND CONCLUSIONS

N.J.S.A. 18A:6-10 provides in part that:

> No person [under tenure] shall be dismissed or reduced in compensation, ***except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.***

By virtue of this statute "***a written charge or charges, of the cause or causes of complaint***" must be preferred against the tenured employee and the charge must be signed by the person or persons making such charges prior to the invocation of formal proceedings against the teacher by the board.

N.J.S.A. 18A:6-11 requires that:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with

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> respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination.
>
> N.J.S.A. 18A:6-13 requires that:
>
> If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

N.J.A.C. 6:24-5.1 mandates that in cases wherein charges are preferred against an employee pursuant to the Tenure Employees' Hearing Act (N.J.S.A. 18A:6-10 et seq.), the board of education shall file the written charges and the required certificate of determination with the Commissioner together with proof of service upon the employee.

In the instant matter, the superintendent filed tenure charges against respondent due to her being charged with violations of criminal statute involving a student in the Somerdale School District and her arrest on said charges. While it is apparent from the affidavit that she was not charged with "conduct unbecoming a teacher" which later appears in the Board Resolution, there is no question that the affidavit documents that tenure charges pursuant to N.J.S.A. 18A:6-10 were being filed by the superintendent. As expressed in In re Kunz, supra, "The charge may be separately stated or stated in the statement of evidence in support thereof.***" (Slip Opinion, at p. 12) Any failure of the affidavit to state "conduct unbecoming a teacher" was corrected at the time of the Board's action to certify tenure charges and would not unto itself warrant dismissal of the tenure proceedings. To do otherwise would put form over substance.

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The instant matter differs markedly from In re Kunz, supra, in that the superintendent's affidavit herein does meet the requirement of N.J.S.A. 18A:6-10 for "a written charge or charges, of the cause or causes of complaint *** signed by the person or persons making the same***." In In re Kunz, the superintendent's affidavit merely stated that he and the board counsel had been charged by the board to "investigate whether or not proceedings should be commenced pursuant to the Tenured Employees Hearing Act, N.J.S.A. 18A:6-10 et seq***." (Slip Opinion, at p. 5) In this matter the affidavit states specifically that the Board is requested to "find probable cause, pursuant to N.J.S.A. 18A:6-10, and certify these charges to the Commissioner of Education, terminating Ms. Rubenstein's tenure and employment with the District."

What remains to be determined is whether there exists a sufficient basis upon which to find probable cause to credit the evidence in support of the tenure charge of unbecoming conduct which was ultimately certified against her by the Board on November 18, 1985 and whether the procedural requirements of N.J.S.A. 18A:6-11, 13, 16 and N.J.A.C. 6:24-5.1 were met.

With respect to the procedural requirements, it is concluded that the Board failed to meet the requirement of N.J.S.A. 18A:6-11 that respondent be notified of its determination regarding tenure charges "personally or by certified mail." The record documents a letter dated November 25, 1985 was written to respondent but nothing documents it was sent by certified mail or personally delivered to her.

N.J.A.C. 6:24-5.1 requires that the written tenure charges and certificate of determination be sent to the Commissioner together with proof of service upon the employee. Nothing in the record supports that respondent was served with the Certificate of Determination in this matter. It must be remembered that it was by way of said Certificate/Board Resolution that respondent was formally charged with conduct unbecoming a teacher and that her attorney became apprised of such charge by way of a telephone call to the Bureau, not via proof of service on respondent. Further, the letter of November 25, 1985 does not state that she was charged with conduct unbecoming a teacher, only that the Board found "probable cause to credit evidence in support of the charge filed against you by the Superintendent***."

Given the above, it is determined that the aforementioned procedural requirements were not met by the Board in this matter with respect to proof of service on respondent.

Respondent alleges that insufficient basis existed upon which to find probable cause to credit the evidence in support of tenure charges against her because In re Kunz, supra, expresses that "An arrest, standing by itself, is not wrongful conduct by an employee." (Slip Opinion, at p. 16) With respect to this allegation, it must be pointed out that the factual circumstances herein differ from those in the Kunz case. In that matter, there

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was no documentation provided by the superintendent to support his "charge" that Kunz had been charged and arrested for violations of criminal law. His information was found to be based on rumor. The judge found that "The Board could not have evaluated the source of the superintendent's information regarding the nature of a criminal charge against respondent because the superintendent did not provide the Board with his source of information." (Id., at p. 16)

In the present matter, a copy of the municipal court complaint signed by Det. Charles Pope is attached to the superintendent's affidavit. Notwithstanding this, the Commissioner determines that, even with the presence of the copy of the municipal court complaint, there was insufficient evidence in support of the superintendent's "charges," N.J.S.A. 18A:6-11, for the following reasons.

Firstly, there is no statement as to how the superintendent came in possession of the complaint. Secondly, while the copy of the complaint is signed by Det. Pope, the complaint itself is one which states "upon oath says that to the best of [his] knowledge, information and belief, the named defendant *** did***", however, the portion of the complaint sheet relative to the name, title and signature of the individual before whom the complaint was sworn is blank. Thirdly, the superintendent's affidavit attests to the fact that respondent was "arrested on these charges" yet there is no evidence provided in support thereof. The "warrant" portion of the complaint sheet and "Police Return" portion which relate to actual arrest are blank, with the exception of a court appearance date being typed in, and no signature of "Judge or Clerk" appears on the complaint.

The superintendent's affidavit fails to provide any evidence that he or any other agent of the Board investigated the factual circumstances of the matter to ascertain (1) if an arrest was actually made; (2) if respondent had a court appearance on October 8, 1985; (3) what the outcome of such appearance was if it occurred; or (4) what steps were taken by the superintendent or other agent of the Board to acquire evidence in support of the charges or to investigate the factual bases of the criminal complaint. This could have been accomplished through such measures as interviewing/questioning/acquiring a statement from the pupil or her parent and/or the detective himself.

Having determined that the Board's petition in the present matter is fatally defective procedurally both in terms of form and substance pursuant to N.J.S.A. 18A:6-10 et seq., the petition is ordered DISMISSED WITHOUT PREJUDICE. N.J.A.C. 6:24-10 As such, the Board is directed to pay respondent her full salary as of the date it suspended her without pay, November 18, 1985 because of its failure to properly certify tenure charges against her. As in In re Kunz, supra, and In the Matter of the Tenure Hearing of Michael Wallwork, School District of Orange, decided July 1, 1985, the Commissioner determines that, in light of the gravity and nature of the charges of the alleged misconduct against respondent, the Board

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is in no way precluded from correctly recertifying the tenure charges and continuing her suspension from active employment while pursuing its investigation of the circumstances surrounding respondent's alleged arrest. N.J.S.A. 18A:6-8.3 Further, in light of the seriousness of the allegations in this matter, the Commissioner directs that the Somerdale Board inform him within 60 days of receipt of this Order of its actions relative to this matter.

COMMISSIONER OF EDUCATION

March 19, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6022-85
AGENCY DKT. NO. 296-8/85

BOARD OF EDUCATION OF
THE TOWNSHIP OF PEMBERTON,
Petitioner,
v.
GREGORY G. WOODWARD,
Respondent.

Ernest N. Sever, Esq., for petitioner (Sever & Hardt, attorneys)

Gregory G. Woodward, respondent, pro se[1]

Record Closed: February 14, 1986 Decided: February 19, 1986

BEFORE DANIEL B. MC KEOWN, ALJ:

On August 13, 1985,[2] the Board of Education of the Township of Pemberton (Board) certified charges of unbecoming conduct under N.J.S.A. 18A:6-10, the Tenure Employees Hearing Law, against Gregory G. Woodward (respondent), a tenure teacher in its employ, to the Commissioner of Education for determination. The charges are based on respondent's arrest on or about March 1, 1985 and subsequent two-count indictment on or about May 1, 1985 by the Grand Jurors of the State of New Jersey for the County of Burlington for (1) violation of N.J.S.A. 24:21-19a(1), knowingly possessing a controlled dangerous substance, cocaine, with intent to distribute and (2) for violation of N.J.S.A. 24:21-20a(1), knowingly possessing a controlled dangerous substance, cocaine. The Commissioner transferred 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.

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1 While Gregory G. Woodward is listed as representing himself, he has made no actual appearance either in writing or personally in this forum despite several attempts to communicate with him.

2 The erroneous date July 8, 1985 was reported in an Order of Inactivity issued in this matter on November 8, 1985.

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A prehearing conference was scheduled to be conducted October 18, 1985 at 9:00 a.m. at the Office of Administrative Law, Mercerville. Neither respondent nor a representative appeared for the scheduled prehearing conference despite having been afforded written notice. Subsequent to respondent's failure to appear at the scheduled prehearing conference, Board counsel agreed that the matter be placed on the inactive list pending disposition of the criminal charges filed against respondent. By letter dated October 18, 1985 certified mail, return receipt requested, a copy of which is attached and incorporated herein as if set forth in full, respondent was advised that absent written communication from him by November 5, 1985 this matter would be placed on the inactive list pending disposition of the criminal charges and that his suspension from his teaching duties, without pay, would continue. The return receipt from the United States Post Office shows respondent signed for receipt of the letter on October 21, 1985.

It is noted that respondent was initially suspended with pay following his arrest on or about March 1, 1985. The suspension continued, but without pay, when respondent was indicted.

An essential element of the Order of Inactivity entered November 8, 1985 obligated the Board to submit a status report of the proceedings against respondent on the criminal charges before the tenth day of each month until the disposition of such charges. On January 20, 1986, Board counsel submitted a certified Judgment of Conviction against respondent. Respondent, according to the Judgment of Conviction entered January 13, 1986, withdrew his plea of not guilty to the two count indictment and entered a plea of guilty on January 10, 1986 to Count One, which states that on March 2, 1985 in Hainesport Township, Burlington County, Gregory G. Woodward knowingly did possess a controlled dangerous substance, namely cocaine, with intent to distribute the same in violation of N.J.S. 24:21-19a(1). The Honorable Paul R. Kramer, J.S.C., upon accepting Mr. Woodward's plea of guilty to Count One, sentenced him on January 10, 1986 to one year probation, 64 hours of community service, a $250 fine, a $25 penalty for the Violent Crimes Compensation Board, and Mr. Woodward is to undergo weekly urinalysis for the next six months at his own expense. Judge Kramer dismissed Count Two of the two count indictment.

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By letter dated January 27, 1986, a copy of which is attached hereto and incorporated herein as if set forth in full, Board counsel and Gregory G. Woodward[3] were directed to submit in writing by February 13, 1986 their views on the application of N.J.S.A. 2C:51-2, Forfeiture of Public Office, to the present matter in light of Mr. Woodward's plea of guilty on Count One of the indictment. It is noted that a violation of N.J.S.A. 24:21-19a(1) is a crime of the third degree, N.J.S.A. 2C:43-1(b), because the violation of N.J.S.A. 24:21-19(a)(1) is considered a high misdemeanor, N.J.S.A. 24:21-19(b)(1). Mr. Woodward did not submit his position in writing. Board counsel urges in writing that the forfeiture statute applies to the facts in this case in a self-executing manner and that as a result ". . . Gregory G. Woodward automatically forfeited his tenure status and employment by the Pemberton Township Board of Education and that no further hearing is required." The Board contends respondent's automatic forfeiture of employment occurred on the date of his conviction and sentencing.

LAW

N.J.S.A. 2C:51-2 provides, in part, as follows:

> 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 a crime of the third degree or above * * *
>
> (2) He is convicted of an offense involving or touching such office, position or employment * * *
>
> b. The forfeiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier or 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 * * *

---

[3] The letter was sent Mr. Woodward, certified mail, return receipt requested. Mr. Woodward signed the postal receipt on February 1, 1986.

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Respondent held employment as a teacher with the Pemberton Township Board of Education. Local boards of education are separate governmental agencies. Kaveny v. Bd. of Com'rs of Town of Montclair, 69 N.J. Super. 94 (Law Div.) aff'd 71 N.J. Super. 244 (App. Div. 1962). Respondent stands convicted under the laws of this State of a crime of the third degree. He has been sentenced for such crime. There is no Order from the sentencing court ordering a stay of the application of the forfeiture of public office statute. The provisions of the statute, N.J.S.A. 2C:51-2, are self-executing. State v. Musto, 187 N.J. Super. 264 (Law Div. 1982), aff'd o.b. 188 N.J. Super. 106 (App. Div. 1983).

CONCLUSION

Given the facts of the matter as applied to the law, I **CONCLUDE** Gregory G. Woodward automatically forfeited his employment and tenure status as a teacher with the Pemberton Township Board of Education as of January 10, 1986, the date of his conviction by way of the court's acceptance of his plea of guilty and upon the sentencing by that court for the crime for which he stands convicted. It is, therefore, **ORDERED** that Gregory G. Woodward has forfeited his employment as a teacher with the Pemberton Township Board of Education and no further proceedings are necessary. Gregory G. Woodward is **DISMISSED** from his tenure employment as a teacher with the Pemberton Township Board of Education as of January 10, 1986.

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

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

February 19, 1986
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

FEB [illegible]
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 2 1 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

Judgment of Conviction

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IN THE MATTER OF THE TENURE HEARING OF GREGORY WOODWARD, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

The recommended report and decision of the Office of Administrative Law is adopted by the Commissioner for the reasons expressed therein. Accordingly, it is ordered that respondent forfeited his employment as a teacher with the Pemberton Township Board of Education pursuant to N.J.S.A. 2C:51-2 and that no further proceedings are necessary. In the Matter of the Tenure Hearing of Terrence McGuire, School District of Haddonfield, decided by the Commissioner October 21, 1985, aff'd State Board February 5, 1986; In the Matter of the Tenure Hearing of David Earl, School District of Trenton, decided by the Commissioner March 2, 1984, aff'd State Board, June 6, 1984; Lovell Kendall v. Bd. of Ed. of City of Camden, decided by the Commissioner March 16, 1983, aff'd State Board July 6, 1983, aff'd N.J. Superior Court, May 29, 1984.

Further, the matter shall be transmitted to the State Board of Examiners for possible revocation of respondent's certificate(s) pursuant to N.J.A.C. 6:11-3.7.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8414-84
AGENCY DKT. NO. 457-11/84

BOROUGH OF HADDONFIELD
SCHOOL DISTRICT,
Petitioner,
v.
WAYNE V. WISDOM,
Respondent.

Joseph F. Greene, Jr., Esq., for petitioner (Brown, Connery, Kulp, Wille, Purnell & Greene, attorneys)

Ezra D. Rosenberg, Esq., for respondent (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: December 31, 1985 Decided: February 14, 1986

BEFORE JOSEPH LAVERY, ALJ:

The Board of Education, Borough of Haddonfield (hereinafter "Board") originally certified charges based on written statements of evidence under oath, against Wayne V. Wisdom (hereinafter "respondent"), a tenured teacher in its employ. It suspended respondent without pay from his duties. The Board alleges that respondent engaged in conduct unbecoming a teacher in that he intentionally touched the intimate parts of a minor child, eight years old, who was a pupil in the school district. The Board asked in its petition that respondent be dismissed, pursuant to authority reposing in the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

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However, before plenary hearing could occur, the Board moved for summary judgment on the theory that, due to criminal conviction and sentencing for the offense prompting his suspension, respondent forfeited his employment. The Board asserts that forfeiture is imposed by the terms of N.J.S.A. 2C:51-2.

It is this motion which is decided today.

PROCEDURAL HISTORY

This matter was initiated by certification of charges timely filed by the Board on November 7, 1984, with the Commissioner of Education. Following answer, the Commissioner declared the matter a contested case, filing it with the Office of Administrative Law on November 20, 1984 pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After prehearing conference, an order issued December 13, 1984, scheduling plenary hearing for March 11, 12 and 13 of 1985. The Board thereafter moved for an order to strike respondent's answer and to require oral deposition of respondent. An order directing oral deposition issued on February 25, 1985. Subsequently, a prehearing conference was held on March 11, 1985, which resulted in two orders of March 27. The first vacated the prior order of February 25, 1985, and the second rendered the case inactive for no more than two months.

Notwithstanding this inactivity, respondent moved for reinstatement of salary while the Board cross-motioned for restitution of compensation already paid. Both motions were denied by order of May 16, 1985. Telephone prehearing conference convened on June 21, 1985, resulting in a renewed order of inactivity, dated June 26, 1985, to accommodate anticipated sentencing on criminal charges. That order was to expire on September 1, 1985.

In the meantime, petitioner moved to reopen the prior ruling of May 16, 1985, because of a later Appellate Division decision. After cross-motion for summary judgment, an order issued on September 13, 1985, reinstating the salary of respondent, vacating the March 27, 1985 order of inactivity and reserving a ruling on the Board's

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cross-motion for summary judgment, pending oral argument. The Board sought interlocutory review by the Commissioner. It was ruled, on October 3, 1985 during a prehearing conference with counsel, that decision on the motion for summary judgment would await the Commissioner's interlocutory decision. Letter briefs followed.

The Commissioner of Education in the interim, reversed the order of September 13, 1985, and, on appeal, was upheld by the State Board of Education on December 4, 1985. These final administrative decisions were filed with this administrative law judge on December 31, 1985, by the Board. On that date, the record closed.

ISSUES

The sole issue for resolution here is whether respondent, originally charged with conduct unbecoming an employee, must now be dismissed under forfeiture provisions of N.J.S.A. 2C:51-2b(2). The question is whether, as a result of respondent's plea of guilty, conviction, and sentencing for the crime of sexual assault, N.J.S.A. 2C:14-2b, forfeiture of his position is self-executing, by operation of law.

Burden of Proof:

The burden of proof in this matter falls on the Board which must carry it by a preponderance of credible evidence.

Undisputed Facts:

The material facts in this case are not in dispute:

Respondent is a tenured teacher, in the employ of the Board since 1972. He has served as a resource room teacher in the Central School, the Haddonfield Junior High School, and the Haddonfield Memorial High School, working in special education.

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In August 1984, respondent was arrested on charges of sexually assaulting a minor child, eight years of age, who attended school in the District. For this reason, the Board suspended respondent, pending the results of a criminal investigation. When an indictment was handed down on October 1, 1984, the Board certified its present charges to the Commissioner of Education, asking that respondent be dismissed or his salary be reduced for conduct unbecoming a teacher. The Board determined that there was probable cause to believe the evidence underlying the criminal charges. As noted above, on receipt the Commissioner declared the case "contested."

Before plenary hearing convened in the normal course of the appeal process which accompanies invocation of N.J.S.A. 18A:6-10 et seq., respondent on March 19, 1985, pleaded guilty to the charge of sexual assault. However, sentencing did not occur at that time. Nevertheless, in the midst of various other procedural motions (outlined above in "Procedural History"), the Board moved for summary judgment. It did so on the strength of the indictment and guilty plea, without benefit of sentence having been rendered. Decision on the motion was reserved by this ALJ, pending disposition by the Commissioner of Education and the State Board of Education on separate issues.

In the meantime, a judgment of conviction and sentencing issued from Rudolph J. Rossetti, J.S.C., for sexual assault as defined at N.J.S.A. 2C:14-2b. The judge, on September 13, 1985, sentenced respondent to three years' probation, directed psychiatric evaluation and treatment, performance of community services for a period of 200 hours, restitution of $375, payment for any psychological therapy required for the child, and compensation for violent crime in the amount of $25.

The Board forwarded a certified copy of the court order for this record. It argued that the change in respondent's status before the Superior Court mandated the summary judgment for which it had previously moved.

ARGUMENTS OF THE PARTIES:

The legal position of the Board and respondent on this issue have been set out by letter briefs submitted in August and October of 1985:

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The Board's Argument:

Prior to sentencing in Superior Court, the Board contended that respondent's indictment, surrender of teaching certificate, and admission of guilt warranted dismissal on the certified charge. It urged that dismissal should be imposed even in the absence of sentencing.

With sentencing now an accomplished fact, the Board argues that automatic forfeiture of employment has taken place under N.J.S.A. 2C:51-2.

Respondent's Argument:

Respondent answered the Board's first brief with the argument that a tenure proceeding, operating contemporaneous with criminal proceedings, cannot be prematurely terminated through allusion to forfeiture. Forfeiture may only take place upon sentencing under N.J.S.A. 2C:51-2. Moreoever, inherent in any tenure proceeding is the right to submit evidence of mitigation and extenuation, a right which may not be abridged.

In the face of sentencing, respondent argues that N.J.S.A. 2C:51-2 is inapplicable to tenured teachers. N.J.S.A. 18A:6-10 et seq. outlines the exclusive procedure for dismissal of a tenured teacher. The statutory provisions governing forfeiture were enacted subsequent to the tenure laws and manifested no intention to alter them. Moreover, the forfeiture statute is general in nature and, thus, subordinate to the specific terms of the Tenured Employees Hearing Law.

FINDINGS OF FACT

After considering the briefs of counsel, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I **FIND** those designated on pages 3 through 4 of this opinion.

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As to matters which are disputed or **CONTESTED**, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

There are no material facts in dispute.

ANALYSIS

Any resort to summary decision must await those conditions precedent set forth at N.J.A.C. 1:1-13.2(a). There can be no genuine issue as to any material fact challenged. Further, it must be shown that the moving parties are entitled to prevail as a matter of law, Judson v. Peoples' Bank and Trust Company of West Field, 17 N.J. 67, 75 (1954).

The Board's motion raises a legal issue which is ripe for resolution through summary decision. Respondent has not provided a rejoinder which would cast in doubt the fact of conviction and sentencing in the Superior Court.

Respondent's arguments grounded on statutory construction are not persuasive. N.J.S.A. 2C:51-2, being more recently enacted than the tenure law, is controlling. Additionally, the plain meaning of language employed by the Legislature must be observed. Respondent was convicted and sentenced for a crime of the second degree, N.J.S.A. 2C:14-2b. He holds public office, position or employment in a political subdivision of the State. He is clearly within the province of N.J.S.A. 2C:51-2, on those facts.

Moreover, the issue of whether the forfeiture act may intrude on operation of the Tenure Employee Hearing Act, N.J.S.A. 18A:6-10 et seq., has been resolved in a recent initial decision by Daniel B. McKeown, ALJ, which has been adopted by the Commissioner of Education. Haddonfield Borough BOE v. McGuire, OAL DKT. EDU 8413-84, adopted, Comm'r. of Ed. (Oct. 21, 1985).

This being so, the effect of the forfeiture statute is self-executing. By its own terms, N.J.S.A. 2C:51-2 declares that forfeiture takes effect upon sentencing. State v. Musto, 187 N.J. Super. 264, 305 (App. Div. 1982). Sentencing occurred here on September 13, 1985. This tribunal and the Commissioner of Education can only

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acknowledge that forfeiture, once established on the record, and comply with the legislative intent. Beyond ascertaining the authenticity of the court's order (not disputed here), no substantive administrative inquiry or adjudication may follow.

CONCLUSION

I **CONCLUDE**, therefore, that pursuant to N.J.S.A. 2C:51-2, respondent has forfeited his position as a tenured teacher in the Borough of Haddonfield School District.

ORDER

I **ORDER**, therefore, that respondent's forfeiture of position through operation of the provisions of N.J.S.A. 2C:51-2 be acknowledged, and his forfeiture of employment be recorded by the Board, effective September 13, 1985.

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

February 14, 1986
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

2/14/86
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 19 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

C-1 Judgment of Conviction and Statement of Reasons for Sentencing, dated September 13, 1985, Rudolph J. Rossetti, J.S.C.

WITNESSES

None

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IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE WISDOM, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
HADDONFIELD, CAMDEN COUNTY.	:	
	:	

The record and recommended report and decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by respondent within the time prescribed by N.J.A.C. 1:1-16.4a and b. The exceptions are summarized as follows.

Respondent asserts that the Administrative Law Judge (ALJ) erroneously found that N.J.S.A. 2C:51-2, the Forfeiture of Public Office Statute, is self-executing. He argues that (1) the tenure statute is remedial and must be liberally construed whereas the forfeiture statute is a penal one which must be strictly construed; (2) in order to apply the forfeiture statute to tenured teachers, the Commissioner would have to find that the tenure law had been altered by N.J.S.A. 2C:51-2; (3) the forfeiture statute is a "general" act which must be construed as subordinate to the "specific" terms of the tenure laws; and (4) N.J.S.A. 18A:6-10 and 28-5 constitute the "only" method of dismissing tenured teachers. As such, respondent argues that he cannot be held to have forfeited his position without recourse to N.J.S.A. 18A:6-10 et seq.

Upon examination of the record in this matter, the Commissioner adopts the recommended report and decision of the Office of Administrative Law for the reasons expressed therein. The issue of automatic forfeiture under N.J.S.A. 2C:51-2 and the arguments raised by respondent with respect to N.J.S.A. 18A:6-10 et seq. being the sole mechanism for removal of a tenured employee have been dealt with in numerous prior decisions which fully support the ALJ's determination that respondent automatically forfeited his position in the Haddonfield School District pursuant to N.J.S.A. 2C:51-2. In re Mc Guire, supra; In the Matter of the Tenure Hearing of James T. Fridy, School District of Long Branch, decided by the Commissioner December 22, 1980, aff'd with modification State Board May 6, 1981 and June 3, 1981, aff'd with modification N.J. Superior Court, Appellate Division January 26, 1983 and rem'd to State Board March 9, 1983, dismissed State Board May 2, 1984; In the Matter of the Tenure Hearing of Novis W. Saunders, School District of Elizabeth, 1981 S.L.D. 433; Lovell Kendall v. Bd. of Ed. of City of Camden, decided by the Commissioner March 16, 1983, aff'd State Board July 6, 1983, aff'd N.J. Superior Court, Appellate Division May 29, 1984; Robert Ash v. Bd. of Ed. of City of Camden, decided by the Commissioner April 6, 1984; In the Matter of the Tenure Hearing of David Earl, School District of Trenton, decided by the Commissioner March 2, 1984, aff'd State Board June 6, 1984.

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Accordingly, summary judgment is granted to the Board with respect to the forfeiture of respondent's position in the Haddonfield School District pursuant to the provisions of N.J.S.A. 2C:51-2. Further, the matter shall be transmitted to the State Board of Examiners for consideration of possible revocation of respondent's certificate(s) pursuant to N.J.A.C. 6:11-3.7.

COMMISSIONER OF EDUCATION

March 21,1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE V. WISDOM,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF HADDONFIELD, CAMDEN COUNTY,	:	
	:	

Decided by the Commissioner of Education, October 15, 1985

State Board Decision on Motion for Interlocutory Review, December 6, 1985

Decided by the Commissioner of Education, March 21, 1986

For Respondent-Appellant, Katzenbach, Gildea and Rudner (Ezra D. Rosenberg, Esq., of Counsel)

For Petitioner-Respondent, Brown, Connery, Kulp, Wille, Purnell and Greene (Joseph F. Greene, Jr., Esq., of Counsel)

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

July 2, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1604-85
AGENCY DKT. NO. 48-3/85

IN THE MATTER OF THE TENURE HEARING OF JEANNE HAMILTON-MOORE, SCHOOL DISTRICT OF THE TOWN OF MONTCLAIR, ESSEX COUNTY

Patti E. Russell, Esq., for petitioner (McCarter & English, attorneys)

Nancy Iris Oxfeld, Esq., for respondent (Oxfeld, Cohen & Blunda, attorneys)

Record Closed: January 6, 1986 Decided: February 13, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

In March 1985 the Montclair Board of Education certified charges of unbecoming conduct and use of corporal punishment against the respondent, Jeanne Hamilton-Moore, a tenured teaching staff member who has been employed in the school district for nearly 20 years. Following certification of the charges, the matter was transmitted on March 25, 1985, by the Commissioner of Education to the Office of Administrative Law as a contested case pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On June 24, 1985, after receipt of additional data, the Board filed an amended certification. The amended charges, which were attached to a new certificate of

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determination, specifically alleged that respondent had engaged in the following activities:

(1) Conduct unbecoming a teacher which renders you unfit to work with children;

(2) Negative and overly harsh conduct toward pupils;

(3) Instilling an atmosphere of fear and threat in the classroom;

(4) Use of corporal punishment in the classroom.

The amended charges, which were essentially similar to the original charges, were consolidated with the original charges on August 12, 1985, pursuant to N.J.A.C. 1:1-14.1 et seq. Respondent filed an answer in which she denied that she engaged in any of the conduct charged against her.

The hearings in the case commenced in October 1985 and spanned a period of several days. The Board presented the testimony of 19 witnesses. Respondent called nine witnesses, including herself. Following conclusion of the testimony, the court directed counsel to file proposed Findings of Fact, together with memoranda of law. Those submissions have been filed and the record closed on January 6, 1986.

TESTIMONY ON BEHALF OF THE BOARD

As noted, the Board called a total of 19 witnesses, including five present and past Board employees, several parents of children who were in respondent's classes between 1978-79 and 1984-85, two of the children themselves and a DYFS employee. The first witness was the present Superintendent of Schools, Dr. Mary Lee Fitzgerald. She was hired by the Board during the spring of 1982. In July 1982, she reviewed several letters from parents of former pupils of respondent which expressed serious concern about the suitability of the respondent to teach because of her past mental and physical abuse of

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pupils. The complaints centered upon the fact that Hamilton-Moore was scheduled to be reassigned to a regular classroom teaching position in September 1982 from a position of supplemental teacher, which she held during most of 1980-81 and all of 1981-82. Since Dr. Fitzgerald was relatively new to the school district, she discussed the letters with the Personnel Administrator, Mr. Robert Y. Schaeffer, and Dr. Janice Tunstall, the principal of the Nishuane School where respondent was to be assigned. According to Dr. Fitzgerald, she instructed Tunstall* to look into the parental concerns and to report back to her about them.

Not long after school opened in September 1982, Dr. Fitzgerald was advised that Schaeffer and Tunstall, together with other supervisory personnel, had met with respondent concerning the allegations in the letters. According to Dr. Fitzgerald, it was the intention of the administration to inform respondent that despite these complaints she was to have "a new chance."

In late October 1984, Dr. Fitzgerald received a telephone call from Dr. Tunstall to the effect that the parents of a boy in Hamilton-Moore's pre-kindergarten class at Nishuane had complained to Tunstall about the treatment of their son in the class. The child had told his parents that he was afraid to go to school because the respondent kept a knife in the classroom, and was threatening students with bodily harm. Upon receiving this information, Dr. Fitzgerald directed the principal to bring Hamilton-Moore to her office, which she did. On that day, a meeting was held among Dr. Fitzgerald, Dr. Tunstall, Mrs. Betty Veal (another senior administrator), and Hamilton-Moore. Although respondent admitted that while she had used certain language concerning the chopping off of fingers and heads, these were contained in the lyrics of children's songs and were not meant to be taken seriously. Hamilton-Moore also identified a knife which she kept in a desk drawer in her classroom (Exhibit P-1).

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* Dr. Tunstall has remarried. During 1982, her last name was Kalafat and several exhibits refer to her as Dr. Kalafat. In this Initial Decision, she will be referred to as Dr. Tunstall.

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Dr. Fitzgerald told respondent at the meeting that she would have to "look into the situation," and would get back to her concerning any action to be taken. The superintendent then consulted with the Board president and Board attorney, who advised her that respondent should be suspended without pay until the next Board meeting. This was done. Dr. Fitzgerald also learned that the Division of Youth and Family Services was undertaking an investigation of Hamilton-Moore's alleged abusive classroom activities, as was the Office of the Essex County Prosecutor. In November 1984, respondent was restored to a pay status, but was assigned to the central office and not given any class to teach. During January 1985, a representative from the Essex County Prosecutor's Office told Dr. Fitzgerald that there appeared to be several allegations of past incidents involving Hamilton-Moore's physical and verbal abuse of children in her class, and that several parents were willing to make statements about it. As a result, following the receipt of additional written information to that effect, the Board determined in March 1985 to file tenure charges. Hamilton-Moore was then again suspended, without pay.

In Dr. Fitzgerald's judgment, given the written evidence which was brought to her, together with respondent's own statements, Hamilton-Moore should no longer be employed in a classroom setting and that her alleged conduct was harmful both to the physical and emotional well-being of children. Particularly significant was the fact that respondent admitted having the knife in the classroom, and using the language that she did.*

Dr. Fitzgerald then identified an affidavit which she had prepared in May 1985, together with several attachments (Exhibit P-2). In that affidavit, Dr. Fitzgerald had set forth much of the information which she related during her direct examination. In particular, she noted the receipt and review of a variety of statements, documents and other data related to respondent's past conduct in her classroom. She noted that the information alleged that on various occasions during September and October 1984,

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* Following the transmittal of the original charges to the OAL, respondent moved to dismiss them on the ground that no competent proof was offered to support the allegations. See, N.J.S.A. 18A:6-11. An Order Denying Motion for Summary Decision was entered by me on June 19, 1985, and the Commissioner declined to undertake an interlocutory review.

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Hamilton-Moore has verbally abused her students, and threatened several of them with serious bodily harm. In addition, Hamilton-Moore was alleged to have instilled an atmosphere of fear in her classroom and admitted that she told students that she would cut or snip off their fingers, heads or other bodily parts if they did not obey her. Dr. Fitzgerald also stated in the affidavit that Hamilton-Moore admitted that she had held a knife within the view of students at various times, although she usually kept it in her desk drawer. The affidavit also set forth that information provided to Dr. Fitzgerald revealed that during the 1979-80, 1980-81 and 1983-84 school years, respondent had spanked pupils in her classroom, struck students with a ruler and on one occasion had directed students to step on another pupil who was on the floor in the midst of a temper tantrum.

The several attachments to Fitzgerald's affidavit also included reports prepared by investigators for the Essex County Prosecutor, letters and statements from parents, psychological data respecting the student who complained in October 1984, about the presence of a knife, statements given by that student and his mother, statements from parents of other children who were in respondent's class, a statement given by an aide who worked in Hamilton-Moore's classroom during 1979-80, memoranda between district administrators pertaining to their own investigation of the allegations, and the letters which had been reviewed by Dr. Fitzgerald during the summer of 1982.

On cross-examination, Dr. Fitzgerald conceded that although Hamilton-Moore was the continued subject of close observation, during 1982-83, and continued under this supervision in 1983-84, by the end of that school year she did demonstrate improvement. Dr. Fitzgerald maintained, however, that respondent continued to exhibit problems with "classroom management." Respondent's "Annual Written Performance Report" for 1983-84 concluded that she had met her "PIP" goals. A "Criteria For Evaluation" list attached to that report revealed she had been "outstanding" in two areas, "satisfactory" in 25 areas, and showed a need for improvement in the areas of, "willing to try new ideas/approaches" and "varies instructional activity." (Exhibit J-2).

Dr. Janet Tunstall, the principal at Nishuane School between 1982-83 and 1984-85, also testified about some of the events which had been previously related by Dr.

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Fitzgerald. According to Dr. Tunstall, when a complaint is received from a parent about a teacher it is her practice to meet with the teacher to discuss it. Since several such complaints were received in July 1982 about respondent, in which concern about the "discipline" and "atmosphere in the class" was expressed, Tunstall spoke with respondent about them. She told Hamilton-Moore that she did not know if the allegations were true, but that she did want to see the situation "turned around." Toward that end Tunstall moved Hamilton-Moore to a classroom next to her office so that she could observe her more closely.

Later, in September 1982, the principal met with Hamilton-Moore, together with Mr. Schaeffer and other senior administrators. Hamilton-Moore denied the truth of the parental complaints. Nevertheless, during the remainder of the 1982-83 school year, there was close observation and supervision of Hamilton-Moore and complaints about her continued in a general fashion. Tunstall stated, some parents asked her to remove a child because of the respondent's reputation, or because of a demonstrated lack of warmth and/or classroom management.

During the 1982-83 school year eight formal observations of Hamilton-Moore were made in addition to informal ones (Exhibit P-8). This is an unusual number for a tenured teacher. The observors, said Tunstall, reported that children were not always under control, and that Hamilton-Moore lacked a certain "style" necessary for teaching younger children. The evaluators also felt there was a lack of warmth, and that there was confusion in the classroom. In general, the class lacked a nurturing environment, although some of the children did seem to have a positive relation with the respondent.

During the 1983-84 school year complaints contined to be received by Tunstall from parents regarding the atmosphere in the classroom, the respondent's management of the class and discipline. As the witness put it, there was "tension" in the classroom.

Then, in late October 1984, a Dr. and Mrs. G., parents of four-year-old J. G., came to Tunstall's office and complained that their son told them respondent kept a knife in class and said to the children that she would snip off hands and fingers, and cut off

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their heads. As a result, Tunstall immediately contacted the Superintendent and a meeting was held with Hamilton-Moore at the end of the school day. Tunstall confronted the respondent about the alleged statements and Hamilton-Moore admitted she did use the words mentioned. She also admitted that she had used them with respect to other children beside J. G., but insisted that she did so only to maintain control when children were getting up to leave the classroom. Hamilton-Moore also gave Tunstall the knife (Exhibit P-1.) It is about twelve and one-half inches long overall, with a blade approximately eight and one-quarter inches long.

During the course of the meeting held at the Superintendent's office, the respondent repeated that she did say that she would cut off heads, or snip off fingers. At no time during that meeting, as far as Tunstall could recall, did Hamilton-Moore ever say that the words were from lyrics in children's songs. However, Tunstall did recall that respondent maintained that she only used the words in a joking manner.

Tunstall also identified respondent's "Annual Performance Report" prepared with respect to the 1982-83 school year (Exhibit R-1). In it, the principal observed that the areas needing attention and/or improvement included instructional activities and techniques. The attached "Criteria for Evaluation" list had one "outstanding," 22 "satisfactory" and six "needs improvement".

Another administrator who testified on the Board's behalf was Robert Y. Schafer, the Personnel Administrator. He has been an employee of the Montclair Board since 1961, and has served as Personnel Administrator for the last 15 years. According to Schafer, in October 1980 the former Superintendent of Schools told him that complaints were being received about Hamilton-Moore's classroom performance. Accordingly, Schafer was directed to meet with respondent and tell her that she was to be transferred from a regular classroom teacher to a supplemental teacher position, which was done.

During the summer of 1982, Schafer was told by the new Superintendent, Dr. Fitzgerald, to meet with Hamilton-Moore in order to help her overcome certain problems which were contained in allegations of parents. Schafer and other administrators met

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with Hamilton-Moore on September 9, 1982, in order to help develop a plan of action to deal with the criticisms. Following the meeting, Schafer sent a memorandum to Hamilton-Moore which summarized the conference. In it he reminded her that serious allegations had been made by parents that she had spanked and yelled at children. He informed her that she has "a reputation to overcome," and that it was the expectation of the administration that she would do so. (See, memorandum of September 15, 1982, attached to Exhibit P-2).*

Approximately two months later, Schafer dispatched another memorandum to Hamilton-Moore which synopsized another conference held regarding her progress. In that memorandum Schafer noted that as a result of classroom observations conducted between September 17, 1982, and November 1, 1982, "there are still problems generally with your classroom management." A variety of these concerns were then listed. They included excess student noise and movement, student inattention, failure to give directions in a proper manner and concern that several of the activities were too difficult for the level of the particular class. Schafer recommended to respondent that she, "learn to work with your aide and give her directions so she can help you." He suggested that respondent visit the classroom of a teacher with proven skills and abilities so that Hamilton-Moore could learn by observation (Exhibit P-7).

On October 30, 1984, Schafer received a telephone call from Tunstall advising him that she was then in conference with the parents of a child in respondent's pre-kindergarten class and that serious allegations of child abuse had been made by them against Hamilton-Moore. The principal asked Schafer for his advice. He recommended that she promptly advise Hamilton-Moore of the allegations. Schafer also called Dr. Fitzgerald, who recommended that there be a meeting among all concerned. According to Schafer, the principal told him that Hamilton-Moore admitted that she did keep a knife in the classroom, and had also told children that she would cut off their fingers.

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*Exhibit P-2 is the affidavit of Dr. Fitzgerald, with many separate attachments.

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As noted supra, an investigation of the child abuse allegations against respondent was conducted during late 1984 and into early 1985. To that end, the Board called the Regional Supervisor of the Paterson office of DYFS, Mr. Leonard Brazaitis, to testify concerning the investigation which his office conducted. According to Brazaitis, DYFS is statutorily responsible for the investigation of charges involving "institutional abuse." These involve incidents which occur out of the home setting, and include schools. Where the facts so warrant, a case being investigated by DYFS would be referred for review and action to the county prosecutor.

In early November 1984, Brazaitis was contacted by a field office in Essex County which had received a complaint from the parents of J. G. He then met with them and the child at their home and was told that the child was experiencing emotional trauma because respondent had threatened to cut off parts of the bodies of students with a knife. The parents also provided Brazaitis with information that other parents had complaints about respondent, involving possible use of corporal punishment. To that end, Brazaitis interviewed at least a dozen other parents, together with school personnel. He never interviewed the respondent. Brazaitis then related what several of the interviewees had told him concerning Hamilton-Moore's conduct. Most of the information was similar to that contained in various statements and reports which were attached to Dr. Fitzgerald's affidavit. Brazaitis conceded he had no personal knowledge of the commission of any of the alleged offenses. While he eventually did refer the matter to the Essex County Prosecutor, apparently no action was taken against the respondent as a result of the information provided.*

The remainder of the Board's case was taken up by the testimony of nine parents, two children, and two Board employees on rebuttal, Mrs. Joyce Casto and Mrs. Margaret Edelhoff. The two children, M. M. and J. G., were examined at Montclair State College in a facility specifically arranged for this purpose. It consisted of adjoining rooms, with a one-way window between them, where one could observe what was going on in the other room. I conducted the examination and the cross-examination of the two children in one

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* A lengthy report prepared by Brazaitis was marked for identification, but I sustained an objection to its receipt in evidence (Exhibit P-4, id.)

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of the rooms, and the audio of that examination could be heard in the adjoining room where the observers were seated. They could also see what was going on at the same time. Beyond that, a television camera was transmitting the video from the "interview" room to the "observer" room. This arrangement had been agreed to, in advance, by counsel for both sides.

Present in the "interview" room, in addition to the child witness and myself, were the court reporter, the mother of each child and, in the case of J. G., Dr. Myrna J. Glick, his psychologist. The direct examination consisted of questions provided to me, in advance, by counsel for the Board, after counsel for respondent first had an opportunity to review them. In addition, in order to maintain some flexibility, I asked additional questions during the course of the direct examination as a result of answers given to me by each child. Following conclusion of my direct examination, I repaired to the adjoining "observer" room in order to give counsel for the Board an opportunity to provide me with additional direct examination questions, which she did. After asking those questions I then came back to the "observer" room where I received questions to be asked each child which had been prepared by counsel for the respondent by way of cross-examination. After completing cross-examination of the witness, I went back to the "observer" room and received whatever additional questions counsel wished to provide me. This entire process was done with the consent of both attorneys.

A transcript of the testimony of the two children was separately prepared and is marked as Court Exhibit 1. The first child witness was J. G. At the time of the taking of his testimony (October 17, 1985) he was five years old. He told me that his sixth birthday would be January 6, 1986. After first ascertaining that J. G. knew the difference between telling the truth and telling a lie, and that he would be punished if he told a lie, I then proceeded with the direct examination. He told me that he was presently in kindergarten and had gone to nursery school, which he liked. He remembered being in respondent's class. As he put it, "it's hard to forget" (Court Exhibit 1, p. 17-3). He said that respondent told him, "she'll cut off my fingernails and I didn't like that at all." As for a friend in class named Jason, he said, "she did two things that I didn't like . . . . One thing she smacked him and for the second thing she told him that she'll cut off his head. I didn't

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like that." (Court Exhibit 1, p. 17-16 to 17-23). According to J. G. the respondent never hit him, but she did say that she would cut off his fingernails. It was not, he said, during a game, but was, "for real. She showed me the knife." (Court Exhibit 1, p.18-8, - 9). J. G. explained that he saw the knife at rest time, but that was not when his teacher said she would cut off his fingernails.

J. G. went on to relate that his friend Jason had been hit by respondent on the "behind," but that he did not cry. (Court Exhibit 1, pp.20-15 to 21-2). However, he did say that the respondent threatened the children in the class by having the knife out on her desk. While it was on her desk, according to J. G., "she said to the people a lot that she'll cut off their heads" (Court Exhibit 1, pp. 23-21 to 24-21). J. G. no longer has Hamilton-Moore as a teacher, but he still sees her from time to time outside of school. He ignores her. He now has another teacher whom he likes. When I asked J. G. whether he thought respondent meant it when she said she would cut off children's heads, he said, "I think that she meant that she really was going to do it, unless you do the right thing right away" (Court Exhibit 1, p. 31-4 to 31-16). However, he never saw her snip any child's fingernails, nor spank anybody in the class.

The other infant witness to be examined by the court was M. M., who was ten years old at the time of the examination on October 17, 1985. She, too, indicated that she knew the difference between telling the truth and telling a lie, and that if one told a lie they would be punished. The child said that she had gone to nursery school and enjoyed it. When she started pre-kindergarten in September 1979, respondent was her teacher. Although M. M. was never threatened by Hamilton-Moore, she did say that other children were threatened. The "threats" consisted of statements that the children would not get free time, or be able to go outside for recess (Court Exhibit 1, pp.43-4 to 44-8).

At no time was M. M. ever spanked by Hamilton-Moore, or hit in any other way. However, she did say that she saw a boy in the class spanked for some reason. His first name was Z. She only saw this happen once (Court Exhibit 1, pp. 44-12 to 45-21). In addition, the witness recalled that the respondent often would yell at the children and that this upset M. M. to such an extent that she would tell her mother about it. She

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would not want respondent as a teacher again because, "she has a bad temper" (Court Exhibit 1, p. 47-5 to -20). In addition, she said, the teacher grabbed other students by the arm if they weren't listening and they would be put into a chair and made to sit there (Court Exhibit 1, pp. 47-24 to 48-4).

Nine parents also testified for the Board in connection with the charges against the respondent. All had children in Hamilton-Moore's class at some time between 1979-80 and 1984-85. One of them was Dr. G. G., father of J. G. He is a college professor and a licensed family therapist. He said that in September 1984, his son was very positive about starting school; indeed, he was quite "exuberant" about it.

However, on or about October 25, 1984, while seated at the family dinner table, J.G. surprised his parents with a request that he not be made to go back to school because his teacher told the children that she would chop off parts of their bodies with a big knife if they were naughty. He also complained that he and a friend were told by respondent that she would chop off their fingernails, and that his friend was spanked by respondent. The child also told his parents that Hamilton-Moore would put the knife on her desk at nap time and would tell the children that she would chop off their arms or heads if they were naughty. He also said that she did a lot of yelling in class.

According to Dr. G., as a result of his son's adverse experience in Hamilton-Moore's classroom, the child has manifested a major personality change. Although J. G. was, and is, an unusually bright and verbal five-year-old, he now has become withdrawn and has a strong aversion to school. Also, he experiences nightmares and night terrors, wherein he wakes up screaming, frightened and anxious. On one such occasion, J. G. told his parents that Hamilton-Moore warned the children not to tell their parents about her. At the present time, J. G. is often afraid to play outside of his home, and is frightened when he is away from his mother. He has expressed fear of the respondent and has become much more combative with other children.

As the result of the personality changes manifested by his son, Dr. G. and his wife determined to seek immediate professional help for him. To that end, the boy was

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evaluated and tested by Dr. Myrna Glick, a licensed psychologist, who is continuing to treat the child. When the "knife" incident took place in late October 1984, Dr. and Mrs. G. brought their son to Dr. Glick as soon as they could. She told them that J. G. was terrified of the teacher and the knife. As a result of this advice, Dr. G. and his wife then went to see Dr. Tunstall.

Dr. G. said his son is still undergoing treatment from Dr. Glick because of the psychological damage visited upon him. His son, he said, has been seriously affected by Hamilton-Moore's conduct and the course of professional psychotherapy which was commenced for him in 1984 must continue. At present, J. G. continues to have difficulties and sees the psychologist on demand whenever a "crisis" occurs.

On cross-examination, Dr. G. agreed that his son never said that Hamilton-Moore directly threatened that she would use the knife to cut off a body part. Rather, his son made a connection between his seeing the knife from time to time, and the statements that the teacher made about cutting.

The psychologist consulted by Dr. and Mrs. G., Dr. Myrna J. Glick, also testified. She has been engaged in private practice for eight years and was trained as a school psychologist. Until October 1985, she served for several years as a school psychologist and was chairperson of a child study team in the Franklin Lakes School District. She holds a Bachelor's degree from William Paterson College, and both a Masters and a Ph. D. degree from Teachers' College, Columbia University. In her private practice she performs psychotherapy with children, and also works with various child study teams on a consultative basis.

Dr. Glick first met J. G. in late October 1984, soon after his parents telephoned her about his not wanting to go back to school. They told her that J. G. was afraid of the teacher because she had a very large knife and said she would cut off the hands, arms and other bodily parts of the children.

Dr. Glick found J.G. to be warm, friendly and quite verbal. However, whenever she mentioned school to him, he "clammed up," clung to his mother and said he

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did not want to talk about that subject. Dr. Glick conducted certain projective personality tests, which indicated to her that J. G. was, "in a state of terror." She pursued the subject of school with him and he told her that the teacher had a big knife that scared him. He told her, as well, that the teacher threatened to cut off the heads and arms of the children. He mentioned the threat to cut off one particular child's head, but then confessed that this might have been in his imagination. However, he did express genuine concern about the well-being of his classmates.

Dr. Glick determined on the basis of her initial evaluation of J. G. that the boy was "genuinely terrified by something that happened in the classroom." However, she at first did not personally believe that the knife which he mentioned had such a long blade - she felt he exaggerated the actual size because of his fright, and perhaps was overreacting because he was in a "state of emotional panic." At the conclusion of the first session that she held with J. G. in October 1984, Dr. Glick did not feel that there would be any need to continue to see the boy - that he could be counselled in school. However, J. G.'s parents insisted that their son should continue to see her, and the boy did too. Thus, he became a regular client.

Dr. Glick said she was astonished both at the accuracy of J. G.'s powers of recall, and that the knife, as it turned out, was nearly as long as J. G. said it was. She was also surprised to learn that the teacher apparently had admitted telling the children she would snip off their fingers and cut off their heads.

As a result, then, of her first meeting with J. G., the witness concluded he was suffering from a "post-traumatic stress syndrome-acute." However, after continuing to see him, she has changed her diagnosis to "post-traumatic stress disorder-chronic" because it has become a "long-lasting anxiety state." As a result of his experience in respondent's class, J. G.'s sense that he could not be harmed has been shattered, and he carries a fear of harm with him all the time.

According to Dr. Glick, children as young as J. G. are so dependent upon adults that the risk of a trauma of this sort is much greater for them. Teachers, she said, have a

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particularly greater potency if they teach children of such tender age as J. G., and the younger the child the greater the possible influence. Children of his age see the teacher as "all powerful," with even more influence than his parents. In fact, children in the four to five year old age group often view their teacher as "omnipotent," and believe themselves powerless to defend against a teacher in any way.

After treating J. G. over time, the witness has come to the conclusion that he is a very intelligent, perceptive and reality-oriented individual - except for the situation which stemmed from his experience in class, which was "overwhelming." She treated J. G. about once a week until February 1985, when he seemed to be doing better. As of the time of the hearing (October 1985) she was seeing the boy about every other week. However, she felt that in view of certain recent reactions by the child she may have to begin to see him on a weekly basis again. In June 1985, she had reevaluated her patient and concluded he was still frightened. She knows that he lives just two doors away from the respondent and this concerns him, since he is still afraid of her.

Dr. Glick is impressed by J.G.'s remarkable veracity and very strong consistency in relating events concerning his experience in school. She believes what he tells her and does not feel that J. G. was fabricating his version of the events, he related to her.

Dr. Glick also prepared a lengthy report with respect to her treatment of J. G. (Exhibit P-5). This report, dated September 10, 1985, and addressed to counsel for the Board constituted her professional opinion as to the psychological impact of both respondent's admitted and alleged classroom conduct on the children. As a result of her review of various documents provided to her, which contain allegations of Hamilton-Moore's conduct, as well as her own independent knowledge of J. G.'s particular situation, Dr. Glick opined that the specific behaviors charged by the Board against respondent, "would be damaging rather than helpful to children, quite the opposite of Mrs. Hamilton-Moore's responsibility as a teacher." In her report, Dr. Glick observed as follows:

> In short, one is forced to conclude that most 4 or 5-year-old children would be placed at risk for emotional trauma, whether immediate or delayed, by attendance in Mrs. Hamilton-Moore's pre-school classes, assuming that she were to continue to

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> display the negative conduct to which she herself admits and which is alleged by the Montclair Board of Education. In addition, there is abundant evidence that a significant number of children who attended her classes were indeed traumatized by the experience. There is the additional possibility that other students who have thus far not been reported as experiencing post-traumatic stress reactions will be so reported in the future.

In the course of preparing to testify in the instant matter, Dr. Glick also reviewed an affidavit which had been executed by respondent in June 1985. In paragraphs 8 and 9 of that affidavit Hamilton-Moore admitted that she maintained a knife in the classroom, albeit for the purpose of cutting up fruit which the children would bring in for a snack and not for purposes of threatening the children. She further admitted that at times she did state to the children that she would, "snip off their fingers" if they misbehaved, but she insisted such comments were, "always said in a joking manner at a time when I held neither scissors nor knives in my hand. The children always took this as a joke and in fact would stick out their arms or hands and state to me: 'snip me'" (Exhibit P-6). According to Dr. Glick, such admitted conduct could be very frightening and devastating to a vulnerable child; particularly in view of the fact that it seemed to her that respondent was actually enticing children to participate in their own punishment by holding out their hands.

Furthermore, said Dr. Glick, given the very presence of a knife in the room, unless a child has been able to "block out" the thought of it, and unless there is a supportive emotional climate in the room, some children would find the admitted statements very frightening. Even if the knife usually was out of sight, the fact that a child was aware of its presence could produce emotional trauma.

Dr. Glick also observed that if statements were made in a joking manner, such as Hamilton-Moore said, the children still might not perceive them to be a joke, and might take them quite literally. In fact, children of the ages of those in Hamilton-Moore's class (four and five years old) are much less capable of understanding abstractions, including such "humor," since it is incongruous (the opposite of what is meant) and often beyond the ability of such children to fully appreciate. Thus, as a result of the conduct which

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Hamilton-Moore admitted, there was a clear possibility that children might manifest physical complaints to avoid attending school, including having nightmares. In Dr. Glick's opinion, from what she knows of the matter, the respondent's "control by force" of the classroom, combined with the "confusion" which it is claimed marked her class, had an adverse affect upon the students. Given, then, the allegations that she also singled some children out for discipline, the result could be devastating to a child's self-esteem. By merely stating that she would snip or cut off parts of bodies, regardless of what she intended, children in the four to five year age group could be put in real fear of their life or their bodily safety in various ways. Not every child could handle it well.

On cross-examination, Dr. Glick noted that she spent about one and one-quarter hours with J. G. when she first met with him at the end of October 1984. She believed that permitting Hamilton-Moore to remain as a classroom teacher, in light of what she knew and was told about her, would, in her professional opinion, expose the Board and its staff to possible liability. Given that situation, and to resolve any doubt, she believed the respondent should be removed from the classroom to avoid such a risk.

On redirect examination, the psychologist restated that she did not believe the respondent ought to be put back into a classroom situation, based upon what she knew and what she had read. She felt that the environment in the respondent's class, based upon the information at her disposal, was "persistently harsh." If Hamilton-Moore was to be returned to a classroom setting there would be no way to assure that the emotional well-being of the children could be safeguarded.

As noted, several other parents also testified for the Board. Mrs. C.S. has two daughters, H., age 8, and L., age five and one-half. L. was a student in Hamilton-Moore's pre-kindergarten class during 1984-85. According to Mrs. S., her daughter, who loved nursery school, soon told her that she did not want to go to respondent's class because another child had been shaken by the shoulders and made to sit down hard in a chair. In addition, L. was upset because she had been made to eat a certain item of food against her will. During the time that she was in respondent's class L. would wake up two to three times a night, every night. She would also draw pictures of herself crying. She had never displayed these kinds of behavior problems. After respondent was replaced, L. stopped

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waking up every night and drawing the pictures. On cross-examination, Mrs. S. identified a letter she had written to the Superintendent in October 1984 about Hamilton-Moore. In the letter she expressed concern regarding her daughter L.'s well-being in the class (See attachment to Exhibit P-2).

The next parent to testify was Mrs. J.G. who is the mother of two daughters, J., age 11, and J., age 7. Her older daughter, presently in sixth grade, had Hamilton-Moore as a teacher during the 1979-80 and 1980-81 school years. Recently, she told her mother that she recalled the respondent had struck some children with a ruler. On cross-examination, Mrs. G. indicated that her daughter had undergone a, "drastic personality change" while a pupil in respondent's class. Previously she had been confident and self-possessed, she had become, "full of self-doubt, withdrawn, and suddenly hated school and didn't want to go." Because of this and other manifestations of a negative nature, it was Mrs. G.'s belief that the respondent should not be returned to a classroom teaching position where she would be in a position to again create, "another atmosphere of excessive criticism and unease among her pupils" (See attachment to Exhibit P-2).

The next parent witness was Mrs. K.M., the mother of M. M., the 10-year-old girl, whose testimony was taken at Montclair State College. According to Mrs. M., her daughter enjoyed nursery school, but when she was in respondent's pre-kindergarten class in 1979-80, she complained about noise and yelling in the classroom. She also told her mother that the teacher was often in a bad mood and that she had grabbed some children abruptly. On one occasion the child told Mrs. M. that another pupil had been slapped by respondent.

In view of her concern over her daughter's complaints, Mrs. M. went to the class and then at the invitation of respondent came in a couple of hours, one day a week, to help out. While there she noted that there was confusion and a very high noise level - too many things were going on at once. In addition she observed that from time to time children were physically moved by the teacher and put in place, "in an unnecessarily harsh way." Mrs. M. was also one of the parents who wrote complaining about the possibility that respondent would be put back into the classroom.

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Mrs. J. B. is the mother of three children. Her middle son, S., was a student in Hamilton-Moore's pre-kindergarten class in 1984-85. After Hamilton-Moore had been removed from the classroom, sometime during the winter of 1985, the boy told his mother that respondent once spanked him while he was in the cloakroom and had put him into a yellow chair. He also said that another child (J. G. - but not the J. G. whose testimony was offered at Montclair State College) had been spanked on more than one occasion.

During the time that he was in Hamilton-Moore's classroom Mrs. B. said her son manifested behavior that was of concern to her. He began to wet his bed and to have nightmares. He became sullen, moody and quiet - simply not happy about going to school. After Hamilton-Moore left the class, he brightened up and seemed once again to enjoy going to school. According to Mrs. B. she cannot ascribe her son's behavior and personality changes to any reason other than his having had respondent as his teacher.

On cross-examination the witness stated that she never went to school to speak to respondent about the personality changes because she had been told by her sister (who had also had a child in respondent's class) that if anyone "started up" with respondent, then the child would be "picked on." The witness said she did not want to "rock the boat."

Mrs. S. W. has three daughters, H., E. and S. E. was in respondent's classes in both 1978-79 (pre-kindergarten) and in 1980-81 (first grade). She recalled that Hamilton-Moore was replaced by another teacher on Columbus Day in 1980. Her daughter, according to Mrs. W., seemed happy to go to the first grade class of Mrs. Hamilton-Moore. However, on her first day there she became upset when the teacher asked her to write sentences. Later she began to complain about school, and did not want to go. She would cry and say she was afraid she would get into trouble. As a result, Mrs. W. eventually spoke to the home and school coordinator, Mrs. Joyce Casto about it. According to the witness, Casto told her that she was wondering when she would be getting a call from E.'s mother since the child had been vomiting on the bus and going to the school nurse.

At the present time E. continues to demonstrate extreme anxiety when faced with a teacher who is "rigid." Mrs. W. believes that this is a carryover from her experience in Hamilton-Moore's class. Recently, the child related that she had seen

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children being hit in class and that the other children were told that if they reported it to parents they would be hit too.

Mrs. W.'s youngest child, S., had Hamilton-Moore in pre-kindergarten during 1983-84. While she had loved nursery school, however, she soon complained about respondent's insisting that the children actually go to sleep at nap time. Since S. did not easily nap, this made her very upset. Recently, her daughter told Mrs. W. that respondent had spanked another child and struck him on the head with a pointer. This child's initials were C. S. She also related an incident when children were told to step on another child on the floor. She did not identify him. As a result of her daughter's experiences Mrs. W. went to the principal and asked to have her child taken out of the class. However, the principal refused to do so.

The next parent witness was Mrs. D. Mc. L. She has three boys, ages ten, seven and six. Her eldest was in respondent's pre-kindergarten class in 1979-80. He soon reported to his parents about spanking and arm grabbing incidents and that a child named S. J. was spanked regularly. Although her son had been enthusiastic about going to school, by the end of the first month he did not want to go at all. Also, he was manifesting self-control problems at home. He had become unhappy and unruly and his mother had to sit with him to help him go to sleep at night.

Mrs. Mc.L. also said that at a back-to-school night during the fall of 1979 she heard respondent express a belief in the use of corporal punishment in response to a question from a parent about how she felt with respect to disciplining the students. Mrs. Mc.L. was upset by the remark but concluded that perhaps she did not fully understand what the teacher had actually said. However, after her child began to complain about spanking and arm grabbing, she believed that the teacher had actually said that she was a proponent of corporal punishment.

Mrs. McL.'s son was transferred out of Hamilton-Moore's class during the middle of the 1979-80 school year to another pre-kindergarten and had no trouble there. Nevertheless, the personality changes which he manifested persist, and he still has some trouble in school.

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On cross-examination Mrs. Mc.L. stated that to the best of her recollection Hamilton-Moore did actually say at the back-to-school night that she believed in corporal punishment. With respect to the transfer of her child, she agreed that one of the reasons had to do with the fact that the class was not, in her opinion, challenging enough to her son. She said she did complain to the then principal (Mr. Freeman) about the spanking and arm grabbing.

The next parent witness was Mrs. E. K. the mother of three children. Her oldest, a son, had Hamilton-Moore in 1979-80 in pre-kindergarten. Although the boy had no problems at a nursery school he reported to his mother that in Hamilton-Moore's class a child who had been bad was spanked. As the boy put it, the other child (S. J.) received "a swat on the fanny." In addition, Mrs. K. said that her son complained that the class was quite noisy and that he wanted to be moved to another class.

On one occasion Mrs. K. visited Hamilton-Moore's class and found it to be "very noisy" and "seemingly chaotic." She actually observed Hamilton-Moore grab a child and make him sit down in a chair. In December 1979 her son was transferred to another class and had no trouble there.

Mrs. K. was also at the back-to-school night in 1979 and did recall hearing respondent say something about "carrying a big stick." It was Mrs. K.'s perception that the respondent was excusing the use of corporal punishment and that she also said that it was "alright to slap hands." Mrs. K. could not believe that Hamilton-Moore really meant it.

On cross-examination Mrs. K. indicated that they lived on the same street as S. J., the child who had been spanked and that her son (K.) should not have been in the same class as that child. As she put it, S. J. was less mature than her own son and the level of the class was not one which was up to her son's abilities. She also related that at the back-to-school night she did not hear any parent say that he (the parent) believed in corporal punishment.

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Mrs. J. S. is the mother of three children. Her youngest, a boy, C., had Hamilton-Moore in pre-kindergarten in 1983-84. When C. was in respondent's class he would often tell his mother that he had been a "bad boy" and that the teacher was mad at him. One night in September or October 1983, the child told his mother, "my teacher hit me today." As a result, Mrs. S. contacted the school social worker and met with her and with the principal. She told the principal about the allegation but the principal refused to have the boy removed from the class, saying that the situation would be reevaluated in a few weeks.

According to Mrs. S. her son also told her that he had been "poked with a stick." Generally, the boy was quite upset and she had to deal constantly with the problem. Her son started to bite his nails, wet his bed at night and also wet his pants in school. He became overly aggressive both with other children and adults and began to stutter. As a result of these and other personality changes her son underwent psychological counselling during 1984-85. He still has a fear of adults and has arrested development in the area of visual perception and fine motor coordination skills. Mrs. S. said that the psychologist whom she had consulted told her that her son's problems stem from being told that he was bad, and that he had believed it. The psychologist also told her that the boy related that he had been spanked and/or hit with a ruler on many occasions.

According to Mrs. S. she would often go to school and would see her son crying in class. She said she tried to speak to respondent and the principal about it, but nothing ever came of it. When C. went on to kindergarten her son did not develop any new problems, and the new teacher worked with him in a kindly way. However, he still is behind in reading and fine motor skills.

On cross-examination Mrs. S. conceded that when she met with Hamilton-Moore, the principal and social worker in 1983 regarding her sons's problems in class she did not mention his claims that he had been hit. She repeated, however, that he continues to have problems with adults and is fearful of meeting new people.

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The last parent witness on behalf of the Board was Mrs. E. J. whose son, S., is presently ten years of age. Her son was in Hamilton-Moore's pre-kindergarten class in 1979-80. After being in that class he soon complained to his mother that he did not like school. He told her that he had been hit by the teacher. In fact, Mrs. J. said that she had first heard about the hitting from her neighbor, Mrs. K., whose son, K., had said that S. was spanked by respondent. When Mrs. J. asked her son about it, he confirmed that it had happened "a few times." He also said that he had once been pulled out from under a table by the arm and that it hurt him. According to Mrs. J., her son told her that two other boys had also been spanked. In March 1980, S. was taken out of Hamilton-Moore's class. While his problems lessened after that, he still is an excitable child.

On cross-examination Mrs. J. revealed that she did speak to the principal about having her son transferred, and was told by him that the situation would be watched. Mrs. J. was also one of the parents who had written to the school in the summer of 1982 complaining about Hamilton-Moore. Her letter, dated July 9, 1982, noted that her son had been in Hamilton-Moore's class and was labelled one of the "three bad boys." This, she said, had a "tremendous psychological impact and my son was afraid to tell me what was happening. He was spanked with a ruler and shut in a closet as discipline measures. He was afraid to go to school." In addition, she went on to observe that with the help of Mrs. Casto and a Mrs. Edelhoff, her son was able to change teachers in March 1980, but that this was too late since the damage had been done. As she put it, her son's first exposure to regular school should have been happy - instead, he started school "in a classroom of chaos." When she visited the room she found a lack of stimulating displays and activities. She noted that both her son's kindergarden and first grade teachers had to do a lot of work and give her son additional attention to "make up for the damage that was done during his first year in school." She concluded her letter with an observation that respondent exercised no real control over the class and that she hoped that other children would not have to go through the same experiences that her son did (see, attachment to Exhibit P-2).

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In addition to the attachments previously mentioned, the affidavit of Dr. Fitzgerald (Exhibit P-2) also contained a copy of a report submitted to an assistant prosecutor by an investigator in the Child Abuse Unit, dated March 12, 1985. He related that in November 1984, as a result of a telephone call from Mr. Brazaitis of DYFS, he spoke to the parents of a boy who claimed to have seen a large knife in respondent's classroom. As a result of his investigation the individual concluded that the teacher had said to students that she would snip off their fingers if they did not listen. However, the knife was never picked up and/or pointed at anyone. He personally interviewed J.G. and J.G.'s parents and took statements from them. The boy was afraid of the teacher and of the knife, although he had never been threatened with it. The parents told him that they felt their son had been traumatized by the teacher. Other parents interviewed by the investigator also told him that the teacher did not use appropriate language for pre-kindergarten students. (see, attachment to Exhibit P-2).

Other attachments included a letter to the Essex County Prosecutor from Mr. Brazaitis, dated November 21, 1984; a copy of a confidential psychodynamic evaluation conducted by Dr. Glick of J.G.; the memorandum from Mr. Schafer to the principal dated November 7, 1984; statements obtained by the Montclair Police Department from J. G., dated December 10, 1984, from J. G.'s mother, dated December 3, 1984; from a Mrs. H.S. dated February 27, 1985 (who later testified on respondent's behalf); from Assistant Superintendent Betty Veal, dated January 30, 1985; from the Mrs. J. G. who testified for the Board, dated January 3, 1985; from Mrs. A.L., dated January 2, 1985; from Mrs. Margaret Edelhoff (who later testified on rebuttal), dated January 8, 1985; from Mrs. G. K., dated December 5, 1984; and from Mrs. W. G., dated January 22, 1985; a memorandum to the file from the Superintendent dated November 2, 1984; a memorandum to the file from Mrs. Veal, dated November 2, 1984; and letters from parents who were not called as witnesses.

TESTIMONY FOR RESPONDENT

The respondent presented the testimony of eight parents of children who were in her class, as well as her own. Their testimony is related below.

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Mrs. A. B. has four children. Her next to youngest son, R., was in respondent's prekindergarten class in 1979-80. Mrs. B. went there often to observe him, at the invitation of Hamilton-Moore. According to the witness, the room was always very neat and the children were behaving fairly well when she arrived. Her son loved school and respondent taught him to write his name. At no time did the boy ever mention children being spanked, grabbed or hit. He never told her that the teacher had yelled at children or referred to them as being "bad." Nor did he ever tell them about a child being locked in a closet.

Mrs. M.F. is the mother of six children. Her daughter, D., had Hamilton-Moore for pre-kindergarten in 1983-84. The witness brought her daughter to school every morning and on Thursdays was a "class mother" who would stay one or two hours to help out. In her judgment the room was always neat and she was quite satisfied with Hamilton-Moore. At no time did she ever see Hamilton-Moore hit a child or yell or scream at a child. At no time did any of the students appear to her to be frightened or afraid of Mrs. Hamilton-Moore. Her daughter, in fact, loved the teacher and she still likes school.

Mrs. D.R. has a six year old daughter who also had Hamilton-Moore in pre-kindergarten in 1983-84. Her daughter, she said, never complained to her about anything going on in class and was, in fact, happy to have respondent as a teacher. An no time did she ever mention that the teacher spanked, hit or yelled at students in an angry way. The witness at one time asked her daughter whether Mrs. Hamilton-Moore ever told children to step on a child. Her daughter replied that this had never happened and, in fact, the teacher once cautioned them not to step on a child. The reason the conversation took place was that the mother had heard a rumor about Hamilton-Moore telling children to step on a child and she asked her daughter about it.

According to the same witness her nephew was also in the class in 1983-84 and he never reported anything negative about the experience. He, too, stated that with respect to the stepping incident it was the teacher who cautioned the children not to step on a child. In short, both her daughter and her nephew liked being in the class.

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Mrs. H.S. has a son who was in pre-kindergarten in 1983-84 as well. She had heard rumors about Hamilton-Moore and when she learned her son was to have the respondent she was alarmed about it. As a result, she called the superintendent and also spoke to two or three parents of children who had the respondent the previous school year. The witness was also told to see the principal if she had concerns, which the witness did. Tunstall, she said, told them that a close eye was being kept on Hamilton-Moore. Although the witness's husband, a professor, was concerned about the number of observations that the administration undertook, the actual "feedback" that she was getting about the respondent's classroom performance did not match the rumors that she had been hearing. As a result, she was confused. Because of that confusion she wrote a letter prior to the opening of school asking that her son not be in Hamilton-Moore's class. This was based upon what she had heard about the respondent. However, her son was not taken out of the class and on the very first day the witness's husband went to Hamilton-Moore's class to observe. He came home and told his wife that he thought the teacher was marvelous. The witness and her husband both felt ashamed about their preconceptions. They spoke to respondent and found her to be warm and understanding. Later, the witness frequently stopped in to observe the class and always found a friendly atmosphere. In particular, her son was always happy there. Her child was quiet and orderly, although other children were discipline problems. However, she felt that the respondent handled them quite well —there was no yelling. At no time did the witness's son ever tell her that children were hit or spanked, and she certainly never saw that happen. Also, her son told her that on one occasion the children were told to "step over" another child.

Mrs. L.P. has two children. Her son, J., age six, was also in the 1983-84 pre-kindergarten class conducted by respondent. She, too, had heard "rumors" about the teacher. When her son was assigned to the class she went to see Dr. Tunstall about it. According to the witness, the principal told her that Hamilton-Moore was a good teacher and if she was not she would not be at the Nishuane School. Dr. Tunstall told the witness to go to speak to Hamilton-Moore, which she did. The witness told Hamilton-Moore about what she had heard, and the respondent stated that some years previous thereto, she had been accused of locking a child in a cloakroom but it was not true. As a result, the

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witness permitted her son to remain in Hamilton-Moore's class. During that year her son was fine. At no time did he ever report that a child was hit, spanked or yelled at. Her son likes the respondent and has a positive attitude about school.

Mrs. C.M. has three children. Her youngest, a boy, was also in the 1983-84 pre-kindergarten class. Once the witness had occasion to pick her son up early. When she arrived she found that classroom organized and children were doing various activities. She did not see any yelling, hitting or spanking. Her son, she said, liked going to school and liked Mrs. Hamilton-Moore. He never reported any hitting or spanking either.

Mrs. M.H. has a great-grandchild who was in Hamilton-Moore's class in 1982-83. When she would go to the class Mrs. H. found the room to be quiet, pleasant and orderly. She never saw the respondent spank, hit or yell at children. In order to get the attention of children she would clap her hands together and raise her hand in the air. The children would become quiet and understood that she wanted them to be obedient. Her great-grandson told Mrs. M.H. that he liked the respondent and he liked to go to school. The witness found the respondent to be very caring about the children in class and that the atmosphere, as far as she knew, was "very pleasant."

The last parent witness for respondent was Mrs. J.B. Her oldest child, a daughter age seven, had the respondent for pre-kindergarten in 1982-83. Her middle child, a boy, had Hamilton-Moore as a teacher in 1983-84. Mrs. B. volunteered to be a class mother for parties and for holidays. She found the classroom was well organized and the children were well behaved. As far as she could tell, the students loved the teacher, certainly her daughter did. At no time did either of her children ever relate that a child had been hit, spanked or yelled at.

The respondent then testified on her own behalf. She is a graduate of Glassboro State College and is appropriately certified. She began her teaching career in Bridgeton, where she worked for seven years as an elementary school teacher. She came to Montclair in 1966 and taught there until September 1984 when she was removed as a result of the instant proceedings. A joint stipulation of facts related that the respondent

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is certificated to teach nursery/kindergarten and kindergarten to grade eight. It also set forth the respondent's entire teaching career in Montclair between 1966-67 and 1984-85. During that time she taught primary grades. Beginning in 1978-79 she taught pre-kindergarten at the Nishuane School. In 1979-80 she was assigned to a program for four year olds. During 1980-81 she was assigned as a first-grade teacher at Nishuane, but after the first month or so she was transferred to a supplemental teaching position. During 1981-82 she was a compensatory education/Title 1 teacher at Nishuane. From 1982-83 until October 1984 she taught pre-kindergarten.

The Stipulation further revealed that on October 30, 1984, respondent "surrendered a butcher knife" to Dr. Tunstall. It further stated that respondent, "kept the knife in her classroom" (Exhibit J-1).

Respondent described the type of activites that she conducted with the children when she taught pre-kindergarten (four to five year olds). She would generally be with the children the whole day, except at lunch when the aide would be in the classroom. Also, the aide would accompany the children to recess, to the lavatory, to gym and to art and music. The purpose of having an aide was to assist the classroom teacher in whatever activities were directed to be done by that teacher.

In 1979-80 Margaret Edelhoff was the respondent's aide for a part of the year. According to Hamilton-Moore, the aide requested a transfer because she was "dissatisfied," and a new aide was assigned.

In order to get the attention of students and to maintain their obedience, respondent said she would turn the lights off or else raise two fingers up in the air which meant "quiet." She also said she would sometimes use French or Spanish words to quiet the children.

Hamilton-Moore conceded that occasionally she would mention snipping fingers, but this would occur, for example, when children were lined up to leave the room. The respondent said she would laughingly tell them that they should not take or touch games,

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otherwise she would "snip off your fingers." At that point some children would reply, equally jokingly, "do me." On other occasions respondent would sometimes tell a child that she would "spank you with a wet noodle." She was sure that the children understood that "threat" to have been made in a joking manner.

At the beginning of each school year Hamilton-Moore sent a letter to parents advising them of the procedures which were to be followed in her class. In that communication she informed parents that the children were to bring a smock for art and a bath towel to rest on at nap time. She mentioned, as well, that they should have a "health food snack" and that candy, popcorn, or other such types of foods should not be permitted (Exhibit P-3). With respect to the procedure at nap time, she would pull down the blinds and have the children lie on their sides or stomachs and place their heads down. It was not intended to be a sleep time—it was simply to have them rest and have a "quiet period." She said this was usually about one-half hour in length and took place after lunch.

With respect to allegations that she abused children, respondent reviewed her experience with some of the pupils who had been mentioned during the course of the Board's testimony in this respect. S.J., she recalled, was in her class in 1979-80 (his mother, E.J., had testified). Respondent denied ever spanking the child or shutting him up in a closet or a cloakroom. The boy was, according to respondent, very active and "a teaser." He enjoyed school, but he would run around the classroom a lot. She admitted that she may have raised her voice to him when he did this.

Because S.J. was so active it was the respondent's recollection that the Child study team felt he should have a half day rather a full day. However, since S.J.'s mother worked, it was not possible for him to have a shorter day. At no time did the respondent ever tell S.J. that he was "bad," nor did she ever pull him out from under a table. Respondent insisted that she never yelled at any of the children, nor did she ever grab them. Hamilton-Moore did remember Mrs. E.K. (mother of K.K.) coming to class during 1979-80, and that she had been a class mother. However, she recalled no problems about

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that. Actually, Mrs. E.K.'s concern was that S.J. was in the class and she did not want her son in the same classroom with him. Also, Mrs. E.K. was concerned that the math being taught was not at her son's ability level.

With respect to the alleged back-to-school night incident during the fall of 1979, the respondent insisted that it was a parent, not herself, who mentioned carrying a "big stick" and that she disagreed with the notion. She insisted that she did not believe in corporal punishment and never said that she did.

With respect to the children of some of the other Board witnesses (J.G., daughter of Mrs. J.G., and E.W. and J.W., daughters of Mrs. S.W.), she was not aware of any problem with them. In fact, she and Mrs. S.W. were friendly and their children went to each other's parties.

Respondent did recall that one day during the fall of 1980, she was told by Mr. Schafer that she would be transferred to a position of supplemental teacher. When they spoke about it, he told her that a suit against her for incompetency had been threatened. After speaking with the principal and an New Jersey Education Association (N.J.E.A.) field representative, respondent decided that as long as she would remain in a classroom situation in the same school and would lose none of her rights, she would accept the transfer.

At the beginning of the 1982-83 school year, respondent spoke to Dr. Tunstall about certain "rumors" that were contained in parental complaints. She said the principal told her that she wanted her to have a good year. In early September, respondent met with Mrs. Veal, Mr. Schafer, Dr. Tunstall, and others and was advised more specifically that a number of parents had complained about her being placed back into a classroom on a full-time basis. She was told that parents accused her of yelling at children, grabbing a child and locking him in a room. No specifics or names were given to her. When she asked for them, she was told that the names "weren't important."

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During 1983-84, respondent remembered having a child, C.S., in her class. At no time did she tell the other children to step on him, although often he would be on the floor having a temper tantrum. She did not recall ever referring him as a "bad boy" and, in fact, had even taught him to write. At no time did she hit or spank C.S. or any other child.

With respect to the 1984-85 school year, respondent conceded that she did keep a butcher knife in the class, but that it was "way back in my drawer." She would use it, for example, to cut bagels in connection with staff meetings when such hospitality efforts were needed. She also used the knife to cut pomegranates and had planned to use it on October 30, 1984, to cut a pumpkin. As far as she knew, most of the children probably never even saw the knife since it was always kept in her desk. She denied that it was kept on top of the desk at nap time. She also denied ever telling any child she would use the knife to cut off any part of their bodies or that she took the knife out to scare children.

By and large, then, respondent denied all of the allegations concerning her conduct toward the children and denied ever doing anything which would cause them to be anxious, afraid, depressed or otherwise disrupted in their personalities. She particularly insisted that she never spanked, hit, grabbed, yelled at, or otherwise became angry with any of the children.

With regard to her alleged threats to "chop off" children's heads, it was respondent's belief that this had to do with a phrase used when playing the game "London Bridge." With regard to the allegation that she said she would "snip off your fingers," she said that occasionally she would say this as children were going out of the room in order not to have them touch or take items. As she explained, she would jokingly say that she would "snip your little fingers off" in order to get them not to do it. At no time was the phrase used by her in any threatening way.

The events of late October 1984 were then discussed at greater length. According to the respondent, the principal told her that the father of J.G. had come storming into school to complain that Hamilton-Moore had so intimidated his son that he longer wanted to come to school. The principal asked respondent whether she had used

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the term "cutting," and she said she had. Soon thereafter she had a meeting with various administrative personnel where she explained that the use of the word "cut" related to nursery rhymes or games, such as "Three Blind Mice." At that same time respondent identified the knife and told the superintendent that it was kept in her top desk drawer. She did say that she sometimes told the children she would spank them with a "wet noodle" and "snip off their little fingers," but insisted that the children fully understood her humorous meaning and context.

The respondent has seen young J.G. since October 1984. In fact, later that same school year, during one of the teachers' convention days, when school was not in session, the child actually came up the steps to her house with another child and asked respondent for her telephone number. She told the boy that his parents already had the number, and said that "I miss you, Jonathan." He then told her that his mother and father were "coming to get you." Respondent has also seen J.G. in stores in the neighborhood and said he would wave to her. The families live just two doors away from each other and she, therefore, sees him often. Once during the winter of 1985, she was walking home on the street with her daughter. J.G. and another child were throwing snowballs and she heard him say, "You get the one on the left and I'll get the one on the right." They then "snowballed us home." The respondent did not make any comment to the child at that time. Generally, the respondent has seen J.G. and/or his mother on several occasions, without incident.

Respondent then identified lyrics from "London Bridge" which contained the words "Chop their heads off one-by-one, one-by-one, one-by-one. Chop their heads off one by one, my fair lady-o" (Exhibit R-2). This was the song that the respondent said she used with the children in which the phrase "chop off their heads" was contained.

Finally, during her direct examination, respondent identified a series of seven photographs, all taken during 1979-80 in her pre-kindergarten class. They had all been in her own daughter's album, since her daughter was also a student in the class during 1979-80 (Exhibit R-4a through R-4g).

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On cross-examination, respondent discussed the duties of her aides and the procedure with respect to snacks. She reiterated that at nap time children were to lie on their sides or their stomachs. If a child had to, however, he or she could sleep or rest on his or her back. With respect to touching children, respondent said that naturally she would, from time to time, take a child by the hand and move that child from one place to another.

With respect to the various criticisms of her classroom activities and management contained in observation reports (Exhibit P-8), she denied there were any serious problems. She repeated that she did not strike, hit, slap, yell, grab, or scream at any child. She insisted that anyone who said that she did so was not telling the truth. She also denied that Mrs. M., mother of M.M., was ever an assistant in her class. She never shut children in the cloakroom or pushed or otherwise shoved them anywhere. Nor did her aides ever hit, spank, or threaten children, at least in her presence.

Respondent did not recall having any meetings during the 1979-80 school year with Mrs. Casto or any parent regarding her classroom conduct. Nor can she recall meeting that year with Mrs. Casto and the principal. She specifically denied that during the 1979-80 school that she hit any children with a ruler, spanked them or otherwise created a "tense atmosphere" by threatening children. She denied that she engaged in "harsh" conduct. She further denied that during the 1983-84 school year she spanked any children, or otherwise hit them. She repeated that she never told children to step on C.S., nor did she ever hit him either with her hand, a ruler or a pointer. She also denied that she kept a knife on the desk at nap time, where children could see it. She said she never threatened that she would cut off heads or snip or cut off fingers or hands. Although she would sometimes use her own fingers to make a scissor-cutting motion, and would sometimes say she would spank children with a "wet noodle" when they would touch or take items they were not supposed to, respondent insisted that when these took place the children would laugh and say to her, "Do me, do me, Mrs. Hamilton-Moore." She did not consider her statements or her hand motions to constitute threats to the children of bodily harm. She also denied telling the children that she had "made a mistake," and they were not to tell anyone about it.

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TESTIMONY FOR THE BOARD - REBUTTAL

Following the conclusion of respondent's testimony, the Board called three witnesses in rebuttal, Mr. Schafer, Mrs. Joyce Casto and Mrs. Margaret Edelhoff. Mr. Schafer simply repeated that when he told respondent she was going to be transferred during the fall of 1980, he did not mention the name of any parent who had complained about her.

Mrs. Casto was the Home-School Coordinator at Nishuane School between 1977 and 1981. Her job was to act as a liaison between the school and the parents. Part of her duties required her to meet with teachers in parent conferences in order to help develop strategies to deal with students. In this respect she was "a problem solver." Thus, if a parent came in to complain about a teacher, she would instruct the parent to first talk to the teacher, and then she would later discuss the situation with the teacher herself.

During 1979-80, Mrs. Casto received parental complaints about Hamilton-Moore. She recalled having a meeting with the principal, Mrs. E.J. and the respondent. Mrs. E.J. had reported that her son, S.J., told her he had been "treated badly by the teacher." Mrs. E.J. was angry and wanted him removed from the classroom. However, the principal kept the boy in the class and said he would meet with respondent and take care of the situation. Previous to that meeting, Mrs. Casto recalled having a conference with Mrs. E.J. and the respondent. She had also met with other parents that same school year and with respondent regarding parental complaints. This, she said, happened a number of times. There were at least three or four such instances. So, too, Casto recalled that the principal also met with the respondent on other occasions besides that involving Mrs. E.J. For example, Mrs. E.K. was quite concerned about what she believed to be her child's regression in Hamilton-Moore's class because friends of his were being treated harshly. Casto told Mrs. E.K. that she would go into the classroom and observe what was going on, which she did. She saw children being asked to sit down and on occasion saw Hamilton-Moore grab S.J., or another child (D.H.), and "force them away" from what they were doing. She discussed such instances with Hamilton-Moore. The boy, D.H., she said, was

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exhibiting disruptive, hostile and angry behavior and his parents had complained to her about it. A meeting was held with the parents and respondent to discuss ways of modifying the child's behavior.

Casto said she told Hamilton-Moore not to grab the child because this would simply reinforce his own grabbing of other children when he became angry or hostile. According to Casto, from her observation, she believed that children were being asked to sit in one place for much too long a period. However, she never saw respondent hit a child. The class, however, during 1979-80, seemed to be one which was "not in control," and that on occasions respondent would "grab children by the arm and make them sit down." As Casto put it, the respondent was "getting at the end of her rope with these children" and she was isolating them thinking that this tactic would help. The classroom atmosphere was "tense and not organized" and the children were reacting to this climate.

In the fall of 1980, Casto also met with respondent and a Mrs. S.G. because the child J.G. had been going to the nurse every morning. She was also expressing fear that the teacher would get angry at her if she did not do her homework. At a conference with Mrs. G., respondent assured the mother that she was doing nothing in class to upset the child.

On cross-examination, Casto insisted that she had the various meetings with parents and the respondent during the 1979-80 school year about which she testified. In particular, she recalled meeting with Mrs. E.J. and the respondent at least two or three times because the mother was angry that her child said he had been hit. During that school year, Casto observed the class on about five occasions. The witness felt that Hamilton-Moore could have improved her performance if she wanted to, but seemed to think that she was doing an adequate job and did not "welcome" Casto's suggestions.

According to Casto, she distinctly recalled meeting in Hamilton-Moore's classroom with Mrs. J.G. about J.G. not wanting to go class. She even spoke to the child, who told her that she was afraid but would not identify precisely what she feared. Casto

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also recalled meeting with Mrs. S.W., and that Mrs. E.K. told her that her son said that other children in class were being hit by respondent. Casto concluded her testimony by repeating that she herself observed Hamilton-Moore grab students and that this seemed to be a regular and consistent course of behavior by respondent in order to keep control.

The last rebuttal witness for the Board was Mrs. Margaret Edelhoff, the teacher's aide in Hamilton-Moore's classroom during the beginning of 1979-80 school year. She was there from September 1979 to January 1980, when she requested a transfer. During her time in the classroom Edelhoff said she often observed harsh treatment by respondent. There was, as she put it, much "grabbing and pulling" of children. Children also were made to stay in chairs for long periods of time. On one occasion she saw Hamilton-Moore "crack a child with a ruler" in order to get him to go to the cloakroom. She personally observed the respondent pull S.J. out from under a chair by the shoulder. As a result, the child cried for a long time and Edelhoff was concerned that his shoulder had been dislocated. S.J., she said, was a small child and occasionally he would be, "carted along - one foot off the ground" by respondent. The children were afraid of respondent and there was a tenseness in the class. If a child went into certain restricted areas he or she would be yelled at by Hamilton-Moore.

On at least three occasions, Edelhoff reported her concerns to the principal then, Mr. Freeman. Once she even met with him and Hamilton-Moore about the situation. According to Edelhoff, she was concerned about her potential liability in the event something happened to a child. The worse thing that she observed was the pulling and grabbing of children. Edelhoff did recall speaking to an investigator during 1984-85. To that end, there was attached to Dr. Fitzgerald's affidavit a statement which was given by Edelhoff on January 8, 1985 (attachment to Exhibit P-2). In that statement she related that the respondent's classroom was marked by filth and litter everywhere - papers all over the desks, dirty tables, dirty floor, "it was a place where four-year olds could not function." In that statement Edelhoff expressed her concern about the general handling of children -that when children misbehaved they were, "carted around by the wrist with their feet off the floor." The children, she said, were young and high-strung but were kept in a degree of tension - "they were not happy young children." Edelhoff complained to the

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principal about the respondent, and told him about the way in which children were being physically handled. In fact, she gave the principal a small notebook that listed the various minor things that went on everyday. He merely looked at it and handed it back to Edelhoff without comment. Thus, as far as Edelhoff was concerned, the problems with Hamilton-Moore were not being handled professionally by the principal.

On cross-examination, Edelhoff repeated that she observed pulling and carting about of children, usually by the wrist. She recalled, specifically, that S.J. would cry out when he was carted around with one foot off the floor. She identified the statement given by her to the prosecutor's office and said it was accurate. She repeated, as well, that S.J. was, "cracked on the backside with a ruler," although she didn't think that particular incident resulted in pain to him. He was hit, she said, because he was not going to get his coat on when he should have. The boy was not a "bad child" - simply young and immature.

With respect to the incident of S.J.'s being pulled out from under a table, Edelhoff said she watched him for 15 to 20 minutes because she believed that his shoulder had been hurt. She did not recall telling Hamilton-Moore of her concern since this was not her job. Overall, the classroom atmosphere was "very tense" and "restricted." Edelhoff was concerned not only about the treatment of children, as such, but also with regard to lack of safety and cleanliness in the room. She complained to the principal about the debris and about the general disorder in the room.

After complaining to the principal about the uncleanliness, Edelhoff had another conference with him in October 1979 because she had been told by a child's father that Hamilton-Moore told parents at a back-to-school night that she (Edelhoff) had said that a crack or swat never hurt anyone. As a result, she immediately requested a conference with the principal to deny it and to make a record of her position on it. Thereafter, Edelhoff was advised by another administrator to keep a notebook and record her concerns. She did so, and after about three to four weeks went back to the principal because of the general treatment of children. She handed him the notebook and asked that he put the information in her file and she would sign it. Finally, in December 1980, she requested a transfer and the following month was transferred to another school.

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On re-direct examination the witness agreed it was unusual for a teacher's aide to complain as much as she did about a teacher, but the witness was concerned that the situation was becoming worse and that there was "a general breakdown" in respondent's class.

TESTIMONY FOR RESPONDENT - SURREBUTTAL

Following the rebuttal testimony offered by Casto and Edelhoff, the respondent took the stand for the limited purpose of surrebutter. She categorically denied ever meeting with Freeman and Edelhoff during the 1979-80 school year. Freeman did tell her that he had met with Edelhoff following her complaint about something respondent did at the school. At no time did the respondent ever see Edelhoff with a notebook, nor did she ever hear about her having made a comment concerning Mrs. Edelhoff at the back-to-school night in the fall of 1979.

FINDINGS OF FACT

In view of the testimony and documentary evidence offered, I herewith make the following findings of fact:

1. Respondent is a tenured teaching staff member employed by the Board of Education of the School District of the Town of Montclair.

2. Respondent is certificated in New Jersey and is endorsed to teach as a nursery/kindergarten and kindergarten-grade 8 teacher.

3. Respondent commenced her employment in Montclair during the 1966-67 school year and taught elementary language, arts and social studies. During the 1967-68 and 1968-69 school years, respondent taught fourth grade at the Nishuane School.

5. During the 1969-70 and 1970-71 school years, respondent taught third grade at the Nishuane School.

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6. During the 1971-72 school year, respondent was a primary teacher at the Nishuane School.

7. During 1972-73, 1973-74 and 1974-75 school years, respondent taught third grade at the Nishuane School.

8. From September 1975 through November 1975, respondent was on a maternity leave of absence.

9. From November 1975 through June 1976, and for the 1976-77 school year, respondent was a teacher at the Northeast School.

10. During the 1977-78 school year, respondent was a second grade teacher at the Edgemont School.

11. During the 1978-79 school year, respondent taught a program for four and five year olds at the Nishuane School.

12. During the 1979-80 school year, respondent taught a program for four year olds at the Nishuane School

13. For the first few weeks of September 1980, respondent taught first grade at the Nishuane School. She was then removed from her regular classroom teaching position and for the remainder of the 1980-81 school year, respondent was a supplemental teacher at the Nishuane School.

14. During the 1981-82 school year, respondent was a compensatory education/Title I teacher at the Nishuane School.

15. During the 1982-83 school year, respondent taught a program for four year olds at the Nishuane School.

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16. During the 1983-84 school year, respondent taught a program for four year olds at the Nishuane School.

17. During September and October 1984, respondent taught a program for four year olds at the Nishuane School.

18. During the 1979-80 school year, when respondent was teaching a pre-kindergarten class for four year olds at the Nishuane School. Mrs. Margaret Edelhoff was her teacher's aide from September to December 1979.

19. During the period September through the end of December 1979, respondent would from time to time grab a child named S.J. On one occasion, she pulled him roughly out from under a table, hurting his shoulder and causing him to cry.

20. During the same period, respondent would sometimes grab S.J. and other children and roughly move them from place to place by one arm, with a foot off the floor.

21. During that same period of time, respondent would often pull, yank, push and grab other children in her class by their arms, and put some of them into chairs and make them stay there as a matter of discipline.

22. During the same period respondent would from time to time require children to sit for extremely long periods in assigned seats as a manner of disciplining them.

23. The general climate and atmosphere in respondent's class from September through December 1979 was one of tenseness and rigidity. The pupils in her class at that time reacted negatively to that climate.

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24. Several of the children in respondent's class during the 1979-80 school year, complained to their parents regarding the behavior of the respondent toward them, including her yelling, scolding, grabbing, pushing, and otherwise rigid treatment of them. In addition, the same children exhibited personality changes, which included nightmares, fear of going to school, general tenseness and occasional depression.

25. During the period September through December 1979, when Mrs. Edelhoff was a teacher's aide in respondent's classroom, she observed a lack of organization and a general condition of messiness and uncleanliness there. She complained to the principal, Mr. Freeman, about her observations.

26. During the 1979-80 school year, meetings were held from time to time with the principal, complaining parents, the respondent and Joyce Casto, a home school coordinator. The subject of those meetings were complaints which had been made by children to their parents about having been spanked, hit or otherwise treated harshly.

27. At the beginning of the 1980-81 school year, respondent was first assigned as a pre-kindergarten teacher at the Nishuane School. However, sometime during September 1980, as a result of a complaint by a parent made to the superintendent, the respondent was involuntarily transferred from the classroom to a position as supplemental teacher. She served in that capacity for the remainder of the school year.

28. During the 1981-82 school year, respondent was a compensatory education teacher and did not have a regular classroom position.

29. During the spring of 1982, Dr. Mary Lee Fitzgerald was appointed as Superintendent of Schools in Montclair. In or about July 1982, she and/or the principal of the Nishuane School, Dr. Tunstall, received letters from parents who complained about conduct exhibited by the respondent when

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she was a classroom teacher during 1979-80. They involved allegations that respondent hit, spanked or otherwise used physical force against children, and that she maintained a rigid and tense atmosphere which was harmful to the emotional well-being of children.

46. As a result of the receipt of those letters and the contents thereof, the superintendent directed senior administrators to carefully observe respondent since she was being returned to the classroom for the 1982-83 school year.

47. On or about September 9, 1982, respondent met with the Nishuane School Principal, Dr. Tunstall, with the Personnel Administrator, Mr. Schafer, and others, to discuss what was expected of her for the upcoming school year. Respondent was made aware of parental complaints, without specifics. She denied the allegations. However, because of the allegations, Dr. Tunstall advised respondent that her classroom would be moved next to the principal's office and that she should keep the door open so that the principal could more easily see or hear the activities going on. In additon, respondent was advised that there would be ongoing monitoring of her performance.

48. On or about November 16, 1982, a meeting was held with respondent which included Dr. Tunstall, Mrs. Veal (the assistant principal), and members of the Montclair Education Association. Prior to that point four observations of respondent had been conducted, and they all contained references to the fact that although progress was being made the respondent continued to demonstrate that she was not fully creating an atmosphere conducive to learning, was not maintaining adequate classroom management, and was prescribing activities which were too difficult for the level of the particular class. Respondent was advised, in writing, by Mr. Schafer that substantial improvement was expected.

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49. A total of eight observations was conducted of respondent during the 1982-83 school year, an unusually high number, particularly for a tenured teacher with her experience. During that same school year, the principal continued to receive complaints about respondent's disciplinary methods, her lack of classroom management and the continuation of a negative atmosphere and lack of warmth. In her own observation, Dr. Tunstall found that the classroom chaotic, and saw children fighting with each other and crying.

50. At the end of the 1982-83 school year, respondent received a written performance report which revealed that their was a need for improvement in six areas. Among the areas were, knowledge and competence in her assignment, maintenance of an atmosphere conducive to learning, variation of instructional activities and encouragement of performance consistent with ability.

51. During the 1983-84 school year, respondent continued to be closely observed by the administration and parental compl·ints continued regarding problems that respondent had in the classroom. Throughout that school year, children in her pre-kindergarten class complained to parents that they had been hit or they have seen the respondent hit other pupils. Some of those children expressed fear to their parents concerning the classroom atmosphere. In particular, one child, C.S., complained to his mother that the teacher called him a "bad boy" and singled him out for harsh treatment and punishment. He told his mother that the respondent hit children many times. Some of the children, according to their parents, suffered emotional trauma including wetting their beds, regression in behavior, anxiety and fear of school. The mother of C.S. felt it necessary to obtain psychological counselling for her child because of his experience in respondent's classroom.

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52. A written performance report prepared with respect to respondent at the conclusion of 1983-84 school year, revealed a need for improvement in the areas of, "varying instructional activities" and "willing to try ideas and approaches." However, it also noted that she had performed in an outstanding fashion with respect to establishing an atmosphere of mutual respect between staff and st dents. It noted that 1982-83 PIP goals had been met.

53. Beginning with the 1984-85 school year, respondent was assigned to teach a regular pre-kindergarten class at the Nishuane School.

54. Respondent taught the class from the beginning of school in September 1984, through October 30, 1984. On that date, she was suspended from her teaching position as the result of a complaint made by the parents of one of the four-year old children in her class, J.G., that respondent had threatened children with a knife and had made statements which were creating fear and tension in the classroom.

55. Prior to October 25, 1984, several children in respondent's pre-kindergarten class had manifested behavioral changes, including nightmares, bed-wetting, nail biting, etc. Many of these children previously had experienced happy times in nursery school and had looked forward to attending public school.

56. During the first two months of the 1984-85 school year, some of the children reported to their parents that respondent had spanked them or other children, or had shaken a child by the shoulders and/or screamed and yelled at students.

57. On or about October 25, 1984, one of the children in the respondent's class, J.G., told his parents at dinnertime that the respondent kept a large knife in view of children in the class, and that she threatened to hurt them with it.

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58. As a result of the information related to them by their son, the parents of J.G. made an appointment for him to see a child psychologist, Dr. Myrna Glick. The child was seen by Dr. Glick on October 30, 1984. As a result of that examination and the subsequent parental conference, Dr. Glick prepared a confidential psychodynamic evaluation in November 1984.

59. In her evaluation, Dr. Glick noted that J.G. was a bright, personable and well-adjusted child who approached his life experience with enthusiasm. However, in mid-October 1984, he began to protest his having to go to school, claiming vague ailments such as headaches and stomach pains. On or about October 25, 1984, according to the report of Dr. Glick, J.G. told his parents that he was frightened to go to school because his teacher kept a large knife in class and threatened to cut off children's heads with it.

60. Dr. Glick also administered various psychological tests to J.G. As a result of those tests, and her own observations, Dr. Glick determined that the boy was quite frightened and had been traumatized by his experience in respondent's class. He now feared that caretakers in general might prove harmful to him, and that he saw himself in great danger of being seized and damaged or killed. The boy told Dr. Glick that his teacher had a big knife and that she puts it on her desk and sometimes says that she is going to chop off the heads of children.

61. According to Dr. Glick's November 1984 report, she believed J.G. to be a reliable person, but since he was an imaginative and very sensitive child, he conceivably could have overreacted to some relatively benign incident at school. His parents were advised to confer with the school principal. Dr. Glick further noted that following the parents' informing school authorities of their child's complaint, it turned out that the teacher had admitted making statements quoted by J.G., and that she actually kept a large knife in class.

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62. On October 30, 1984, respondent was confronted by the administration with the claims made by J.G. A conference was held with her in the office of the Superintendent, Dr. Fitzgerald. This meeting was held immediately after respondent admitted to the principal, Dr. Tunstall, that she had a knife and did on occasion make statements in class regarding cutting off heads, etc. Specifically, according to Dr. Tunstall, when she asked respondent whether she said that she would cut off heads, the respondent replied, "Yes, but not directly to (J.) but to other children." She admitted having the knife, but said that it was used to peel a pomegranate. She also admitted that she would jokingly say that she would cut off the fingers or snip off the hands of children in order to discourage them from touching games as they were going out the door.

63. During the course of the meeting that respondent had on October 30, 1984, with the superintendent she admitted using the expression, "snipping off fingers" and "chopping off their heads," but said these came from songs. According to the respondent, although children may have seen the knife in class, they were not afraid of it because they knew she used it either to cut sandwiches or fruit.

64. Following her meeting with the respondent, Dr. Fitzgerald removed Hamilton-Moore from a classroom situation and put her to work in the central office. Subsequently, the Board met and on the basis of the information at its disposal determined to suspend her, first with pay then without pay, and then to certify charges against her to the Commissioner of Education.

65. Respondent did during the 1984-85 school year tell four- and five-year-old children in her pre-kindergarten class that she would cut off their heads, snip off their fingers and/or snip or cut off other bodily parts. Some of these statements may have been made in connection with children's songs; however, others were made by respondent in order to warn the students

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against breaking certain rules and in order to maintain control in the classroom. At least one these children, J.G., was extremely upset and disturbed by respondent's comments and as result has suffered psychological damage for which he is continuing to undergo professional treatment.

DISCUSSION

The foregoing Findings of Fact, and the implications which flow naturally from them, must now be considered in relation to the specific charges which have been certified by the Board against the respondent.

A. CONDUCT UNBECOMING A TEACHER

Although two of the specific charges certified against the respondent are articulated as creating an atmosphere of fear and threat in the classroom and use of negative and overly harsh conduct towards pupils, they both fall under the general umbrella of "conduct unbecoming a teacher" under N.J.S.A. 18A:6-10. Thus, they will be discussed as a group, separate and apart from the allegation involving corporal punishment.

As noted by the respondent both at the hearing and in her post-hearing submission, a great deal of the testimony offered at the hearing with regard to what went on in her classrooms during the school years in question was related second-hand, third-hand or "worse." Unquestionably, most of it is hearsay. Recognizing this fact, the Board insists that many of the instances of complaints made by children to their parents constitutes "fresh complaint," having been made within a reasonable time after the event. See N.J. Evidence Rule 63(4). Under that rule an exception to the hearsay rule is made for a spontaneous and contemporaneous statement provided that it was made under the stress of nervous excitement caused by such perception, in reasonable proximity to the event and without an opportunity to deliberate or fabricate. New Jersey has adopted the "fresh complaint" exception related to the testimony of children regarding certain offenses allegedly committed against them. See, e.g., N.J. Div. of Youth and Family

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Serv. Div. v. S.S., 185 N.J. Super. 3 (App. Div. 1982); State v. Hummel, 132 N.J. Super. 412 (App. Div. 1975). Thus, the Board points out that all of the parent witnesses offered by the Board related "fresh complaints" made by their children regarding the harsh physical and verbal treatment they were receiving at the hands of the respondent during the school years when they were in her class. It seems to me, however, that standing alone much of the testimony of the parents in this respect would not support the charges of conduct unbecoming a tenured teaching staff member, using a "fresh complaint" theory were it not for the fact that eyewitness testimony to the respondent's activities was also offered. In this respect I found, for example, the testimony of Mrs. Edelhoff and Mrs. Casto to be particularly apropos. Edelhoff, in particular, observed and testified to her concerns regarding the harsh atmosphere in the classroom created by the performance of Hamilton-Moore. She complained about it to the principal, and meetings were actually held among the principal, respondent and Edelhoff as a result of those allegations. I find lacking in credibility the respondent's denial that no such meetings ever took place. In addition, Casto also testified directly with respect to her personal experience about what took place in class. So, too, did Mrs. E.K.

I find particularly pertinent the transfer, practically without protest, of the respondent in September 1980 to a supplemental teaching position. Clearly, the respondent was a problem to the administration. Whether or not she was a "horrid teacher," as the former superintendent opined, or simply unable or unwilling to effectively manage her class, is somewhat besides the point. The fact is that the parental testimony concerning the various behavioral changes manifested by their children as a result of their school experience was supported by direct testimony of persons who were there at the time and had knowledge of the facts. There were simply too many complaints, by too many people, for me to conclude that the children and/or their parents were fabricating a story in order simply to do undeserved harm to Mrs. Hamilton-Moore. Unfortunately, she seems clearly not to have been an effective teacher, and while the Board, perhaps, had some obligation to help her overcome her deficiencies, the fact is that she maintained a classroom which was marked by a high state of tension and anxiety, resulting in emotional harm, if even on a short term basis, to many of her pupils.

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As the Board points out in its post-hearing brief, the Commissioner has demonstrated particular concern where behavioral changes of pupils caused by teacher conduct is concerned. See, e.g. In the Matter of the Tenure Hearing of Betty Nacht, Sch. Dis. of the City of Elizabeth, Union County, 1980 S.L.D. 431. In that case the Commissioner affirmed a hearing officer's determination that the teacher had been guilty of creating an atmosphere of threat and fear in the classroom to the detriment of the students. There, the principal and other teachers had testified as to personal observations made by them of the effect on students who complained of anxiety and who demonstrated other adverse symptoms. In the present case the testimony revealed to me that over the course of the school years in question this teacher conducted herself in a manner which can plainly be styled as "unbecoming" within the meaning and intent of the Teacher Tenure Law. While it is not always true that "where there is smoke there is fire," there were simply too many instances of such incidents in this case to be ignored. Parent after parent testified not only as to complaints made to them by their children, but also spoke of their own personal observations of behavioral changes. Many of these same parents felt it necessary to go directly to the school to complain both to the teacher, to the principal and to others. Several of them also wrote to protest when they learned that the teacher was going to be returned to the classroom in September 1982.

There is no question but that the testimony overwhelmingly revealed the presence of an overly harsh, negative atmosphere in the classroom. The parents' testimony as to what they saw, or what their children told them, was corroborated by the testimony of Edelhoff and Casto, at least for the 1979-80 school year here in question, and by the events which took place in respondent's classroom during September-October 1984.

Without doubt, respondent yelled at the children, referred to them as "bad," compelled them to sit in one place for long periods of time, and otherwise acted so as to create an almost oppressive atmosphere. This situation is particularly distressing in view of the ages of the children and the fact that this was their first experience in a regular public school setting. Child after child exhibited traumatic symptoms at home—all of which their parents related to the negative school experience they had.

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This course of unbecoming conduct, present in 1979-80, also surfaced in subsequent school years, as evidenced by the 1982-83 and 1983-84 observations and performance reporting. In this respect, I reject the respondent's claim that the allegations which made up the charges are tantamount to claims of "inefficiency" which should have been dealt with under N.J.S.A. 18A:6-12 and N.J.S.A. 18A:6-13. Rather, they went well beyond the realm of "inefficiency."

Accordingly, I **FIND** from the testimony and other evidence in this case that the respondent's method of attempting to maintain discipline and control in the classroom too often relied on undeservedly chastising pupils of tender age and yelling, screaming or otherwise raising her voice against them. I further **FIND** that respondent's methods regularly created a harsh, negative atmosphere in her classroom, as a result of which many of her students exhibited adverse behavioral changes. Her conduct clearly was unbecoming a tenured teaching staff member.

B. **CORPORAL PUNISHMENT**

Charges of using physical force against pupils were made against respondent for each of the school years involved in this case. Some eyewitness testimony was offered; more testimony was offered by the parents of pupils who had complained either that they were hit or that they saw other children hit, spanked, grabbed, pushed or otherwise made the subject of an unwanted physical touching by the respondent.

N.J.S.A. 18A:6-1 prohibits the infliction of "corporal punishment" upon a pupil, except where the touching is within the scope of employment and is used and applied in such a way as reasonably necessary to quell a disturbance threatening physical injury, to obtain possession of weapons or other dangerous objects or for the purpose of self-defense or for the protection of persons or property. Even where there is no physical harm resulting from the touching, corporal punishment may still be found, although it need not necessarily warrant forfeiture of tenure rights. See, e.g., School District of Red Bank v. Williams, 3 N.J.A.R. 237 (1983). In the instant case, there are eyewitness accounts of respondent using such physical force that unquestionably constitutes "corporal

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punishment." In particular, Mrs. Edelhoff, Mrs. Casto and Mrs. E.K. all personally observed either the spanking, hitting, grabbing, or pushing of pupils. Edelhoff's description of the severe treatment of S.J. was particularly disturbing. The boy also complained to his mother about it, and she followed up with both letters and visits to the school. She also testified at the hearing. I am convinced that her child was mistreated in the manner described. If, as may be the case, the child was too young or immature to be in school, or otherwise inappropriately placed, the proper method to handle the situation should clearly have been an alternative to physical hitting and/or restraint. From the various and sundry complaints registered by children with their parents, there must clearly have been a consistent pattern within the respondent's classroom whereby children were subjected, if not to strong force, at least to such force as put them in fear of being physically harmed. I have no doubt from the testimony before me that the respondent did, as alleged by the Board, regularly restrain, pull, yank, push, grab or otherwise move children around in class in a manner which she intended to impose control and discipline, but which was patently inappropriate and in violation of the statute. While the testimony concerning the alleged statement made by respondent at the back-to-school night in 1979 is confusing, and I can make no finding with respect to what she actually said, it is clear to me that the respondent did engage in conduct tantamount to corporal punishment on many occasions. Sadly, despite the knowledge of the administration prior to 1982, no effective action was taken, other than moving Mrs. Hamilton-Moore out of a regular classroom in September 1980 into a supplemental teaching position. The Board, at that time, together with its senior administration, should have done more and could thereby have avoided the continuing problems which took place in later school years when the respondent was returned to the regular classroom setting.

The testimony convinces me that during 1979-80 school the respondent did spank or otherwise strike S.J. in particular. She also roughly grabbed him on several occasions. She also pulled, pushed, yanked or otherwise grabbed other children. During the 1983-84 school year there were additional instances whereby the respondent clearly engaged in spanking or hitting children, such as C.S. The mother of C.S. convincingly testified that her son complained to her about such treatment, and the mother of another child also testified that C.S. had been the victim of corporal punishment.

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So too, in the beginning of the 1984-85 school year, respondent again engaged in such behavior. J.G. stated that he saw spanking take place, and another child (S.B.) told his mother that he was spanked by Hamilton-Moore. I thoroughly agree with the Board that although such incidents did not take place every school year, over the years in question the respondent did engage in conduct which involved striking, hitting, yanking, grabbing, pulling, pushing, shoving, or otherwise laying hands upon pupils in a manner which is not condoned under the statute. In short, I am convinced that corporal punishment was taking place in Hamilton-Moore's classroom, despite her protestations to the contrary, and despite the testimony of other parents of children in her class who spoke of the warmth and affection which they found there.

C. **The Knife Incident**

I consider in a separate category the use of a large knife by the respondent in her classroom, combined with the statements she made, jokingly or otherwise, that she would cut or snip off fingers or heads of pupils. From my consideration of the evidence and testimony in this case, including that of respondent herself, I have no doubt that she created a situation, intended or otherwise, whereby young pupils were aware that she kept a large butcher knife in the room and that they believed her when she said she might do bodily harm to them. In my judgment, it was not necessary for the Board to prove a direct connection between any particular threatening statement and brandishing the knife itself. As Dr. Glick put it during the course of her testimony, children of the age group involved here not capable of making sophisticated distinctions of that sort, and coming from an authority figure such as a teacher, whom they believed without question, use of intemperate reference to the removal of bodily parts, combined with the mere presence of such a knife, was particularly distressing. Having had the opportunity personally to observe and examine young J.G., I cannot but wholeheartedly agree with both his father and Dr. Glick that this is a very verbal and remarkedly articulate young person. I believe both his father and Dr. Glick with respect to their testimony that J.G.'s initial enthusiasm toward going to school rapidly reversed itself because of what he experienced in respondent's classroom. This is not say that respondent is a person determined to do evil to children. To the contrary, she is a teacher of long-standing who unfortunately was

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either unable or unwilling to thoroughly understand her role with respect to the children she was teaching and the proper manner of conducting herself in their presence. By saying what she said, and doing what she did, as related above, she clearly caused psychological harm to J.G., at least, and in all likelihood to other students whom she had in her class. While the number of parents who testified does not, by itself, prove that the allegations were true, I was impressed by the fact that so many of them did feel constrained to expose themselves, and in two cases their own children, to the rigors of this litigation in order to describe what they personally had observed. The Board unquestionably acted with proper dispatch when the knife incident took place. The testimony surrounding the circumstances demonstrated that the respondent clearly conducted herself in a manner unbecoming a tenured teaching staff member.

PENALTY

Accordingly, since the Board has demonstrated that the respondent's conduct was unbecoming a tenured teaching staff member, and that she also used corporal punishment in violation of N.J.S.A. 18A:6-1, there remains for consideration the question of what sanction ought to be imposed for that conduct. Mrs. Hamilton Moore has been a teacher for many years and many, many children have been in her classes and have not suffered as a result. Unfortunately, too many others, as demonstrated by the evidence in this case, have suffered because of the conduct which I found she committed.

As a result of my consideration of all the evidence and the testimony in this case, I must **FIND** that given her proven conduct, respondent must forfeit her right to continue in her tenure status. Too many children have suffered in too many ways to condone her return to the classroom. At times she has probably been a good teacher. Often, however, she has done physical or emotional harm to the pupils entrusted to her care. I believe that the Montclair Board is justified in its request that she be deprived of her tenure so that it need not expose the pupils in the district to her any further. There was in this case an abundance of evidence to show that she did create an atmosphere of tension and anxiety. She did instill fear in her students, particularly with respect to having a knife in the classroom about which the children knew. While she may very well

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have used children songs that have "threatening" lyrics, she conducted herself in such manner as to create a real fear in her pupils in that she meant what those words said. Four and five year old children, if not other children as well, should not have been exposed to that psychic and emotional harm. Further while I do not believe that respondent intended to hurt any child, she did, in my judgment, do so from time to time when she pulled, yanked, grabbed, spanked or otherwise struck some of the children in her classes. As the Commissioner said in In the Matter of the Tenure Hearing of Thomas Appleby, School Dist. of Vineland, Cumberland Co., 1969 S.L.D. 159, aff'd State Bd. of Ed. 1970 S.L.D. 448, aff'd 1972 S.L.D. 662 (N.J. App. Div., March 14, 1972) (unreported).

> ***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 only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. [Emphasis added]. [1969 S.L.D. at 172-173].

That freedom from offensive bodily touching set forth in Appleby, supra, was also articulated by the Commissioner in In the Matter of the Tenure Hearing of David Fulcomer, 1961-62 S.L.D. 160, remanded State Board of Education 1963 S.L.D. 251, remand 93 N.J. Super. 404 (App. Div. 1967), decision on remand 1967 S.L.D. 215, aff'd appellate division, Superior Court, (December 13, 1967) (unpublished), where he said:

> ***[p]rohibition 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 discipline 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 happened...." While teachers are sensitive to the same emotional stresses as all other

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> persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control. [1961-62 S.L.D. at 162].

In further addressing the degree of self-control required of a teaching staff member, the Commissioner said In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden Co., 1972 S.L.D. 302, 321, that:

> [t]eachers...are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment... Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. [Emphasis added.]

In looking at corporal punishment cases, in particular, with respect to penalty, the setting of the incident, the presence or absence of provocation, the degree of self-restraint exhibited, the intent to punish, the ongoing nature of the event and the age of the students are all salient factors to be considered. See, e.g., In the Matter of Thomas Tiefenbacher, Comm'r of Ed. (Feb. 22, 1982) aff'd and modified State Board (August 6, 1982) (N.J. App. Div., December 5, 1983, A-165-82T3) (unreported) remanded State Board (Sept. 7, 1984). In the instant case, with respect to many of those elements, the use by respondent of physical force was singularly inappropriate.

In view, therefore, of the number and the nature of the respondent's acts of misconduct which I have found to have taken place in this case, I am convinced that taken as a whole they clearly demonstrate her unsuitability to continue in the tenured employ of the Board. Accordingly, I hereby direct that the respondent, having been adjudged to have committed the several charges certified against her, has forfeited her right to remain in the employ of the Montclair Board of Education and should be DISMISSED.

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

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

February 13, 1986
DATE

STEPHEN WEISS, ALJ

Receipt Acknowledged:

FEB 18 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 19 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE HAMILTON-MOORE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MONTCLAIR, ESSEX COUNTY.	:	

The Commissioner has reviewed the record and the recommended report and decision in this matter rendered by the Office of Administrative Law.

It is observed that exceptions to the report and decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c. Respondent's exceptions, thirty-eight pages in length, rely heavily on the testimony taken at the many days of hearing conducted in this matter. The Commissioner notes, however, that only the transcript of the testimony of two children, J.G. and M.K.M., taken by the ALJ on October 17, 1985 has been made a part of the record before him.

Respondent's exceptions are summarized below. She contends that the ALJ erred:

1. In that the charges were predicated upon "essentially *** contradictory and inconsistent statements, which are predominantly hearsay statements not made at the time of the incidents alleged." (Respondent's Exceptions, at p. 1)

2. In relying on hearsay, in violation of the law. Respondent cites N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-15.8(b), which require "'legally competent evidence' to support EACH ULTIMATE FINDING OF FACT." (Respondent's Exceptions, at p. 2). Respondent also cites Michael S. Colavita v. Board of Education of the Township of Hillsborough, Somerset County, decided by the Commissioner November 3, 1983, St. Bd. aff'd May 2, 1984, N.J. Super. Ct. rev./rem. March 28, 1985, St. Bd. aff'd October 2, 1985 for the proposition that "the 'residuum rule' is still in effect, and that no ultimate finding of fact in an administrative proceeding can be based solely on hearsay evidence." (Respondent's Exceptions, at p. 2)

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3. In that the charges against respondent have been found in similar cases to be inefficiency and must be dismissed in the instant matter for failure to follow the proper 90-day notice procedure pursuant to N.J.S.A. 18A:6-11. Respondent cites In the Matter of the Tenure Hearing of Gertrude Lennon, School District of the Borough of Spotswood, Middlesex County, decided by the Commissioner August 29, 1983, St. Bd. aff'd March 7, 1984 (tantrums, yelling and threats found to be inefficiency); In the Matter of the Tenure Hearing of Zolton J. Fodor, School District of the Township of Green Brook, Somerset County, decided by the Commissioner March 2, 1984, St. Bd. aff'd July 11, 1984 (use of physical restraint to place students into their seats or keep them out of the classroom found to be inefficiency); In the Matter of the Tenure Hearing of Stanley Slovney, School District of the City of Newark, Essex County, decided by the Commissioner November 19, 1984 (inefficiency found where respondent failed to maintain order in his classes and to establish proper discipline); In the Matter of the Tenure Hearing of Edna Booth, School District of the Township of West Orange, Essex County, decided by the Commissioner May 31, 1985 (inefficiency found where disciplinary measures were often inappropriate and disproportionate to the offenses committed and results desired, and there was a noticeable increase in the level of anxiety among students). (Respondent's Exceptions, at pp. 3-6)

4. In failing to consider in his decision that inefficiency is something that can be determined only by properly certificated supervisory personnel (In the Matter of the Tenure Hearing of Franklin Johnson, School District of the Township of Cherry Hill, Camden County, 1981 S.L.D. 660) The ALJ further failed, respondent avows, to consider in his decision the fact that almost none of the testimony concerning inefficiency was offered by any properly certificated supervisors. (Respondent's Exceptions, at pp. 6-7) Respondent also argues that the failure of the Board of Education to call her supervisors as witnesses "justifies a conclusion that their testimony would have been unfavorable to the

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Board of Education" and cites Duration Corp. v. Republic Stuyvesant Corp., et al., 95 N.J. Super. 527, 531 (App. Div. 1967), cert. denied, 59 N.J. 404 (1967) for the proposition that the ALJ failed to draw this conclusion. (Respondent's Exceptions, at p. 7)

5. The remaining twenty-seven pages of respondent's exceptions focus on the testimony of the twenty-seven witnesses called, nineteen by the Board, eight by respondent, broken down into a school year-by-school year analysis of events and allegations, beginning with the 1979-80 school year, that led to the tenure charges filed against respondent by the Board in 1985. Essentially, respondent contends therein that there is inadequate corroboration among the witnesses to substantiate any of the charges averred and thus that the evidence does not support the ALJ's findings and conclusion

The Board's reply exceptions categorically reject the arguments advanced in respondent's exceptions, and the Board urges the Commissioner to give appropriate weight to the ALJ's Findings of Fact and Conclusions interpreting the evidence. Additionally, the Board reiterates, inter alia, the argument it raised in its post-hearing brief concerning the "fresh complaint" exception, which, the Board avers, permits "introduction of the testimony of complaints by children with respect to certain offenses committed against them. See State v. Balles, 47 N.J. 331 (1966); State v. Humel, 132 N.J. Super. 412 (App. Div. 1975); New Jersey Division of Youth and Family Services v. S.S., 185 N.J. Super. 3 (App. Div. 1982) " (Petitioner's Reply Exceptions, at p. 2) The Board seeks to bolster its position by proferring the testimony of the two young children

> "whose strength of character and maturity, and their parents' general concern for other young children, enabled them to testify. The evidence supplied by parents as to reports by young children of Respondent's physical and emotional abuse was properly given similar weight "in accord with In the Matter of the Tenure Hearing of Fred J. Gaus, II, School District of the Township of Chester, Morris County, State Board of Education, 1980 S.L.D. 1490." (Id., at p. 3)

The Board also attacks respondent's argument that most of the charges against her are inefficiencies. The Board argues that

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> "None of the inefficiency cases cited by Respondent involved teachers, like Respondent, who engaged in a pattern of harsh and negative physical and mental treatment of pupils. The cases all focused on teaching techniques and any disciplinary problems cited were primarily lack of control and there were no instances of corporal punishment. (Id. at p. 3)

The Board urges the recommended decision be affirmed.

The Commissioner, upon review of the one day of transcripts available to him, as well as the evaluations of respondent's classroom performance, the letters of concern and of support filed by parents and administrators dating back as far as 1981, the reports filed by DYFS, as well as the statements of parents and children taken by the County Prosecutor's Office, finds and determines that respondent's exceptions to those findings and conclusion in the recommended decision are her own inferences with regard to the relevant findings of fact and law in this matter and are deemed to be misplaced and essentially without merit for the following reasons.

The Commissioner will first address the knife incident since the sole transcript provided concerns this matter.

On the issue of whether respondent's possession of a 12¾ inch butcher knife and her admission that she did indeed tell students that she would "cut" or "snip" "their fingers off" if they did not obey, albeit in an allegedly joking manner, rises to the level of conduct unbecoming a teacher, the Commissioner, upon his review of the record before him, wholeheartedly agrees with the ALJ that such behavior on the part of a teacher of very young children can be and was, particularly in the case of J.G., terrifying. Such a disciplinary technique admittedly used by respondent repeatedly (see P-6) demonstrates a continuing pattern of grossly inappropriate behavior. As the ALJ notes from the testimony of Dr. Glick, the child psychologist called by the Board as an expert witness,

> [C]hildren of the age group involved here are not capable of making sophisticated distinctions*** and coming from an authority figure such as a teacher, whom they believed without question, use of intemperate reference to the removal of bodily parts, combined with the mere presence of such a knife, was particularly distressing.
>
> (Initial Decision, ante)

Initially, the Commissioner observes that it was respondent herself who elevated the presence of the knife in the classroom to the level of becoming a feared object by telling her four and five year old charges that she would remove bodily parts if they misbehaved. Further, the Commissioner finds no merit whatsoever in

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respondent's exception averring that "no testimony was offered, not only by any other child, but by any other parent of any other child, to corroborate [J.G.'s] testimony." (Respondent's Exceptions, at p. 32) The inference made by respondent herein concerns the rule of evidence suggesting that the testimony of children must be weighed with extreme care, and that corroborating evidence should be considered to bolster the testimony of children. The Commissioner points out that he was not furnished a complete set of transcripts and therefore, will not make an independent judgment regarding corroborating or conflicting testimony. Under such circumstances, he relies on the standard of judicial review initiated by the Court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85 which holds in pertinent part:

> ***Finally, on the matter of the applicable law, the thoroughly established scope of judicial review of administrative adjudications should be briefly noted. As to state agency findings, the role of the appellate court is that of 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 of their credibility *** and *** with due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros, 44 N.J. 589, 599 (1965).*** (at 93-94)

See also: Parker v. Dornbierer, 140 N.J. Super. 185 (App. Div. 1976).

The ALJ was present to hear and observe all twenty-seven witnesses and prepared a studied evaluation of that testimony in his fifty-five page recommended decision. In the Commissioner's judgment the findings of fact and the conclusion reached by the ALJ are sufficiently documented in the record of these proceedings and comply with the Mayflower standard. Further, in respect to the arguments raised by respondent concerning inefficiency, the Commissioner finds reference to Booth, supra, Slovney, supra, and Fodor, supra unpersuasive because the charges herein involve conduct unbecoming and corporal punishment, not inefficiency or incapacity.

The Commissioner notes, as did the ALJ, that the record taken as a whole represents a situation that had existed and was of concern to the Board since 1981. The record is replete with examples of continuing problems which took place in respondent's classroom that far exceed any claim of mere inefficiency. The Commissioner acknowledges with approval the conclusion of the ALJ that "too many children have suffered in too many ways to condone her return to the classroom. At times she has probably been a good teacher. Often, however, she has done physical or emotional harm to

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the pupils entrusted to her care." (Initial Decision, ante) Additionally, the Commissioner adds that in Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), the Court adopted the following language of the Commissioner:

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

Although any of the proven charges, standing alone, and certainly the knife incident, would be sufficient ground to recommend the dismissal of respondent, the Commissioner concludes that the cumulative effect of the charges in the instant matter goes far beyond the standard in Redcay, supra, and the State Board of Examiners shall be apprised of the decision in this case pursuant to N.J.A.C. 6:11-3.7 for possible revocation/suspension of the teaching certificate of Jeanne Hamilton-Moore.

Accordingly, the Commissioner adopts the findings and determination of the ALJ. It is hereby ordered that Jeanne Hamilton-Moore shall be and is hereby dismissed as a teaching staff member in the employ of the Montclair Township Board of Education effective as of the date of this decision, and it is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 26, 1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE HAMILTON-MOORE,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
MONTCLAIR, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 26, 1986

For the Respondent-Appellant, Oxfeld, Cohen and Blunda
(Nancy Iris Oxfeld, Esq., of Counsel)

For the Petitioner-Respondent, McCarter and English
(Patti Russell, Esq., of Counsel)

The State Board affirms the decision of the Commissioner of Education for the reasons expressed therein.

August 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION AND CROSS-MOTION
FOR SUMMARY DECISION
OAL DKT. NO. EDU 6457-85
AGENCY DKT. NO. 319-9/85

PAUL GORDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,
Respondent.

James F. Schwerin, Esq., for petitioner/movant
(Greenberg and Prior, attorneys)

Robert Goldsmith, Esq., for respondent/cross-movant
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: December 26, 1985 Decided: February 10, 1986

BEFORE **SYBIL R. MOSES, ALJ:**

This matter comes before the Office of Administrative Law (OAL) as the result of a verified petition filed by Paul Gordon with the Commissioner of Education on September 17, 1985, asking that the Commissioner declare that his tenure and seniority rights were violated when the Board of Education of Passaic Township (Board) failed to appoint him to a position to which he was entitled. The Board filed an answer on October 3, 1985, asking

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that the petition be dismissed, basing its request on several grounds set forth in that answer. The matter was forwarded to the OAL on October 9, 1985 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on November 25, 1985. After discussion, both attorneys agreed that the case could be decided as a matter of law. The legal issues to be determined are:

1. Whether petitioner is entitled to the 1985 position of vocal/instrumental music teacher in the Passaic Township school district.

2. Whether this action is barred by the theories of res judicata and/or collateral estoppel.

Petitioner filed a motion for summary decision and brief in support thereof on November 14, 1985. Respondent filed its cross-motion and memorandum in support of same and in opposition to petitioner's motion for summary decision on December 9, 1985. Petitioner filed a responsive brief in opposition to the cross-motion and in support of his motion on December 18, 1985. There being no further reply from the Board, the record closed one week later on December 26, 1985.

A review of the briefs indicates that the following narrative of the relevant facts is basically uncontroverted and will be considered the facts in this case.

Petitioner, Paul Gordon, possessed a valid secondary school teaching certificate and was employed full-time as a teacher of instrumental music by the Passaic Township Board of Education from 1968 to 1976. Mr. Gordon had acquired tenure in the position of teaching staff member by 1976. His employment was reduced to part-time status for the 1976-77 and 1979-80 school years. Gordon's teaching certificate included an endorsement in instrumental music received in 1971. He received an elementary school certificate in May 1980. The Board abolished its instrumental music program for the 1980-81 and 1981-82 school years, and Mr. Gordon lost his job pursuant to a reduction in force (RIF).

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In 1982, the Board established an instrumental/vocal music program for the 1982-83 school year and hired a teacher for that program who had a comprehensive music endorsement. In December 1982, Mr. Gordon became aware of this position and sought to assert his rights to the position. He filed a petition with the Commissioner of Education to replace the teacher hired by the Board for the instrumental/vocal music position. By March 1983, Mr. Gordon had obtained a comprehensive music endorsement. The petition filed by Mr. Gordon regarding his entitlement to the combined instrumental/vocal music position was heard by Ward Young, ALJ, who held that although Gordon had forfeited his right to retroactive relief by failure to file his petition within the 90 days allowed by N.J.A.C. 6:24-1.2, he was prospectively entitled to employment in that position as of the 1983-84 school year. The Commissioner of Education affirmed Judge Young's decision. On appeal from the Commissioner, the State Board of Education reversed on the basis that the 90-day rule barred him from any relief, either retroactive or prospective. The ruling of the State Board of Education was appealed and is pending decision by the Appellate Division, docket number A-3294-84T7.

On July 7, 1985, the Board advertised in the Star Ledger for a teacher of instrumental music with a comprehensive music certificate [sic] [1] for a position available in September 1985. The Board did not communicate with Mr. Gordon in regard to this position. Mr. Gordon subsequently filed this petition asserting he has preclusive seniority rights to the position advertised in July 1985.

Although initially arguing that the Commissioner's decision in the prior case has collateral estoppel or res judicata effect in the present matter, Gordon's attorney concedes, in his reply brief, that the Commissioner's decision can only be given persuasive

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[1]See N.J.A.C. 6:11-6.2(a)16, which lists music as a teaching endorsement on the instructional certificate. Cf. N.J.A.C. 6:11-4.1 et seq. When appropriate, music certificate will be referred to as music endorsement.

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effect in the present action. However, he argues that Gordon's rights under the teacher/tenure statutes of New Jersey entitle him to be appointed to the position as advertised by the Board; he is not seeking the position which existed at the beginning of the 1982-83 school year. Mr. Gordon argues that since all of the requirements for his comprehensive music endorsement were completed long before March 1983, the actual date he obtained that endorsement, he is fully eligible for any position covered by that requirement. Petitioner's reply brief seems to indicate that he is not asserting seniority rights to the 1983 position but is asserting that his tenure entitles him to the current vacant position. He asserts that even if he is not entitled to the entire position because his comprehensive music endorsement was obtained after he was no longer employed by the district, his tenure does apply to the instrumental music portion of the combined position, and he is therefore eligible to teach the instrumental portion up to half-time.

The Board argues that the State Board's reversal of the Commissioner's affirmance of Judge Young's 1983 decision has res judicata effect upon the present petition and precludes Gordon's claim to the 1985 opening. The Board also argues that Gordon's tenure extends only to the scope of his certificate (really meaning endorsement) at the time he was hired, and that his after-acquired comprehensive music endorsement does not entitle him to the 1985 job opening. Counsel asserts that tenure in one category does not establish preference in another category absent the requisite teaching service in that other category.

A review of the law of res judicata and collateral estoppel indicates that the State Board of Education's 1983 decision, Paul Gordon v. Passaic Township Bd. of Ed., Morris County, OAL Dkt. No. EDU 4416-83, Agency Dkt. No. 150-5/83A, does not have res judicata or collateral estoppel effect on either party's claims in this action. The doctrine of res judicata or claim preclusion bars relitigation of a cause of action which has been ruled upon in a prior court action. N.J. Highway Authority v. Renner, 18 N.J. 485, 493 (1955). The policy behind this rule is to preclude expensive relitigation of the same factual situation between the same parties once the matter has been ruled upon by a court of competent jurisdiction. Bango v. Ward, 12 N.J. 415, 420 (1953). A cause of action is

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defined as the allegations in a lawsuit which are the basis of a party's claim for relief. Templeton v. Scudder, 16 N.J. Super. 576, 579 (App. Div. 1951). If the proofs which supported the assertion in the prior case would also fully support the assertions in the second suit between the same parties, then that second suit is barred by res judicata. Ibid. This doctrine, as well as the related principle of collateral estoppel, is applicable to administrative proceedings. Hackensack v. Winner, 82 N.J. 1, 31 (1980).

In the case at bar, Mr. Gordon is asserting tenure rights (or preclusive seniority rights) for a teaching post which did not come into existence and was not available until July 1985. This position of instrumental music teacher required a comprehensive endorsement. Petitioner's prior claim, in 1983, to the position of instrumental/vocal music teacher for the 1982-83 school year was not upheld by the State Board of Education because of his failure to file a timely appeal pursuant to N.J.A.C. 6:24-1.2. While the legal theory asserted in the 1985 petition is identical to the theory asserted in the 1983 position, the 1985 petition is based on different factual allegations than existed in the 1983 claim. Therefore, the Board's argument that the 1983 decision by the State Board precludes any future seniority claim by this petitioner to any job opening to which he might be entitled in this school district cannot control. To extend such an argument to its logical conclusion would permit the victorious party in a particular lawsuit to freely violate the vanquished party's legal rights in the future, with no fear of an additional lawsuit on the same legal claim, notwithstanding any change in factual circumstances.

The law of res judicata does not provide for such an unjust result. See, Lasasso v. Lasasso, 1 N.J. 324, 328 (1949), as well as Board of Directors, Ajax, etc. v. First National Bank of Princeton, 33 N.J. 456, 464 (1960).

> The principal of res judicata, however, does not bar relitigation where, after the rendition of the judgment, subsequent events or conditions occur, thus creating a new legal situation or altering the legal rights or relations of the parties. It is obvious that a judgment cannot be conclusive as to rights which were not in existence at the time of its rendition.

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(Citations omitted), Lasasso, 1 N.J. at 328. Cf. Washington Township v. Gould, 39 N.J. 527, 534 (1963), where the court held that where the plaintiff cannot establish any new facts or circumstances which were not contained in the prior action, his second suit will be barred by the doctrine of res judicata.

In this case, Gordon's claim is based upon facts which arose subsequent to the 1983 claim. Therefore, the ruling in the prior case should not be a bar to his present claim. See, Lawlor v. National Screen Service Corp., 349 U.S. 322, 99 L.Ed. 1122, 75 S. Ct. 865 (1955). In Lawlor, an antitrust suit filed in 1942 between the parties was settled and dismissed with prejudice in 1943. Id. L.Ed. at 1126. A second lawsuit brought in 1951 alleged continuing violation of antitrust laws by the original defendants, as well as additional defendants. Ibid. The courts below ruled the second suit was barred by res judicata due to the prejudicial dismissal of the 1942 lawsuit. The Supreme Court reversed, ruling that the 1943 dismissal could not extinguish claims which arose after the ruling in that case. Ibid. The Lawlor case appears analogous to this claim in that Gordon is alleging a violation of his rights which occurred subsequent to the 1983 decision. I conclude that this factual change of circumstances prevents the application of res judicata to the case at bar and allows Gordon to litigate his claim to the 1985 job.

The related doctrine of collateral estoppel or issue preclusion also cannot apply to any of the issues raised by Gordon in this case. That doctrine bars relitigation of any issue actually determined in a prior action upon a different cause. State v. Gonzalez, 75 N.J. 181, 186 (1977). The application of collateral estoppel depends on what was actually ruled upon in the prior action. Mazzilli v. Accident & Casualty Insurance Co., 26 N.J. 307, 314 (1958). The holding of the prior decision determines the scope of collateral estoppel; dictum can have no claim preclusion effect. Gareeb v. Weinstein, 161 N.J. Super. 1, 13 (App. Div. 1978).

The reversal of the Commissioner of Education's decision by the State Board rendered the Commissioner's decision (and the decision of the administrative law judge which was affirmed) without legal force. See, Landy v. Lesavoy, 20 N.J. 170, 176 (1955). The Commissioner's resolution of seniority disputes therefore has no preclusive effect on

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the present case. Ibid. Furthermore, since the State Board's reversal was based only upon Gordon's failure to comply with the 90-day rule, there is no existing decision in effect on his seniority claim. Therefore, the doctrine of collateral estoppel does not prevent litigation of Gordon's claims in this action. Mazzilli, 26 N.J. at 314.

It is therefore appropriate to address the merits of Mr. Gordon's claim. Since all of the relevant facts are uncontroverted, this case can be decided as a matter of law. I conclude that Mr. Gordon is not entitled to the 1985 position of instrumental music teacher, which required a comprehensive music endorsement in the Passaic Township school district. This conclusion is reached after a review of the applicable law, especially the case of Howley v. Ewing Township Board of Education, 6 N.J.A.R. 509 (1982). Howley is the definitive discussion concerning the application of those criteria affecting seniority of tenured teaching staff members whose positions are under consideration by virtue of a reduction in force. Commissioner's decision, Howley, 6 N.J.A.R at 534. That decision points out that tenure status attaches only to a particular position held by a teaching staff member. N.J.S.A. 18A:28-5. A position is defined as any office, position or employment or any office with a position title. N.J.S.A. 18A:28-1. In order to obtain tenure in a position, a teacher must have a standard certificate to teach as provided for by N.J.A.C. 6:11-4.1.

It has been well-established that certification is necessary to assume all responsibility for instructing a class. Every teaching staff member, tenured or otherwise, must hold a valid certificate to teach. There are only three kinds of regular certificates; that is, certificates with lifetime validity issued to candidates who meet New Jersey standards for regular certification; instructional (N.J.A.C. 6:11-6.1 et seq.); administrative and supervisory (N.J.A.C. 6:11-9.1 et seq. and 10.1 et seq.); and educational services (N.J.A.C. 6:11-11.1 and 12.1 et seq.). All other certificates referred to in case law are actually "endorsements" on one of the foregoing three certificates. Howley, 6 N.J.A.R. at 513, 514. In order to teach in particular categories of education, the certificate of the teacher must contain the proper endorsement. The fields and the requirement for those fields in which teaching endorsements may be issued on an instructional certificate are set forth in N.J.A.C. 6:11-6.2 and 3. N.J.A.C. 6:11-10.4 lists

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the endorsements which may be issued on New Jersey administrative and supervisory certificates, and N.J.A.C. 6:11-12.1 et seq. lists the 18 separate endorsements which may be issued on the regular New Jersey Educational Services certificate. Once a teacher obtains tenure in the position of teaching staff member, seniority begins to accrue in the category in which the teacher is employed and for which the teacher has the appropriate endorsement on his certificate.

Seniority is a concept which applies only to certain rights of tenured personnel and has meaning only when a reduction in the employment force is necessary. Id., 6 N.J.A.R. at 521. The source of the concept is in the tenure laws; See, N.J.S.A. 18A:28-9, 10 and 13. Standards applying to seniority have been promulgated in N.J.A.C. 6:3-1.10 et seq. There are specific categories in which seniority may be accrued, which differ from areas of endorsement and certification.

Sometimes the term "category" is synonymous with the terms "position" and "endorsement," but sometimes it is not. "'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." (citations omitted). Howley, 6 N.J.A.R. at 524. In the category of secondary teacher, which was the certificate Mr. Gordon possessed until 1980 when he received his elementary school certificate, seniority attaches only in the subject area endorsement under which the teacher has actually served. N.J.A.C. 6:3-1.10(l)(15)(i). In this matter, Gordon lost his employment as a part-time instrumental music teacher with the Board due to a RIF in 1980. N.J.S.A. 18A:28-9. Upon dismissal due to a RIF, a tenured teacher is to be placed on a preferred eligible list in order of seniority for reemployment whenever a vacancy occurs in the position for which a teacher is qualified, N.J.S.A. 18A:28-12.

Subsequent to Mr. Gordon's loss of his position due to a RIF, the Commissioner of Education promulgated amendments to N.J.A.C. 6:3-1.10, which amendments went into effect on September 20, 1983. A review of the statutory provisions, as well as the amended regulation, indicates that Mr. Gordon has tenure in the position of teaching staff member with the Passaic Township school district. N.J.S.A. 18A:28-5. His category at

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the time of employment was secondary teacher. N.J.A.C. 6:3-1.10(l)(15). His endorsement at that time was in instrumental music. He subsequently, after the RIF, obtained a comprehensive music endorsement. N.J.A.C. 6:11-6.2(a)16. Contrary to the Board's assertion, the 1985 instrumental/vocal teaching post is not a "position" to which tenure may attach but is a category of employment in which a teacher may accrue seniority. The language of N.J.S.A. 18A:28-12 is mandatory in this regard. Therefore, the real issue I must determine is whether Mr. Gordon's seniority in the position of secondary school teacher with an instrumental music endorsement requires the Board to give him a full-time instrumental/vocal music teacher's job that requires an endorsement as a comprehensive music teacher.

For a clear explanation of the rationale behind the statutory distinction between tenure and seniority, see Lautenschlager v. Bd. of Ed. of Jersey City, 1961 S.L.D. 98, as cited in Compton v. Bd. of Ed. of Hanover, 1972 S.L.D. 274. The Compton case held that a teacher with certification (really endorsement, as discussed in Howley) in certain categories other than the category in which the teacher has actually served acquired seniority only in those categories in which that teacher served. 1972 S.L.D. at 280. The Commissioner reasoned that the position for which a teacher must be qualified under N.J.S.A. 18A:28-12 requires more than mere certification (really meaning endorsement) to teach in that position in order to be qualified for preferential reemployment under the foregoing statute. To qualify, a teacher must actually have taught in the category of employment for which he is certified (again really meaning endorsed). Ibid. That is because to provide seniority based upon endorsement alone would undermine the distinctions drawn between position and category in Title 18. Ibid. Under an endorsement only analysis, a tenured teacher with an endorsement and 15 years teaching experience in mathematics as well as an endorsement in English could replace a teacher with 14 years experience in English even though the former teacher had no teaching experience in English. Such a result would be contrary to the theory behind a thorough and efficient educational system. Ibid. This interpretation of N.J.S.A. 18A:28-12 is echoed by a long line of school law decisions. See, for example, Smith v. Bd. of Ed. of Sayreville, 1974 S.L.D. 1095, Dullea v. Bd. of Ed. of Northvale, 1978 S.L.D. 638, 641, Berkout v. Bd. of Ed.

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of Roseland, 1978 S.L.D. 534 and Newark Teachers' Union v. Bd. of Ed. of Newark, 1978 S.L.D. 908, 911.

Petitioner's reliance on Givens v. Bd. of Ed. of Newark, 1974 S.L.D. 906 and Kane v. Bd. of Ed. of Hoboken, 1975 S.L.D. 12 are inapposite. Kane held that eligibility for a certificate (really endorsement) is sufficient to qualify a teacher to be considered to fill a job opening requiring that certificate. (emphasis added) Kane, 1975 S.L.D. at 17. Givens held that a teacher may acquire tenure as a teaching staff member without holding a specific subject area endorsement so long as a teacher was qualified for such an endorsement. Givens, 1974 S.L.D. at 910-911. These cases, of course, establish Gordon's eligibility for the 1985 position, but do not apply to the question of whether he is entitled to this position by virtue of preferential seniority.

Even if I were to rely on the aforementioned cases, I conclude that whether or not Gordon possessed the endorsement of comprehensive music teacher, without service under this endorsement he cannot acquire seniority in that category. N.J.A.C. 6:3-1.10(l)(15)(i). This is because his service as instrumental music teacher is distinct from service as a comprehensive music teacher, and he only has seniority rights pursuant to his instrumental music teacher endorsement and service in that category. This is particularly clear after reading the full text of the amended N.J.A.C. 6:3-1.10, as well as the statements accompanying the proposed amendments, 15 N.J.R. 464 (April 4, 1983). The theory behind the new rule is ". . . to ensure that seniority entitlement may not be claimed by persons who have never taught under a specific endorsement . . ." 15 N.J.R. at 465. The new rule provides that ". . . 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 . . ." N.J.A.C. 6:3-1.10(l)(15). See also, N.J.A.C. 6:3-1.10(l)(16), which states "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." N.J.A.C. 6:3-1.10(m) holds "this section shall apply prospectively to all future seniority determinations as of the effective date of this rule." The effective date of this rule was September 20, 1983,

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and the operative date September 1, 1983. 15 N.J.R. 1017 (June 20, 1983). The amendments to N.J.A.C. 6:3-1.10 et seq. were obviously drafted after the issuance of Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509 (Decided October 21, 1982).

I have reviewed the cases cited by petitioner, which he interprets to mean that endorsements of instrumental music teacher and comprehensive music teacher are within the same category for purpose of seniority accrual. A careful reading of Popovich v. Bd. of Ed. of Wharton, 1975 S.L.D. 737, 744 indicates that the decision in that case was based upon a prior regulation, N.J.A.C. 6:3-1.10(k)27, 28, 30. The amended regulation has deleted (k)27, 28 and 30, and contains the service within the endorsement requirement, as set forth in the September 1, 1983 version of N.J.A.C. 6:3-1.10. Therefore, the holding of Popovich must be distinguished from the case at bar. There, a teacher who initially had an endorsement to teach vocal music and then, during employment, received an endorsement as a comprehensive teacher of music, was found to be entitled to seniority in any area of music. In 1975, her endorsement plus actual service in any category of music teacher was sufficient to accrue seniority in any category. Id. at 744. However, the new regulations do not provide for such a conclusion. To be entitled to the Passaic Township position, Mr. Gordon must have actual service within the category of instrumental/vocal music teacher while at the same time holding a comprehensive music endorsement. Accordingly, Popovich cannot control. The holding of Weir v. Bd. of Ed. of Closter, OAL Dkt. No. EDU 792-81, adopted, Commissioner of Education (September 9, 1981), where a teacher with an endorsement in music who had served only in areas other than instrumental music had seniority rights to a job in instrumental music also cannot control here in light of the new regulations.

Furthermore, the comprehensive music endorsement obtained by Mr. Gordon in March 1983 is, in effect, an after-acquired endorsement. The Board's argument that seniority can accrue only in endorsements held at the time a teacher begins employment with the school Board is supported by case law, as well as the new regulation that there must be actual service in a subject area endorsement. See, Feit v. Bd. of Ed. of Roselle, Commissioner's Decision, 1980 S.L.D. 1378, 1379, where the Commissioner held that petitioner "can only claim tenure status and seniority protection within the scope of the

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subject field for which she was eligible at the time the Board abolished her position." (emphasis added) Aff'd. State Board of Ed. (1981). See also, Morer v. Bd. of Ed. of the Township of Teaneck, 1976 S.L.D. 963, which held that seniority can accrue only in the category in which the teacher held endorsements at the time the teacher began employment with the school board. The Commissioner held that "petitioner can only claim a tenure status and seniority protection within the scope of the subject field endorsed on her teaching certificate at that time (initial employment with the Board)." 1976 S.L.D. at 968. See also, Dedrick v. Bd. of Ed. of Hammonton, 1977 S.L.D. 1043, Freigtag v. Bd. of Ed. of Glen Rock, 1978 S.L.D. 792. While not addressing the same issue in dispute here, the Supreme Court has noted that N.J.A.C. 6:3-1.10 emphasizes that the critical determinant is actual service within the category. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368-369 (1983). See also, Flanagan v. Bd. of Ed. of Camden, State Bd. of Ed. (September 5, 1984), where the State Board held that despite a broad endorsement, the service and experience of that petitioner entitled him to seniority only in the position which he had actually taught. State Bd. of Ed. decision at 7. Possession of the appropriate endorsement has no meaning absent fulfillment of the requirement of service under that specific endorsement.

Petitioner made a bald assertion, without citing any supporting case law, that even if he is not entitled to the full-time position which requires a comprehensive music endorsement, he is entitled, by virtue of seniority and prior service under his endorsement in instrumental music, to up to a half-time position as an instrumental music teacher. I find no case law to support the proposition that the Board can be required to bifurcate a position it has determined to be a full-time position with a specific endorsement requirement.

Accordingly, for all the foregoing reasons and based on the foregoing analysis, I conclude that the Board of Education's cross-motion for summary decision in this matter should be granted because, as a matter of law, Mr. Gordon has never served in the position of instrumental/vocal music teacher with a comprehensive music endorsement and therefore is not entitled to assert any tenure and/or seniority rights to that position. Summary decision is not being granted because of any res judicata effect of the State

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Board's 1983 decision, nor is collateral estoppel effect being given to the decisions of the administrative law judge or Commissioner of Education in the 1983 dispute between the same parties.

It is hereby **ORDERED** that the petition of Paul Gordon asserting entitlement to a 1985 position of instrumental/vocal music teacher with a comprehensive music endorsement be, and is, hereby **DENIED.**

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

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

Feb 10, 1986
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

FEB 11 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 13 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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PAUL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC,	:	DECISION
RESPONDENT.	:	

The record and recommended decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's response to those exceptions were filed within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. However, the Board's own exceptions to the recommended decision were untimely pursuant to that regulation. The exceptions and response are summarized below.

Petitioner excepts to the Administrative Law Judge's (ALJ) determination that he has no seniority rights to a position involving both instrumental and vocal music, contending that the ALJ's reasoning is flawed and fails to take into account the regulations regarding endorsements and ignores precedent directly on point which dictates a ruling in his favor.

More specifically, petitioner alleges that the ALJ gave no weight to the right of a tenured teacher to hold any position for which he is qualified to the exclusion of a nontenured teacher and he asserts her seniority analysis is irrelevant because he is not competing with another tenured teacher claiming seniority. Petitioner asserts that the ALJ's differentiation between instrumental and vocal music is unsupported by the existing regulations governing teaching endorsements, N.J.A.C. 6:11-6.2(a)(16), wherein there is only one endorsement for teaching music. He contends that teaching either vocal or instrumental music entitles one to seniority credits within the category of music whereby a tenured teacher who has taught one or the other must receive seniority preference for a combined position. In support of this, petitioner cites Camilli v. Bd. of Ed. of Northern Highlands Regional High School District, decided January 3, 1985, aff'd State Board May 1, 1985.

Further, petitioner sees Camilli, supra, as relevant because the Commissioner held that where a reduction in force (RIF) occurred prior to September 1, 1983, the prior regulations are controlling and seniority rights are vested under those regulations. Petitioner asserts that even if instrumental and vocal music are viewed as different endorsements, he has acquired seniority in all areas for which he had an endorsement whether or not he actually taught. Thus, according to petitioner, Popovich, supra, and Weir, supra, are controlling contrary to the ALJ's determination. In addition, petitioner believes the ALJ's reliance

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on Feit, supra, and Morer, supra, is misplaced. He points out that the Commissioner has already once found that because he was eligible for a comprehensive music certificate, he was entitled to a combined music position in 1982. Gordon, supra Thus, in petitioner's estimation, nothing in the present case should change that result.

Petitioner alleges the ALJ's fundamental error was in perceiving this as a matter wherein seniority gained by actual teaching in a particular endorsement is relevant. Of this he states:

> ***Even if that analysis were correct, she commits a further fundamental error by analogizing this to a case where a teacher with endorsements in mathematics and English, but who has taught only math, lays claim to an English vacancy. Here, there are no separate endorsements involved. Instrumental and vocal music both come under a single music endorsement, so the only truly relevant case would be Camilli.
> (Petitioner's Exceptions, at p. 4)

The Board's response to petitioner's exceptions asserts that he relies on the proposition that a tenured teacher must always receive preference over a nontenured teacher for any position for which he is qualified, whereby he makes a critical assumption that he was qualified for the position. The Board contends, however, that petitioner was not qualified for the position at the relevant times which would give him any tenure preference for the controverted position in this matter because at the time of the RIF he did not possess an endorsement in comprehensive music. Feit, supra

The Board supports the ALJ's differentiation between instrumental music and vocal music endorsements as appropriate, stressing that when petitioner received his endorsement, the music categories were distinct. It also discounts petitioner's reliance on Camilli, supra, because Mr. Gordon taught under the more limited certificate, instrumental music. Further, it finds as significant petitioner's reliance on that case to argue that the seniority regulations prior to September 1, 1983 are controlling because it believes that if his claim dates back to 1980, the matter is not a new cause for action. The Board also contends that the ALJ was correct in determining petitioner's reliance on Gordon, supra, is unfounded. As such, the Board submits that petitioner's claim is barred by res judicata, or, alternatively, that the decision of the ALJ be affirmed because he is not entitled to assert any tenure and/or seniority rights in the position at issue.

Upon examination of the record and exceptions in this matter, the Commissioner adopts that portion of the ALJ's recommended decision that determines petitioner is not barred by res judicata from litigating this matter. Contrary to the Board's argument, the matter herein is a new cause for action in that it deals

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with a music position coming vacant in 1985. The ALJ's analysis and conclusion with respect to this particular issue is correct.

Despite petitioner's assertions to the contrary, this matter is one which is controlled by seniority regulations because it would be solely by virtue of seniority rights that petitioner may or may not have entitlement to the controverted position. Petitioner is correct, however, in asserting that the prior seniority regulations, N.J.A.C. 6:3-1.10, are controlling herein. Seniority determinations are based upon the regulations in effect at the time the RIF occurred. Camilli, supra, and Elsa Hill v. Bd. of Ed. of West Orange, decided January 21, 1985, aff'd State Board May 1, 1985, aff'd N.J. Superior Court, Appellate Division February 26, 1986. Because the RIF occurred prior to the effective date of the current regulations for seniority, the previous regulations determine what seniority rights he possesses.

With respect to petitioner's seniority, the ALJ erred in determining that "[h]is category at the time of employment was secondary teacher. N.J.A.C. 6:3-1.10(1)(15)." (Initial Decision, ante) At the time petitioner's seniority rights were vested, the controlling regulation was N.J.A.C. 6:3-1.10(k)(30) which reads, "Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11)."

Thus, petitioner's seniority accrued in the seniority category of instrumental music since his instructional endorsement was such and his teaching position was that of instrumental music teacher. Within the context of this matter, petitioner is erroneous in arguing that because N.J.A.C. 6:11-6.2(a)(16) indicates one endorsement for teaching either vocal or instrumental music, this entitles him to seniority within the category of music. At the time petitioner's certificate/endorsement was issued in 1971 there were two distinct music endorsements, namely, teacher of music (instrumental) and teacher of music (comprehensive). See N.J.A.C. 6:11-6.26, 6.27(4)(xxi and xxii) and Rules Concerning Teachers Certification, 20th Edition, 1966. The regulation cited by petitioner was not in effect until 1984 and therefore is not controlling in the instant matter. Consequently, the ALJ's differentiation between the two endorsements was entirely appropriate.

N.J.S.A. 18A:28-12 mandates that if a teaching staff member is dismissed as a result in a reduction in force, "such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***." (emphasis supplied). N.J.A.C. 6:3-1.10(h), in effect at the time petitioner was subject to RIF, reads:

> 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***.

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Petitioner's instrumental music endorsement authorizes him to teach instrumental music. Therefore, in accordance with the above-cited statute and regulation, his placement on the preferred eligibility list affords him seniority entitlement to any instrumental music position which became available in the district in 1985. As previously stated, such position constitutes a new cause for action, separate and distinct from the disputed vocal/instrumental position in 1982. Gordon, supra

The controverted position herein was advertised as an instrumental music position (Exhibit D, Petitioner's Brief on Motion) and is referred to as such in the Petition of Appeal and on pages 3, 5, and 6, ante. However, the position is also referred to as a combined instrumental/vocal music position or an instrumental music position requiring a comprehensive music certificate. The Commissioner, therefore, cannot make a final determination as to whether petitioner has entitlement to the position until he is apprised of the actual teaching duties of the position. If the position is exclusively instrumental music, there is no question as to petitioner's entitlement pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(h) of the regulations in effect when he was subject to a RIF, irrespective of the fact that the Board required a comprehensive music certificate.

An instrumental music position may be taught by one who holds either an instrumental music endorsement or the comprehensive music endorsement. While the Board has the discretionary authority to require the latter endorsement for such a position, it cannot in this instance place the teacher of music requirement on an instrumental music position so as to deprive an individual on a preferred eligibility list of his or her seniority rights in that category. Richard Walldov et al. v. Bd. of Ed. of East Brunswick, decided May 10, 1985, aff'd State Board November 6, 1985. If no teachers were on the preferred eligibility list in the instrumental music category, the Board would be free to require the comprehensive music endorsement.

In view of the lack of clarity in the record with respect to the exact teaching duties of the controverted position, i.e. solely instrumental music or a combined vocal/instrumental position, the matter is remanded to the Office of Administrative Law for limited purpose of supplementing the record in this regard. The Commissioner holds in abeyance rendering a determination as to petitioner's entitlement to any position other than one restricted to instrumental music until he is fully cognizant of the nature and scope of the disputed position.

The Commissioner retains jurisdiction in this matter.

March 27,1986

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2247-86
(OAL DKT. NO. EDU 6457-85 ON REMAND)
AGENCY DKT. NO. 319-9/85

PAUL GORDON,
Petitioner,
v.
PASSAIC TOWNSHIP BOARD OF EDUCATION,
Respondent.

James F. Schwerin, Esq., for petitioner (Greenberg and Prior, attorneys)

Robert S. Goldsmith, Esq., for respondent (Wiley, Malehorn and Sirota, attorneys)

Record Closed: August 4, 1986 Decided: August 8, 1986

BEFORE **SYBIL R. MOSES,** ALJ:

This matter comes before the Office of Administrative Law as the result of a remand from the Commissioner of Education of the State of New Jersey of an Initial Decision rendered by this Judge in a prior case between the same litigants, Docket No. EDU 6457-85 (Feb. 10, 1986). The purpose of the remand was solely to determine the actual duties of the 1985 position which was the subject of the litigation in the prior case. The matter was remanded on April 1, 1986, for the limited purpose of supplementing the record as to the exact teaching duties of the disputed position.

After appropriate notice, a prehearing conference was held on April 28, 1986. Counsel agreed that the following issues had to be determined:

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1. What are the actual teaching duties of the position?

2. If the position is not factually found to be exclusively instrumental music, does Paul Gordon have an entitlement to the 1985 position?

Counsel attempted to stipulate to all the facts so that the case could be completely determined as a matter of law. Counsel were not able to stipulate to all of the facts. Therefore, a hearing was held on July 28, 1986 at the Office of Administrative Law in Newark. Letter memoranda were filed on an expedited schedule by both attorneys. The record closed on August 4, 1986.

The following items were moved into evidence during the course of the hearing:

R1 Passaic Township Public Schools Job Description-vocal/instrumental music teacher

R2 Advertisement for instrumental/music teacher - July 7, 1985 Newark Star-Ledger

R3 Application for Professional Position-Cheryl A. Steinbeck

R4 Administrative recommendation to Board of Education, dated August 15, 1985, from Anthony F. Gonnella, Superintendent of Schools, to hire Ms. Steinbeck

R5 Employment contract for Ms. Steinbeck, dated August 16, 1985

R6 Certificate from the State Board of Examiners indicating that Cheryl A. Steinbeck is a certified teacher of music

Anthony F. Gonnella, Superintendent of Schools, Passaic Township, and Paul Gordon testified.

Mr. Gonnella has been Superintendent of Schools since 1972. He acknowledged that Mr. Gordon had previously taught instrumental music for the Board, but his position was eliminated in 1980-81 as a result of declining student enrollment, a lack of interest by the students in instrumental music and budget restraints. The Board established a

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vocal/instrumental position for grades five through eight for the 1982-83 school year. R-1, the job description, was prepared for that year and is still in effect. Mr. Gordon was not appointed to the 1982 position, which denial was litigated in another matter between him and the Board of Education. The position was filled by Eileen Arnold, from 1982 through the 1984-85 school year. She taught both vocal and instrumental music. According to Mr. Gonnella, there was a dramatic increase in the number of students enrolled in music.

Ms. Arnold declined a tenure contract and, therefore, the position was readvertised in the Newark Star-Ledger for the 1985-86 school year. The Board was looking for a person with both vocal and instrumental expertise, to teach in both areas, and was using the same job description (R-1). Ms. Cheryl Steinbeck was interviewed during the first week in August 1985 and given R-1 as the job description. She was an excellent candidate due to her experience in both areas and due to her being a hard worker. Mr. Gonnella recommended the appointment of Ms. Steinbeck for the 1985-86 school year on August 15, 1985. The Board approved the appointment and a contract was signed on August 16, 1985.

As of that date Mr. Gonnella did not know the breakdown of music classes. This is because there is no final music schedule until mid-September. In early September, a letter goes out to students in grades five through eight to determine if they want to take music. A good deal of recruitment is necessary to get students to take music. According to Mr. Gonnella, Ms. Steinbeck's certificate was comprehensive and permitted her to teach both subjects. Mr. Gonnella feels the Board has greater flexibility if a music teacher has a comprehensive certificate. In addition, Passaic Township is part of the Morris/Union Consortium, a group of school districts working together. Ms. Arnold had done work for the consortium, although it was not a requirement of the job. Consortium work was considered in the nature of job enhancement.

Mr. Gonnella's responses to cross-examination were crucial. He conceded that he was certainly aware, as of March 1983, that Mr. Gordon possessed a comprehensive music certificate. Mr. Gonnella knew the seniority regulations and reduction-in-force

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regulations governing tenured teachers in the State of New Jersey. Yet, neither he nor any member of the Board gave Mr. Gordon notice of the 1985 vacancy. The position is vacant again, as of June 1986, but Mr. Gordon has not been contacted. According to Mr. Gonnella, Mr. Gordon was not given notice of the vacancies due to the ongoing prior litigation, dealing with the 1982 position. Mr. Gonnella testified that if there had been no litigation, Mr. Gordon would have received notice of the 1985 position as he had the appropriate certification. The same is true in regard to the 1986-87 position, as Mr. Gordon's name is on the seniority list for all teachers of music. Absent the present litigation, Mr. Gonnella conceded that Mr. Gordon has rights to this position by virtue of his name being on that list. Mr. Gonnella believed that a favorable State Board decision in the prior case meant that Gordon was not entitled to the 1985 position.*

Mr. Gordon testified that his job performance was praised when he was teaching in Passaic Township. He has been unemployed, on a full-time basis, since June 1980, although he has taught compensatory education and science and has substituted in schools. He thinks he has gotten bad references from Passaic Township. Mr. Gonnella rebutted this statement, saying he has never received a request for a reference from another district in regard to Paul Gordon.

Mr. Gordon's attorney argues that the Commissioner's decision, remanding the matter, held that if the position in dispute was one of teaching only instrumental music then, as a matter of law, Mr. Gordon is entitled to fill the position and, therefore no further matters need be addressed. Counsel points out that the parties have stipulated that Ms. Steinbeck's teaching duties consisted solely of instrumental music and believes that he is entitled to prevail on that fact alone. Counsel asserts that the only argument presented by the Board of Education, in light of the stipulation of fact regarding the 1985-86 duties, is that there is a difference between the position for which a person is hired and the duties of the position. He urges that that argument is not supported by case law, as the duties performed in a position control the determination of tenure and seniority, rather than the name given to a particular position.

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*The prior case, OAL DKT. NO. EDU 4416-83 (Sept. 12, 1983), dealt with the application of the 90-day rule to Gordon's petition for the 1982 position. The State Board of Education found Mr. Gordon to be out of time in filing his claim to the 1982 position. The decision was affirmed by the Appellate Division which did, however, indicate that it was making no findings whatsoever in regard to the current position.

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Gordon's attorney argues that Mr. Gonnella's testimony that Mr. Gordon is entitled to the position by virtue of his seniority if it were not for the earlier ongoing litigation regarding the 1982-83 vacancy, must be given great weight, since both this judge and the Commissioner have ruled that the prior litigation does not have res judicata or collateral estoppel effect here.

Counsel for the Board of Education argues that the actual duties of a position, although relevant, are separate and distinct from the nature of the position. Counsel points out that between 1982 and 1985, the actual duties of the position included instrumental and vocal music and Ms. Steinbeck was hired because of her experience and expertise in both areas. The Board requires flexibility in scheduling as it is not until early September that a schedule for music classes (whether vocal and instrumental or solely instrumental) is established.

Counsel argues that Mr. Gordon was not considered for the 1985-86 position because the State Board determined, in the prior litigation, that Mr. Gordon was time barred, both retroactively and prospectively, from seeking to enforce his tenure and seniority rights. That decision was issued on March 6, 1985 and affirmed by the Appellate Division on May 27, 1986. Counsel acknowledges that this judge and the Commissioner have both determined that this specific cause of action is not barred by res judicata or collateral estoppel as a result of the State Board decision in the prior case. However, counsel continues to argue that Gordon's tenure and seniority rights were established in the first Gordon matter. By failing to act in a timely manner, Mr. Gordon lost any tenure and seniority rights to which he was previously entitled. The time bar of the original action precludes relief in future years. Counsel asserts that it is absurd to suggest that because the individual who was appointed to the position litigated in Gordon # I resigned, Mr. Gordon's claim and/or rights to the position are re-established.

The parties stipulated to the following facts, which I adopt as the most relevent facts in this case:

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N.J.A.C. 6:24-1.2, he was prospectively entitled to employment in that position as of the 1983-84 school year. The Commissioner of Education affirmed Judge Young's decision. On appeal from the Commissioner's Decision, the State Board of Education reversed on the basis that the 90-day rule barred him from any relief, either retroactive or prospective. The ruling of the State Board of Education was appealed and was affirmed by the Appellate Division in Paul Gordon v. Passaic Township Bd. of Ed. (N.J. App. Div., May 27, 1986, A-3294-84T7)(unreported).

On July 7, 1985, the Board advertised in the Star-Ledger for a teacher of instrumental music with a comprehensive music certificate [sic] [1] for a position available in September 1985. The Board did not communicate with Mr. Gordon in regard to this position. Mr. Gordon subsequently filed a petition asserting that he has preclusive seniority rights to the position advertised in July 1985. As of June 1986, the position is again vacant.

In addition, after a review of the testimony and evidence, I make further findings of fact:

1. Mr. Gordon was subject to a reduction in force in 1980-81 solely due to declining enrollment in school population and in the music program.

2. The teaching duties for the music position at issue in this matter for the 1985-86 school year were exclusively the teaching of instrumental music.

3. The Board of Education would have offered the 1985-86 position to Paul Gordon, as his name was on the seniority list for re-employment for this music position, if it were not for the fact that the Board believed the earlier litigation, which had been decided adversely to Mr. Gordon by the State Board of Education, precluded his being rehired.

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[1] See, N.J.A.C. 6:11-6.2(a)16, which lists music as a teaching endorsement on the instructional certificate. Cf., N.J.A.C. 6:11-4.1 et seq.

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4. The only reason Mr. Gordon has not received notice for the 1986-87 position is the Board's assertion that he is barred by the State Board ruling in the prior litigation, concerning the application of the 90-day regulation of litigation.

5. The Board concedes that absent the litigation, Mr. Gordon had rights to the 1985 position by virtue of his name being on the seniority list.

I must first reiterate my conclusion that a prior ruling by the State Board of Education, affirmed by the Appellate Division, in Paul Gordon v. Passaic Township Bd. of Education, A-3294-84T7, does not operate as either res judicata or collateral estoppel to defeat this cause of action. This matter is a separate cause of action concerning Gordon's entitlement to the music position for the 1985-86 school year. I incorporate by reference my discussion of the law of res judicata and collateral estoppel, set forth on pages 4 to 7 of the Initial Decision in EDU 6457-85. The Commissioner of Education, in reviewing that initial decision, "adopts that portion of the ALJ's recommended decision that determines petitioner is not barred by res judicata from litigating this matter. Contrary to the Board's argument, the matter herein is a new cause of action in that it deals with a music position coming vacant in 1985. The ALJ's analysis and conclusion with respect to this particular issue is correct." Commissioner's Decision, at 17.

In regard to the 1985 position, the Commissioner has clearly stated that Gordon's placement on the preferred eligibility list affords him seniority and entitlement to any instrumental music position which became available in the district in 1985, Commissioner's Decision, at 19. This remand was solely for the purpose of determining the actual teaching duties of the position in question. The Commissioner maintained that "If the position is exclusively instrumental music, there is no question as to petitioner's entitlement pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(h) of the regulations in effect when he was subject to a RIF, irrespective of the fact that the Board required a comprehensive music certificate." Commissioner's Decision, at 19-20.

After considering the stipulations of fact and the testimony, it is clear that the actual teaching duties of the controverted position were limited to instrumental music.

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Any work for the Morris/Union Consortium by Ms. Arnold or Ms. Steinbeck concerning vocal music was in the nature of job enhancement and was not a duty of the position. The law is clear that there is no difference between the teaching duties of a position and the position itself. Any arguments to that effect just posit a distinction without a difference. The case cited by petitioner, Rudolph-Nachtman and Herbert v. Middletown Bd. of Ed., State Bd. of Ed., Dkt. No. 131-83 (Dec. 5, 1984), is right on point. The duties performed by the teacher in a position control the determination of the tenure and seniority rights, rather than the name given to a particular position. See, Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805, as well as Christie v. East Orange Bd. of Ed., Commissioner's Decision, Dkt. No. 65-85 (March 11, 1985). It is stipulated that the duties of this position consisted solely of teaching instrumental music. The Commissioner has ruled that if that should be the case, Mr. Gordon is entitled to the position by virtue of his tenure and seniority rights. This is especially true in light of the fact that Mr. Gonnella would have offerred the position to Mr. Gordon based on those tenure and seniority rights, but for his opinion, and that of the Board of Education, that the prior litigation barred Gordon. Accordingly, I conclude that Mr. Gordon is entitled, by virtue of the nature of actual teaching duties of the position, which are exclusively instrumental, to have been appointed to that position for the 1985-86 school year. He is entitled to be appointed to the position, which is again vacant, for the 1986-87 school year.

Counsel for Mr. Gordon also asked for back pay, less amounts earned in mitigation, for proper seniority credit, and for all other emoluments of the position for 1985-86 to which Gordon is entitled. This shall be granted.

Mr. Gordon requests that the Board pay interest on the money owed to him, running from the beginning of the 1985-86 school year. The applicable regulation, N.J.A.C. 6:24-1.18(c)2, Awarding of Interest, holds that "[p]ost-judgment interest shall be awarded when a respondent has been determined through ajudication to be responsible for such payment, the precise amount of such claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of decision but has failed to satisfy the claim within 60 days of its award." Pre-judgment interest is only awarded by the Commissioner when the denial of the monetary claim was an action

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taken in bad faith or a deliberate violation of statute or rule, N.J.A.C. 6:24-1.18(c)1. There has been no assertion or evidence of bad faith or deliberate violation of a statute or rule here.

I conclude that post-judgment interest shall be awarded on the exact sum of money equal to the salary which would have been due to Mr. Gordon for the 1985-86 school year, less any amounts earned in mitigation, if the Board of Education does not obtain a stay of this decision and if it does not pay the claim within 60 days of the final decision in this case. The rate of interest shall be based on the prevailing rate established by New Jersey Court Rule 4:42-11(a), currently 9.5 percent for the year commencing January 2, 1986. See, Board of Education, City of Newark, Essex County v. Levitt, 197 N.J. Super. 239, 246 (App. Div. 1984.)

Accordingly, based on the foregoing findings of facts and conclusions of law, it is hereby **ORDERED** that the Passaic Township Board of Education shall reemploy Paul Gordon for the 1986-87 school year in the currently vacant teacher of music position for grades five through eight, at the appropriate salary on the regular teacher's salary guide currently in use between that Board of Education and the Teachers' Association and;

It is further **ORDERED** that the Passaic Township Board of Education shall pay Mr. Gordon, as back wages, the salary for which he would have been entitled for the 1985-86 school year, less any amount he earned during that year in mitigation and;

It is further **ORDERED** that the Passaic Township Board of Education shall award Mr. Gordon appropriate seniority rights and all other emoluments of the position of teacher of music for grades five through eight and;

It is further **ORDERED** that absent a stay of the final decision in this case, the Passaic Township Board of Education shall pay the liquidated sum of money for back wages less earnings in mitigation within 60 days of the final decision; or

It is hereby **ORDERED** that interest shall be awarded to run from the 61st day subsequent to the final decision at a rate of nine and a half percent per annum.

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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.

Aug. 8, 1986
DATE

SYBIL B. MOSES, ALJ

Receipt Acknowledged:

AUG 11 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 13 1986
DATE

Ronald I. Parker/t.s.
FOR OFFICE OF ADMINISTRATIVE LAW

kdk/amn/e

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PAUL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board argues in its exceptions that Rudolph-Nachtman, supra, is inapposite in that in the instant matter the duties vary from year to year based on the needs of the district. It again argues that res judicata should bar petitioner's claim.

Upon review of the record and the Board's exceptions, the Commissioner is unpersuaded that the ALJ erred in her findings and conclusions in this matter and adopts them as his own. The record unequivocably establishes that the vacant position advertised (R-2) was for instrumental music and that the disputed job was solely that of instrumental music. As determined in the March 27, 1986 Commissioner's decision in this matter, petitioner's seniority rests in the area of instrumental music, thus, he is entitled to any instrumental music position in which a vacancy arises, notwithstanding the prior litigation which barred his claim to a vacancy which arose in 1982. That time bar does not extend to any vacancy that may arise subsequent to 1982.

The Commissioner wishes to state emphatically that, despite the Board's vigorous arguments to the contrary, a new cause of action for reemployment does, in fact, arise each and every time a vacancy occurs within a seniority category where a preferred eligibility list exists. Thus, while petitioner's 1982 claim was time barred, the claim in the instant matter is not barred by res judicata in that a new cause of action arose and the resultant Petition of Appeal was timely filed.

Given the above, the Commissioner adopts the initial decision as his final decision in this matter. Accordingly, the Board is directed to comply on an expeditious basis with the orders contained therein.

September 17, 1986

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4663-85
AGENCY DKT. NO. 130-5/85

BOARD OF EDUCATION OF
THE CITY OF GARFIELD,
Petitioner,
v.
CITY COUNCIL OF THE
CITY OF GARFIELD,
Respondent.

Paul S. Rotella, Esq., for petitioner
(Picinich, Rigolosi & Selser, attorneys)

Lawrence J. Jaskot, Esq., for respondent
(Fiore & Jaskot, attorneys)

Record Closed: December 24, 1985 Decided: February 14, 1986

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by the Board of Education of Garfield ("Board") from a reduction by the governing body of the City of Garfield ("City") in the proposed school budget for fiscal year 1985-86. As proposed by the Board, the budget provided $9,536.552

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for current expenses and $188,908 for capital outlay. At the school election held on April 2, 1985, the electorate voted to reject these amounts. After consultation with the Board, the City reduced the amount of current expenses by a total of $183.500. These cuts were made in six areas: (1) lawyers' fees; (2) guidance counselors' salaries; (3) high school administrators' salaries; (4) merger of department heads; (5) secretaries' salaries; and (6) operation of plant. The City did not make any reductions in capital outlay. Thus, on May 7, 1985, the City approved the sum of $9,353.052 for current expenses and $188.908 for capital outlay.

Procedural History

On May 20, 1985, the Board filed a petition with the Commissioner of Education alleging that the amount approved by the City is inadequate to provide a thorough and efficient system of public education as mandated by N.J. Const., (1947), Art. VIII, § IV, par. 1 and by N.J.S.A. 18A:22-37. The City filed its answer on June 21, 1985. Subsequently, on July 29, 1985, the Commissioner of Education transmitted the matter to the Office of Administrative Law for handling as a contested case. Hearings were held on November 12. 13, 21. 22 and 25, 1985. Witnesses who testified and exhibits received in evidence are listed in the appendix. Upon receipt of position papers from the parties, the record closed on December 24, 1985. Time for completion of an initial decision has been extended to February 14, 1986. N.J.S.A. 52:14B-10(c).

Undisputed Facts

Some background information is helpful to set this case in its proper context. Garfield is a predominantly blue-collar community located in Bergen County. Of the 73 districts in Bergen County, Garfield ranks near the bottom in expenditures per pupil. It operates a high school and six elementary schools. Enrollment was 2,437 at the start of 1985-86 compared with 2,504 students at the start of 1984-85, a decline of 67 students or 2.7% of the student population. Facilities are old and in need of repair. The newest elementary school was built almost 60 years ago.

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Previously, the Commissioner of Education noted that the Garfield school district has "a continuing record of fiscal mismanagement for which they have been required in the past to undertake remedial action."[1] Due to poor planning and inadequate record-keeping, the Board has incurred substantial budgetary deficits in prior years. In 1983-84, the deficit amounted to $351,000. An independent audit conducted by the Board's certified public accountant reveals that for 1984-85 the deficit totaled $301,605. Last year, the Commissioner of Education awarded the Board $240,200 to cover the amount of deficit projected for 1984-85. In addition, the Commissioner acted to restore $168,000 of the cuts made by the City in the 1984-85 budget. Apparently, the existing $301,605 deficit is in excess of amounts already certified by the Commissioner in anticipation of the 1984-85 shortfall. Nevertheless, the Board's 1985-86 budget appeal does not involve any request for additional amounts to make good the deficit carried over from earlier years.[2] Instead, the Board limits its present request to restoration of the City's $183,500 reduction from the 1985-86 current expense budget.

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[1] Bd. of Ed. of Garfield v. Mayor and Council of Garfield, 1985 S.L.D. ___ (Comm'r of Ed. May 31, 1985).

[2] Recently, the Legislature enacted Assembly Bill 3373 (1985) which addresses the deficit problem by advancing to the district an amount of state aid not to exceed $375,000. Any advance of funds must be repaid by deductions from state aid for 1986-87. L. 1985 c. 190 (effective June 20, 1985).

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Findings of Fact

There are six areas in which the City has made reductions in the Board's recommended budget:

1. Lawyers' Fees

With respect to lawyers' fees, the Board agreed to pay $25,000 as a retainer to its counsel for routine legal services, such as attendance at all board meetings, rendering of advice to school administrators and handling of minor grievances (Account 110E). Additionally, the Board set aside $10,000 for litigation expenses not included within the retainer agreement (Account 120B). Both sides agree that this total of $35,000 represents a substantial savings over charges by the Board's prior attorney who received $70,000 for similar services. While the City does not object to the $25,000 retainer payment, it refuses to authorize the extra $10,000 for litigation expenses.

Significantly, the City offered no evidence that the fees charged by the Board's attorney are excessive or that the Board is engaged in unnecessary litigation. Mayor Thomas Duch, himself a licensed New Jersey attorney, testified against other line items in the budget, but failed to complain about litigation costs. Currently, the Board is a party to a dozen or so cases pending before federal and state courts or administrative agencies. Some of the cases had been instituted by present or former employees and the Board has little choice but to defend against these claims. One case involves construction costs for the new high school gymnasium and could result in a savings of money if the Board is successful. Two other suits, including the 1985-86 budget appeal, involve disputes between the Board and the City. Superintendent of schools Jerome Benigno emphasized the importance of selecting a law firm with which the Board is satisfied. None of the Board's witnesses could say what hourly rate is charged by the law firm now representing the Board. However, Benigno explained that the $10,000 figure is "a ceiling" and that the Board will carefully scrutinize each itemized bill before making payment for legal services.

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I **FIND** that $10,000 is a reasonable amount for anticipated litigation expenses beyond the services covered by the retainer. Unfortunately, involvement of school boards in contested litigation is an unavoidable reality of modern life. Despite its contention that the legal fees are too high, the City gave no specific suggestion of how further savings in this area could be achieved. Certainly the City has not shown that the fees charged by Board counsel are greater than those customarily charged by comparable attorneys. Indeed, the record reflects that the law firm previously retained by the Board charged twice as much. Nor has the City demonstrated that the Board is overly litigious. If there is any way in which the Board could have avoided litigation, it does not appear in the record. To the extent that the City itself is involved in litigation against the Board, the City has a direct conflict of interest. By denying this portion of the budget, the City impedes the Board's ability to present its side of the controversy to an impartial decision-maker. Absent any proof that the Board's legal position is frivolous, the City must approve reasonable lawyers' fees to enable the Board to have its day in court.

2. Guidance Counselors' Salaries

Although lumped together here for purposes of discussion, the City actually recommended two distinct reductions in this area totalling $72,000.[3] During 1984-85, the Board had employed a six-member guidance department comprised of one director and five full-time guidance counselors. First, the City expects to realize a savings of $36,000 in 1985-86 resulting from the transfer of the former director of guidance to the position of elementary principal. (Account 214B) Next, the City proposes a further reduction of $36,000 by the elimination of one more guidance counselor at the elementary school level, leaving a guidance department of one new director and three full-time counselors for the entire district. (Account 214B). For its part, the Board insists that a return to a six-member department is essential in order fully to meet the need for guidance services in the district.

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[2]Initially, the City incorrectly identified the savings as accruing in the accounts designated for salaries of principals (Account 211) and teachers (Account 213). From the evidence, it is evident that any savings would be realized in the account for salaries of guidance counselors (Account 214B).

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Regardless of the Board's ultimate goal of a six-member department, the district is presently paying salaries for only five guidance counselors. Thomas Cangelosi, director of guidance in 1984-85, has been reassigned to elementary principal for 1985-86. His new salary of $42,000 per year is equal to the salary of the elementary principal whom he is replacing. Therefore, no change has occurred in the account for salaries of principals (Account 211). Meanwhile, his successor as director of guidance, Rita Scuito, will be earning the same salary of approximately $38,000 that Cangelosi used to make. At the time of the hearing, the Board had not yet hired anyone to fill Scuito's vacant guidance counselor position. Scuito's salary for 1985-86 as a guidance counselor would have been $36,265. By not replacing her, the Board has already saved two months of her salary or about $7,265. Moreover, it is unlikely that the Board will hire a new guidance counselor for the remainder of 1985-86. According to business administrator George Ball, the Board has placed a "freeze" on spending through the end of the school year. Even if the Board decides to add another guidance counselor to its staff, however, the entry level salary of $18,500 would be half as much as Scuito had been earning.

Not only does the City wish to accomplish economies through attrition, but also it seeks to reduce the present guidance staff from five to four persons. The City's rationale for this further cut came from Mayor Thomas Duch, who recalled that when he was a high school student in the district more than a decade ago there were four guidance counselors for a considerably larger student body. Elimination of one counselor would still leave three full-time counselors for 748 high school students and one full-time counselor for 1,689 elementary school students. While making this recommendation as a representative of the City, Duch admitted having personal doubts about the wisdom of reducing guidance staff to one counselor for six elementary schools. On cross-examination, he acknowledged his own lack of qualifications in the field of education.

In contrast, superintendent of schools Benigno has more than 28 years of professional experience as a teacher and school administrator. In his view, the guidance department is already understaffed and the situation would worsen if the district were to lose another counselor. Over the last few years, the workload of the guidance department

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has increased as a result of implementation of proficiency testing and programs for early identification of students with learning difficulties. Moreover, this district has a particular need for college counseling since many parents are unaware of the opportunities available to their children. Consequently, Benigno had to switch a counselor from the elementary schools to part-time duty at the high school to satisfy unmet demands. Because of this diversion of resources, delivery of services at the elementary level has suffered. No guidance counselor has been to visit Elementary School No. 9 since the opening of school in September.

I FIND that the Board has overbudgeted by the amount of $36,000 for a sixth guidance counselor who is not on the payroll and whom the Board has no immediate plans to hire. Further cuts in the guidance department, however, would be detrimental to the Board's obligation to provide every child in the district with a thorough and efficient education. The City's suggestion to remove the one remaining full-time elementary guidance counselor was made solely on the basis of business judgment, without giving sufficient consideration to educational objectives. Already some of the elementary children in the district have been shortchanged in the provision of guidance services to which they are entitled. Nothing on the record lends support to the idea that a staff of one director and four counselors is excessive for a district with 2,437 students. In the event of the loss of the fifth counselor, continuation of required guidance services at the high school could be maintained only at the sacrifice of elementary school children in need of services.

3. High School Administrator

As stated by Mayor Duch, the City regards the high school administration as being top-heavy in staff. Without specifying which individual might be expendable, the City advocates returning at least one excess administrator to a teaching position, thereby eliminating the need for a teacher's salary of $18,000 at the lowest end of the scale (Account 213A). Testimony at the hearing focused on the job duties of two certified teachers presently assigned full-time as "administrative assistants." Each administrative

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assistant earns a salary in excess of $36,000 (Account 216).

Florence Adler possesses a master's degree and has been employed by the district for 42 years. Her primary duty is development of curriculum for the high school. The Board also employes a "curriculum coordinator," who devotes full-time to preparation of a written curriculum for the entire district. Asked to clarify the difference between these seemingly overlapping functions, superintendent Benigno indicated that Adler coordinates curriculum exclusively in the high school whereas the curriculum coordinator's activities extend to the elementary schools as well. Earlier in his testimony, Benigno had described the advantages of employing someone to organize the curriculum throughout the district so that all schools would be using compatible materials. Benigno never adequately explained why the Board wanted to divide this responsibility between two different administrators. Apart from curriculum development, Adler spends a portion of her time scheduling substitute teachers or assisting department heads with purchase orders. Most if not all of these other duties do not require a teaching certificate and could appropriately be delegated to support staff such as secretaries or clerks.

Robert Mastroberte also holds a master's degree and has been working in the district for 16 years. He currently serves as the high school "disciplinarian," a role which includes in-house supervision of disobedient students, the keeping of attendance and tardiness records, and occasional appearances in juvenile proceedings. Prior to Mastroberte's assumption of these duties, the guidance department handled student discipline in Garfield. Other districts make student discipline the responsibility of the high school principal or vice principal. Again, some of the clerical tasks, such as record-keeping, could be performed by noncertificated personnel. On behalf of the City, Duch questioned the need for a full-time disciplinarian. City officials feel that there is not enough student misbehavior to justify taking a teacher away from the classroom. Board witnesses generally agree that discipline is not a major problem at the high school.

I FIND that both Adler and Mastroberte are overqualified for the jobs they are doing. Either could be put to better use in the classroom. Adler's administrative position

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is largely superfluous in view of the fact that the district already has a full-time curriculum coordinator on its staff. Mastroberte does perform a useful function, but his disciplinary duties could be redistributed among the high school principal, vice principal and guidance department without any impairment of efficiency. Contrary to the Board's warning of dire consequences if $18,000 is not restored to its budget, managerial effectiveness would probably be improved by the removal of an unnecessary layer of bureaucracy.

4. Merger of Department Heads

Another cost-cutting device suggested by the City is the merger of two or more departments in the high school, which would free the displaced department head for additional hours of teaching. The City deducted $35,000 for this anticipated savings (Account 213). Teachers in the district have a normal teaching load of five periods per day plus two free periods for lunch and preparation time. Department heads teach only two periods per day and use the remaining three work periods for departmental business. Consolidation of two departments would release 3/7 of a full-time teaching position or the equivalent of $7,928 at the entry-level salary. Consolidation of four departments would release 6/7 of a full-time teaching position or the equivalent of $15.857.

Today the district has seven subject-area departments in the high school. Depending on student enrollment, the departments range in size from a high of twelve teachers (English) to a low of six teachers (science). Until the 1985-86 school year, the district had a combined department of English-and-foreign languages. Among the other possible combinations are a department of mathematics-and-science and a department of social studies-and-business education. The Board concedes that it is not prohibited by law from merging departments, provided that the department head holds the appropriate certifications. Rather, the Board maintains that there are educational benefits derived from specialization which outweigh any savings accomplished through consolidation.

In this regard, superintendent Benigno expressed his opinion that merger of existing departments would be "educationally unsound" for several reasons. Above all,

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department heads are selected for their expertise in the particular subject matter. Even if a teacher has dual certification in two subjects, it is difficult to keep current in the latest developments in both fields. A department head must evaluate the performance of teachers in the department. When departments are combined across subject matter lines, a situation may arise where, for example, an English teacher who does not speak the French language is called upon to evaluate the knowledge of a French teacher. Similarly, a department head unfamiliar with the subject will find it hard to make meaningful decisions about curriculum content or textbook choices. Size is also a relevant factor. As the department grows in size, it becomes more difficult for the department head to exercise control over teaching staff. Benigno considered the former English-and-foreign language department, consisting of 15 or more teachers, to be too big for one person to manage effectively.

I FIND that the organization of departments at the high school has a direct impact on the quality of education in the district. Type and size of departments are educational issues which, within reasonable limits, are entrusted to the discretion of the Board. Proofs strongly demonstrate that the specialized departments are run by better informed and more efficient managers. It is wrong for City officials, who have no educational expertise, to substitute their own judgment for those who do. Here the Board acted in reasonable reliance upon the advice of its chief school administrator to establish departments best suited to meet the educational requirements of the district.

5. Secretaries' Salaries

The City proposes a reduction of $7,500 resulting from the retirement of a secretary with 50 years seniority and her replacement by a lower salaried employee (Account 110F). Although the City mistakenly described the retiring employee as a secretary assigned to the high school principal, Benigno identified the individual as Leonia Colacino, who served as his secretary in the superintendent's office. Since she was the most senior employee in the district, Colacino's 1985-86 salary would have been $21,554. Her replacement, Lucille Pizzichetta, was promoted from a principal's aide to a

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secretarial position. As secretary in the superintendent's office, Pizzichetta is now earning $16,051. Hence, the difference between salaries amounts to $5,500 in round numbers.

Benigno contended that the $5,500 savings is more than offset by an unforeseen expense of $16,289 to hire a bookkeeper for the business administrator's office (Account 110B). According to Benigno, the bookkeeper was hired in compliance with a recommendation by state auditors sent to monitor the district's finances. At the same time, Benigno acknowledged the removal as of December 2, 1985 of another employee whose annual salary was $23,605 (Account 110N). Savings in salary for the remaining seven months of 1985-86 will be 7/10 x $23,605=$16,524. Hence. these two recent employment changes cancel each other out.[4]

I FIND that the budget should be reduced by $5,500 because of the retirement of a senior secretary in the superintendent's office.

6. Operation of Plant

Out of a total budget of $500,000 for salaries of custodians, the City deducted $40,000 (Account 610A). City witnesses outlined measures to reduce costs by rescheduling custodial staff to minimize overtime expense, for which the Board had budgeted $15,000. Thomas Duch argued that there are "sufficient janitors in the system" to eliminate overtime completely. By holding monthly PTA meetings in the high school gymnasium rather than in the various elementary schools, the Board could utilize night-time custodians and save unnecessary overtime. Duch also pointed out that many after-school events, such as sporting contests and elections, are known in advance. Shifts can be arranged so that overtime will be avoided. Likewise, Duch recommended revision of

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[3]Benigno also complained of shortages in secretarial support for elementary school principals, but those salaries, reported in an entirely different category (Account 215A), are irrelevant to a discussion of salaries for administration (Account 110).

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vacation schedules to eliminate the need for summer help, for which the Board had set aside an extra $15,000. Furthermore, Duch criticized the Board's practice of allowing sick or injured custodians to go on "light duty." He believed that management must encourage early retirement of those custodians physically unable to do a full job.

These ideas were rejected by Board representatives, who insisted that the custodial staff was already utilized at maximum capacity. Business administrator George Ball cited code regulations requiring the presence of a certified black seal licensee to operate the district's high pressure boilers. In response to the suggestion that PTA meetings be held at the high school, superintendent Benigno related his experience that such meetings produce low parent turnout.

Beyond suggested reductions in overtime and summer help, the evidence indicates that the Board has budgeted for employees no longer on the payroll. George Ball testified that there are now 19 full-time custodians working for the district, down from 24 full-time custodians just five years ago. Notwithstanding the staff of only 19 custodians, the Board submitted a proposed budget for 23 custodians including a nonexistent supervisor of custodians. If the salaries of the supervisor and the three lowest paid custodians are removed from the budget, the Board would save $85,220. Using his existing staff, Ball has been able to assign six custodians to the high school and two custodians to each of the six elementary schools.

It should also be noted that the custodians' duties are limited to operating the heating and ventilation systems and performing housekeeping duties. Additionally, the Board employs six maintenance workers who are responsible for repair and upkeep of buildings, grounds and equipment (Account 710A). The City has not sought to reduce funds for maintenance workers.

I FIND that there is sufficient padding in the account for custodial salaries (Account 610) to permit the $40,000 reduction without any adverse effect on essential janitorial services. While overtime can never be reduced to zero, better use of existing staff would yield substantial reductions in this $15,000 outlay. Summer help for $15,000 is a luxury which the Board simply cannot afford. The existing staff of 19 full-time

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custodians is enough to provide adequate coverage at the high school and all elementary schools. Any part of the $40,000 reduction which cannot be achieved through cutbacks in overtime or summer help will come from salaries for custodians no longer employed by the Board.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the sum of $10,000 must be restored to guidance counselors' fees; $36,000 to the account for guidance counselors' fees; $36,000 to the account for teachers' salaries; and $2,000 to the account for secretaries' salaries.

When reviewing local school budgets, the Commissioner of Education has an overriding responsibility to see that the mandate for a thorough and efficient system of free public schools is being carried out. East Brunswick Bd. of Ed. v. East Brunswick Tp. Council, 48 N.J. 94, 106 (1966). Summarized by the New Jersey Supreme Court in the East Brunswick case, the scope of review is very broad:

> . . . the Commissioner in deciding the budget dispute here before him, will be called to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislation and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" . . . school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the Board of Education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83 [now N.J.S.A. 18A:22-38], then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. 48 N.J. at 107.

Application of this standard requires restoration of the above amounts to assure a thorough and efficient education in the Garfield school district. See Robinson v. Cahill, 62 N.J. 473 (1973), cert. den. 414 U.S. 976 (1973).

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Often the contribution of the school board attorney is overlooked, but he or she plays an indipensable role in advising the school administration of its legal obligations and protecting the district's legitimate interests in lawsuits. As long as boards of education possess the power "to sue or be sued," a school district must be given adequate resources to retain competent legal counsel. N.J.S.A. 18A:11-2. Cf. Merry v. Paterson Bd. of Ed., 100 N.J.L. 273 (Sup. Ct. 1924). Insofar as guidance counselors are concerned, regulations defining the basic elements of a "thorough and efficient system of free public schools" refer specifically to an educational program which "provide[s] all pupils guidance and counseling to assist in career and academic planning." N.J.A.C. 6:8-3.5(a). While the same set of regulations are silent about departmentalization of schools, they do require that instruction must make "effective use of personnel, resources and facilities of the school and community." N.J.A.C. 6:8-3.6(a)(6). That is exactly what the Board was attempting to do when it organized instructional departments by subject matter. Recent amendments to the seniority rules contemplate increased departmental specialization by directing boards of education "to adopt job descriptions for each supervisory position which shall set forth the qualifications and specific endorsements required for such position." N.J.A.C. 6:3-1.10(1)(10).

Finally, attention must be given to the Board's argument that the City is barred from imposing any reduction by virtue of the Commissioner's grant of a cap waiver under N.J.S.A. 18A:7A-25. Before the Commissioner of Education may authorize a waiver of the budget cap, he must make a finding either that spending within the limit will be insufficient to meet the goals of a thorough and efficient education or that enrollment in the district is likely to increase. Review of the supporting cap waiver documents submitted to the Commissioner reveals that none of the programs involved any of the issues raised here by the City. Thus, the Commissioner has not had occasion to consider the City's objections to the budget. Moreover, a cap waiver proceeding is legislative in nature:

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> The [cap waiver] proceedings . . . were not a contested case or one of an adversary nature. The agency was not under a duty to consider evidence and apply the law to the facts as found, thereby exercising a discretion or judgment judicial in nature on evidentiary facts. [Citation omitted] The Commissioner was not called upon to evaluate evidence. There was no formal testimony to be taken, no witnesses to be heard and no credibility to be judged.
>
> East Windsor Reg'l Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547, 552 (App. Div. 1980).

On the other hand, school budget appeals are full-fledged contested cases where parties are afforded the opportunity to present written and oral testimony and cross-examine witnesses. N.J.A.C. 6:24-7.8. Given this right to a quasi-judicial type of hearing, the City cannot be bound by the outcome of a nonadversarial proceeding in which the City itself never participated as a party.

Order

For the foregoing reasons, it is **ORDERED** that the City of Garfield certify the additional amount of $84,000 for current expenses to the Bergen County Board of Taxation to be included in the taxes to be assessed, levied and collected in the municipality for the school year 1985-86.

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

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

2/14/86
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

FEB [illegible]
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 20 1986
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