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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1984 to December 31, 1984

Vol. 2

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1984 to December 31, 1984

Vol. 2

SAUL COOPERMAN
Commissioner of Education

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FRANK ROBERTS ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioners filed primary exceptions to the initial decision by Judge Dower-LaBastille. Petitioner Horton cites Rall, supra, to sustain his argument that the action of the Board expressed in its letter of August 18, 1980 (P-28) conferred tenure on a category of teaching staff members rather than on Horton as an individual. The Commissioner cannot agree. For purposes of clarity, P-28 is herewith set down in its entirety:

> "Please be advised that the Board of Education of the Hudson County Area Vocational-Technical Schools has hired you effective September 1, 1980 for the position of Supervisor - Academics.
>
> "Please be advised that it is the intent of the Board, based on your action in resigning your position with another system, to vest tenure upon your hiring."

The words of the letter are clear and explicit, tenure was to be accorded Horton as an individual, no reference was made to tenure for the entire category of supervisors. The words of the letter must be accorded their literal, unequivocal meaning. The Commissioner so holds.

Further, the Commissioner finds no merit in the contention that an injustice would be done to Horton if his tenure with the Board were revoked because he forfeited his tenure in another system to gain employment with it. Such an act on the part of Horton was a purely voluntary choice made by him at the time for monetary gain. He was not forced or coerced to take the position with the Board but did so of his own free will. The Commissioner so holds.

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Petitioner Roberts does not except to the determination by the judge of his entitlement to the award of payment for 13 days but alleges that he should be compensated for 34 other unused accumulated vacation days. The Commissioner notes that the 34 days so named accumulated from December 8, 1980 to June 30, 1983. The Commissioner cannot agree. Roberts was not covered by any negotiated contract, nor was there an applicable contract provision for payment of accrued vacation leave. Nor did there exist an applicable Board policy or practice. The Commissioner concurs with the judge's conclusion, ante, that "under Rall, supra *** the Board was without power to grant tenure to Roberts and the rescission of January 27, 1983 was valid."

The Commissioner sets down in entirety the statutes pertinent hereto:

> N.J.S.A. 18A:12-1.1. Ineligibility for appointment to paid office or position filled by board
>
> "No member of a board of education shall, during the term for which he is elected or appointed, be eligible for appointment to any paid office or position required to be filled by the board unless he shall resign or cease to be a member at least 6 months prior to his appointment, except in cases where the office or position is by law required or permitted to be filled by a member of the board."

Further:

> N.J.S.A. 18A:12-2. Inconsistent interests or office prohibited
>
> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county."

The Commissioner finds and determines that the Board's rescission of its previous action was a proper one.

The paid vacation leave of 22 days for 1982-83 was applicable to Roberts as of his termination on June 30, 1983. He had previously used 9 of the indicated 22 days and the Board should pay

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him the sum of $2,435.42. The Commissioner herewith corrects the initial decision listing of vacation days for 1982-83 to 22 vacation days.

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

The Commissioner concurs with the order set down by the judge and incorporates it as his own, noting the application to Vincent McFadden as tenured, the dismissal of the Petition of Lester Horton, the entitlement of $2,435.42 to Frank Roberts in entire satisfaction of his Petition and the admonishment to the Board to conform with the provisions of statute and code applicable herewith.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JUNE 5, 1984

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FRANK ROBERTS ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 5, 1984

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

For the Respondent-Respondent, Schumann, Hession, Kennelly and Dorment (Frank DeStefano, Esq., of Counsel)

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

S. David Brandt abstained in this matter.

October 3, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8617-83
AGENCY DKT. NO. 330-9/83A

ELLIOT POLLACK,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,

Respondent

APPEARANCES:

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Aron & Salsberg, attorneys)

Record Closed: March 30, 1984 Decided: April 9, 1984

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

Elliot Pollack, a tenured teacher staff member employed by the Board of Education of the Township of Ridgefield Park, Bergen County, alleged the Board's action in withholding his salary increments for 1983-84 was arbitrary, capricious and therefore illegal.

The Board said its action was a proper exercise of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case on October 27, 1983, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 22, 1983 and a plenary hearing was held at the Office of

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Administrative Law, Newark, on March 30, 1984. The record closed at conclusion of hearing.

RELEVANT TESTIMONIAL EVIDENCE

Petitioner testified that although he substituted in the district prior to January 1977, his regular employment began at that time with his appointment as a teacher of English. Since his employment began, no disciplinary action had ever been taken against him. He testified he had received commendations from parents and supervisors, as indicated in his evaluations.

Petitioner said the quality of his performance did not lessen in 1982-83. Test scores of his pupils in the California Test of Basic Skills showed growth.

In 1982-84 he received one formative evaluation, two summative evaluations and one summary evaluation. The first evaluation in the record is a summative evaluation dated March 10, 1983. See J-3. Petitioner testified he requested clarification from his supervisor concerning the statement his instruction "is often superficial, peripheral and fragmented, as opposed to sequential and structured." The response from his supervisor was that those were the words of principal Kramer. Petitioner then spoke to principal Kramer, who referred him to his supervisor.

Petitioner said he became concerned about probable withholding action when he received his second summative evaluation on May 2, 1983. See J-2. His concern mounted when he received a letter from the superintendent dated May 5, 1983, warning him, upon direction from the Board on May 4, 1983, that uncorrected deficiencies "may call for a withholding . . . . See J-33.

Petitioner testified that in March his supervisor required him to file plans and assessments. Though he complied, he received no response from the supervisor. He said he requested suggestions from the supervisor for improvement, but, he said, he received none.

He said he was observed on but one occasion for about 15 minutes by the supervisor in June after his May 2 evaluation and the May 5 letter from the superintendent.

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He testified his summary evaluation under date of June 10, 1983 was handed to him in class on the one occasion of observation after May 5th. He also said he was not observed or evaluated by the principal or superintendent.

About the supervisor's concern that a nexus did not exist between lesson plans and teaching, petitioner said he did deviate from plans when there was good cause, such as a follow-up or a lesson taught by a substitute teacher, which was the occasion during an observation by the supervisor.

The supervisor testified his first recorded evaluation of petitioner in 1982-83 was on March 10, 1983, although a previous formative evaluation in December 1982 was considered null and void because of expiration of a time limit under a negotiated agreement. He said he shared the concerns of principal Kramer in the evaluation even though he didn't know what the principal thought at the time.

The supervisor said a formative evaluation on March 21, 1983 indicated he did not think petitioner's pupils were prepared for the lesson because of his observation of their facial expressions. Grading pupils appeared to be an intimidating problem for petitioner, he felt.

Further testimony indicated the supervisor's concern over absence of a nexus between petitioner's lesson plans and teaching. In characterizing the teacher-supervisor relationship, the supervisor said petitioner seemed to refuse to perceive the concerns expressed. Petitioner's reaction was that he, the supervisor, had a perceptual problem.

The supervisor corroborated petitioner's testimony that he quoted the words used by principal Kramer and that he sent petitioner to see the principal for clarification. He said his May 2 evaluation lasted only for six to ten minutes.

The supervisor testified, finally, the recommendation to withhold was between himself and the superintendent, bypassing the principal. He recommended that action sometime in May or June.

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RELEVANT DOCUMENTARY EVIDENCE

The supervisor's summary evaluation of petitioner under date of June 10, 1983, said "The superintendent sent you a letter dated May 5, 1983 in which he outlined those areas where your effectiveness was less than satisfactory;" "It was expected that you would correct those deficiencies;" and "Subsequent observations have indicated that you have not corrected these deficiences to a level of acceptability." See J-1.

FINDINGS OF FACT

My consideration of testimonial and documentary evidence, as well as of demeanor of the witnesses, results in the following FINDINGS OF FACT:

1) There was no observation of petitioner by either supervisor, principal or superintendent from the May 2 summative evaluation or May 5 letter of the superintendent to support a conclusion in the supervisor's June 10 summary evaluation that petitioner had not corrected deficiencies referred to.

2) Petitioner's testimony is credible and I give it credence.

3) Credibility of the supervisor is suspect because of his parrotting of the principal's words in the evaluation without explaining their meaning; absence of a written recommendation by the supervisor he was recommending a withholding action; the supervisor's hesitancy and lack of directness when asked by the court whether he recommended withholding or concurred with the intent of the superintendent to do so; and the supervisor's bypassing the principal in recommending withholding by the Board.

4) The action of the Board in withholding the salary increments of petitioner for the 1983-84 school year, therefore, was arbitrary and capricious.

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It is noted that Issue #2 as incorporated in the Prehearing Order was mooted by corrective Board action in a resolution adopted at a public meeting. The issue was withdrawn by stipulation of the parties.

CONCLUSIONS OF LAW

The discretionary authority of a local board of education pursuant to N.J.S.A. 18A:11-1 is indisputable. It is also so that neither the Commissioner nor the courts will substitute their judgment for that of a local board in absence of affirmative showing that the judgment was arbitrary, capricious or unreasonable. See Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448 (App. Div. 1960); Quinlan v. Board of Education of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); and Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

Here, I find petitioner has met his burden of proof the Board's action was arbitrary and capricious. It follows the action must be set aside.

I **CONCLUDE** and **ORDER**, therefore, that the Board shall reinstate petitioner's salary at the appropriate step of the salary guide as if the withholding action had not occurred, and that the Board shall compensate petitioner for all salary withheld since September 1, 1983, forthwith.

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

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OAL DKT. NO. EDU 8617-83

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

4-9-1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

April 11, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 13, 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 8617-83

ADDENDUM

WITNESSES

Elliot Pollack, petitioner
Vincent Bernaducci, supervisor

EVIDENTIARY DOCUMENTS

J-1: June 10, 1983 summary evaluation of petitioner w/rebuttal
J-2: May 2, 1983 summative evaluation of petitioner w/rebuttal
J-3: March 20, 1983 summative evaluation of petitioner w/rebuttal
J-4: March 21, 1983 formative evaluation of petitioner w/rebuttal
J-5: March 28, 1984 summative evaluation of petitioner
J-6: June 24, 1982 summative evaluation of petitioner
J-7: March 12, 1982 summative evaluation of petitioner
J-8: June 10, 1981 summative evaluation of petitioner
J-9: March 24, 1981 summative evaluation of petitioner
J-10: June 13, 1980 summative evaluation of petitioner

J-11: November 20, 1979 summative evaluation of petitioner
J-12: April 11, 1979 summative evaluation of petitioner
J-13: February 13, 1979 summative evaluation of petitioner
J-14: November 9, 1978 summative evaluation of petitioner
J-15: April 9, 1978 summative evaluation of petitioner
J-16: March 21, 1978 summative evaluation of petitioner
J-17: January 24, 1978 summative evaluation of petitioner
J-18: Novcember 18, 1977 summative evaluation of petitioner
J-19: April 7, 1977 summative evaluation of petitioner

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J-20: March 25, 1977 summative evaluation of petitioner
J-21: January 20, 1977 summative evaluation of petitioner
J-22: April 7, 1977 summative evaluation of petitioner
J-23: April 15, 1979 formative evaluation of petitioner
J-24: January 18, 1979 formative evaluation of petitioner
J-25: October 10, 1979 formative evaluation of petitioner
J-26: November 20, 1978 formative evaluation of petitioner
J-27: January 26, 1978 formative evaluation of petitioner
J-28: March 8, 1977 formative evaluation of petitioner
J-29: May 18, 1983 note, Danzo to Meehan

J-30: June 7, 1983 letter, Juris to Pollack
J-31: June 17, 1983, Juris to Pollack
J-32: May 12, 1983 letter, Pollack to Board
J-33: May 5, 1983 letter, Kramer to Pollack
J-34: January 11, 1983 letter, Kramer to Pollack
J-35: June 1, 1983 letter, Kramer to Pollack
J-36: July 1, 1980-June 30, 1983 sections of negotiated agreement

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ELLIOT POLLACK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

The Board contends that, when considering the proofs as a whole, the first and third findings of fact stated in the initial decision are not supported by sufficient credible evidence present in the record. Findings one and three read as follows:

> "1) There was no observation of petitioner by either supervisor, principal or superintendent from the May 2 summative evaluation or May 5 letter of the superintendent to support a conclusion in the supervisor's June 10 summary evaluation that petitioner had not corrected deficiencies referred to.
>
> ***
>
> "3) Credibility of the supervisor is suspect because of his parrotting of the principal's words in the evaluation without explaining their meaning; absence of a written recommendation by the supervisor he was recommending a withholding action; the supervisor's hesitancy and lack of directness when asked by the court whether he recommended withholding or concurred with the intent of the superintendent to do so; and the supervisor's bypassing the principal in recommending withholding by the Board."

The Board further contends that the judge should not be permitted to buttress his findings by questioning the credibility of the supervisor, reiterating that the finding with respect to said credibility is not supported by the evidence.

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With respect to the Board's exceptions to the first finding of fact, the Board contends that the June 10, 1983 evaluation was a "global evaluation" which considered petitioner's overall performance for the entire school year. It was not predicated on a classroom observation subsequent to May 5, nor was such an observation intended to be determinative of whether a recommendation to withhold petitioner's increment would be made to the Board by the superintendent. The Board further contends that there is no question that petitioner's supervisor did observe him subsequent to May 5 and prior to the superintendent's recommendation to the Board to withhold his increment. Said observation occurred during a class in which petitioner was conducting a review for the final examination sometime during the first two weeks of June. (Tr. 92)

The Board cites in its exceptions the supervisor's testimony with respect to the observation as follows:

> "A. When I entered the room, Mr. Pollack immediately made a transition from whatever he was doing to questions related to Robinson Crusoe. Students were asked to infer some particular elements in the story and students did not seem to know what he was talking about. He put it on the board and explained it. They still didn't know what he was talking about. Then he went to another topic. I again sensed confusion."
> (Tr. 92-93)

The Board avers that the supervisor communicated to petitioner and the superintendent (Tr. 96) his observations relative to the above and asserts that the classroom visitation constituted a sufficient observation of petitioner's teaching performance to support the Board's determination that he had not corrected his deficiencies. The Board again reiterates that the supervisor's conclusion in the June 10 annual performance review that petitioner had not corrected his deficiencies was not based on this final classroom observation, but rather on all of the observations performed during the 1982-83 school year. Further, the Board contends that petitioner was given an opportunity to correct his deficiencies subsequent to May 5 and that there was a rational basis for determining that he had not corrected said deficiencies.

The Board strongly objects to the judge's finding that the supervisor's credibility was suspect. It claims that it is utterly absurd to suggest that the observations made by Judge Young, which are cited in the third finding of fact, could implicate the supervisor's credibility, particularly in view of the fact that the judge conceded the superintendent was not required to act on the recommendation of the principal rather than that of the supervisor.

The Board asserts that the judge's criticism of the supervisor on the one hand for including the principal's criticism in evaluation of petitioner (J-3) and then, on the other hand, to

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criticize him for bypassing the principal when recommending the withholding of the increment provides further evidence of the judge's inconsistent and wholly unsupported findings.

The Board also rejects the judge's conclusion that the supervisor was "hesitant" or "lacked directness" when asked if he had recommended the withholding, avowing that said conclusion is not borne out in the record. It contends that the supervisor's responses could not be more direct or straightforward (Tr. 116) and it suggests that, if he were hesitant at all, it was because the judge had questioned him in a manner appropriate to cross-examination rather than questioning by the court. Further, the Board avows that a review of the transcript shows that the judge exceeded his authority under the guise of filling in the "gaps" for the Commissioner.

The Board argues that the supervisor's inclusion of the principal's words in the evaluation (J-3) without explanation of their meaning was appropriate in that no explanation was necessary because said wording does not call for further clarification. The Board also avows that the supervisor acted appropriately in referring petitioner to the principal and it also points out that the supervisor's recommendation for the withholding of an increment is not required to be memorialized in writing.

In addition to the above exceptions, the Board suggests that Judge Young ignored the standard of review articulated by the Court in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295-297 (App. Div. 1960), stating it is clear that what is focal herein is a determination as to whether there existed a reasonable basis for the Board's action. It avows that, in fact, it did have such a basis, having reviewed six evaluations performed on petitioner during the 1982-83 school year and having permitted petitioner to present testimony and documentation in his defense before taking action to withhold his increment. The Board avers that the judge chose to ignore the Board's actions and focused on the supervisor's exclusively, making no determination as to whether the underlying facts of the evaluations were as claimed.

Petitioner in his reply to the Board's exceptions affirms the appropriateness of the determination rendered in the initial decision, asserting that the Board's argument is without merit when it contends the findings of fact are not supported by sufficient credible evidence. More specifically, petitioner states that the May 5, 1983 letter from the superintendent delineating the seven alleged deficiencies put him on notice to correct said deficiencies. The letter reads, "...such deficiencies may call for a withholding of your employment and adjustment increments for the 1983-84 school year unless the deficiencies are corrected forthwith." (J-33) Petitioner contends that, notwithstanding this notice, the Board made no effort subsequent to this letter to determine whether he had in fact corrected the alleged deficiencies and yet it proceeded to withhold his increment.

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With respect to the observation which the supervisor testified took place after May 5, 1983, petitioner points to the confusion the supervisor had regarding the date it was purported to have taken place; that is, testimony indicates that it either took place on June 10, the day the supervisor handed him his annual summative evaluation, or sometime earlier. Petitioner asserts that, whenever it took place, the observation was only for a matter of ten or fifteen minutes and, if it were on June 10, there was, in fact, no observation since the evaluation was already prepared.

Further, petitioner rejects the Board's contention that the observation constituted a sufficient observation to support the Board's determination that he had not corrected the deficiencies. He also asserts that the Board compounds the matter by contending that the conclusion with respect to the correction of said deficiencies was based on all of the observations for 1982-83, not on the final observation. According to petitioner, such inconsistent positions by the Board are tantamount to a denial of his due process rights.

Petitioner also rejects the Board's arguments in regard to the judge's findings with respect to the supervisor's credibility, asserting that it is long-standing policy and law that deference should be given to the views of the trier of fact in assessing credibility. In support of his assertion he cites Sweeney v. Pruyne, 134 N.J. Super. 15 (App. Div. 1974), aff'd 67 N.J. 314 (1975) and Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

Clearly, the relevant statute in this matter is N.J.S.A. 18A:29-14 which provides:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Further, the Board is correct in its assertion that the standard of review of a board's action pursuant to this statute is

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set forth in Kopera, supra, wherein the Court stated that "the scope of the Commissioner's review is ... not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." (at 296) Pursuant to Kopera there are two determinations to be made in this controverted matter: 1. whether the underlying facts were as those who made the evaluations claimed and 2. whether the conclusions drawn by them were unreasonable based upon the facts. Thus, the burden of proof with respect to unreasonableness is upon petitioner.

The Commissioner observes that the Board's notice to petitioner regarding the possible withholding of his increment, together with the reasons therefor, was conveyed to him by way of the May 5, 1983 letter from the superintendent which reads in part:

> "***On Wednesday, May 4, 1983, the board of education instructed me to provide you with a written statement of reasons setting forth deficiencies that exist which have an adverse effect on the performance or effectiveness of you as a teacher. Such deficiencies may call for a withholding of your employment and adjustment increments for the 1983-84 school year unless the deficiencies are corrected forthwith.
>
> "In reviewing your recent evaluations we have identified in the Index of Teacher Effectiveness the following areas where your effectiveness is less than satisfactory:
>
> a) Exhibits objectives for instructional activities.
>
> b) Establishes routine for daily planning.
>
> c) Uses evaluation techniques to improve teaching-learning experiences.
>
> d) Plans and fulfills all assignments (has organized work plans).
>
> e) Has established a clear set of course objectives with appropriate and varied learning activities.
>
> f) Has an instructional management system that identifies strengths and weakness and charts mastery of essential objectives.
>
> g) Establishes teaching objectives which include consideration of school and district goals.***" (J-33)

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Despite the Board's argument to the contrary, this letter clearly predicates the Board's decision with respect to the withholding of petitioner's increment upon the correction of the delineated deficiencies. The Commissioner observes that the Board was not required by statute to set such a condition and yet it chose to do so herein. Upon careful review of the record, the Commissioner finds that sufficient observation of petitioner was not conducted to support a determination by the Board that the deficiencies had not been corrected. The testimony of the supervisor in the instant matter with respect to observation of petitioner after May 5 and prior to the Board's action to withhold the increment clearly indicates a lack of reasonable basis to draw a conclusion that the deficiencies remained uncorrected. Specific testimony by the supervisor regarding observation of petitioner reads in part:

> "Q. Mr. Pollack as a result of the May 5th letter was given the opportunity to correct certain deficiencies, is that correct that you had observed during the course of that year?
>
> "A. Yes.
>
> "Q. And from May 5th on, the only time that you evaluated him was that one time in June that you can remember?
>
> "A. That's the only time I remember. I could have been in the room at another time which I didn't document, I don't recall.
>
> "Q. The one time that you remember, Mr. Bernarducci, do you remember how long you sat in the class, was it 15 minutes?
>
> "A. It was probably similar to the other informal visitations.
>
> "Q. Could have been a few minutes, could have been 10 minutes, could have been 15 minutes?
>
> "A. Yes.***" (Tr. 112-113)

While the Board contends its decision was based on the entire year's observations and evaluations, it nonetheless clearly made the decision to withhold contingent upon correction of the deficiencies and yet insufficient observation was made to formulate a rational base for concluding they had not been corrected. Further, the Commissioner finds merit in the judge's conclusion that the credibility of the supervisor is suspect because of his parroting of the principal's words in the March 10 summative evaluation. (J-3) Testimony of both petitioner and the supervisor indicates that the principal never observed petitioner during 1982-83

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but "popped in and out" as evidenced in the following testimony by the supervisor:

> "Q. ***There's been testimony that you incorporated in one of your evaluations certain language [of the principal] concerning the deficiency, fragmented was one of the words, there were three words there, whatever they were.***
>
> "A. Yes.
>
> "Q. There's been testimony that the principal never observed the teacher for evaluative purposes other than the popping in and out that you heard?
>
> "A. Yes.
>
> "Q. Is there any reason to doubt the credibility of that testimony?
>
> "A. No.
>
> "Q. How did the principal develop his concerns?
>
> "A. From what he told me, every time he passed or walked in the room there was an abrupt transition *** that's the way he perceived it.
>
> "Q. Yet [given] the popping in and out one could draw conclusions that you incorporated in that observation, in that evaluation?
>
> "A. Yes, I based them on his observations."
> (Tr. 118-119)

Clearly, the principal's belief that petitioner's instruction was fragmentary, peripheral and superficial could not be based upon observation within the meaning of N.J.A.C. 6:3-1.21(h)6 which states:

> "6. Observation means a visitation to an assigned work station by a certified supervisor for the purpose of formally collecting data on the performance of a teaching staff member's assigned duties and responsibilities and of a duration appropriate to same***." (Emphasis supplied.)

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Therefore, what is suspect is the factual basis for the principal's statement which was then incorporated into petitioner's summative evaluation by the supervisor. (J-3)

Moreover, the Commissioner finds that there is much in the supervisor's testimony to diminish the credibility of a factual basis upon which a decision could be reached by the Board to withhold petitioner's increment, in that the evaluation process itself in the instant matter appears fragmentary.

The supervisor testified that petitioner had not been observed for a full class period, despite the departmentalized setting for instruction and the fact that lesson plans are written for a full class period. Testimony with respect to this reads in part:

"Q. ***On the formative evaluation you are also aware you are supposed to sit for an entire class of the work, isn't that correct?

"A. For an entire lesson, yes.

"Q. Is a lesson different from a class period?

"A. Yes, it is at the elementary level it's different.

"Q. Now, you testified that the first formative evaluation that you did was based upon your observing a full class period, is that correct?

"A. I say full lesson.

"Q. So you didn't sit through the whole class period, is that correct?

"A. How are you defining class period?

"Q. From the moment the children come into the class till the moment the bell rings and they leave.

"THE COURT: Let's stop here for a clarification. Grade seven and eight are departmentalized?

"THE WITNESS: Yes.

"THE COURT: The bell rings the period starts and the bell ends [the class]?

"THE WITNESS: Yes.

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"THE COURT: Lesson plans at the department level are for a class period?

"THE WITNESS: Okay.

"THE COURT: I don't think we have to explore that any further, the Court is clear.

"Q. And the first formative evaluation you didn't sit through the full class period, is that correct?

"A. Yes, it is correct.

"Q. You did sit through the whole period?

"A. Yes, you're correct, I did not.

"Q. So your evaluation, your formative evaluation on that date was based on your observation for less than a full class period?

"A. Yes.

"Q. Now, isn't it entirely possible that some of the concerns you raised may have been premature?

"A. In my judgment the lesson was over.

"Q. But yet, you didn't sit through the entire class period so that some of the concerns you may have raised may have been taken into account during the period of that class which you didn't observe, isn't that correct?

"A. May have." (Tr. 97-99)

Similar testimony is found with respect to a summative evaluation (J-2) as well. It reads in part:

"Q. Now, on J-2, which we're currently looking at, isn't it also true that your observation of that class lasted only a few minutes?

"A. Well, it was a brief visitation, could have been six minutes, could have been ten, could have been fifteen.

"Q. I said a few minutes?

"A. Yes.

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"Q. So again, it's possible that some of the concerns you raised in preparing this evaluation may have been taken care of during the part of the class that you did not observe, isn't that true?

"A. That's possible, yes." [Tr. 106]

After careful review of the entire record, it is the conclusion of the Commissioner that petitioner has borne the burden of proof that the Board did not have a reasonable basis upon which to render its determination to withhold his increment, both with respect to the period of time from the notice of deficiencies to the time the Board took action and for the time prior to May 5, 1983. This conclusion is based on the fact that there is a lack of clear evidence in the record to demonstrate that sufficient observation of petitioner's performance was conducted to provide a rational basis for such a determination. While it is the Commissioner's opinion that the Board believed it had a rational basis for its action, given the input provided by the superintendent and the supervisor, the record clearly indicates that these individuals lacked a reasonable basis upon which to make a recommendation to withhold petitioner's increment, given the alleged deficiencies cited herein, many of which would reasonably require more appropriate observations than were conducted for one to ascertain if, in fact, said deficiencies existed and to determine if they, in fact, persisted.

Accordingly, the Commissioner concurs with and adopts as his own the conclusions of law rendered by Judge Young in the initial decision. Therefore, it is ordered that the Board reinstate petitioner's salary at the appropriate step of the salary guide and that he be compensated as directed in the initial decision.

The Commissioner is constrained to point out that had the record provided clear evidence that evaluation data had been collected through procedures consistent with regulations and sound supervisory practices, the Board's action would have met the Kopera standard of review, a review which requires a determination that the underlying facts are those as claimed by the evaluators. Given the circumstances prevailing in the instant matter, the Commissioner is compelled to determine that the action did not meet the mandated standard of review.

IT IS SO DETERMINED.

JUNE 8, 1984
PENDING STATE BOARD

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING PETITIONERS' MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S MOTION TO DISMISS
OAL DKT. NO. EDU 9836-83
AGENCY DKT. NO. 401-11/83A

NEWARK TEACHERS UNION, LOCAL 481, AFT/AFL-CIO, and EDNA SMITH,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

APPEARANCES:

Sidney H. Lehmann, Esq., for petitioner (Tomar, Gelade, Kamensky, Klein & Lehmann, attorneys)

Dwayne C. Vaughn, Associate Counsel, for respondent (Louis C. Rosen, General Counsel, Newark Board of Education)

Record Closed: April 15, 1984 Decided: April 26, 1984

BEFORE **STEPHEN G. WEISS**, ALJ:

In November 1983, a petition of appeal was filed with the Commissioner of Education by the Newark Teachers Union, Local #481, AFT/AFL-CIO (hereafter "Union"),

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and Edna Smith, a tenured teaching staff member employed by the respondent Newark Board of Education. The petition consisted of five separate counts. Count I alleged that the Union was the exclusive representative of the teaching staff members employed by the Board, and that on September 2, 1983, the Board voted to withhold the adjustment and/or employment increments for 1983-84 of 22 tenured teachers who were represented by the Union. Alleging that the Board's withholding action was untimely, and thus not effective, the Union demanded that all of the withheld increments be restored to the employees and that any adverse material relating to the action be removed from their files. Count II alleged that the Board had taken its action in violation of the Open Public Meetings Act and relief similar to that demanded on Count I was sought. Count III alleged that the Union, by filing the instant Petition, had raised issues common to all of the teaching staff members whose increments were withheld on September 2, 1983, and that pursuant to the provisions of N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1 et seq. a declaratory judgment could and should be rendered at the request of the Union as representative of all the affected staff members. Count IV set forth that petitioner Smith was one of those tenured teaching staff members whose increment had been withheld on September 2, 1983, and that she was filing the petition on her own behalf, as well as on behalf of the other 21 similarly situated employees. Count V set forth that petitioner Smith had not been notified by the Board that her increment was being withheld and, in any case, the Board's action in her particular case was arbitrary, capricious and in violation of her statutory rights.

The Board filed an Answer denying the essential allegations of the Petition and 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. Prior to the prehearing conference, the Board moved to dismiss the Petition on the following grounds: (a) the Union was not a proper party capable of invoking the jurisdiction of the Commissioner; (b) the matter was not one which could be maintained as a "class action"; (c) the matter was not properly one which could be styled as a "declaratory judgment" since there was no justiciable controversy before the Commissioner; and (d) Count II, pertaining to the Open Public Meetings Act, was totally lacking in any specificity.

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Following transmittal of the case to the Office of Administrative Law, a prehearing conference was conducted in order to address the issues raised in the Board's motion. At that conference the Union indicated that it wished to cross-move for summary decision on the grounds that the Board's action of September 2, 1983 was void as a matter of law. A briefing schedule was established and thereafter the Union's brief and a reply brief from the respondent Board were received. Thus, the matter is ripe for determination at this time.

The Board's motion to dismiss touches upon the propriety of the Union even acting as a petitioner. First, it is argued that the Union, although admittedly the collective negotiations representative for the teachers, is not actually involved in the underlying "merits" of the case since the matter really involves the question of whether 22 individual tenured teaching staff members should or should not have had their increments withheld for performance-related reasons. Put another way, the Board maintains that the Union does not have, "a direct and substantial interest in the subject matter of a controversy before the Commissioner." See, N.J.A.C. 6:24-1.1. The Board further points to the fact that all of the relief sought is exclusively related to the rights of the individual petitioners and that no remedy that would flow to the Union, as such, is even sought. In addition, the Board maintains that since the Union is not "any interested person," there is no underlying predicate for the matter to proceed as one for a declaratory judgment. Thus, since the underlying "merits" of the Board's action to withhold individual increments is not put into issue by the Union, there is not, says the Board, any issue involving the Union which is susceptible of a declaratory ruling by the Commissioner.

I must agree with the Board that the format of the Union's pleading leaves something to be desired. It is, in many respects, somewhat vague. However, a fair reading does reveal that there is an arguable basis for the Union, in this case at least, to participate as an interested party. After all, 22 of its members are alleged to have had their rights violated in respect to a significant term and condition of their employment, their salary entitlement. As the Union notes in its brief, the decision in Winston v. Bd. of Ed. of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1978),

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recognized that a collective negotiations representative has an interest in matters touching the employment of its members and that interest is sufficient to enable such an entity to participate as a party in proceedings before the Commissioner. See also Camp v. Board of Ed. of Glen Rock, 1977 S.L.D. 706.

Thus, although the Union may not necessarily have a direct interest in every case touching upon the terms and conditions of employment of any one or more of its members, I am convinced that given the case law the circumstances of this case do provide an adequate underpinning for its participation.

Whether or not the Union properly can invoke the declaratory judgment provisions is, under the circumstances, not a meaningful problem. The question for determination—the issue in controversy—concerns the propriety of the action of the Board on September 2, 1983, vis-a-vis the requirements of N.J.S.A. 18A:29-14. Clearly, petitioner Smith has an independent right to raise that issue on her own behalf and she has done so.

With respect to whether the matter should be styled a "class action," whereby Smith represents all other teachers similarly situated, I am convinced that no such designation ought to be made. In the first instance, it could be argued that absent any express provision for class action proceedings in the Office of Administrative Law, no jurisdiction even exists to entertain a such a matter here. See, Lukas v. State of New Jersey, Dept. of Human Services, OAL DKT. NO. EDU 9183-81 (December 2, 1982), aff'd. Commissioner of Education (January 19, 1983). Beyond that, even if a class action may appropriately be maintained before the Office of Administrative Law, the requirements of the rules pertaining to such actions do not appear to have been met in this matter. Specifically, it would not appear to me that the potential class is so numerous that a joinder of all members would be impracticable. See, Pressler, Current N.J. Court Rules, Comment R. 4:32-1(a) (1984). The purposes for designating certain cases as class actions are certainly salutary ones. However, I am convinced that the determination in this individual case as it relates to petitioner Smith can be rendered without such a special

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designation procedure and that whatever the Final Decision may be following the issuance of my Initial Decision, all other employees who have filed suit and who are similarly situated will have their cases disposed of promptly.

Thus the major legal issue now to be addressed is whether the respondent Board effectively acted to withhold the 1983-84 increment of tenured teaching staffing members as late as September 2, 1983. Three key dates are potentially pertinent. The Union and Smith argue that no withholding action can be taken after June 30. As a "fallback" position, they further argue that in any event no such action can be taken in the case of ten-month employees on or after September 1. The Board, for its part, maintains that until actual attendance by the teacher for the new school year begins, the Board can act to withhold an increment. In this case there apparently is no dispute that September 2, 1983, preceded the first day of school for both teachers and pupils.

Interestingly, there does not appear to be any school law decision which is precisely on all fours with the instant matter. On the other hand, there have been decisions which relate to the issue and therefore provide some guidance. In Gersie v. Clifton Bd. of Education, 1972 S.L.D. 462, the respondent acted to withhold the petitioner's increment in November. A salary guide had been adopted to become effective the prior July. In setting aside the board's decision it was held that the action was untimely under the board's own rules. Once having fixed the salary of teachers by formal adoption of the guide, together with qualifying conditions as to procedure, such a salary decision could not be rescinded at a subsequent meeting of the Board. It is conceded in the instant case that the 1983-84 salary for Smith and other teachers in the district was contained in a collective negotiations agreement which had been adopted prior to July 1, 1983.

The notion that boards must act prior to June 30 in order effectively to withhold an increment because of performance during the school year ending on that June 30 has been touched upon in a variety of other cases. For example, in Van Houten v. Bd. of Education of Middletown Township, OAL DKT. NO. EDU 3338-80, (Nov. 17, 1981) aff'd by

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the Commissioner (January 4, 1982), the Board's withholding action took place on June 27, 1978. The petitioner argued that since a contract had already been agreed to for 1978-79 between the Board and him, the terms of that contract were fixed and could not unilaterally later be changed. The administrative law judge who heard the matter determined that since the Board's action was taken three days prior to the conclusion of the 1977-78 school year, the year within which the performance took place, the fact that a contract previously had been entered into for the following year was not persuasive since it was conditioned upon continued adequate performance which did not take place.

In O'Malley v. Bd. of Education of the Borough of West Long Branch, OAL DKT. NO. EDU 323-9/78 (May 15, 1980), aff'd by the Commissioner (July 15, 1980), the board had notified the petitioner during May 1978 that her salary for the 1978-79 school year would be $13,600. However, following the issuance of that "salary notice," petitioner engaged in certain conduct which prompted the Board to hold a special meeting which culminated in a resolution on June 20, 1978 to withhold her increment for 1978-79. Petitioner argued that since she had received a salary notice prior to the board's action of June 20, the board could not thereafter take the withholding action. The argument was rejected upon the basis that mere notice of a salary under a negotiated labor agreement cannot be held to be binding upon a board until that employee, "begins actual service in that period," since to hold otherwise would deny boards the ability to timely apply the powers conferred in the statute, "for a significant part of the school year." See, O'Malley at 4. See also, Gregg v. Bd. of Education of Camden County Vocational Technical School District, 1977 S.L.D. 120. However, both O'Malley and Gregg involved situations where the action taken by the Board occurred prior to June 30. The facts in this case are, of course, distinguishable with regard to that critical event.

In the case of Bd. of Education of Northern Highlands Regional High School District v. Martin, (N.J. App. Div., March 13, 1979, A-2119-77) (unreported), 1979 S.L.D. 852, the school board had failed strictly to comply with N.J.S.A. 18A:29-14 in that it did not originally adopt the withholding of increment resolution by a recorded roll call

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majority vote, nor did it give written notice of the action and the reasons therefor within ten days. In Martin it seems that the board had determined at a private session held in March 1975 to deny petitioner's increment and that same month the Superintendent informed petitioner of the action. However, it was not until August 11, 1975 that the board took a recorded roll call vote at a public meeting reaffirming its earlier private decision. The Commissioner's reversal of the board's withholding action was set aside by the Appellate Division as being "hyper-technical." The Appellate Division observed that, "the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote." See, Bd. of Education v. Martin at 853 (emphasis added). It is not altogether clear exactly what the Appellate Division had in mind when it referred to, "commencement of the school year involved," since the public action did not take place until August, which was after the start of the 1975-76 school year. See N.J.S.A. 18A:36-1. On the other hand, the initial action in Martin, albeit incomplete, took place in March and petitioner was notified of it during that same month. On balance then, the Martin case would appear to point in a direction favorable to the Union and Smith.

The petitioners aptly point out in their brief that with the enactment in 1965 of N.J.S.A. 18A:29-4.1 the adoption of a salary schedule, either by independent resolution or through ratification of a collective negotiations agreement, gives rise to a contractual right to salary. All increments anticipated by the salary guide therefore become contractual entitlements to those qualified for them on July 1. The cases reviewed above all support, in one way or another, this proposition although not explicitly so stated. I believe that unless a board has acted to withhold an increment prior to June 30 where, as here, a binding salary schedule is to take effect on July 1, the board cannot, after July 1, take such action. In such situations there is no need to consider whether in the case of ten month employees the board can still act on or before the day school opens for teachers, or for students, or on September 1. It seems to me that a uniform date must apply, given the specific contractual nature of the increment entitlement. That date is June 30.

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Accordingly, for the reasons set forth above I herewith determine as follows:

a) The Union is a proper party petitioner given the specific circumstances of this case;

b) The matter is not an appropriate for one for designation as a class action;

c) The determination by the Newark Board of Education to withhold the increment of petitioner Smith, having occurred after July 1, 1983, is void and of no effect.

Thus, the motion for summary decision by the petitioners herewith is **GRANTED** and the Board's Motion to Dismiss is **DENIED.**

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

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OAL DKT. NO. EDU 9836-83

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

April 26, 1984
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

May 1, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 3 1984
DATE

Ronald L. Tarabar
FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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NEWARK TEACHERS UNION, LOCAL 481, AFT/AFL-CIO, AND EDNA SMITH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX 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.

The Commissioner observes that the Board's primary exceptions and petitioner's reply to those exceptions were filed in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b and c. However, the Commissioner notes that petitioners' reply to the Board contains issues which were not raised by the Board and, therefore, rejects those exceptions as not being consistent with the intent of the aforementioned regulations.

The Board excepts to the determination in the initial decision that it could not take action in the withholding of increments after July 1 because a binding salary schedule became effective on that date. It avers that a close review of the cases cited by Judge Weiss offers no support for such a determination. The Board contends that the determination erroneously renders a board powerless to withhold a teaching staff member's increment between the period of time after July 1 and the commencement of the new academic school year.

The Board asserts that the initial decision fails to recognize that the cases cited fall into two categories: those that sought to withhold increments for an ensuing academic school year while school was still in session for the preceding school year (Van Houten, supra; Gregg, supra; and O'Malley, supra) and those that sought withholding for the selfsame year.

The Board contends that each of the cases cited in the initial decision supports the notion that the timing of the withholding of an increment is tied to actual job service of a particular employee, pointing out that teachers are ten-month employees who teach from September to June and as such have no expectation for any salary payments until at least the first day of work. The Board cites Bd. of Ed. of Northern Highlands Regional High School v. Martin, supra, as directly supportive of a board's right to withhold an increment up to the first day of school and asserts that the initial decision seeks to escape the clear mandate of the Appellate

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Division by suggesting that the language of the Martin decision is unclear. The Board further contends that since the controverted board action in Martin was in August, the Appellate Division was clearly addressing a date other than July 1, a factor which highlights the fallacy of the initial decision herein. The Board purports that the Appellate Division was speaking in terms of the academic school year or the commencement of the actual work year of the employee, asserting that to read the case otherwise would suggest that the Court wrote an absurd decision.

In addition to the above exceptions, the Board characterizes the designation of July 1st as the effective date for purposes of teachers' salary schedule as merely a manifestation of N.J.S.A. 18A:27-3. It provides a lengthy discussion of those sections of N.J.S.A. 18A:29-1 et seq. which define such terms as "yearly increments," "year of employment," "employment increment" and "adjustment increment." On the basis of said discussion, the Board avows that it is clear that the statutes infer that an academic year is the beginning of a teacher's entitlement to the stated salary. It cites Winson v. Ridgewood Bd. of Ed., decided January 19, 1981, as additional support for its position. By way of conclusion, the Board urges that it is apparent increment granting or denial is bound to the actual commencement of work and that to conclude otherwise would be devoid of legal and logical support.

Petitioners in their reply exceptions reject the legal arguments put forth by the Board and affirm the initial decision as rendered by Judge Weiss. Petitioners support as correct the judge's conclusion that the effective date for employees' salaries was July 1, 1983 pursuant to the collective negotiations agreement. The employees in the instant matter had a contractual right on that date to the salary set forth in the contract and salary guide. Petitioners assert that, absent action by the Board to withhold an increment by June 30, 1983, said increment accrued or was vested on July 1, 1983 because the increment was no longer a proposed raise, which could be withheld, but a part of the employees' contractual salary.

Petitioners assert that the Board's attempt to develop an argument based on the definition of "academic year" in N.J.S.A. 18A:29-6 is without merit and they point out that, while the Board objects to relying on N.J.S.A. 18A:27-3 as authority for determining July 1 as a uniform date, the Board itself sets July 1 to June 30 as the contract year for teaching staff members' negotiated agreement. Petitioners agree with Judge Weiss that the date of July 1 establishes uniformity and certainty because it is consistent with their agreement and with the statutes defining school year.

Upon review of the record in the instant matter, relevant statute and code and the legal arguments put forth by the parties, the Commissioner is in agreement with Judge Weiss' determination

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that the Board's action to withhold the increments herein was untimely and, therefore, is void and of no effect. However, he is not in agreement with the reasons for reaching a determination of untimeliness as cited in the initial decision.

The Commissioner is cognizant of the fact that this matter requires an interpretation of relevant statutes and code as a matter of first impression in the absence of a specific legal mandate and case law directly on point with the facts herein. After careful deliberation, it is the Commissioner's firm belief that, as a matter of equity and reasonableness, any board action to withhold an increment should be taken within a sufficient period of time to insure that a staff member is informed of such action when he or she is notified of the salary forthcoming for the ensuing school year. It is only reasonable and logical to expect that at the time a staff member's salary is determined for the ensuing school year, barring unforeseen circumstances, a board should be aware of any unsatisfactory performance that might warrant a withholding of increment the next school year. However, the Commissioner is in agreement with the Board herein that Martin, supra, does indicate that a board may take action after July 1 but prior to the commencement of the school year involved. Judge Weiss is correct in pointing out, however, that the Martin decision is not exact as to what date is meant, since the action therein occurred in August, which would be after the commencement of a school year as defined by N.J.S.A. 18A:36-1.

While the Commissioner is persuaded in part by the Board's argument that the date by which a board must act to withhold an increment should be tied to actual service, he does not support its contention that a board is empowered to act up to the date of actual commencement of service nor does he agree that the date should be dictated by the definitions of "academic year" contained in N.J.S.A. 18A:1-1 and 29-6.

It is the belief of the Commissioner that as a matter of fundamental fairness, board action to withhold an increment must be prior to the date the ten-month period of service commences. Therefore, this would require board action prior to September 1 of the school year involved. Although actual service may not commence until the first day of school, September 1, nonetheless, is the date upon which a staff member's salary entitlement commences for the ten-month period of service, September to June. The Commissioner further notes that many boards require teachers to report to work prior to the opening of school or the commencement of the "academic year."

Consequently, it is the determination of the Commissioner that a board of education must act prior to September 1 of a given school year to withhold the increment of a staff member whose period of service is September to June.

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Accordingly, the Commissioner concurs with and adopts as his own the determination rendered by Judge Weiss in the initial decision, with the modification noted herein. Therefore, the Motion for summary decision by petitioners is granted and the Board's Motion to Dismiss is denied.

IT IS SO DETERMINED.

JUNE 13, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 4454-83
AGENCY DKT. NO. 154-5/83A

JANET D. MILES,
Petitioner,
v.
WATCHUNG BOARD
OF EDUCATION,
SOMERSET COUNTY,
Respondent.

APPEARANCES:

Barbara G. Rapkin, Esq., for petitioner (Ruhlman, Butrym & Friedman, attorneys)

Victor E.D. King, Esq., for respondent (King, King & Goldsack, attorneys)

Record Closed: March 23, 1984 Decided: May 7, 1984

BEFORE BRUCE R. CAMPBELL, ALJ:

Action by Janet D. Miles for an order directing the Watchung Board of Education to reassign her to a full-time assignment of classes and awarding her back pay, benefits and other emoluments for the controverted period in which she was employed on a part-time basis.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition as a contested case. N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was heard on March 1, 1984, in the Watchung Municipal Court, Watchung. Counsel timely filed post-hearing submissions and the record closed on March 23, 1984.

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I

Counsel submitted the following joint stipulation of facts:

1. Janet Miles began teaching as a vocal music teacher in September 1975 at a salary of $7,812.00 per annum.

2. At the time she began in district, she possessed a New Jersey Standard Teacher of Music Certificate.

3. For the 1975-76 school year, she was a part-time or 4/5-time teacher of vocal music.

4. She was then employed from September 1976 through June 1983 as a full-time teacher of vocal music; she was employed in that capacity for each school year from September 1976 to June 1983 without a break in service. By virtue thereof, petitioner has acquired tenure with the respondent.

5. At its meeting on February 24, 1983, the Board of Education of the Borough of Watchung abolished and eliminated the position of full-time vocal music teacher at Valley View School, which Mrs. Miles held at that time, effective June 30, 1983.

6. The Board further resolved that no contract for that position would be offered to Mrs. Miles for the 1983-84 school year.

7. At the same meeting, the Board created a 4/5-time vocal music teacher position at the Valley View School, which was offered to Mrs. Miles in April 1983 at a salary of $18,098.00.

8. Her salary for the school year 1982-83 was $20,007.00 on a full-time basis.

9. Joan M. Plasner was first hired by respondent at the beginning of the 1973-74 school year as a vocal music teacher 4/5-time at a salary of $8,360.00.

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10. She was rehired in the 1974-75 school year as a 9/10-time vocal music teacher at $10,449.00.

11. She was rehired in the 1975-76 school year as a 4/5-time vocal music teacher at $10,816.00.

12. On August 25, 1975, she was granted a maternity leave commencing January 1, 1976 and ending September 1976.

13. This first maternity leave was extended to June 1977.

14. A second maternity leave was granted through June 1978.

15. On May 15, 1978, Mrs. Plasner resigned.

16. Mrs. Plasner began working for respondent again in February 1982 as a 4/5-time vocal music teacher.

17. She was rehired in September 1982 for the full year 1982-83 as a full-time vocal music teacher.

18. She was rehired in September 1983 as a 4/5-time vocal music teacher.

19. At all times relevant to this dispute, Mrs. Plasner possessed a teacher of Music Certificate issued in 1969.

The foregoing are adopted as FINDINGS OF FACT.

II

The petitioner testified that she currently teaches at the Valley View School, a middle school, Tuesday through Friday of each week. Plasner follows a similar schedule at the Bayberry School, which is an elementary school. In 1978-79, the petitioner taught

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Monday through Thursday at the Valley View School and Friday at the Bayberry School. She expressed the belief that the schedule worked well. She further stated that she believes she can work with Plasner and can work between schools now as she did in 1978-79.

The superintendent of schools testified as to enrollments in the district and the related arts program, which includes physical education, music, art and industrial arts. He also testified as to long- and short-term planning in which he and the Board have been involved. In view of changing pupil populations and changing staff needs, he concluded and recommended to the Board of Education that vocal music staff could be cut to one person and art staff could be cut to one person and these could be shared between the district's two schools.

Public input was sought as part of the budget-making process. A substantial number of the public expressed the belief that the related arts program should not be reduced.

The Board also considered a reduction in the number of regular classroom teachers. There has, in fact, been a reduction in regular classroom teachers over the last three to four years. Related arts teachers have not been reduced during that time. As a result, the Bayberry School population is receiving more minutes of related arts instruction and the Valley View population is getting the benefit of smaller classes in the related arts.

The superintendent also testified that he could not schedule computer science regularly without reducing music offerings. He further determined that music program costs, on a per pupil basis, were inordinately high (R-23).

Prior to the current school year, the related arts subjects, except physical education, varied by trimester. While physical education was taught throughout the school year, each of the related arts subjects was available to pupils in 12-week sessions rotated throughout the school year. Under the current schedule, these subjects are available once per week throughout the school year.

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The superintendent further expressed the opinion that scheduling at the Valley View School is complicated because of the presence of relatively fewer pupils and many options. Scheduling at the Bayberry School is done early in the year. If Plasner were reduced by another day, and the petitioner were brought in to teach on that day, the pupils would have two different teachers each week for the same subject. In his opinion, that is not the best mode of instruction for younger pupils. He concedes that the principals would have no great difficulty with this arrangement, however.

A member of the Board of Education testified that the Board did, at its February 24, 1983 meeting, abolish the full-time music positions. (See Stipulations, above.) Throughout the 1982-83 school year, the Board discussed costs, the related arts program, and staff suggestions. From among the options it had available to it, the Board chose to eliminate the vocal music positions. In reaching this decision it considered declining enrollment, total educational costs and costs of the music program. She did not, however, know if one full-time teacher plus one 3/5-time teacher would cost more than two teachers working 4/5-time.

The Board member also testified that the Board acted on the superintendent's recommendation to employ two teachers on a 4/5-time basis and did not explore the possibility of a full-time teacher and a 3/5-time teacher.

The principals of the Valley View and Bayberry Schools also testified. They stated that they met with staff and discussed the many options which were ultimately presented to the superintendent of schools. The Valley View School principal stated that she would see no particular scheduling problem if a full-time music teacher spent the same time in that school as now. The principals generally expressed agreement with the superintendent's opinion that, if the petitioner were to be returned to full-time employment, scheduling in at least one of the schools would be more difficult. If the petitioner were returned to a full-time position, it would mean she would have to be in one of the schools on a one-day-per-week basis. Under the current scheduling arrangement, this would mean pupils would attend a 60-minute period rather than two 30-minute periods.

At the conclusion of the petitioner's case, the Board moved for summary judgment in its favor. Having heard the arguments of counsel, I required the Board to put on its case. The Board's motion is considered renewed.

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III

The petitioner argues that she has not been dismissed, but her employment and salary have been reduced. Such reduction of a tenured teaching staff member is tantamount to a reduction in force and, therefore, falls under N.J.S.A. 18A:28-9 and 28-10. Popovich v. Wharton Bd. of Ed., 1975 S.L.D. 745, 757.

It is stipulated that the petitioner is a tenured teacher and that the only other music teacher is non-tenured. The Board was obligated to assign a full-time schedule of vocal music classes to the most senior teacher, particularly over a non-tenured teacher. In Prysianzny v. Sayreville Bd. of Ed., OAL DKT. EDU 2722-79 (Mar. 19, 1980), aff'd Comm'r of Ed. (May 5, 1980), the board of education terminated a teacher of social studies and assigned six periods of social studies to teachers with less seniority than that of the terminated teacher. The initial decision specifically found that there were six social studies classes at the junior high school being taught by teachers who were either untenured or who had less seniority than Prysianzny. The Commissioner held, accordingly, that the board had violated Prysianzny's tenure and seniority rights.

Here, the same pattern has occurred. The Board has reduced the petitioner to a four-day work week and has allowed a non-tenured teacher to teach vocal music classes to which the petitioner is entitled by virtue of her tenure and seniority. See also, Proebstle v. Burlington County Vocational-Technical Schools Bd. of Ed., OAL DKT. EDU 771-82 (Sept. 20, 1982), modf'd Comm'r of Ed. (Oct. 29, 1982); Large v. Roseland Bd. of Ed., 1978 S.L.D. 970; Ellis v. Middlesex County Vocational School District Bd. of Ed., OAL DKT. EDU 7025-82 (Mar. 31, 1983), aff'd Comm'r of Ed. (May 18, 1984).

In Miller v. Mendham Tp. Bd. of Ed., OAL DKT. EDU 5029-81 (Apr. 2, 1982), rev'd Comm'r of Ed. (May 17, 1982) rev'd State Bd. of Ed. (Feb. 3, 1983), the Mendham Township Board of Education had retained two full-time non-tenured teachers, at least one of whom was teaching courses which the petitioner was qualified to teach. The State Board held that a tenured teacher whose position is abolished is entitled to those classes which are assigned to non-tenured teachers as long as the tenured teacher is qualified to fill the position.

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In the present case, the respondent has retained a non-tenured teacher to teach the subject of vocal music in the Bayberry School. There is no dispute that the petitioner is a tenured vocal music teacher who can teach and who has taught classes at the elementary level. The petitioner is entitled to those classes which will give her a full-time schedule.

Here, the Board has claimed that its scheduling convenience is superior to the petitioner's tenure rights.

The petitioner contends that the Board did not consider giving a full-time schedule of classes to her at the time it reduced the vocal music positions. As was stated in Prysianzny, above:

> It is well settled that boards of education cannot economize by discharging tenured teachers and assigning their jobs to nontenured personnel. Downs v. Bd. of Ed. of Hoboken, 12 N.J. Misc. 345 (Sup. Ct. 1934), aff'd sub. nom. Fletcher v. Bd. of Ed. of Hoboken, 113 N.J.L. 401 (E & A 1934); Bd. of Ed. of Kearny v. Horan, 11 N.J. Misc. 751 (Sup. Ct. 1933). While the Board is vested with extensive management power to employ, promote, transfer and dismiss, it must exercise that power within the constraints imposed by the tenure law. Regardless of scheduling inconvenience, the Board simply cannot replace tenured with non tenured teachers. To hold otherwise would render meaningless the protection afforded by the tenure system. Seidel v. Bd. of Ed. Ventnor City, 110 N.J.L. 31 (Sup. Ct. 1932) aff'd 111 N.J.L. 240 (E & A 1933). Given the unpleasant choice between eliminating a tenured teacher or reducing the working hours of non tenured teachers it is the latter who must suffer. [at 9] [emphasis added]

The Board argues that it is authorized by law to abolish positions held by teaching staff members and to reduce the number of its employees for reasons of economy or other good cause. N.J.S.A. 18A:28-9. However, the petitioner here may not claim the protection of N.J.S.A. 18A:28-18 which provides

> Dismissals of teaching staff members with a tenure status resulting from any such reduction shall be made on the basis of seniority according to standards. . . .

The Board maintains that the petitioner here was not dismissed. Nor is this a situation in which her duties or a portion of them have been distributed to other teachers with less seniority or no seniority at all. The record clearly shows the reduction of two full-time positions to 4/5-time positions, one in each of the Board's two school buildings.

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The petitioner seeks a full-time position which no longer exists in the district. Alternatively, she seeks to teach one of the non-tenured teacher's days which would give her a full-time salary and reduce the non-tenured teacher to 3/5 time. These teachers are the only vocal music teachers in the district. Their certification is comparable. The only question, in the Board's view, is whether it is obligated to change its earlier action abolishing the two full-time positions and alter its administrative reorganization of the related arts program to protect the petitioner's alleged entitlement to a full-time salary. The Board maintains that a full-time position cannot be insisted upon when such insistence will, in the opinion of the superintendent, substantially interfere with district goals.

The petitioner's reliance on Miller, above, is misplaced. In order to understand Miller, it is necessary to look at Klinger v. Cranbury Bd. of Ed., OAL DKT. EDU 5679-79 (Nov. 19, 1980), modf'd Comm'r of Ed. (Jan. 8, 1981). The court notes, however, in its decision in Miller, the State Board of Education specifically addressed Klinger, stating

> As in Klinger, supra, this Board had the right to reorganize and abolish full-time positions. As in Klinger, we find that such action was taken in good faith and was the result of a legitimate reorganization. However, in this case, there appear to be other positions which Miller was qualified to fill. We find the board retained two full-time tenured teachers, at least one of whom was teaching English courses which petitioner was qualified to teach. Petitioner holds certification as an English teacher and taught those courses on a part-time basis in the district for five years. . . .
>
> We cannot determine from the record whether an attempt was made by the Board to acknowledge petitioner's tenure in the district by eliminating one of the non-tenured teachers or reducing one of the non-tenured teachers to a half time position. Before reducing petitioner to a half-time position, while retaining two full-time non-tenured teachers, the Board was obligated to make a good faith attempt to acknowledge petitioner's tenure rights and assign her to teach the courses which the Board had assigned to a least one of the nontenured teachers. . . . [Slip op. at 5]

The State Board also stated, "If the full-time employment of petitioner would have been accomplished without realignment of class schedules or without impairment of the Board's flexibility to reorganize its school program, it was bound to honor petitioner's tenure rights, giving due regard to her qualifications, prior service and abilities."

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There was testimony that it would be impossible to so schedule the petitioner's time. That testimony, without more, is unconvincing. At most, the petitioner would be scheduled one day per week in the Bayberry School. This would have absolutely no effect on the related arts program which is conducted in the Valley View School at which the petitioner now teaches four days per week.

IV

Having reviewed the entire record herein, I further **FIND:**

1. The related arts program at the Valley View School would not be affected by the assignment of the petitioner one day per week to the Bayberry School in addition to the four days per week she now teaches in the Valley View School.

2. There has been no substantial showing of the likely disruption of the music program at the Bayberry School if the petitioner were so assigned.

3. There is nothing in the record to indicate that the decision to abolish the full-time music position and to create two 4/5-time positions was made other than in good faith.

In consideration of the foregoing, and the State Board of Education decision in Miller, above, I **CONCLUDE** that the Watchung Board of Education has improperly reduced the employment and salary of Janet D. Miles for the 1983-84 school year.

Accordingly, it is **ORDERED** that:

1. The Board compensate the petitioner, retroactive to September 1, 1983, the difference between the salary she has received and the salary she would have received had she been employed on a full-time basis, and make all necessary adjustments of statutorily and contractually required benefits and emoluments, including contributions to the Teachers Pension and Annuity Fund.

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2. In consideration of the nearness of the end of the 1983-84 school year, the petitioner shall be reassigned to full-time teaching duties within the scope of her certifications now or at the commencement of the 1984-85 academic year, at the option of the respondent board.

3. The Board's motion to dismiss is **DENIED.**

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

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

7 MAY 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7 May 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 9 1984
DATE

Ronald I Parker/ghc
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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EXHIBITS

R-1	Agenda Meeting Agenda, September 9, 1982
R-2	Minutes, Agenda Meeting, September 9, 1982
R-3	Business Meeting Agenda, September 16, 1982
R-4	Business Meeting Minutes, September 16, 1982
R-5	Agenda Meeting Agenda, October 7, 1982
R-6	Business Meeting Agenda, October 21. 1982
R-7	Business Meeting Minutes, October 21, 1982
R-8	Agenda Meeting Agenda, January 13, 1983
R-9	Letter dated January 11, 1983 to Board of Education from Patrick Parenty
R-10	Letter dated January 12, 1983, Patrick Parenty to Valley View staff
R-11	Schedule (A) proposed
R-12	Schedule (B) proposed
R-13	Schedule (C) proposed
R-14	Schedule (P) proposed
R-15	Notes on Schedule (A)
R-16	Notes on Schedule (B)
R-17	Notes on Schedule (C)
R-18	Enrollment and scheduling documents
R-19	Public Comments
R-20	Projected organization Bayberry School
R-21	Minutes of Business Meeting of 2/24/83
R-22	1983-84 staffing appointments
R-23	Music program costs/teachers salaries

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R-24 Pupil enrollment figures 1973 through 1984

R-25 Budget 1983-84

R-26 1983-84 staffing appointments, excerpt 4/21/83

R-27 1982-83 staffing appointments

R-28 1983-84 salary lists

R-29 1982-83 salary lists (showing certifications, etc.)

R-30 1981-82 teachers appointments

R-31 List of faculty members dated 8/20/81

R-32 Salary list dated 11/3/81

R-33 Salary list dated 10/22/77

R-34 Salary list dated 1978-79

R-35 Salary list dated 1977-78

R-36 Salary list dated 1976-77

R-37 Salary list dated 1975-76

R-38 Salary list dated 1974-75

R-39 Salary list dated 1973-74

R-40 Vocal music schedules both schools for 1982-83 and 1983-84, 6 pps.

R-41 Memorandum by Walter Kasman with attached schedule

R-42 Valley View School schedule

R-45 Projected Grade Level Enrollments, 5/14/82

R-46 Straight Line Projection

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OAL DKT. NO. EDU 4454-83

WITNESSES

Janet D. Miles
Dr. Patrick Parenty
Hildred Nozick
Marlene Marburg
Walter Kasman

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JANET D. MILES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

The relief sought by petitioner shall be accorded her with reassignment to full-time teaching duties within her teaching certificate effective the commencement of the 1984-85 academic year.

The Board's Motion to Dismiss is denied.

JUNE 14, 1984 COMMISSIONER OF EDUCATION

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JANET D. MILES,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 14, 1984

For the Petitioner-Respondent, Ruhlman, Butrym and Friedman
(Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, King, King and Goldsack
(Victor E. D. King, Esq., of Counsel)

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

December 5, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9523-83
AGENCY DKT. NO. 244-7/83A

EDISON TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Stephen E. Klausner, Esq., for petitioner (Klausner and Hunter, attorneys)

R. Joseph Ferenczi, Esq., for respondent

Record Closed: March 23, 1984 Decided: May 3, 1984

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced with the filing of a Petition of Appeal on July 15, 1983, seeking a determination that the Board of Education of the Township of Edison (hereinafter respondent) had violated the tenure and seniority rights of at least 50 of the members of the Edison Township Education Association (hereinafter petitioner) when it imposed a reduction in force in April 1983. An Answer to the Petition was filed on November 28, 1983, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was scheduled and was conducted on February 6, 1984. The Prehearing Order which was issued as a result thereof set forth the following as issues for determination in this matter:

1. Were petitioner's members, or any of them, entitled to assignments in grades 7-8 following the April 1983 reduction in force (RIF)?

2. Which regulations are applicable to the recalls following the April 1983 RIF?

3. If petitioner's members' seniority and tenure rights were violated following the April 1983 RIF, to what relief are they entitled?

The Prehearing Order also provided that petitioner's motion for partial summary decision would be determined prior to the scheduled hearing dates of March 26, 27, and 28, 1984.

Following the issuance of the Prehearing Order, several discussions between counsel and the undersigned administrative law judge took place by telephone conference calls concerning whether it would be possible to issue a decision on petitioner's motion prior to an identification of the individual teachers who were affected by the reduction in force. During a supplemental prehearing conference on March 23, 1984, it was determined that counsel were then currently unable to identify those individual teachers who had been affected by the April 1983 reduction in force. It was agreed that summary decision would issue, therefore, on the appropriateness of respondent's stipluated policy for calculation of seniority credit with respect to grades 7 & 8 for teachers in respondent's school system who hold standard New Jersey Instructional Certificates with Elementary Education Endorsements and whose teaching assignments have been confined to the elementary schools, grades K through 6. It is currently and has been respondent's position that such teachers who have accrued seniority only in the elementary category and who have never taught in grades 7 or 8 are not entitled to "bump" teachers assigned to teach grades 7 or 8 in the event of a reduction in force. The appropriateness of this policy was the subject of a prior determination by the undersigned administrative law judge in EDU 9457-82, Order Granting Partial Summary Decision issued May 20, 1983, adopted by the Commissioner of Education in his decision issued December 29, 1983.

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FINDINGS OF FACT

The following facts are not in dispute and I, therefore, **FIND** them as uncontested facts.

Following the issuance of the Order Granting Partial Summary Decision in Edison Township Education Association, et al. v. Board of Education of the Township of Edison, EDU 9457-82, on May 20, 1983, respondent made a determination to await a final decision in the matter prior to implementing any of the determinations therein. That Order is attached hereto and incorporated herein by reference. Accordingly, the reduction in force notices for the 1983-84 school year, which had been issued by respondent prior to April 30, 1983, as required by the negotiated agreement, were not amended and reissued. Consequently, following the 1983 RIF, when teachers with seniority in the Elementary category whose previous assignments had been confined to grades K through 6 attempted to exercise their seniority rights by claiming full-time positions teaching common-branch subjects in grades 7 or 8, they were not permitted to do so by respondent. In addition, the seniority lists which had been prepared for the April 1983 reduction in force had been computed pursuant to Aslanian v. Board of Education of Borough of Fort Lee, (N.J. App. Div. March 27, 1981, A-4745-79T1) (unreported) with part-time seniority and full-time seniority designated separately.

On June 20, 1983, the Supreme Court decided Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983), which dictated that part-time and full-time seniority should be combined in one list and that part-time service should be pro-rated on a full-time basis. Pursuant to Lichtman, supra, and the decision of the Commissioner of Education in Mary Jane James, et al. v. Bd. of Ed. of the Twp. of Edison, EDU 850-83, decided September 1, 1983, respondent revised its previously calculated seniority lists in accordance with the standards established by the Supreme Court in Lichtman.

Also on June 20, 1983, the New Jersey Register, 15 N.J.R. 1017, published new seniority regulations adopted by the State Board of Education on June 1, 1983, with an operative date of September 1, 1983. With respect to the operative date, N.J.A.C. 6:3-1.10(m) of the new regulations provided:

> This section shall apply prospectively to all future seniority determinations as of the operative date of this rule, September 1, 1983.

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With respect to calculation of seniority entitlement concerning grades 7 and 8, the new regulations provide as follows:

> N.J.A.C. 6:3-1.10(l)15 Secondary: The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding an instructional certificate with subject area endorsements shall have seniority within the second category only in such subject area endorsement(s) under which he or she has actually served. Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsement. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.
>
> N.J.A.C. 6:3-1.10(l)16 Elementary: The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 without departmental instruction. District boards of education who make a determination to reorganize instruction at grades seven and eight pursuant to these rules must do so by adoption of a formal resolution setting forth the reasons for such reorganization. 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 educational services certificate or special field endorsement. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

It is undisputed that respondent's district is organized with elementary schools-K through 6 and with grades 7 and 8 in junior high schools with departmental instruction. At all times prior to September 1, 1983, as well as thereafter, respondent refused to assign any teacher with elementary seniority, whose assignments had been previously confined to K through 6, to an assignment in grades 7 or 8 on the basis of seniority rights. Respondent's position in this regard is set forth in its letter memoranda dated February 16, 1984:

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> All teaching assignments for the 1983-84 school year were approved by the Board at its regular meeting on September 12, 1983, which was also the first day of school. Respondent therefore applied the new rules regarding the determination of seniority as it had no other choice but to give effect to the law at the time of the appointments. It is incomprehensible that the Board's appointments should have been based upon the old rules which were superseded prior to the start of the school year.

Petitioner sets forth its position in a letter memorandum dated February 13, 1984 as follows:

> Although it may be true that Respondent recomputed its seniority list in September, 1983, ostensibly in compliance with the Lichtman and James decisions, it is respectfully suggested that this is of no consequence. Petitioner alleges that the Board of Education improperly RIFfed members of Petitioner's bargaining unit in April, 1983, when it, again, recognized the certification and seniority rights of some but not all of Petitioner's members to teach in grades 7 and 8.
>
> It is Petitioner's position that had the Board acted correctly in April, 1983, a number of Petitioner's members would have been employed as of September 1, 1983. It is the RIF in April that is the subject of this Petition. That is what is alleged to be illegal.

APPLICABLE LAW AND DISCUSSION

The articulation of the issues for determination herein in the Prehearing Order notwithstanding, what really needs to be determined in this case is what seniority lists were to be used by respondent at what times and for what purposes. The Commissioner of Education has partially answered this question in his final decision in Edison Twp. Ed. Association et al v. Bd. of Ed. of Twp. of Edison, EDU 9457-82, dec'd December 29, 1983, wherein he said:

> The Board shall revise its seniority calculations with respect to all seniority determinations prior to September 1, 1983, pursuant to the Opinion Granting Partial Summary Decision. With respect to seniority determinations, as of September 1, 1983, and thereafter, they shall be governed by N.J.A.C. 6:3-1.10(1)16 as amended June 30, (sic) 1983. Slip Opinion pg. 24.

Pursuant to that Order respondent was required to give each teacher who had acquired elementary seniority as defined by N.J.A.C. 6:3-1.10(k)28 (the regulation in effect prior to June 30, 1983) employment within the elementary category as was defined by that

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regulation up to and including August 31, 1983. I **CONCLUDE** that this means that any vacancy which occurred, i.e. which the respondent became aware of on or before August 31, 1983, in grades K through 8 in respondent's system was to be filled from a seniority list as it would have been accurately prepared under the law up to the date of the vacancy and pursuant to the opinion in the Order Granting Partial Summary Decision. Accordingly, if a vacancy became known to the Board on August 31, 1983, in grade 7 or 8, the person chosen to fill that vacancy on the basis of seniority would be either the teacher at the top of the elementary seniority list which had been prepared in accordance with Lichtman and Mary Jane James, supra, and in accordance with the seniority regulations as they existed prior to amendment or the person at the top of the secondary seniority list prepared in accordance with Lichtman and Mary Jane James, depending upon which teacher had the greatest number of years of pro-rated full-time seniority. If the vacancy occured, i.e. became known to the Board, on September 1, 1983, or thereafter, the person who would be entitled to claim the assignment pursuant to seniority rights would be the person at the top of the secondary category seniority list for the subject area in question, in accordance with the regulations which became operative on September 1, 1983. Because the new regulations apply to "all future seniority determinations as of the operative date of this rule, September 1, 1983," selection of persons to fill vacancies must be done in accordance with the new rules, since this is also a seniority determination. The word "determination" should not be read to mean reductions in force only. If the State Board had wished to restrict the applicability of the new regulations to all future reductions in force as of the operative date of the rule, they could have said so. Since the section applies to "determinations," selections of persons to fill vacancies, i.e. recalls, must also be governed by the new rules. Accordingly, on or after September 1, 1983, no teacher whose seniority was in the elementary category who was not then currently assigned* to teach grades 7 or 8 and who had not previously taught in grades 7 or 8 would be entitled to claim an assignment in grades 7 or 8 by virtue of seniority. The following chart may be helpful:

---

* The relevant date is the date of assignment which would also be the date the vacancy became known to the Board's administrators. Respondent should not be permitted to choose which rules to follow by waiting until September 1 to fill a preexisting vacancy. Likewise, the date upon which the Board actually ratified the appointments, September 12, 1983, is not the relevant date.

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Date of Seniority Determination (RIF or vacancy to be filled)	From lists prepared according to Case Law applicable	Seniority Regulations applicable
April 20, 1983 to June 19, 1983	Aslanian	Old
June 20, 1983 to August 31, 1983	Lichtman	Old
Sept. 1, 1983 to Present	Lichtman	New

For all of the foregoing reasons, summary decision is hereby granted in favor of petitioner in accordance with the foregoing opinion.

If the parties are unable to agree upon relief to be afforded to individual teachers under this opinion, they shall notify the Commissioner that there is a dispute as to the issues and request that the matter be retransmitted to the Office of Administrative Law, pursuant to N.J.A.C. 1:1-5.2.

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

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OAL DKT. NO. EDU 9523-83

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

May 3, 1984
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

MAY 4, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 8 1984
DATE

Ronald L. Yaskin/gh
OFFICE OF ADMINISTRATIVE LAW

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EDISON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

The Board excepts to the initial decision by Judge Duncan and pleads for reversal by the Commissioner of the seniority determination by her. The Board contends that the seniority determinations for the 1983-84 school year should have been determined by N.J.A.C. 6:3-1.10(m), effective September 1, 1983; to do otherwise constitutes error by the judge and should be reversed. The Board pleads that all seniority determinations prospective to September 1, 1983 are so governed and its seniority determination should be measured from the meeting of the Board on September 12, 1983 duly constituted under the Open Public Meetings Act, N.J.S.A. 10:4-7 et seq. The Commissioner finds no merit in such argument.

The Board imposed a reduction in force of certain members of the Edison Township Education Association at its meeting in April 1983. The Commissioner notes the right of the Board to reduce the number of its teaching staff members as follows:

> "18A:28-9. Reduction of force; power to reduce and reasons for reduction
>
> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

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Such a reduction may be made only for certain reasons:

> "18A:28-10. Reasons for dismissals of persons under tenure on account of reduction
>
> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

According to such standards the Board shall determine the seniority of the affected persons:

> "18A:28-11. Seniority; board to determine; notice and advisory opinion
>
> In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

The persons so listed may be eligible to be reemployed:

> "18A:28-12. Dismissal of persons having tenure on reduction; reemployment
>
> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining

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> seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service."

The standards so established shall be determined by the Commissioner:

> "18A:28-13. Establishment of standards of seniority by commissioner
>
> The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Teaching staff members must be properly certified:

> "18A:28-14. Teaching staff members not certified; not protected; exception
>
> The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial, except that any school nurse appointed prior to May 9, 1947 shall be protected in her position as is provided in section 18A:28-4 of this title."

The Commissioner finds and determines that 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, or September 12, 1983 in the present case, simply has no authority in law. N.J.S.A. 18A:28-9 et seq. Such time delay could be attributed to bad faith on the part of the Board.

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From his own records the Commissioner notes that the standards for determining seniority had been established June 25, 1955 and these standards were in effect in April 1983 when the Board took action to reduce the number of its teaching staff. The Commissioner so holds and finds no merit in the arguments of the Board that seniority be determined by the standards established September 1, 1983.

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

The relief to be accorded individual teachers shall be governed by this opinion; disputations, if any, of the relief of individuals shall be transmitted to OAL pursuant to N.J.A.C. 1:1-5.2.

IT IS SO DETERMINED.

JUNE 18, 1984 COMMISSIONER OF EDUCATION

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EDISON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
RESPONDENT-RESPONDENT	:	

Decided by the Commissioner of Education, June 10, 1984

For the Petitioner-Appellant, R. Joseph Ferenczi, Esq.

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

The decision of the Commissioner is affirmed for the reasons expressed therein. Moreover, although the issue of the propriety of the reduction in force itself is not before us in this appeal, the State Board emphasizes the clear responsibility of boards of education to carefully analyze such reductions in accomplishing their legitimate purpose as defined by N.J.S.A. 18A:28-9. We further emphasize that the numbers terminated must not impair a school district's ability to fulfill its statutory responsibility to afford its students a thorough and efficient education. See, e.g., N.J.S.A. 18A:11-1(d); N.J.S.A. 18A:7A-5(c) and (g). A practice of wholesale dismissals involving a significant portion of the teaching staff would violate this statutory duty even where teaching staff members were properly recalled at a later date.

December 5, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
SUMMARY DECISION
OAL DKT. NO. EDU 4057-84
AGENCY DKT. NO. 203-6/84

J.C.,
Petitioner,
v.
LONG BRANCH BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Kim A. Fellenz, Esq., for petitioner (Kaplan and Steinberg, attorneys)

Richard D. McOmber, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: June 8, 1984 Decided: June 8, 1984

BEFORE BRUCE R. CAMPBELL, ALJ:

This matter comes on by way of a request for emergent relief. The petitioner, a pupil in his senior year at Long Branch High School, who has attained majority, was suspended on March 12, 1984, following his arrest, not on school grounds, for possession of less than 25 grams of marijuana. The petitioner claims his suspension was without notice or hearing, as required by law. He pleads to be reinstated, to be allowed to take final examinations, and to participate in final senior activities, including the graduation ceremony.

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The matter was filed before the Commissioner of Education and transmitted to the Office of Administrative Law on an expedited basis. Therefore, the papers were transmitted without an answer from the respondent Long Branch Board of Education. In all other respects, the transmittal was in accordance with N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A hearing on the emergent relief question was held, by telephone, commencing at 2:00 p.m. on June 8, 1984. Counsel were allowed to argue all relevant points. Three witnesses - the high school principal, the superintendent of schools, and petitioner's mother - were called. After hearing summary arguments, the court issued a bench decision directing that petitioner be allowed to participate in the senior chapel and graduation ceremony activities.

The text of the oral decision is as follows:

First, I am not concerned at this point because of problems of proof with what may have transpired prior to March of 1984. Obviously, it's fraught with some hearsay problems. It would need considerable exposition in a plenary hearing. I am confining my consideration at this point to what happened subsequent to the arrest of John Cooper in March of 1984. It becomes apparent from the witnesses and the very scant papers I have before me at this point that John Cooper was advised by telephone by Mr. Haines, the principal of Long Branch High School, that he was being suspended. Its my understanding of the law in this State that a long-term suspension, that is, 10 days or more, invokes the same due process rights as a threatened expulsion, which is why I asked counsel to address those six points. We'll reach that in a moment.

Acquittal in a criminal or other court does not bar a disciplinary action by a board of education. I call your attention to a case that's about a dozen years old but is still good law. It's styled, S.T. v. Neptune Tp. Bd. of Ed., you'll find it in the 1972 School Law Decisions. I'm sorry I don't have an exact page, but that case stands for the proposition that acquittal in a criminal or other court does not bar disciplinary action by a board. Now, I do not mean to imply, Mr. Fellenz, that I read your argument as saying that the disposition of the case was equivalent to an acquittal. I understand what happened in the case and what the municipal judge invoked. But, I still think that's an important principle. The Board is not in any way barred from a disciplinary action simply because

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there was some disposition of a case other than a conviction in a criminal or other court. So, the fact that there was not a crime is not controlling on the Board. The fact that there was not a conviction even of a petty offense, a disorderly persons offense, is not binding on the Board. I have to look at whether the Board's action was reasonably related to its charge from the legislature, which is found at 18A:37-2, and whether or not procedurally this matter was handled correctly.

We've mentioned, just a minute ago, that there was a notice by telephone to Mr. Cooper from Mr. Haines on 3/12. That appears to be uncontroverted. It was also represented that Mrs. Ashford herself spoke to Mr. Haines later in the same day. This was followed on the 19th by a letter to Mrs. Ashford from Mr. Haines, the contents of which have pretty much if not completely, been put in the record today. So, I am satisfied that J.C. (John Cooper) was aware of the charge against him. That's the first point. Second, a list of witnesses. This was referred to in the letter of 3/19, but further it was actually stated in the letter of 4/18 of Mr. Korey to Ms. Ashford. It advised the names of the two persons would would testify. The earlier letter of Mr. Haines, that of 3/19, advised of the right to cross-examine. There was also advice in these letters of the right to be represented by an attorney and the right to enter a defense. That still leaves the matter of a child study team evaluation.

The March 19 letter to Mrs. Ashford from Mr. Haines contains the paragraph or clause saying that the child has been referred as requiring the services of the pupil personnel department. That seems, on the face of it, to be clear notice of the intent or the desire to evaluate. I am not convinced, however, that it was made clear to Mrs. Ashford what the purpose of the evaluation was and that there was a legal requirement here having to do with the long-term suspension and expulsion process as quite separate and apart from any routine referral to a child study team. Without the documents before me, I admit this is a difficult determination to make. But, on the basis of the record that's been developed today, I have some question as to whether or not there was adequate notice in that one respect.

Now, does the Board's action bear a rational relationship to 18A:37-2? Well, looking at subsection c where it talks about the danger to the physical well being of other pupils, we've had parallel arguments in Graves Act questions where the simple presence of a handgun may invoke certain penalties. What does the Legislature mean by constituting a danger to the physical well-being of other pupils. Well, in determining the meaning of

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the statute, we have to take the words as having their ordinary meanings. One might very well argue that this means that the other pupils have to be free from fear of assault or offensive touching. I believe that the wording of subsection c admits of that but it also admits of a wider meaning which could be a threat to well-being by the presence of dangerous substances or any of a variety of other factors. I believe that as to the requirements set down in 18A:37-4, which has to do with the suspension or pupils by a principal, that I can see no procedural problem here. It hasn't been alleged and it hasn't even been controverted that the suspension was not reported to the Board of Education at its next regular meeting following the suspension. It appears to me that we have a suspension in stages, if you will: on 3/12 there's a statement made, it's not denied that it was made, by the principal to the pupil in question that he is suspended. I asked Mr. Haines specifically if he advised Cooper on that day of the length of suspension. His answer was that he did not notify as to the length of suspension. He said it was pending investigation. I have a problem with that. We have the so-called ten-day rule. A nine-day suspension, if it had been stated at that point, would not be a problem. As it turned out, it was considerably longer than that. I think that we have already addressed the fact that the long-term suspension invokes the same due process rights as a proposed expulsion. We've gone over those points.

Subsequent to that telephone conference on the 12th, in fact one week later exactly, there was a letter. This advised of the continued suspension and it advised of several other things which have already been testified to today.

I think that substantially the board has met its burdens. But, I think there are some details that give me some serious question. It's admittedly a close call. I think the Board is not to be criticized for its motives. It is apparent to me that the Board acted in the best interest of the student body. Nor do I perceive an intent to "get" John Cooper.

Reviewing carefully what's been put forward today, although there has been substantial compliance with the due process requirements, I think that the lack of clarity in the notice concerning the child study team evaluation is a flaw, if not fatal, certainly serious, and I think that the lack of clarity in stating the length of the suspension is another flaw, which certainly is serious and perhaps may be fatal. So then, based on these two points particularly, although I have no real quarrel with the rest of the procedural steps, I think that the action of the Board in this matter was too slow. I realize it has to be deliberate and it certainly cannot go off half-cocked.

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On the basis of the serious questions still in my mind concerning the child study team evaluation and concerning the indefiniteness of notice of the term of the proposed suspension, I'm going to find that there was sufficient noncompliance with the steps laid out so as to require a setting aside of the suspension.

In consideration of the findings made earlier as to the defects as to notice concerning the CST evaluation and the lack of specificity as to the length of the suspension, I hereby **DIRECT** that J.C. (John Cooper) be allowed to participate in senior chapel and in the graduation exercises of the Long Branch public schools. It is so **ORDERED.**

This order may be reviewed by the Commissioner of the Department of Education either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case pursuant to N.J.A.C. 1:1-16.5.

June 8, 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

ij

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J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this controverted matter including the initial decision rendered in the form of an Order and Summary Decision by the Office of Administrative Law, Bruce R. Campbell, ALJ.

The Commissioner observes that the Board has made application for an Interlocutory Review and a Stay of the Order issued in the Summary Decision, pending review.

In the Memorandum of Law in support of the application for an Interlocutory Review and Stay, the Board takes exception to Judge Campbell's Order permitting petitioner to participate in senior class graduation activities. It points out the Summary Decision determined the Board substantively met its burden of proof that his suspension and exclusion from senior activities are reasonable. It believes that the judge erred when determining that a lack of clarity in notice concerning child study team (CST) evaluation and in stating the length of suspension requires that petitioner be allowed to participate in said senior activities.

The Board avows that in fact it did meet the requirements of R.R. v. Bd. of Ed. of Shore Regional High School, 109 N.J. Super. 337 (Chan. Div. 1970) with respect to affording petitioner his due process rights. Regarding this, the Board states that its telephone call to petitioner and to his mother on March 12, 1984 and the conference held with them on March 16, 1984 meets the preliminary hearing requirement of the R.R. decision. It acknowledges that the 21-day requirement for a full hearing was not met but urges that, when the R.R. decision was rendered in 1970, there was no requirement for CST evaluation as herein and avers that the 21-day time constraints are no longer applicable. With respect to this, the Board avers that it is difficult, if not impossible, to have a full CST evaluation and case conference within 21 days, let alone a hearing before the Board as well.

In addition to the above, it points to the delay resulting from petitioner's mother not providing parental consent for evaluation until April 5 in verbal form and April 10 in written form, as well as the need to reschedule the hearing planned for April 25 at petitioner's request. Notwithstanding the perceived procedural defects in CST notice, the Board avows that it complied with the

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Administrative Code requirements relative to CST evaluation well within the mandated 60-day period and did, under all circumstances, conduct an expulsion hearing within a reasonable amount of time. As such, it respectfully urges that Judge Campbell erred in concluding that the notice was procedurally defective.

The Board, in urging that a stay be granted, avows it is fearful that, if petitioner is permitted to participate in graduation activities, it will undermine its policy against drugs and controlled substances. It seeks to exclude his participation as a sign both to petitioner and the student body that the Board will not tolerate drugs in the Long Branch school system.

Petitioner's response to the Board's application for Interlocutory Review and Stay was filed in the form of an affidavit by Mrs. Barbara Ashford, petitioner's mother. Petitioner urges that the Commissioner deny the relief sought by the Board, avowing that the legal arguments advanced by it are without merit. He states that the possession charge for which he was arrested was based upon a "constructive" possession situation, that is, the contraband was not within his or the other arrestee's actual possession but in an area giving rise to an inference of control and possession.

Petitioner explains the conditional discharge resulting from his arrest as a case disposition which places a first offender, charged with possession only, on a six-month probationary term. If successfully completed without further incident, the charges are fully dismissed without adjudication of guilt and application for expungement of the arrest records is allowed. He points out that persons charged with intent to distribute or possession with distribution are not eligible for the conditional discharge and that, even if the discharge program is not successfully completed, there is no imposition of guilt; rather, the person is afforded a trial.

As such, petitioner avers that he has not violated his conditional discharge and has not been found guilty of any charge.

Petitioner contends that even assuming arguendo he were guilty of possession, he does not believe that mere possession of marijuana off school premises gives rise to the danger the law speaks of in the R.R. decision, a case that involved a student stabbing another student in the victim's home. He avows that, if disciplinary action is taken by a board of education with regard to totally out-of-school activities, unrelated to operation of school in any manner, said activities must reasonably relate to a danger to the students, faculty or property of the district.

The Commissioner has carefully reviewed the record and legals arguments put forth by the parties. He is in agreement with Judge Campbell that substantively the Board's action in suspending petitioner was within its discretionary authority. The R.R. decision has held that, if school officials have reasonable cause to believe a student is a danger to himself, to others or to school property by virtue of conduct after school hours off school pro-

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perty, school officials are empowered to suspend that student after affording him a preliminary hearing. Clearly, given the circumstances in this controverted matter, the Board had reasonable cause to act in accordance with N.J.S.A. 18A:37-2. The Commissioner finds petitioner's arguments to the contrary without merit.

Notwithstanding the substantive correctness of the Board's actions, the Commissioner is in agreement that procedural defects exist herein which are of sufficient moment to warrant support of Judge Campbell's setting aside of petitioner's suspension on procedural grounds. While the Commissioner agrees with the Board's position that the requirements of the R.R. decision were met relative to the conduct of a preliminary hearing, he is not persuaded by its arguments that a hearing was conducted before the Board in a reasonable period of time, despite the requirement for CST evaluation and the delays indicated herein. N.J.S.A. 18A:37-2.1 is quite specific as to the 21-day requirement for a hearing and must be applied in the instant matter.

The Commissioner, however, does not agree with Judge Campbell's order to permit petitioner's participation in graduation activities. He is cognizant of the fact that the Board acted to suspend petitioner rather than expel him and that, aside from any decision rendered by the Commissioner in this matter, petitioner would receive a diploma by the Board's own action. Despite the setting aside of his suspension on procedural as opposed to substantive grounds, the Commissioner finds that, under the circumstances of this matter, the procedural defects do not warrant placing form over substance with respect to withholding a public award privilege in the interest of maintaining an orderly, safe and efficient school system.

On numerous occasions the Commissioner has previously held that, under certain circumstances, a local board of education may so act. In Gustave M. Wermuth et al. v. Bd. of Ed. of Livingston, 1965 S.L.D. 121, the Commissioner held that:

> "***An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.***" (at 129)

See also Gertner et al. v. Bd. of Ed. of Elmwood Park, 1974 S.L.D. 611; Holmes v. Bd. of Ed. of Lower Camden County Regional High School District, 1975 S.L.D. 491; Kenngott v. Bd. of Ed. of Lower Camden County Regional, 1975 S.L.D. 489.

The Commissioner is of the firm belief that the Board is entirely justified in the interests of both petitioner and its student body to withhold from J.C. the privilege of participating in

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a graduation ceremony and/or activities, a privilege which is separate and apart from the mandated entitlement to a thorough and efficient education. He finds that it is within the discretionary powers of the Board to impose such a sanction as a deterrent to unacceptable behavior and to insure conformity with desirable standards of conduct and, therefore, said action is not arbitrary, capricious or unreasonable. Participation in graduation ceremonies is a privilege to be earned rather than a mandated entitlement.

Accordingly, the Commissioner reverses that portion of the Summary Decision which orders petitioner's participation in senior chapel and graduation ceremonies and affirms the setting aside of petitioner's suspension due to procedural defects as noted by Judge Campbell and herein.

IT IS SO ORDERED.

JUNE 18, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4660-83
AGENCY DKT. NO. 183-6/83A

DONALD SPEER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Nancy Iris Oxfeld, Esq., for petitioner (Rothbard, Harris & Oxfeld, attorneys)

William Wallen, Esq., for respondent (Martin R. Pachman, P.A., attorney)

Record Closed: March 28, 1984 Decided: May 4, 1984

BEFORE **STEPHEN G. WEISS,** ALJ:

Petitioner, Donald Speer, is a custodian employed by the respondent East Brunswick Board of Education. In a Petition of Appeal filed in June 1983, Speer maintained that he is tenured and that the action of the Board taken on April 20, 1983 purporting to withhold his salary increase for the 1983-84 school year was in violation of a collective negotiations agreement entered into by his representative, the East Brunswick Education Association and the Board, and thus ultra vires. Further, Speer maintained that as a tenured janitorial employee the Board was without authority even to pursue a

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withholding of increment procedure; rather, any such disciplinary action had to be processed, if at all, under the tenure laws. The Board's answer denied that Speer is tenured and maintained that its action in withholding his salary increment was a proper exercise of its discretionary authority under the school laws and the labor agreement.

The matter was transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case and a plenary hearing was conducted before the late Judge Eric G. Errickson in November 1983. Following the close of the hearing, but prior to the filing of briefs, Judge Errickson, unfortunately, passed away. Thereafter, counsel entered into a Stipulation whereby they agreed that the matter could be assigned to another administrative law judge for the purpose of rendering an Initial Decision. In that Stipulation, they agreed that the Initial Decision would be based upon the transcript of the hearing and the briefs.

The Prehearing Order entered by Judge Errickson identifies three separate issues: (a) Is Petitioner tenured?; (b) Was the Board's action withholding Petitioner's increment legal?; and (c) To what relief, if any, is Petitioner entitled? The question of whether Petitioner is tenured was addressed at the hearing before Judge Errickson, both by way of motion and through the introduction of oral testimony and exhibits. Further discussion of this issue will follow. Insofar as the propriety of the Board's action in withholding the increment is concerned, a question arose at the hearing with respect to whether the underlying basis was, or was not, appropriately in issue before the Office of Administrative Law. It appears that the Petition challenged the Board's action on strictly legal grounds and did not call into question the reasons for the Board's decision. Further, the transcript reveals that petitioner challenged the underlying reasons in a separate arbitration action, which was then made the subject of a Petition for Scope of Negotiations Determination by the Board to the Public Employment Relations Commission (PERC) with respect to whether such arbitration was appropriate (PERC Docket SN-84-12). The aforesaid Petition was attached to the reply brief submitted by Petitioner and will be marked as Court Exhibit 1. It reveals that Speer and two other noncertificated employees, whose salary increments were withheld by the Board on April 20, 1983,

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submitted grievances concerning that action in accordance with Article III of the Collective Negotiations Agreement. The Board's Petition to PERC maintains that the grievances are neither negotiable nor arbitrable and that jurisdiction to entertain the same properly lies, instead, with the Commissioner of Education. Thus, a permanent restraint against further processing of the grievance arbitrations was sought (Exhibit C-1). I am advised by counsel that no action has yet been taken by PERC with respect to the Board's Petition and it is merely pending at that agency at the present time.

At the outset of the hearing before Judge Errickson, both counsel addressed the question of whether the underlying basis for the Board's withholding action should be tried in this case. Petitioner ultimately moved for an order that he not be compelled to submit proofs on the merits of the Board's reasons for withholding the increment. That motion was granted. Accordingly, given that determination, as well as the pendency of the PERC matter, I will not address that issue in this Initial Decision. While the Board maintains that Petitioner is essentially "forum shopping" and should not be permitted to so bifurcate the situation, I see no compelling reason to address the issue further.

The first issue raised in the Prehearing Order is whether Petitioner has tenure. In that respect the testimony of both Speer and Richard Peterson, president of the East Brunswick Education Association during 1981-82 and 1982-83 was offered. According to Speer, he had been informed by teachers and other custodians, "that after three years you automatically became tenured." Peterson testified that he was familiar with the contracts and employment agreements issued to both certified and noncertified employees, and that during the period that Speer had been employed no contracts between the Board and tenured employees, both certified and noncertified, had termination clauses. Peterson also testified that it was not until certain litigation was brought by another custodian that he first became aware that the Board contended, contrary to his understanding, that custodians did not acquire tenure in the school district. The case to which Peterson referred is Smith v. Board of Education of the Township of East

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Brunswick, OAL DKT. EDU 5654-81 (June 11, 1983), decided by the Commissioner (August 15, 1983), aff'd, State Board of Education. (April 6, 1984)* Further discussion of the tenure issue and the Smith case will be related infra.

Based upon my review and consideration of the evidence in the record before me, I herewith make the following Findings of Fact:

1. Petitioner was first employed by the Board for a six-month probationary period from December 6, 1971 to June 6, 1972, as provided in a "custodial contract" that further contained a provision that upon approval he would continue in employment until June 30, 1972 (Exhibit J-2).

2. For the school years 1972-73 through 1974-75, Petitioner was employed annually, pursuant to successive documents entitled "Contracts for Non-Certificated Personnel." All provided for termination by either party on two week's notice (Exhibit J-2).

3. At the conclusion of the 1974-75 school year, Petitioner had served more than three years as a janitorial employee of the Board of Education.

4. Beginning with the 1975-76 school year, Petitioner, rather than receiving a document entitled "Contract for Non-Certificated Personnel" was given a "Letter of Intent" and/or a "Salary Agreement" (Exhibit J-2).

5. Unlike the documents given to Petitioner for the school years prior to 1975-76, neither the "Letter of Intent" nor the "Salary Agreement" contained a termination clause, and they are essentially the same as Letters of Intent

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* The State Board of Education decision modified the decision of the Commissioner with respect to an issue not now pertinent. With respect to the tenure question involved in Smith, the State Board specifically noted that it, ". . . adopts the ALJ's findings and conclusions, as affirmed and adopted by the Commissioner, regarding the issue of Petitioner's tenure status." The ALJ and the Commissioner found that Smith had tenure.

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and Salary Agreements provided by the Board to certificated tenured employees. It also was stipulated that the only difference in the documents had to do with a paragraph concerning additional training for professional advancement (Exhibit J-2).

6. For the 1978-79, 1979-80, 1980-81 and 1981-82 school years, Petitioner was given salary agreement documents, all of which contained notations in the upper lefthand corner as follows: "Non-Certificated/Tenure" (Exhibit J-2).

7. At a special meeting of the East Brunswick Board of Education held on June 30, 1955, the following resolution was adopted:

> Resolved, that it is the stated policy of the Board of Education of East Brunswick Township to grant tenure to efficient Janitors, who are members of the State Pension and Annuity Fund, after three years of service. (Exhibit J-1).

8. For the 1982-83 school year, Petitioner received a "Letter of Intent" which indicated that the salary for his position had not yet been approved (Exhibit J-2).

9. Under date of September 1, 1982, Petitioner was provided with a "Salary Agreement" indicating what his annual salary would be for the period July 1, 1982 to December 31, 1982 and for January 1, 1983 through June 30, 1983 (Exhibit J-2).

10. Neither of the documents provided to Petitioner in 1982 made reference to whether he was considered tenured. Neither contained any termination clause.

11. On April 15, 1983, Petitioner was given a memorandum setting forth that it would be recommended to the Board that any salary increase for the 1983-

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84 school year would be withheld due to his, "overall inadequate performance of assigned custodial duties" (Exhibit J-3).

12. On April 21, 1983, Petitioner was advised, in writing, by the Assistant Superintendent for Personnel, that on the previous day the Board had voted to withhold any salary increase for the 1983-84 school year (Exhibit J-4).

DISCUSSION

As noted above, the first issue set forth in the Prehearing Order pertains to whether or not Speer is tenured. As a janitorial employee, he clearly is capable of obtaining tenure, provided the statutory requisites are satisfied. See, N.J.S.A. 18A:17-3. According to Petitioner, he enjoys tenure by virtue of the fact that following his first three years of employment he received salary agreements identical to those given to tenured teachers, which also was perfectly consistent with the 1955 Board resolution (Exhibit J-1). According to Petitioner, given the Commissioner and State Board decisions in the Smith case, supra, there can be no question but that he, too, must be considered a tenured janitorial employee.

The Board denies that Speer has acquired tenure. It argues that the Commissioner's decision in Smith placed "overriding reliance" upon the 1955 Resolution and, "is in error" (Brief of Respondent, p. 5). Beyond that the Board argues that, in any event, tenure cannot be conferred by mere intention of the parties; rather, it must be established that the precise requirements of the statute have been met and such an underpinning does not appear here. To that end, the Board points to Article XXV, Pargraph A of the Collective Negotiations Agreement in the District (Exhibit J-5). That provision sets forth that the Board reserves unto itself the managerial prerogative with respect to policy pertaining, inter alia, to the hiring and retention of employees. The Board concludes that this language is clearly inconsistent with any preexisting policy. Attention is also directed to other provisions of the Collective Negotiations Agreement, which the Board maintains reinforces the conclusion that noncertificated personnel are

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"involved in annual contract renewals" which is the, "direct antithesis of tenure acquisition for custodial employees" (Brief of Respondent, pp. 9-11).

With all due respect to the Board's arguments as to why Petitioner should not be considered a tenured janitorial employee, I believe that the question must be resolved in favor of Speer. While I do not agree with Petitioner that I necessarily am bound by the Commissioner and State Board decisions in the Smith case, I wholeheartedly adopt the rationale contained therein and believe it applies with equal force to the matter sub judice. In my judgment, a combination of the 1955 Board resolution, when considered in light of the various employment documents between Speer and the Board since 1975-76, plainly established that pursuant to N.J.S.A. 18A:17-3, Petitioner is tenured. None of the Board's arguments persuade me to the contrary, at least insofar as a janitorial employee with Speer's employment record is concerned.

Having determined that Speer is tenured, the next question is whether the Board properly acted on April 20, 1983 when it purported to withhold his 1983-84 salary increase. In truth, the question of tenure possibly is irrelevant to this particular inquiry since there would not appear to be any prohibition against a board withholding the otherwise expected salary increase for a nontenured employee. However, the tenure issue does become pertinent in view of the argument advanced by Speer that there is no statutory authority for a Board to discipline a tenured janitorial employee other then by preferring charges, and to attempt to impose a sanction by way of withholding his increment is ultra vires and cannot be condoned. Thus, Speer urged that since his salary was negotiated between his representative, the East Brunswick Education Assocation, and the Board, absent a contractual provision respecting the Board's right to withhold, there simply is none. Anticipating that the Board would argue that N.J.S.A. 18A:29-14 is broad enough to permit withholding the increment of a custodian, Speer maintains that the provisions of Chapter 29 cannot possibly apply to other than "teaching staff members," which Speer is not. Finally, Petitioner maintains that if there is any statutory basis for a board to withhold a janitorial employee's increment, that authority flows only from N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1. Support for that proposition is stated to be found in the decision of the Commissioner in Regent v. Board of Education of the Township of

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Woodbridge, 1981 S.L.D. __, decided by the Commissioner March 9, 1981. Regent was a tenured clerk whose salary and adjustment increment for the 1978-79 school year was withheld by the employing board pursuant to the authority of N.J.S.A. 18A:29-14. Regent argued that the statute did not apply to her since it had reference exclusively to teaching staff members. In a lengthy Initial Decision analyzing the various statutes pertaining to increment withholding and their relationship to decisional law in the area of labor relations, Judge Campbell determined that the Woodbridge Board did have a statutory basis for withholding Regent's increment. However, he said the appropriate statutes were N.J.S.A. 18A:11-1 and 16-1, not N.J.S.A. 18A:29-14. The Commissioner affirmed the findings and determination of Judge Campbell and adopted them as his own without any additional comment.

The Board's brief in this case does not appear to differ with respect to the position urged by Speer insofar as N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1 are said to provide authority to withhold the increment of a janitor. Indeed, the Board points to the very decision of the Commissioner in the Smith case, supra, in which Smith's increment was withheld for 1981-82 school year. Judge Law, relying upon the Regent decision, supra determined that the analysis employed by the Commissioner in Regent was equally on point and that the Board did act within its statutory authority when it withheld Smith's increment. The Commissioner affirmed Judge Law's determination. It was, of course, necessary to refer to the withholding of Smith's increment since it was bound to an Open Public Meetings Act issue. Specifically, the meeting at which the Board determined to withhold Smith's increment was alleged to have violated the provisions of the OPMA because it was not conducted in public and persons other than board members were permitted to attend the private session. Judge Law agreed that a violation had occurred, but took no action with respect to the consequences of that violation on the withholding of the increment. The Commissioner determined that the claim with respect to the OPMA violation was not cognizable before him on jurisdictional grounds since the 45-day time for appeal pursuant to N.J.S.A. 10:4-15(a) had expired prior to the filing of the petition of appeal by Smith. It was that portion of his decision which was modified by the State Board in its recent decision. In that respect the State Board agreed that the OPMA

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challenge was untimely, but impliedly criticized the Commissioner's reason for reaching that conclusion. According to the State Board, all issues arising under the Open Public Meetings Act, as they relate to school law controversies, fall within the jurisdiction of the Commissioner and the limitation which he imposed upon himself vis-a-vis the 45-day rule was apparently not appropriate. Rather, it was the mere "untimeliness," without reference to the statute, which was found by the State Board to be the appropriate ground for dismissing Smith's challenge to the withholding on procedural grounds. In short, the Board does have the statutory authority to withhold the increment of a janitorial employee and that authority stems from N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1, not N.J.S.A. 18A:29-14.

The last issue set forth in Judge Errickson's Prehearing Order raised the question of what relief, if any, Petitioner should receive. It is not altogether clear what is meant by that issue beyond that which has already been determined in this Initial Decision to this point. Since Petitioner is not challenging the underlying "merits" of the withholding, and I agree that he need not do so in this proceeding, there would not appear to be any further action to be taken. Suffice it to say that I have determined that Petitioner does enjoy tenure, that the Board did have the statutory authority to withhold his 1983-84 increment and that unless and until some authority sets that action aside, I assume it is effective. Specifically, I am rejecting the argument advanced by the Board in Point III of its Brief that the Commissioner has the jurisdiction in this matter to determine whether or not the underlying basis for the withholding is arbitrary, capricious and unreasonable and to determine that question in the negative. To put it another way, the relief to which Petitioner is entitled in this case is a declaration that he has tenure and that the Board's withholding of his increment stems not from N.J.S.A. 18A:29-14, but from N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1.

Accordingly, it is herewith **CONCLUDED** that Petitioner, Donald Speer, is a tenured janitorial employee of the East Brunswick Board of Education and that the action taken by the Board on April 20, 1983 to withhold his 1983-84 salary increase was authorized pursuant to N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1.

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OAL DKT. NO. EDU 4660-83

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who is empowered by law 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 is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

MAY 4, 1984
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

MAY 7, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 9 1984
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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APPENDIX

List of Witnesses

Donald Speer

Richard Peterson

List of Exhibits

Exhibit No.	Description
C-1	Petition for Scope of Negotiations Determination, PERC Docket No. SN-84-12
J-1	Minutes of the East Brunswick Board of Education meeting, June 30, 1955
J-2	Custodial Contracts, Salary Agreements and Letters of Intent between Petitioner and Respondent, 1971-1982
J-3	Memorandum to Petitioner, April 15, 1983
J-4	Letter to Petitioner, April 21, 1983
J-5	Collective Negotiations Agreement, 1982-84
J-6	Minutes of meetings of East Brunswick Board of Education, April 1973-March 1982 relating to petitioner's appointment
J-7	Annual Notice of Meetings of East Brunswick Board of Education, Notice of Regular Meeting of April 20, 1983 and Minutes of Regular Meeting of April 20, 1983
J-8	Minutes of Meetings of East Brunswick Board of Education, April 16, 1980, and April 9, 1975 (These minutes were submitted under cover letter of March 15, 1984 and no objection was received from counsel for Petitioner to their proffer.)
P-1(Id.)	Custodial Contract and Contracts for Noncertificated Personnel between Harold Smith and East Brunswick Board of Education
P-2	Salary agreements between Harold Smith and East Brunswick Board of Education

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DONALD SPEER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner contends that Judge Weiss erred in determining that the Board has the right to withhold his increment pursuant to N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1, avowing that the withholding of an increment has meaning only for teaching staff members as specifically authorized by N.J.S.A. 18A:29-1 et seq. Petitioner further contends that a tenured janitorial employee cannot be dismissed, suspended or reduced in compensation except pursuant to N.J.S.A. 18A:6-10 wherein charges must be filed and a hearing conducted. He asserts that his salary is determined by virtue of a collective negotiations agreement and therefore must be held as a mandatory term and condition of employment which must be negotiated by the public employer with a public employee organization.

The Commissioner finds that Judge Weiss' discussions and analyses of petitioner's right to tenure and the Board's power to withhold petitioner's increment are well reasoned and appropriate. The Commissioner's decision rendered in Regent, supra, clearly establishes a board's power to withhold the increments of tenured employees other than teachers pursuant to N.J.S.A. 18A:11-1 and 16-1; additional support for this is also found in Smith, supra.

The Commissioner notes that petitioner has not challenged the underlying "merits" of the Board's withholding action. Therefore, the standard of review as dictated by Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960) need not be applied in the instant matter. As such, he is constrained to point out that, while the Commissioner does indeed have sole jurisdiction to determine whether or not the underlying basis for the withholding herein was arbitrary, capricious and unreasonable, Judge Weiss was correct in rejecting the Board's argument that he was obligated to

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address the underlying basis for its action in the initial decision. The Commissioner further notes that, since the Board was empowered to withhold petitioner's increment and petitioner did not challenge the underlying merits of said action, the withholding of his increment is, therefore, effective.

Accordingly, the Commissioner concurs with and adopts as his own the conclusions rendered by Judge Weiss in the initial decision wherein petitioner is determined to be a tenured janitorial employee of the East Brunswick Board of Education and that the action taken by said Board to withhold his 1983-84 salary increment was authorized pursuant to N.J.S.A. 18A:11-1 and N.J.S.A. 18A:16-1.

IT IS SO DETERMINED.

JUNE 19, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5670-83
AGENCY DKT. NO. 208-6/83A

LORI BOEHM,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,
Respondent.

APPEARANCES:

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

Alan R. Schmoll, Esq., for respondent (Betsy G. Shain, Esq., on the brief) (Capehart & Scatchard, attorneys)

Record Closed: March 26, 1984 Decided: May 7, 1984

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

Petitioner, a teacher who was employed by the Board of Education of the Township of Pennsauken (Board) and was not reemployed for the 1983-84 school year, contends she had acquired a tenure status pursuant to N.J.S.A. 18A:28-5. She alleges in Count One that the Board violated her tenure and seniority rights by its action not to reemploy her as a teacher of science for the 1983-84 school year, and she seeks an Order from the Commissioner of Education to reinstate her to a position of teacher of science at the Board's seventh step of its salary guide together with appropriate back pay and

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other emoluments lost during the period of her alleged illegal dismissal. In petitioner's Amended Petition of Appeal, Count Two, petitioner alleges, among other things, that the Board's failure to reappoint her to a position of Non-Teaching Assistant (NTA) for the 1983-84 school year was in retaliation against her for filing the original Petition of Appeal herein and in violation of her rights under the New Jersey School Laws, Title 18A of the New Jersey statutes, and the First Amendment of the United States Constitution. The Board admits and denies so much of the allegations and seeks a dismissal of the Petition of Appeal.

Petitioner perfected her Petition of Appeal before the Commissioner on June 27, 1983. On July 26, 1983, subsequent to the issues having been joined, 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. Thereafter, on September 8, 1983, a prehearing conference was held at which the parties agreed, among other things, to the issues to be determined by this tribunal. A hearing was held on December 6, 1983, at the Merchantville, New Jersey, Municipal Court. Post-hearing submissions were offered by the parties and the record was considered closed on March 26, 1984.

Prior to the close of the herein record, by way of motion, dated March 22, 1984, petitioner sought an order to provide the opportunity for Ms. Barbara Rebman to participate in these proceedings as a party intervenor grounded upon petitioner's assertion that Ms. Rebman, a teacher of science in the Board's employ, was a person "who will be substantially, specifically and directly affected by the outcome" of this case and, consequently, had a right to intervene "at any time." N.J.A.C. 1:1-12.2 and N.J.A.C. 6:24-7. The Board opposed petitioner's application contending, among other things, that the matter had been heard, exhibits had been submitted into evidence, all legal arguments had been submitted, and the matter was ready for decision; therefore, to permit intervention at this late date would cause undue delay.

The court, having considered the application and the arguments of the parties, denied petitioner's motion on the grounds that: (1) The issues to be determined in this matter are concerned solely with petitioner's tenure status and, if so found, her seniority eligibility; and (2) Ms. Rebman's intervention at this time would cause undue delay arising

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from movant's inclusion. N.J.A.C. 1:1-12.3. The order, dated April 12, 1984, was immediately transmitted to the Commissioner. The Commissioner, having failed to give notice to conduct an interlocutory review within ten calendar days, the herein order is therefore considered to be in full force and effect. N.J.A.C. 1:1-9.7(c).

STATEMENT OF FACTS

The following facts, as set forth by way of uncontroverted testimony, exhibits moved into evidence and stipulation, are not in dispute and, therefore, are adopted by reference as FINDINGS OF FACT in the herein matter:

Petitioner was employed by the Board in 1976 while she was an undergraduate student at Glassboro State College. Upon her graduation from Glassboro State College in May 1976, petitioner acquired a permanent certificate as a teacher of health and physical education issued by the New Jersey Department of Education State Board of Examiners. Thereafter, for the 1976-77 school year, she was employed by the Board as a permanent substitute teacher. From September 1977 through January 31, 1978, petitioner was employed as an NTA; thereafter, for the remainder of the 1977-78 school year she served as a health and physical education teacher. In the 1978-79 school year, she continued as a health and physical education teacher for the first half of the school year; during the second half of the 1978-79 school year, she again served as an NTA. Petitioner spent the entire 1979-80 school year as an NTA. For the school years 1980-81, 1981-82 and 1982-83, petitioner was employed by the Board as a science teacher assigned to its junior high school under the appropriate certification as a teacher of science. The parties stipulated that petitioner's teaching for the school years 1980-81 through 1982-83 were creditable toward tenure.

At all times during petitioner's employ as an NTA, the Board required that she possess and be the holder of a valid teaching certificate issued by the Board of Examiners. There is no certification issued for the position of NTA. Petitioner's duties while serving as an NTA consisted of maintaining pupil order and discipline together with responsibility for the security of the junior high school building. Petitioner was assigned to after-school pupil detention, bus duty, hall duty and lunchroom duty. In addition, she sat in on conferences with parents concerning pupil disciplinary problems, proctored homerooms

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and classrooms and substituted for absent teaching staff members. Petitioner did not perform the same duties as a teacher assigned to a regular classroom, i.e., she did not prepare lesson plans, grade pupil papers, prepare grade lists for report cards. Petitioner was not required to attend faculty meetings or teacher in-service sessions, nor did she meet with parents to discuss pupil progress or participate in the annual back-to-school night. The Board did not evaluate petitioner pursuant to its teacher evaluation form or compensate her in accordance with its adopted teacher's salary guide.

This concludes the recital of the uncontested facts in this matter.

TESTIMONIAL EVIDENCE

The issue of the Board's alleged retaliation against petitioner arises as a consequence of a series of incidents which occurred in the last half of the 1982-83 school year. On or about March 28, 1983, petitioner had a conference with her building principal who presented petitioner with a letter from the Superintendent of Schools which stated, in part, that:

> We are sorry to inform you that due to the return of teachers from sabbatical and disability leaves, and our declining enrollment, it is impossible for the Board of Education to offer you a contract for reemployment at this time.
>
> We are grateful for the contribution you have made in the education of our students during your stay with us.
>
> Be assured, that should there be an opening, you will be contacted.
>
> Best wishes. [J-3]

The principal stated to petitioner that he was uncertain as to the number of science teaching positions available for the ensuing school year. Subsequently, the Board issued a list of teaching assignments for the 1983-84 school year on which petitioner's name was omitted. Instead, the name of another teaching staff member, Ms. Barbara Rebman, was listed for the science assignment to which petitioner had been assigned for the 1982-83 school year. Petitioner thereupon inquired of the principal as to Ms. Rebman's seniority, vis-a-vis her own, and was advised by the principal that Ms. Rebman enjoyed greater seniority as a science teacher in the school district.

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Subsequently, petitioner had a conference with the junior high school principal and a member of the Board's central office administration at which petitioner was advised, for the first time, that she had not acquired a tenure status in the school district. The administrators informed petitioner of an NTA position for the 1983-84 school year and stated that it was offered to her in the event she was interested. Petitioner was advised, however, that contracts for the NTA position would not be issued until August 1983.

On June 24, 1984, petitioner perfected and filed her Petition of Appeal in the instant matter, alleging she had acquired a tenure status in the school district together with concomitant seniority rights. Subsequent to the filing of the herein petition, petitioner was in receipt of a letter from the principal, dated August 15, 1983, which stated:

> It is with regret that I inform you that we will not have a position for you at Pennsauken Junior High School during the coming 1983-84 school year.
>
> Please accept my best wishes for your success in seeking a position in your field of interest.
>
> [J-4]

At hearing the Superintendent testified that he was aware of petitioner's Petition of Appeal alleging she had acquired a tenure status as a consequence of the time she served as an NTA. He further testified that as a result of the filing of the petition, there was a concern about whether or not petitioner's employment as an NTA should be continued in the school district. A determination was made not to offer petitioner the position of NTA for the 1983-84 school year, as promised, because "it was felt we [the Board] would be giving credence to the fact that she [petitioner] had tenure by being an NTA in the district" (TR-81). The Superintendent testified, on cross-examination, that no discussions were held concerning petitioner's performance either as an NTA or as a teacher of science. The Superintendent opined, on cross, that to reemploy petitioner for the 1983-84 school year as an NTA would give credence to petitioner's assertion that she had acquired a tenure status in the school district, although the Superintendent was of the opinion that petitioner had not acquired tenure by virtue of her NTA experience.

FINDINGS OF FACT

The testimony and joint exhibits set forth above were neither controverted nor disputed: therefore, I adopt the foregoing as FINDINGS OF FACT.

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DISCUSSION AND CONCLUSION

POINT I

The first issue for consideration is whether, under the facts and circumstances of this matter, petitioner has acquired a tenure status in the Board's school district. The controlling statute, with respect to the acquisition of tenure of teaching staff members, is found at N.J.S.A. 18A:28-5 and provides, in pertinent part, that:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;

Read in para materia with N.J.S.A. 18A:28-5 are the Definitions, words and phrases defined, at N.J.S.A. 18A:1-1, which include, among others, the term "Teaching staff member" as follows:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

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It is uncontroverted that petitioner's three years of service as a science teacher are creditable toward tenure. The issue before this tribunal is whether petitioner's service as an NTA is so creditable.

The undisputed evidence herein clearly demonstrates that petitioner's employment as an NTA was contingent upon her holding a valid teaching certificate issued by the Board of Examiners. The title of NTA, notwithstanding, required petitioner to perform such duties as those traditionally performed by teaching staff members. The Commissioner and our courts have given close scrutiny to job titles ascribed by local boards of education, particularly where such titles or designations have been used as a mere subterfuge to deny tenure to an otherwise tenurable position. Downs v. Bd. of Ed. of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935); Wall v. Bd. of Ed. of Jersey City, 1938 S.L.D. 614 (1936), rev'd and rem. State Board of Education, 618, aff'd, 119 N.J.L. 308 (Sup. Ct. 1938).

The most recent and landmark decision as to the nature of tenure rendered by the New Jersey Supreme Court is found in the matter of Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). There, the Court construed the statutes, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:1-1 to hold that:

> By express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.
>
> [Id. at 74]

The facts herein demonstrate that: (1) petitioner worked in a position for which the Board required a teaching certificate; (2) she held an appropriate certificate; and (3) she has served the requisite period of time to acquire a tenure status. Thus, petitioner has satisfied the requisite statutory conditions for tenure in the school district.

The Board contends, however, that both N.J.S.A. 18A:28-5 and 18A:1-1 clearly provide that a tenurable position is one in which the State Board of Examiners requires that the employee hold an appropriate certificate. The Board asserts that only positions stated in the statutes are positions to which tenure can attach and a local board of

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education cannot by its own action grant tenure to any other position. Rossi v. Bd. of Ed. of Burlington Tp. (Comm. of Ed. decision, November 7, 1980, at 4). The Board argues, among other things, that whether it requires a teaching certificate for a particular position has no relevance in determining whether a position is tenurable.

While the Board's argument may have some validity, this court observes that the State Board of Examiners issued no appropriate certificates for Title I teachers under ESEA or Supplemental teachers; nor did the State Board of Education promulgate any regulations with respect to such teachers or teaching positions. Resort to N.J.A.C. 6:11-6.3, Endorsement, reveals no specific teaching endorsement for Title I or Supplemental Teacher. Yet, in the absence of a specific certificate or endorsement or acquired certificates, our Supreme Court held Title I and Supplemental Teachers to be tenurable. Spiewak, supra.

Prior to the Court's decision in Spiewak, local boards of education denied tenure to certain teaching staff members who had otherwise satisfied the statutory requirements of N.J.S.A. 18A:28-5 and the three-part test enunciated in Spiewak. In denying such teachers a tenure status, the local boards of education relied upon the decision of the Appellate Division of Superior Court in the matter of Point Pleasant Beach Teachers Ass'n., et al. v. Dr. James Callam and Bd. of Ed. of the Borough of Point Pleasant Beach, 173 N.J. Super. 11 (App. Div. 1980) certif. den. 84 N.J. 469 (1980). The Appellate Division, in Point Pleasant Beach, held, in part, that Title I teachers were employed under a contract theory rather than protected by the Teachers Tenure Law, thus creating a special "class" of teaching staff members who might or might not acquire a tenure status dependent upon the whim or caprice of the local board of education. This contract theory was extended by some boards of education to include teachers of "supplemental instruction" for continued employment with a denial of tenure. The Supreme Court in Spiewak corrected these aberrations by specifically and explicitly overruling Point Pleasant Beach, thus restoring the time-honored proposition that tenure is a "legislative status" and not a "contractural status." Greenway v. Bd. of Ed. of City of Camden, 129 N.J.L. 46 (1942), aff'd, 129 N.J.L. 461. Kopera v. Bd. of Ed. of Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960).

With regard to the Board's reliance upon Rossi, supra, this court observes that that case dealt with a tenure claim advanced by a Learning Resource Center Aid (paraprofessional, N.J.A.C. 6:11-4.9) who claimed tenure as a clerk, pursuant to N.J.S.A.

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18A:17-2(b). The Board therein followed the prescribed prerequisites of developing a job description and standards for appointment as an LRCA, together with the approval of Burlington County Superintendent of Schools for the employment of petitioner, therein in the position of paraprofessional. N.J.A.C. 6:11-4.9. The Commissioner affirmed the Administrative Law Judge's determination that Rossi was a nonprofessional employee serving in a nontenurable position and, therefore, the Board's action not to renew her contract was proper and in accordance with law.

The Rossi decision is inapposite to the herein matter. There was no evidence that the Board herein designated petitioner's position of NTA as a "paraprofessional." Nor was any evidence proffered by the Board sought or granted approval by the Camden County Superintendent of Schools to designate the position of NTA as a paraprofessional position, pursuant to N.J.A.C. 6:11-4.9. The Rossi case stands for the proposition that a paraprofessional position, as approved by a county superintendent of schools, is afforded no statutory tenure protection. Nor does the individual appointed to a paraprofessional position acquire tenure as a clerk under N.J.S.A. 18A:17-2(b), notwithstanding that the individual job description encompassed clerical duties.

The Rossi case is clearly distinguishable from the instant matter. In Rossi there was a paraprofessional, whose position was not tenure protected, who sought to gain tenure as a clerk, which position was so protected by statute, N.J.S.A. 18A:17-2(b). Here, petitioner was required to hold a valid teacher's certificate, was assigned duties normally and traditionally performed by teaching staff members, and was continuously employed by the Board, discounting the 1976-77 school year, for six full school years from the 1977-78 school year through and including the 1982-83 school year. Spiewak, supra.

The action of the Board herein to deny petitioner tenure after six full years of employment in the school district was held to be improper and in clear violation of the statutes by our Supreme Court in Spiewak. The fiction that Title I teachers, or any other class of teaching staff member who had otherwise satisfied the statutory requirements to acquire tenure, could be denied tenure by virtue that their employment was under "contract" or their positions were dependent upon "federal funds" was clearly put to rest in Spiewak. The device of a board of education, as herein, to invent job titles for teachers performing duties under a valid teachers certificate and, thereafter, to deny such teachers tenure is similarly improper and in violation of the clear and unambiguous language of N.J.S.A. 18:28-5.

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An analysis of petitioner's employment history shows the following:

1977-78	1978-79	1979-80
NTA/HPE	HPE/NTA	NTA

1980-81	1981-82	1982-83
Science	Science	Science

Further analysis demonstrates that petitioner acquired a tenure status with the Board as an NTA at the commencement of the 1980-81 school year. (N.J.S.A. 18A:28-5(b): "three consecutive academic years, together with employment at the beginning of the next succeeding academic year.") At the time petitioner acquired tenure in the NTA position, the Board transferred petitioner to the position of teacher of science. Petitioner operated in the position of science teacher for three full academic years. Therefore, petitioner acquired a tenure status as a science teacher at the commencement of the 1982-83 school year by virtue of the Board's transfer and pursuant to N.J.S.A. 18A:28-6(b), which provides in pertinent part as follows:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> . . . .
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year;. . .

Accordingly, I **CONCLUDE** petitioner has obtained tenure as an NTA with six years' seniority and as a teacher of science with three years' seniority. See also, Philip Howley and Dewey Bookholdt v. Ewing Tp. Bd. of Ed., OAL DKT. EDU 3664-82; decided by Commissioner, Dec. 20, 1982, at pp. 9-15.

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POINT II

PETITIONER'S ARGUMENT

Petitioner observes that it has been judicially recognized that the filing of a lawsuit constitutes an exercise of one's First Amendment right "to petition the Government for a redress of grievances." Hydro-Tech Corp. v. Sundstrand Corp., 673 F. 2d 1171 (10th Cir. 1982); City of Long Beach v. Bozek, 31 Cal. 3d 527, 183 Cal. Reptr., 645 P. 2d Article 1, paragraph 18 of the New Jersey Constitution. After citing a series of related federal decisions, the California Supreme Court stated the following in City of Long Beach, supra:

> These authorities make it clear that the right of petition protects attempts to obtain redress through the institution of judicial proceedings as well as through importuning executive officials and the Legislature. It is equally apparent that the right encompasses the act of filing a lawsuit solely to obtain monetary compensation for individualized wrongs, as well as filing suit to draw attention to issues of broader public interest or political significance. As the Supreme Court declared in Mine Workers v. Illinois Bar Assn., supra, 389 U.S. 217, 223, 88 S. Ct. 353, 356, 19 L. Ed. 2d 426, "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political." (See also Thomas v. Collins, supra 323 U.S. 516, 531, 65 S. Ct. 315, 323, 89 L. Ed. 430). Hence, the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection. [emphasis added] [645 P.2d at 140]

Petitioner contends that her filing of the Petition of Appeal herein was an action protected by both the federal and state Constitutions. Accordingly, respondent Board could not legally retaliate against her for her action. The U.S. Supreme Court has previously announced its test for determining whether a public body has acted in retaliation of one's exercise of First Amendment rights in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).[1]

---

[1] The Mt. Healthy approach has already been adopted by the Superior Court-Appellate Division in cases involving discriminatory discharges of employees in retaliation for their exercise of rights protected by New Jersey EmployerEmployee Relations Act. In the Matter of East Orange Public Library and Constance Taliaferro, 180 N.J. Super. 155 (App. Div. 1981)

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The Supreme Court succintly summarized its test in its Mt. Healthy decision:

> Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected and that this conduct was a "substantial factor" - or, to put it in other words, that it was a "motirating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Petitioner asserts she has shown that the filing of her Petition of Appeal was constitutionally protected. Secondly, she contends that said filing was a "substantial" or "motivating" factor in the Board's decision not to employ her for a promised NTA position for the 1983-84 school year. Petitioner contends further that the filing of her position was not merely "a" motivating factor; but, rather, it was the motivating factor for the Board's failure and refusal to reemploy her as an NTA. This, asserts petitioner, is supported by the testimony of the Board's Superintendent who testified that petitioner was not reemployed because "it was felt we [the Board] would be giving credence to the fact that she [petitioner] had tenure by being an NTA in the district" (TR 81-5 to 14).

Petitioner declares that the Board would not have reached the same decision in the absence of her protected activity of filing her Petition of Appeal. No legitimate business justification was given, such as a poor work record, to support respondent's action. The Superintendent's explanation was merely a pretext; there was no "credence" to be given to petitioner's legal position by the act of reemploying her as an NTA. Either she had tenure in the district, based on her past science and NTA service, or she did not have tenure. No action or inaction by the Board in 1983 could change her legal status based on past events. That legal status remained to be decided in the context of this case. If NTA experience counts toward tenure, then petitioner had already obtained tenure prior to the 1983-84 school year, and her employment as an NTA could not change her status. On the other hand, if NTA experience is not creditable toward tenure, she could be rehired as an NTA for the next hundred years and she would never obtain tenure. Thus, respondent's assertion that such a rehiring for 1983-84 would lend "credence" to petitioner's legal argument is merely a smokescreen. It must be concluded that the Board's failure to rehire her, after she was promised employment as an NTA by school administrators, was an action taken in retaliation for her filing the Petition of Appeal herein.

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THE BOARD'S ARGUMENT

The Board argues that it exercised its legal right not to appoint petitioner as a nontenured employee to an NTA position for the 1983-84 school year and that its action did not constitute retaliation. As a nontenured teacher, the petitioner had no right to continued employment and the Board could legally choose not to offer her employment, except for proscribed reasons, such as those in violation of her constitutional rights. See, North Bergen Federation of Teachers v. Bd. of Ed. of Tp. of North Bergen, 1978 S.L.D. 218, 248. The Board, however, decided not to employ the petitioner as a NTA for 1983-84, for legitimate, nonproscribed reasons.

The Board contends that contrary to the petitioner's contention, the applicable test for determining a constitutional violation in this situation is not the test set forth in Mt. Healthy. The Commissioner of Education has apparently not adopted the Mt. Healthy test. See, e.g., Salvati v. Bd. of Education of Montague, OAL DKT. EDU 4530-81 (April 15, 1982); Piscataway Tp. Ed. Assoc. v. Piscataway Tp. Bd. of Educ., 1980 S.L.D. 483. For alleged constitutional violation cases concerning the denial of continued employment of a nontenured teacher, the Commissioner has applied an arbitrary or capricious test. See e.g., North Bergen Federation of Teachers.

In the instant case, the Board's decision not to appoint the petitioner to an NTA position for 1983-84 was not based on arbitrary or capricious grounds, proscribed by the First Amendment. The Board made such decision to protect its legal position concerning the petitioner's tenure status. Because the petitioner, after her nonrenewal as a science teacher, had filed the instant Petition of Appeal, claiming she had acquired tenure as a result of her service as an NTA position for the 1983-84 school year, her action would adversely affect the Board's legal position in defending such claim. Thus, the Board's decision was not in "retaliation" for the petitioner's filing of her Petition of Appeal, but based on its concern that reemploying her would act as a waiver of their right to contest her tenured status. Moreover, despite the actual legal consequences of her reemployment, the Board's concern about the detrimental effect of such reemployment legitimately existed, and thus, it cannot be contended that the Board's decision not to hire the petitioner as an NTA was based on arbitrary and capricious reasons.

The Board argues further that should the court decide to apply the Mt. Healthy test in this situation, the application of such test does not mandate a different

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result. In the instant case, the Board decided not to reemploy the petitioner, not in retaliation for her exercise of a constitutional right, but such decision was made for the legitimate reason of protecting the Board's legal position. To find the Board acted in retaliation against petitioner would be a gross injustice, since it based its decision on its concern for the preservation of its legal position. As argued hereinabove, the actual legal consequences of its appointing petitioner to an NTA position are irrelevant. It is only the perception of the legal consequences of its decision which must be considered. Because the Board sincerely believed that if by hiring petitioner as an NTA in 1983-84, it would adversely affect its legal position by recognizing that she had acquired tenure, it clearly did not make such decision for retaliatory purposes.

DISCUSSION AND CONCLUSION

POINT II

The Board herein asserts that its action to deny petitioner reemployment to an available and promised position was grounded not in retaliation for petitioner's filing of the herein Petition of Appeal and not for arbitrary and capricious reasons but, rather, to protect its legal position that petitioner had not acquired tenure in the school district. Petitioner, on the other hand, has clearly demonstrated that her filing of the petition was constitutionally protected. Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 22-223 (1967); Thomas v. Collins, 323 U.S. 516, 530-531 (1945). The issue then is whether the Board's action not to reemploy petitioner, for whatever reason, was in violation of petitioner's constitutionally protected rights.

The Board contends that the test to be applied to alleged constitutional violation concerning the denial of continued employment of nontenured teaching staff members is the arbitrary or capricious standard as adopted by the Commissioner. Petitioner, however, advocates the Mt. Healthy standard. The undersigned, as is our Appellate Division of Superior Court, is "persuaded that the Mt. Healthy approach is sound, balanced and fair to both sides." East Orange Public Library v. Taliaferro 180 N.J. Super. 155, 161 (App. Div. 1981) In Taliaferro, the Appellate Division applied the Mt. Healthy test which, it observed, has now been adopted by the National Labor Relations Board (NLRB) in reaching its determinations concerning the discharges of employees or the failure to rehire those who have exercised their protected First Amendment rights. The Appellate Division cites with approval the NLRB decision in Wright Lines, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), which said:

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> Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activites played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because it action will have been found to have been motivated by an unlawful consideration. . . . [105 LRRM at 1174] [180 N.J. Super. 155 at 163]

Thus, petitioner herein has shown that she was not reemployed as a science teacher for the 1983-84 school year; that she was promised an available position of NTA for the 1983-84 school year; that subsequent to her filing of the herein Petition of Appeal the promised position of NTA was withdrawn by the Board; and, that petitioner has not been reemployed by the Board for the 1983-84 school year in any position. Petitioner has shown, prima facie, that her protected activity played a role in the Board's decision not to reemploy her for the 1983-84 school year.

Pursuant to the Mt. Healthy test, the burden now shifts to the Board to prove its asserted justification for not reemploying petitioner. The Board is granted great leeway to muster its proofs, i.e., performance evaluations demonstrating petitioner's marginal or unsuccessful job performance; disciplinary actions which would give rise to nonreemployment; other indicia which would generate a belief that petitioner's future employment was likely to be unsuccessful, among others. The Board failed to advance any such proofs. In fact, the Superintendent testified that petitioner's job performance was not considered in any manner when the Board made its determination not to reemploy.

I **CONCLUDE,** therefore, that the Board has failed to show by a preponderance of the credible evidence that its determination not to reemploy petitioner was for reasons other than these violative of petitioner's protected First Amendment rights "to petition to Government for a redress of grievances."

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ORDER

Having found and determined petitioner to have acquired a tenure status within the School District of the Township of Pennsauken, I hereby **ORDER** that the Board immediately reinstate petitioner to the position of Non-Teaching Assistant with all appropriate back pay and emoluments denied her since September 1, 1983.

It is further **ORDERED** that the Board of Education immediately determine petitioner's seniority status, vis-a-vis, NTA and teacher of science, pursuant to N.J.S.A. 18A:28-11, and consistent with the findings, conclusions and determinations of this decision.

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.

7 May 1984
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

5/8/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAY 10 1984
DATE

Mailed To Parties:

Ronald L. Parker /pkb
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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DOCUMENTS IN EVIDENCE

J-1 Certificate, Lori Boehm — Teacher of Health and Physical Education

J-2 Professional Summary Report, May 1979, Non-Teaching Assistant Lori Boehm

J-3 Memorandum, March 28, 1983, to Lori Boehm from Office of the Superintendent

J-4 Letter, dated August 15, 1983, to Lori Boehm from Joseph Mondelli, principal

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LORI BOEHM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of this controverted matter including the Initial Decision rendered by the Office of Administrative Law, Lillard E. Law, ALJ.

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

Petitioner acknowledges that the findings of fact and conclusions of law reached by Judge Law were in her favor; however, she believes that his order neglected to grant the appropriate relief due her. Petitioner contends that the order should be clarified to indicate that she is entitled to reinstatement with back pay and all salary, benefits and emoluments accorded regular teaching staff members. Thus, for the 1984-85 school year, petitioner further contends she should be reinstated at the 8th step of the Board's salary guide, asserting that she is entitled to this relief irrespective of her seniority status in the positions of Nonteaching Assistant (NTA), teacher of science, or as a health and physical education teacher.

The Board in its reply to this exception rejects petitioner's argument that she is entitled to be placed on the 8th step, contending that petitioner would be entitled only to compensation at the NTA salary level since the record reflects NTAs and teachers are compensated under different salary guides.

Petitioner also contends that, while the judge properly determined that as of the conclusion of the 1982-83 school year she had obtained tenure as an NTA with six years' seniority and as a teacher of science with three years' seniority, the initial decision is silent concerning her years of seniority as a teacher of health and physical education. She, therefore, urges that the initial decision be augmented to include a finding that she had also accrued six years' seniority as a teacher of health and physical education, citing Mulhearn v. Bd. of Ed. of the Sterling Regional High School District, Superior Court of New Jersey, Appellate Division, Dkt. No. A-5123-81T2, October 31, 1983, as support. Petitioner further contends that the judge's order with respect to the determination of her "seniority status vis-a-vis NTA and Teacher of Science pursuant to N.J.S.A. 18A:28-11" be modified to include her entitlement to

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seniority in the position of teacher of health and physical education.

In addition, petitioner requests that the procedural history contained in the initial decision with respect to the question of intervenor status be clarified. The specific portion of the procedural history, ante, being excepted to read as follows:

> "Prior to the close of the herein record, by way of motion, dated March 22, 1984, petitioner sought an order to provide the opportunity for Ms. Barbara Rebman to participate in these proceedings as a party intervenor grounded upon petitioner's assertion that Ms. Rebman, a teacher of science in the Board's employ, was a person, 'who will be substantially, specifically and directly affected by the outcome' of this case, and, consequently, had a right to intervene 'at any time.' N.J.A.C. 1:1-12.2 and N.J.A.C. 6:24-7. The Board opposed petitioner's application contending, among other things, that the matter had been heard, exhibits had been heard, exhibits had been submitted into evidence, all legal arguments had been submitted, and the matter was ready for decision; therefore, to permit intervention at this late date would cause undue delay."

Petitioner asserts that Judge Law misconstrued what was in actuality only a "suggested procedure" for dispute resolution contained in her response letter brief dated March 22, 1984 to be a motion or an application for Ms. Rebman's intervention. She, therefore, requests that the record be clarified to accurately reflect what actually occurred herein concerning the issue of intervention.

The Board in its exceptions avows that Judge Law erred in holding that petitioner has obtained tenure and seniority as indicated in the initial decision, maintaining that the statutory requirements pursuant to N.J.S.A. 18A:28-5(b), 18A:1-1, or 18A:28-6(b) had not been met. In addition, the Board contends that the judge misconstrued the Spiewak decision's enunciation of the statutory requirements for tenure. It avers that these statutory provisions, construed together, provide that a tenurable position is one for which the Legislature, through the State Board of Examiners, has required that the employee hold an appropriate teaching certificate and it avows that whether the Board required a teaching certificate for a particular position has no relevance in determining if a position is tenurable.

The Board points out that the State Board of Examiners does not provide for certification as an NTA, therefore such a position is untenurable. Consequently, petitioner has only been employed for three consecutive years in a tenurable position and has therefore not satisfied the statutory requirements for tenure acquisition.

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Further, the Board asserts that to construe the Spiewak pronouncement as creating tenurable positions for any position for which a board of education requires a certificate, particularly if the position is a nonteaching one, would modify statutory requirements and expand the number of tenurable positions. Such an interpretation of Spiewak would thus create a result not contemplated by the Legislature. The Board also maintains that, despite the judge's factual distinction of Rossi, supra, from the instant matter, that decision remains the precedential authority for the general principle that a board of education cannot by its own action grant tenure to any position other than stated in the statutes.

The Board goes on to stress that, unlike the Title I teachers in Spiewak, an NTA herein is a nonteaching assistant whose primary duties concern discipline and security. Further, it contends that, although the judge notes that NTAs performed "such duties as those traditionally performed by teaching staff members," the duties were nonacademic and nonteaching and it delineates at length numerous differences between the duties of regular teaching staff members and NTAs.

In addition to the above, the Board avows that Judge Law erred in holding that its determination not to reemploy petitioner as an NTA violated her First Amendment rights. It maintains that its action was not retaliatory and avers that petitioner had no right to continued employment, therefore, the Board could legally choose not to offer her employment except for proscribed reasons. The Board contends it decided not to employ petitioner for legitimate, nonproscribed reasons which were not arbitrary or capricious. It cites North Bergen Federation of Teachers, supra, in support of its position. It also objects to the judge's application of the Mt. Healthy test, contending that the Commissioner has applied an arbitrary or capricious test in cases where constitutional violations have been alleged. It cites as support Salvati v. Bd. of Ed. of Montague, decided April 15, 1982; North Bergen Federation; and Piscataway Twp. Ed. Assoc. v. Piscataway Twp. Bd. of Ed., 1980 S.L.D. 483.

The Commissioner has carefully reviewed the entire record herein and the legal arguments put forth by both parties and finds no merit in the Board's assertion that petitioner has not acquired tenure for the following reasons.

The position of NTA is an unrecognized title. There is nothing contained within the record herein to demonstrate that the Board submitted a written request to the county superintendent of schools for approval to use this title and to determine what certification requirement was warranted pursuant to N.J.A.C. 6:11-3.6(b). Unrefuted testimony indicates the Board required that petitioner hold a valid teaching certificate to serve as a NTA. Nor did the Board seek approval of the county superintendent for the position as a paraprofessional pursuant to N.J.A.C. 6:11-4.9 as noted in the initial decision. Therefore, tenure and seniority with respect to petitioner's assignment as an NTA must be attached to the

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valid teaching certificate required by the Board, which in relation to petitioner was that of a teacher of health and physical education.

The Commissioner concurs with and adopts as his own the judge's finding and determination that petitioner acquired tenure because (1) petitioner worked in a position for which the Board required a teaching certificate; (2) she held an appropriate valid certificate; and (3) she served the requisite period of time to acquire a tenure status. The Commissioner does not find merit in the Board's argument that only positions stated in statutes are tenurable or that a tenurable position is only one for which the State Board of Examiners issues a certificate. N.J.A.C. 6:11-3.6(b) is mandated in order to address the very issue of unrecognized titles/positions and yet the Board failed to abide by this requirement.

The Commissioner also finds no merit in the Board's argument that the instant matter is distinguishable from Spiewak, supra, because petitioner's duties as an NTA were nonacademic and nonteaching. While it is clear from the record petitioner was not engaged in instruction on a regular basis, the Board in requiring a teaching certificate clearly viewed the position as one which warranted the professional expertise inherent in or associated with a teaching certificate. The Commissioner notes with interest that in addition to the duties cited in the initial decision, petitioner functioned as a field hockey coach in 1977 (Tr. 37), a position requiring at that time a full-time certificated member of the school faculty (N.J.A.C. 6:11-3.12 and 6:29-6.3) and that petitioner was compensated at the 5th step of the salary guide (Tr. 63) at the time of her termination, a factor which obviously signifies that the Board acknowledged more than petitioner's three years' teaching service as a teacher of science in the district.

Notwithstanding the above, the Commissioner is not in agreement with the finding and determination in the initial decision which specifies petitioner's tenure and seniority. The Commissioner is in agreement with petitioner that the initial decision is silent with respect to her tenure and seniority rights as a teacher of health and physical education. He determines her status with respect to tenure and seniority as follows:

Year	Position(s)	Tenure/Seniority Accrual	Tenure Acquisition
1977-78	NTA/HPE	1 year (HPE)	
1978-79	HPE/NTA	1 year (HPE)	
1979-80	NTA	1 year (HPE)	
1980-81	Science	1 year (Science)	Tenured as HPE in 9/80
1981-82	Science	1 year (Science)	
1982-83	Science	1 year (Science)	Tenured as Science in 9/82

Accordingly, petitioner is determined to have acquired, as of June 1983, six (6) years' seniority as a teacher of health and

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physical education, having obtained tenure as such in September 1980. She also acquired three (3) years' seniority as a teacher of science as of June 1983, having attained tenure as such in September 1982, pursuant to N.J.S.A. 18A:28-6, tenure upon transfer or promotion.

Tenure and seniority attach not to the NTA position, an unrecognized, nontenurable position, but to health/physical education which is recognized and tenurable by virtue of the Board's self-imposed teaching certificate requirement. Therefore, that portion of the initial decision ascribing tenure and seniority to petitioner's NTA position is modified by the Commissioner as indicated above. In addition, the Commissioner modifies the judge's orders with respect to reinstatement, back pay, emoluments and determination of seniority as follows: petitioner's seniority status vis-a-vis teacher of health and physical education and teacher of science is to be immediately established by the Pennsauken Board of Education consistent with the findings and determinations stated herein; the Board is also ordered to immediately reinstate her to a regular teaching position for which she has entitlement with all appropriate back pay and emoluments denied her since September 1, 1983. Said compensation is to be based upon the regular teachers' salary guide, step 7, less mitigation of unemployment benefits received during the controverted period of time.

In the event a health and physical education or science position is not available, the Board is ordered to place petitioner on the preferred eligibility lists for those subject areas and is ordered to reinstate her immediately to an NTA position at the 7th step of the regular teachers' salary guide. It is further ordered that, regardless of the position to which petitioner is reinstated, the Board is to immediately submit a job description for the NTA position to the county superintendent for approval pursuant to regulation.

In view of the determinations rendered herein and relief granted to petitioner, it is the conclusion of the Commissioner that it is not necessary to address the constitutional issue raised in the instant matter. Nor does he deem the issue raised by petitioner with respect to the procedural history to be of sufficient moment to warrant any change to be made with respect to that history.

IT IS SO DETERMINED.

JUNE 19, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9171-83
AGENCY DKT. NO. 403-11/83A

DIANE GARFOLE AND
CARMEN GARFOLE,
Petitioners

v.

BOARD OF EDUCATION OF THE
BOROUGH OF ALLENHURST, MONMOUTH COUNTY,
Respondent

APPEARANCES:

Peter B. Bass, Esq., for petitioners

Andrew J. Wilson, Esq., for the Board
(Laird & Wilson, attorneys)

Record Closed: March 21, 1984 Decided: May 4, 1984

BEFORE **JAMES A. OSPENSON,** ALJ:

The Board of Education of the Borough of Allenhurst, Monmouth County, is a non-operating school district: that is, it has no schools. The officially designated receiving school district for Allenhurst is the adjoining community of the City of Asbury Park, Monmouth County, under N.J.S.A. 18A:38-8 et seq. Diane Garfole and Carmen Garfole, parents of a student of elementary school age, who reside in Allenhurst, elected, beginning September 1983-84, to send their child to Deal Elementary School in another adjoining community on a tuition basis under N.J.S.A. 18A:38-3 instead of to Bradley

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Elementary School in the Asbury Park receiving district. When the Board of Education of Allenhurst, having begun non-remote pupil transportation to elementary schools in both Deal and Asbury Park, discontinued transportation of petitioners' child to Deal Elementary School on September 28, 1983, petitioners filed a petition of appeal with the Commissioner of the Department of Education seeking adjudication that the Allenhurst Board be required to reinstitute and to continue petitioners' child's transportation from Allenhurst to Deal Elementary School. They also sought emergent interim relief ordering reinstitution of such pupil transportation until plenary hearing. All transportation from the Borough of Allenhurst to the Borough of Deal and to the City of Asbury Park and their respective elementary schools is non-remote as defined in N.J.A.C. 6:21-1.3.

The Allenhurst Board admitted petitioners' child's status generally but denied any legal obligation to reinstitute or continue pupil transportation for Allenhurst elementary pupils as tuition students under N.J.S.A. 18A:38-3 to Deal Elementary School under provisions of N.J.S.A. 18A:39-1, which requires pupil transportation be supplied to school pupils residing in a sending district in going to and from any remote school other than a public school [emphasis added].

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on November 10, 1983. Because the petition contained a demand for emergent interim relief, the Commissioner of the Department of Education transmitted the matter before answer to the Office of Administrative Law on November 17, 1983 for hearing and determination in accordance with N.J.S.A. 52:14F-1 et seq. The Board's answer was filed in the Office of Administrative Law on December 14, 1983.

On short notice to the parties, the matter was set down for prehearing conference in the Office of Administrative Law on November 28, 1983 and an order was entered. At that time, petitioners **WITHDREW** their demand for emergent interim relief seeking temporary reinstitution of pupil transportation.

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It was established by prehearing order that the matters at issue were to be addressed and resolved as if on cross-motions for summary decision pursuant to N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, stipulations, documentation and memoranda of law, examination and cross-examination of witnesses having been waived.

At issue generally in the matter, it was established, was whether the Allenhurst Board was required to provide non-remote pupil transporation to another public school (Deal) with which it has no sending-receiving relationship, when it has an officially approved sending-receiving relationship with another school district (Asbury Park), to and from which it does presently provide non-remote pupil transportation; and/or, whether non-remote pupil transportation to such other public school on a tuition basis under N.J.S.A. 18A:38-3 without underlying sending-receiving relationship is precluded under provisions of N.J.S.A. 18A:38-8 et seq. and N.J.S.A. 18A:39-1, l.l.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I make the following **Findings** of **Fact:**

1. The Board of Education of the Borough of Allenhurst has no public schools and sends all Allenhurst students to the Asbury Park public schools under a sending-receiving relationship. There is no written agreement between Allenhurst and the Asbury Park Board of Education, although this relationship has existed for many years.

2. The Board of Education of the Borough of Deal operates an elementary school and has no sending-receiving relationship with Allenhurst. It admits non-resident students on a tuition basis.

3. Petitioners are residents of Allenhurst and parents of an elementary age student who is enrolled in the Deal Elementary School on a tuition basis under N.J.S.A. 18A:38-3 instead of in the Bradley Elementary School in Asbury Park, the receiving district. There are approximately 7 or 8

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Allenhurst students attending Deal Elementary School. Deal is non-remote under N.J.A.C. 6:21-1.3, which provides "The words "remote from the schoolhouse" shall mean beyond two and one-half miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight). . . "

4. Allenhurst provides non-remote pupil transportation to the receiving district in Asbury Park for pupils of the Allenhurst district. At the beginning of the school year in September 1983, Allenhurst began non-remote transportation of petitioners' child and other Allenhurst children to Deal. Such transportation to Deal Elementary School was discontinued on September 28, 1983 by the Allenhurst Board, after receipt of an opinion from the Monmouth County superintendent of schools:

   1. Allenhurst is a non-operating district with no schools. The officially designated receiving school district for Allenhurst is Asbury Park (N.J.S.A. 18A:38-8, 11, 13, 18, 19, 21 and 22).

   2. A group of Allenhurst parents have decided to send their children to the Deal Elementary School on a tuition basis (N.J.S.A. 18A:38-3).

   3. All transportation from Allenhurst to Deal is less than remote as defined by N.J.S.A. 6:21-1.3. However, Allenhurst provides less than remote transportation to its pupils attending the Asbury Park School District; this practice would obligate the district to provide similar less than remote transportation to eligible students attending a non-public school (John Shields et al v. the Boards of Education of the Borough of West Paterson, and Passaic County Regional High School District No. 1; Commissioner of Education Decision, August 28, 1980).

   4. N.J.S.A. 18A:39-1 in pertinent part states: "When any school district provides any transporation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing ing insuch school district in going to and from any remote school other than a public school. (emphasis supplied). . ."

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It is my opinion that the Allenhurst Board of Education can only expend transportation funds for the transportation of its public school students to the officially designated receiving district which is Asbury Park. Further, Allenhurst's non-public students must be provided transportation pursuant to N.J.S.A. 18A:39-1 and Shields, supra. The tuition students attending Deal cannot benefit from the provisions of N.J.S.A. 18A:39-1 or Shields because they are attending a public school. The parents have made the decision to send their children to other than the designated public school and it is my opinion that the attendant ramification of that decision is that they are now responsible for the transportation of their students to the Deal Elementary School at their own expense.

DISCUSSION

In Lichtenberger v. Bd. of Ed., Borough of Maywood, 1976 S.L.D. 163, aff State Bd., 1970 S.L.D. 458, it appeared petitioner elected to anticipate by a school ye the termination of a sending-receiving relationship in her district by voluntarily ar unilaterally sending her daughter to a different public high school. Her given reason w her daughter wished to study German, a course not offered in the receiving district's hig school. She sought reimbursement for cost of tuition and transportation to the high scho she chose for her daughter. The Commissioner found that the action of the reside district in denying petitioner's request for special assignment at public expense was proper exercise of its discretionary authority, that cost of tuition and transportation f the school year were incurred by petitioner at her own peril and that she was no therefore, entitled to reimbursement.

In Potter v. Bd. of Ed., Township of Holmdel, 1971 S.L.D. 384, aff'd State Bd 1972 S.L.D. 689, it appeared petitioner and two sons lived in Holmdel Township, the so attending public schools in the adjoining community of Middletown. Complete tuitio costs for education of both were borne by Holmdel Township, even though Holmdel had it own elementary school during the period when the eldest son was enrolled in Middletow Elementary School. That circumstance of school attendance in Middletown wa

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occasioned by the fact that petitioner's home was remote from the school in Holmdel and arrangements for transportation were thought not to be practicable at the time. Petitioner's youngest son also was enrolled in and attended elementary school in Middletown. During the first five years of that son's attendance, his tuition was paid by the Holmdel Board. In 1962, the Holmdel Board informed petitioner that new transportation routes for the succeeding year would make transportation now available for his son and would make necessary, as well, that his son transfer from the Middletown public school to Holmdel Township public schools. Petitioner, after making arrangements personally to pay tuition costs for his son in Middletown public schools, declined to make the transfer. Some years later, he sought reimbursement of all tuition costs and transportation during the intervening years. The Commissioner held the claim untimely. The Commissioner said:

> Parents are free to make a choice and to assume tuition costs for the attendance of their children at private schools if the schools are willing and able to accept them. However, parents are barred from demanding reimbursement for the cost incurred under such circumstances.
>
> In a number of cases involving attendance of children in private schools, the Commissioner has made similar rulings [citations omitted]. While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice [citation omitted].
>
> In the instant matter, the choice involved is not one between a public and a private school, but between two public schools. However, the Commissioner holds the consequences are the same.
>
> In the year 1962, it is clear that the Holmdel Board gave petitioner fair notice. Petitioner's son was free to take it and to begin school attendance in a new system. Petitioner chose not to avail himself of this new service, but instead to continue his son's attendance in the Middletown school system at personal expense. The Commissioner holds that said parental choice of enrollment was determinative of the son's attendance unless and until petitioner chose, on own his volition, to change it. Since he did not, the Commissioner holds that petitioner is barred at this late date from the reimbursement for tuition funds which were disbursed by him by virtue of a decision voluntarily made to enroll his son in the Middletown school.

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Accordingly, the petition is dismissed. [Id. at 386-87].

In Clifford v. Bd. of Ed., North Warren Regional School District, 1972 S.L.D. 298, it appeared petitioner resided in the Township of Knowlton, Warren County, a constituent district of the North Warren Regional High School District. Because of residence, therefore, petitioner's son was entitled to attend the North Warren Regional High School. Petitioners elected, however, voluntarily to continue their son's enrollment in a vocational agricultural education course in Belvidere, Warren County, for the reason that the agricultural course was not offered by the North Warren Regional High School. They appealed to the Commissioner from the Regional Board's refusal to reimburse them for tuition and transportation resulting from continued enrollment of their son in Belvidere High School. The Commissioner held the Regional Board was obligated under N.J.S.A. 18A:38-1 to provide an education free to persons over 5 and under 20 years. Once it discharged its responsibility, however, it had no further educational responsibility to the students of the district. Parents and peoples were not free to select schools of their choice and demand payment of tuition from the Board. Having determined petitioners had elected voluntarily to have their son remain in Belvidere High School for the special course he wished to pursue, the Commissioner held, the claim for payment of tuition and transportation by the North Warren Regional Board was groundless. The petition was dismissed. Id. at 301-02.

Undeniably, as a general rule, parents have the right to send their child to a public elementary school in Deal, where they do not reside, on a tuition basis (N.J.S.A. 18A:38-3), just as the Board of Education of Deal has the right to receive such students, on a tuition basis. But see, on other facts, Bd. Ed., City of Asbury Park v. Bd. Ed., Shore Reg. H.S. Distr., Boros. Deal, Interlaken, 1971 S.L.D. 221, 225-6; aff'd St. Bd. Ed. 1971 S.L.D. 228.

Just as undeniably, it would seem, the Board of Education of Allenhurst in its discretion may provide non-remote transportation for pupils under N.J.S.A. 18A:39-1.1, subject only to the qualification that such pupil transportation costs may not be included in calculating the amount of State aid for transportation of pupils. When a board of education has undertaken definitionally non-remote busing, that is, transportation of pupils within 2.5 miles of the schoolhouse, and when such classification for non-remote

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busing has a reasonable basis, favoring no child or children classification more advantageously than all others so situated, the determination of the local board shall not be disturbed by the Commissioner as arbitrary, capricious or unreasonable. Cf. Walters v. Board of Education of the Township of Mendham, Morris County, 1977 S.L.D. 854, 857-8' and Beggans v. Board of Education of Town of West Orange, Essex County, 1974 S.L.D. 829, 832-3, aff'd State Board, 1975 S.L.D. 1071, aff'd App. Div. 1975 S.L.D. 1071 (unreported).

School districts uniformly must transport public school students living more than the administratively-defined remote distance from their assigned schools, it has been held, and if such transportation is thus required, then the district must also provide on equal protection grounds transportation for students living within the district who attend remote private schools. West Morris Regional Bd. of Ed. v. Sills, 58 N.J. 465, 475 (1971), cert. den. 404 U.S. 986, 92 S. Ct. 450, 30 L. Ed. 2d. 370 (1971). As between those two classifications, moreover, it has been held, districts that undertake to provide students with transportation to less than remote public schools must even-handedly provide non-public school students within the district with similar transportation. Shields v. Bd. of Ed., Borough of West Paterson, et al, 1980, S.L.D. — (Comm'r's Dec. Aug. 28, 1980, slip op. at 9-11). The keynote is absence of invidiously disparate treatment between or within classifications of students similarly situated. In other respects, certainly, local boards have broad authority to determine which less than remote students should be bussed because of hazardous road conditions or other good reasons. In Shields, the Commissioner said:

> Prior administrative decisions consistently hold that school boards have broad authority to determine which less than remote students should be bussed because of hazardous road conditions or other good reasons. Beggans v. Bd. of Ed., West Orange, 1974 S.L.D. 829, aff'd State Bd., 1975 S.L.D. 1071, aff'd N.J. Sup. Ct., App. Div. 1975 S.L.D. 1071; Pepe v. Bd. of Ed., Livingston, 1969 S.L.D. 47, 49. It is well established that the Commissioner of Education will not substitute his own judgment for that of a local board in matters within the exercise of its discretionary authority, or intervene unless there is a clear showing of abuse of such discretion. Pepe, supra at 50. A

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> board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in various sections of the district. Schrenk v. Bd. of Ed., Ridgewood, 1961 S.L.D. 185, 188. Similarly, the Commissioner will not disturb the good faith decision by the local board to locate bus stops at certain places rather than others, Centofani v. Bd. of Ed., Wall Twp., 1975 S.L.D. 513 and Baldanza v. Bd. of Ed., Tinton Falls, 1976 S.L.D. 362, or to select one bus route as distinguished from an alternative route, Walters v. Bd. of Ed., Mendham, 1977 S.L.D. 854, regardless of the Commissioner's personal view regarding the wisdom of the board's particular action. [Shields, supra, at 9].

A board's policy must be clearly nondiscriminatory and not arbitrary, unreasoned, or, therefore, unreasonable. Such classifications will be struck down. In Donlan v. Bd. of Ed., Borough of Merchantville,, 1979 S.L.D. 140, it appeared that in implementation of policy, the Board provided transportation to all its pupils who attended ninth grade at Pennsauken Junior High School even though none of them resided remote from the schoolhouse; the Board provided transportation to private school pupils enrolled in the ninth grade only if they lived remote from the schoolhouse; the Board provided transportation to all pupils attending tenth, eleventh, and twelfth grades at Pennsauken Senior High School since all pupils lived remote from the schoolhouse; and the Board provided transportation to all private school pupils enrolled in tenth, eleventh, and twelveth grades who lived remote their respective schoolhouses. Simply stated, the policy provided thus:

1. All public school students attending Pennsauken Junior High School will be transported.

2. All tenth, eleventh and twelfth grade students attending Pennsauken Senior High School will be transported.

3. The Board shall have the option to provide transportation of private school students or reimburse the parents only if the students lived remote.

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The Commissioner held the classifications were arbitrary, designed by the Board to exclude private school students from receiving equal or similar benefits given public school students. The policy was struck down.

Here, the Allenhurst Board exercised its discretionary authority to provide non-remote transportation to resident students attending both the regularly designated elementary school in the receiving district in Asbury Park as well as to those students, like petitioners' child, attending an elementary school in Deal, public in nature, on a tuition basis. Presumably, there would be no question of similar entitlement of any private school student resident in Allenhurst living less than remote from his private school outside the district, if one were to exist. For the sake of analysis then, one may envision three student classifications: public school in receiving district, private school, and tuition-based public school. When the Allenhurst Board determined, in response to an opinion of the Monmouth County superintendent of schools on September 28, 1983, to terminate non-remote transportation to Deal, while continuing such non-remote transportation to the elementary school in the receiving district, there was, unquestionably, creation of the third classification. The question arises, therefore, whether discontinuance of non-remote transportation to Deal Elementary School was invidiously disparate, and therefore unlawful, treatment of the classification.

The petition of appeal in this matter alleged, merely, transportation for petitioners' child to Deal Elementary School was necessary for the "child's own safety." Under stipulated facts here in evidence there is suggested no reason for petitioners' selection of another public school to the exclusion of the designated elementary school in the receiving district. It has been said that it is elementary the equal protection clause of the Constitution does not require statewide uniformity in all instances or within or among all classifications. West Morris Regional Bd. of Ed. v. Sills, supra, 58 N.J. at 477-78. And indeed, it would seem, classification in such matters by local districts that result in apparent disparate treatment have nevertheless been adjudged reasonable and, therefore, non-discriminatory despite appearance of suspect classifications. In Kenney v. Byrne, 144 N.J. Sup. 243 (App. Div. 1976), the court said:

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> It is axiomatic that a classification in a statute or executive order does not offend the Equal Protection Clause if it conceivably has some reasonable basis to justify the same. Mere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination. See Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1910). And a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination. Morey v. Doud, 354 U.S. 457, 463, 77 S. Ct. 1344, 1348, 1 L. Ed. 2d 1485, 1490 (1957).
>
> A classification is presumed to be constitutional and the one who attacks it has the burden of showing that it is arbitrary and without a reasonable basis to support it. David v. Vesta Co., 45 N.J. 301, 315 (1965). Plaintiffs have utterly failed to sustain this burden [id. at 257].

CONCLUSION

From the above, I **CONCLUDE** that petitioners' proofs in this matter have failed to establish the classification was arbitrary or without any rational basis. Voluntary and unilateral declination to accept the public school education provided by the Allenhurst district may well be petitioners' right under statute, equally as if they had chosen to send their child to a non-public school. But the election, nevertheless, does not necessarily and sufficiently entitle them to non-remote pupil transportation to another public school at the expense of taxpayers of their resident municipality. In justification, the Board here argued continued provision of non-remote transportation to the Deal public school would have potentially erosive effect on the established sending - receiving relationship with Asbury Park, an effect, that is, not lightly if at all to be tolerated. In some instances, it has been determined, such erosion may well be abusive of other well established constitutional protections. Cf. Bd. Ed. Asbury Park v. Bd. Ed. Shore Regional, supra, 1971 S.L.D. at 226-7, 229-30. There has been established no reasonable

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or compelling reason for the voluntary act of petitioners and one cannot say, from this evidential record, they have shown the Allenhurst Board has failed to fulfill its constitutional or statutory duty to furnish free public education, or to make available, generally, non-discriminatory, non-remote pupil transportation in the district. In short, even to the extent that a differently treated classification has been created here, one cannot say from the evidential record there is invidiously discriminatory, and therefore unlawful, treatment of the classification. See Trap Rock Industries, Inc. v. Kohl, 63 N.J. 1,5 (1973) (". . .an equal protection issue is not generated merely by an assertion that someone else was treated differently. . .").

From all of the foregoing, therefore, I **CONCLUDE** the petition for relief in this matter should be, and it is hereby, **DISMISSED.**

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

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OAL DKT. NO. EDU 9171-83

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

May 4, 1984
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAY 7, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 9 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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DIANE GARFOLE AND CARMEN GARFOLE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly, the Petition of Appeal is hereby dismissed.

JUNE 20, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1311-83
AGENCY DKT. NO. 489-12/82A

JAMES V. WALLACE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

APPEARANCES:
Phillip Feintuch, Esq., for petitioner

William A. Massa, Esq., Legal Department, for respondent

Record Closed: March 22, 1984 Decided: May 7, 1984

BEFORE **ROBERT T. PICKETT**, ALJ:

PROCEDURAL HISTORY

This is an appeal by the petitioner, James V. Wallace, contesting the reduction in his salary upon his reemployment by the respondent in September 1982 in violation of N.J.S.A. 19A:6-10. The respondent, on the other hand, contends that the petitioner's reemployment was a "new employment" and required that he be placed on the first step of

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the salary guide offered for teaching staff memebers in its school district and that placement does not constitute a reduction in salary, contrary to the provision contained in N.J.S.A. 18A:6-10. The petitioner subsequently filed a petition with the Commissioner of Education on December 14, 1982. Thereafter, on February 25, 1983, the Commissioner of Education transferred the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on March 30, 1983. A hearing was held on March 22, 1984 and the record closed on that date. For the reasons which follow, the petitioner's salary must be restored to the level he would have received upon his reemployment with the respondent in September 1982.

FINDINGS OF FACT

All of the material facts are undisputed. From the stipulation of the parties, exhibits and uncontradicted testimony at the hearing, this court hereby **FINDS:**

The petitioner commenced his employment with the respondent school district in September 1969 as a classroom teacher. He held an appropriate certificate as teacher. In September 1971, the petitioner acquired tenure as a teacher in the district. In January 1971, he was appointed by the respondent as a guidance counsellor and received compensation commensurate with that position. He remained in that position until June 1978. For the academic year 1978-79, he applied for a leave of absence from his duties as a guidance counsellor for personal reasons. The respondent granted the leave request. Thereafter, the petitioner was granted an additional personal leave of absence by the respondent through November 1980. On or about November 1, 1980, the petitioner submitted his resignation to the respondent. Shortly, thereafter, he realized that he had made a mistake in resigning and requested that the respondent rescind his resignation and grant him another leave of absence. On or about June 17, 1981, the respondent rescinded the petitioner's resignation and granted him another leave of absence for personal reasons for the academic year of 1981-82. The respondent, in an official resolution rescinding its

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acceptance of petitioner's resignation, further indicated that the petitioner would be placed last on the seniority list for guidance counsellors as of June 17, 1981. The petitioner returned to the employ of the respondent in September 1982 with the expectation that he would be placed on the salary step commensurate with his years of experience in the district. The respondent, through its agents and employees, considered the petitioner to be a new employee and, therefore, placed him on the first step of the salary guide offered for teaching-staff members. It was the intention of the respondent to permit the petitioner to remain on his leave of absence for the academic year 1981-82 and when he returned at the end of the academic year he would be placed at the appropriate salary step based on his years of experience in the district. The petitioner was not to suffer any loss or deduction in salary. It was not the respondent's intention to treat the petitioner as a "new employee." The First Assistant Superintendent in charge of Personnel, James J. Jencarelli, considered petitioner's placement on the first step of the teacher's salary guide to be inappropriate for his years of experience to the district. Jencarelli did not consider petitioner to be a "new employee." The petitioner is presently on step 2 of the teachers salary guide (Exhibit P-2).

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, this court **CONCLUDES** that the petitioner's salary was reduced inproperly upon his return, after numerous approved leaves of absences, to the employ of the respondent. The petitioner should have been placed on the appropriate salary guide based on his prior years of service to the respondent, and not on the first step as a "new employee."

It appears that the clear intention of the respondent Board of Education, in granting the petitioner the numerous leaves of absences and subsequently rescinding his resignation offered in November 1980, was to permit the petitioner to return to its

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employ on the appropriate salary step/level he based on his years of service with the respondent. No other document or testimony was submitted to contradict that fact. In fact, the President of the respondent for the academic year 1980-81, testified that it was the respondent's intention to do exactly that. Indeed, the First Assistant Superintendent in charge of personnel indicated that the action by certain employees of the respondent was inappropriate in placing the petitioner at the first step of the salary guide since, in his view, the petitioner was not a "new employee" in the light of the respondent's granting several requests for leaves of absences.

The failure of the respondent, through its agents or employees, to place the petitioner on the appropriate step of the teacher salary guide constitutes, in this court's view, a reduction in salary contrary to N.J.S.A. 18A:6-10. It is undisputed that N.J.S.A. 18A:6-10 requires compliance with its procedure before a teaching staff member can suffer a reduction in salary. Those procedures were not followed in this matter. The respondent arbitrarily determined petitioner to be a "new employee" despite numerous leaves of absences granted.

ORDER

It is therefore **ORDERED** that the respondent, Board of Education of the City of Jersey City, place the petitioner on the appropriate step of the teacher salary guide based on his prior years of service; and

It is further **ORDERED** that the respondent, Board of Education of the City of Jersey City, pay to the petitioner any amount of loss of salary from September 1982 to date as a result of improper placement on the teacher salary guide upon his employment with respondent.

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OAL DKT. NO. EDU 1311-83

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

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

May 7, 1984
DATE

Robert T. Pickett
ROBERT T. PICKETT, ALJ

Receipt Acknowledged:

May 8, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 10 1984
DATE

Ronald J. Parker/ehb
FOR OFFICE OF ADMINISTRATIVE LAW

par /e

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APPENDIX

EXHIBITS MARKED IN EVIDENCE

P-1 Respondent's resolution rescinding petitioner's resignation and granting an extension of leave of absence, dated June 17, 1981

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JAMES V. WALLACE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly, petitioner shall be placed on the proper step of the teachers' salary guide based on training and years of service with appropriate remuneration for salary lost because of improper salary guide placement.

IT IS SO ORDERED.

JUNE 20, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0858-84
AGENCY DKT. NO. 455-12/83A

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN,

Petitioner

v.

MARILYN A. BAILEY and LOUIS ORLANDO,

Respondent

APPEARANCES:

Patrick Amoresano, Esq., for petitioner
(Jeffer, Hartman, Hopkinson, Vogel, Coomber & Peiffer, attorneys)

Verina S. Ameen, Esq., for respondent Bailey
(Siegmar Silber, attorney)

Record Closed: April 23, 1984 Decided: May 4, 1984

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

The Fair Lawn Board of Education petitioned the Commissioner of Education for declaratory judgment that:

(a) the established railroad crossing for pedestrians in the vicinity of Berdan Avenue and 20th Street . . . is a public walkway for purposes of determining remoteness in connection with pupil transportation in accordance with N.J.A.C. 6:21-1.3 and N.J.S.A. 18A:39-1; and

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(b) certain traversal routes through Dunkerhook Park are public railways and/or walkways for purposes of determining remoteness in connection with pupil transportation in accordance with N.J.A.C. 6:21-1.3 and N.J.S.A. 18A:39-1.

The matter concerning the railroad throughfare and respondent Orlando in (a) above was **WITHDRAWN** by the Board on representation that no geniune dispute exists concerning same.

Respondent Bailey avers that Dunkerhook Park may not be used to measure remoteness and seeks payment of transportation expenses for the years her children were denied transportation to the Paramus Catholic High School.

The matter was transmitted to the Office of Administrative Law on February 7, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on March 19, 1984 at which the following issue was framed:

Has the Board abused its discretionary authority or otherwise illegally used a Dunkerhook Park pathway for measuring remoteness pursuant to N.J.A.C. 6:21-3(b) for a determination of pupil transportation pursuant to N.J.S.A. 18A:39-1?

The parties agreed to submit the matter for summary decision and filed simultaneous briefs and responses. The record was closed on April 23, 1984 upon receipt of simultaneous responses.

N.J.A.C. 6:21-1.3(b) reads as follows:

> For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school.

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The Board argues "that Dunkerhook Park is real estate held by Bergen County 'for the purpose of public parks,' N.J.S.A. 40:37-96 through 174, 195 through 247, that it must be 'forever kept open and maintained as such,' N.J.S.A. 40:37-133, 238, and that public parks are areas exclusively devoted by definition to public recreation and amusement." It cites Hill v. Borough of Collingswood, 9 N.J. 369, 375-376 (1952). As such, the Board continues, it has "properly concluded that pupils have the prerogative of walking through Dunkerhook Park . . ., free from any legitimate accusation of trespass," and cites State v. Besson, 110 N.J. Super. 528 (L. Div. 1970).

Respondent argues for preclusion of the Board from using Dunkerhook Park pathways for purposes of measuring for remoteness. She argues that County snow removal customs make the Park walkway "accessible as soon as possible" after a storm, which presumably necessitates the use of an alternate route to school until the snow is removed.

The procedural history of this dispute as outlined in respondent's brief is incorporated herein by reference, as are all briefs, and need not be reproduced here. Opinions cited by respondent from County officials, as well as a determination by the Acting County Superintendent of Schools, support her contention that the Park may not be used to measure remoteness, are also incorporated herein by reference.

N.J.A.C. 6:21-1.3(b) is not a permissive regulation. It is mandatory, and directs that "measurement shall be made by the shortest route." It refers to "public roadways or walkways."

In order to determine whether the Board abused its discretionary authority, analysis of respondent's supporting arguments is necessary.

A determination by the Acting County Superintendent of Schools must be viewed as a respected opinion of a legal issue which the Board is indeed free to challenge. It did so in filing this Petition, and said opinion, therefore, is not binding on the Board.

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The letter of the Commissioner simply acknowledges inquiry from the respondent with an assumption that the matter was resolved locally. The substantive issue was not addressed.

Opinions from other County non-school officials must also be viewed as respected but they are not binding on the Board.

A long line of Commissioner's decisions has addressed the factors of safety and convenience in transportation disputes. Steadfastly reiterated is that public roadway and walkway maintenance are not responsibilities of local boards of education, and that the Commissioner will not set aside their determinations and substitute his own judgment in absence of a showing of arbitrariness, capriciousness or unreasonableness.

See Read, et al. v. Roxbury Twp. Bd. of Ed., 1938 S.L.D. 763; Schrenk v. Ridgewood Bd. of Ed., 1960-61 S.L.D. 185; Frank, et al. v. Englewood Cliffs Bd. of Ed. 1963 S.L.D. 229; Trossman v. Highland Park Bd. of Ed. 1969 S.L.D. 61, Locker, et al. v. Monroe Twp Bd. of Ed. 1969 S.L.D. 178; Horner v. Kingsway Regional Bd. of Ed. 1979 S.L.D. 487; West Morris Regional Bd. of Ed. v. Sills, et al., 58 N.J. 464 (1971); Fox v. West Milford Tp. Bd. of Ed., 93 N.J. Super. 544 (Law Div. 1967); Meyer v. Montville Tp. Bd. of Ed. 1971 S.L.D. 183.

See also Boult and Harris v. Passaic Bd. of Ed. 1939-49 S.L.D. 7 (1946), aff'd St. Bd. of Ed. 15, aff'd 135 N.J.L. 521 (E. & A. 1948; Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965).

In the instant matter, the only safety matter appears to be the necessity of using alternate routes when the park walkway is covered with snow. This factor cannot be considered critical when it is realized that roadways and adjacent sidewalks are often temporarily impassable during and immediately following snowstorms. From a purely safety standpoint, one may indeed argue the park walkway to be safer because of absence of vehicular traffic.

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The absence of a dedication of a park walkway as a public thoroughfare appears only to cloud the issue. Said dedication does not appear to require a special act other than the required statutory scheme which identifies property as a public park. It is undisputed that Dunkerhook Park is property held by the County of Bergen and is a public park.

Respondent distinguishes the "public" as used in public thoroughfare from the "public" as used in public park by control and dominion. She contends that the municipal corporate owner in the former and the governance by a Park Commisison in the latter is a distinction which school boards in Bergen County, other than Fair Lawn, recognize in uniformly avoiding parklands for measuring remoteness. I have no knowledge of the practices of other school boards, which are nevertheless irrelevant. The distinction argument has no merit because the Board of Education has no responsibility or control over the maintenance of either public roadways, public walkways, or public parks. It is noted that public roadway maintenance may be the responsibility of either municipal, county, state or federal government.

What has the Board done concerning the use of Dunkerhook Park for measuring remoteness which warrants a finding and conclusion that said use must be set aside?

It appears that the Board in this matter has followed the regulatory scheme as mandated - by measuring the shortest route along public roadways or walkways. The fact that public officials disagree with this practice does not require a finding that said practice is an abuse of discretion. The Legislature has vested that discretion in the local Board. If it intended to transfer same to others it would have expressly said so. The Board is answerable to its constituents for the wisdom of its actions, but only to the Commissioner for the legality of same.

I **FIND** and **DECLARE** that the Board may use Dunkerhook Park for measuring remoteness for school transportation purposes. I **CONCLUDE**, therefore, that Summary Decision is **GRANTED** to the Board and **DENIED** respondent.

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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.

4 May 1984
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

MAY 7, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 9 1984
DATE

Ronald L. Yorkowitz
FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARILYN A. BAILEY AND LOUISE ORLANDO, RESPONDENTS.	:	DECISION

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

The Commissioner observes that Respondent Bailey's exceptions to the initial decision and the Board's reply exceptions were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent's exceptions to the initial decision are as follows:

> "*** 1. The Administrative Law Judge errs when he equates a public park being held for public recreation and amusement with the NJAC 6:21-1.3(b) public roadways or walkways. [page 3, lines 1 through 8].
>
> 2. The Administrative Law Judge errs when he raises the issue of safety and comments that a park is safer 'because of absence of vehicular traffic' [page 4, lines 21 through 26].
>
> 3. The Administrative Law Judge errs when he indicates that thoroughfares in public parks are public thoroughfares [page 5, lines 6 through 15].***" (Respondent's Exceptions, at p.1)

Respondent argues that the "publicness" of Dunkerhook Park, the control of the access by the public, is within the domain of the Bergen County Park Commission. The Bergen County Park Commission has the power to restrict the use of the byways and pathways of Dunkerhook Park pursuant to N.J.S.A. 40:37-201.1, while also being in compliance with the provisions of N.J.S.A. 40:37-133, 238 which require that a public park be forever kept open and maintained as such as would be available in the appropriate season for the appropriate recreation. Therefore, respondent argues that, with the

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power to restrict the use of Dunkerhook Park vested in the Bergen County Park Commission, the byways and the pathways of the public park may not be construed to comply with the definition of public roadway set forth in N.J.A.C. 6:21-1.3(b).

Respondent further maintains that, with public parks close to urban areas, traffic safety may not necessarily be a consideration; however, freedom from tortuous conduct of molesters and sexual offenders is definitely a concern insofar as it relates to the safety of pupils who may be required to walk on the pathways of the park to and from public or private schools.

Finally, respondent argues that the Bergen County Park Commission maintains that the roadways, lanes and hiking trails in public parks are not public roadways, but rather they are within its control and dominion distinct and apart from municipal, county, state or federal control. In this regard respondent relies on the provisions of N.J.S.A. 40:37-135, 136.

The Board, in its reply to respondent's exceptions, relies on the prior decisions of the Commissioner and the applicable provisions of N.J.A.C. 6:21-1.3(b) in asserting that there is no material distinction between a public park and a public walkway, between park commission and municipal jurisdiction, or between safety in the streets and safety in the parks.

In this regard, the Board anchors its position in the specific findings rendered by the judge, ante, which state in pertinent part:

> "***It appears that the Board in this matter has followed the regulatory scheme as mandated -- by measuring the shortest route along public roadways or walkways. The fact that public officials disagree with this practice does not require a finding that said practice is an abuse of discretion. The Legislature has vested that discretion in the local Board. If it intended to transfer same to others it would have expressly said so. The Board is answerable to its constituents for the wisdom of its actions, but only to the Commissioner for the legality of same.***"

The Commissioner has reviewed the respective positions advanced by the parties herein.

In the Commissioner's judgment the remoteness criterion set forth in N.J.A.C. 6:21-1.3(b) has been addressed in Horner, supra, (aff'd by State Board, 1979 S.L.D. 493) and is deemed to be dispositive of the matter herein controverted. In Horner the Commissioner held in pertinent part as follows:

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> "***In the instant matter, the pivotal issue is the 'remoteness criteria.' The Commissioner observes that historically and since its inception, the practice of determining 'remote' from the schoolhouse for transportation purposes has been to measure by the shortest route along public roadways.***" (Emphasis supplied.) (at 491)

What has occurred in the instant matter is that an attempt has been made by the Board to construe the specific provisions of N.J.A.C. 6:21-1.3(b) in such a manner so as to allow the footpaths and trails which exist in Dunkerhook Park to be used as a basis for determining whether or not respondent's children resided "remote" from Paramus Catholic School by declaring such footpaths or trails walkways pursuant to N.J.A.C. 6:21-1.3(b). The record of this matter reveals that, because such method was used by the Board in determining the "remoteness" of respondent's children, they were declared to be ineligible to be provided with transportation to and from Paramus Catholic School.

The Commissioner cannot agree with the position advanced by the Board and affirmed by the ALJ that the footpaths and trails in Dunkerhook Park may be used in determining remoteness in connection with pupil transportation.

It is noted that there are no existing public roadways into Dunkerhook Park open to vehicular traffic. Consequently, the footpaths or trails in Dunkerhook park may not be considered to constitute walkways so as to comply with the intendment of the provisions of N.J.A.C. 6:21-1.3(b). The Commissioner therefore finds and determines that the Board's determination to use the footpaths or trails located in Dunkerhook Park to declare respondent's children non-remote from Paramus Catholic School violates the intent of the provisions of N.J.A.C. 6:21-1.3(b) and must therefore be set aside. The Commissioner so holds.

Accordingly, for the reasons set forth herein the recommended findings and conclusions in the initial decision are reversed and the Board is hereby directed to immediately comply with the provisions of N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3(b). This determination prohibits the Board from using the footpaths of Dunkerhook Park in determining remoteness for the purpose of pupil transportation.

Finally, in granting Summary Judgment in respondent's favor, the Commissioner determines such action to be prospective in application. The Commissioner denies any retroactive payment of transportation fees to respondent in the instant matter inasmuch as she was not the petitioning party herein nor was there any Cross-Petition of Appeal so filed in this matter requesting such relief.

IT IS SO ORDERED.

JUNE 21, 1984

COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,		
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
MARILYN A. BAILEY AND LOUISE ORLANDO,	:	
RESPONDENTS-CROSS-APPELLANTS.	:	

Decided by the Commissioner of Education, June 21, 1984

For the Petitioner-Appellant, Jeffer, Hartman, Hopkinson, Vogel, Coomber & Peiffer (Patrick Amoresano, Esq., of Counsel)

For the Respondents-Cross-Appellants, Siegmar Silber, Esq.

For the Amicus Curiae, Roman Catholic Archdiocese of Newark, William A. Cambria, Esq.

This appeal involves the issue of whether footpaths and trails through a park are "walkways" within the meaning of N.J.A.C. 6:21-1.3 and, therefore, whether they may be used for purposes of determining remoteness under N.J.S.A. 18A:39-1. The issue arose when the Board of Education of the Borough of Fair Lawn sought a declaratory judgment concerning the eligibility of students for transportation where the students, who attended nonpublic schools, would not be considered to reside remote from school if pathways through the park were used in measuring the distance.

In the Initial Decision, the Administrative Law Judge concluded that the pathways through the park could be used in measuring the shortest route along public roadways or walkways. The commissioner set aside the findings and determination in the Initial Decision. In doing so, he found that Horner v. Board of Education of the Kingsway Regional High School District, 1979 SLD 487, aff'd by the State Board 1979 SLD 493, was dispositive of the issue. Board of Education of the Borough of Fair Lawn v. Marilyn A. Bailey and Louise Orlando, decided by the Commissioner June 21, 1984, at 9. In Horner, the Commissioner observed that the practice of determining remoteness had been to measure by the "shortest route along public roadways". Horner, supra, at 491. In reaching his conclusion in the instant case, the Commissioner reasoned that because there were no existing public roadways into the park open to vehicular traffic, the footpaths did not constitute "walkways" within the intendment of N.J.A.C. 6:21-1.3(b).

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The State Board does not find Horner to be dispositive of the issue before us in this appeal. Horner involved the issue of whether the twenty mile maximum distance specified by N.J.S.A. 18A:39-1 may be measured by radial miles rather than road miles. Accordingly, the decision in that case did not address the question of what constitutes a walkway within the meaning of N.J.A.C. 6:21-1.3(b). However, the State Board agrees with the Commissioner that the pathways through the park do not constitute walkways within the meaning of the regulation.

In this case, permitting the footpaths and trails through the park to be used for purposes of determining remoteness would be tantamount to requiring the students to walk through the park when going to and from school. This would impose on them an increased risk of molestation and other threats to the safety of their persons. Such interpretation of the regulation would contradict the purpose of N.J.S.A. 18A:39-1, which is to promote the safety and welfare of children. Everson v. Board of Education of Ewing Township, 330 U.S. 1, affirming 133 N.J.L. 350 (E. & A. 1945). See also McCanna, et al. v. Sills, et al., 103 N.J. Super. 480, 487-88 (1968). Therefore, we conclude that the pathways through this park are not walkways within the meaning of N.J.A.C. 6:21-1.3(b) and may not be used for purposes of determining remoteness under N.J.S.A. 18A:39-1. However, because it is imperative that the regulations effectuate the purpose of the statute in a clear manner, we also direct that the Commissioner review the regulations pertaining to measurement of remoteness for school transportation purposes. Finally, the cross-appeal for retroactive payment of transportation fees is denied because Cross-Appellant was not the petitioning party in this case.

December 5, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 10723-82
AGENCY DKT. NO. 421-10/82A

STEVE MASONE,
Petitioner,
v.
RUTHERFORD BOARD OF EDUCATION
Respondent.

APPEARANCES:

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

Glenn T. Leonard, Esq., for respondent
(Checki and Politan, attorneys)

Record Closed: March 29, 1984 Decided: May 10, 1984

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

I
Procedural History

This matter comes before the court as a result of a petition filed on October 28, 1982, pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school law. The Board of Education (Board) filed a verified answer on November 17, 1982. The matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., on December 3, 1982.

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A prehearing conference was held on April 4, 1983. Marvin Stern, Esq., represented Rutherford Board of Education on that date. Both counsel agreed that the legal issues to be determined were as follows:

A. Whether the Board's actions and reasons for withholding petitioner's employment and adjustment increments for the 1982-83 school year were arbitrary, capricious, unreasonable and/or retaliatory?

B. If the Board's reasons fall in any of the above categories, what is the remedy to which petitioner is entitled?

C. In defense, the Board asserts it acted in a reasonably prudent matter.

Unfortunately, Marvin Stern, Esq., passed away suddenly on April 18, 1983. As a result, the Board of Education was given ample time to obtain new counsel. In June 1983, Glenn T. Leonard, Esq. was named to represent the Board.

An amendment to the verified petition was permitted on June 30, 1983, and hearing dates were scheduled for October 1983. The October hearing dates were adjourned because of discovery problems which resulted from the substitution of Mr. Leonard for Mr. Stern and because of the unavailability of the Superintendent of Schools on the October dates.

The hearing was held on January 26, 1984. On January 26, 1984, Count III of the verified petition was withdrawn by petitioner after the Board conceded that Mr. Masone was correct in alleging that no resolution had been passed by the Board in regard to withholding the 1983-84 employment and adjustments increments. Counsel could not agree on the form of the Order in regard to Count III, in regard to the amount of money to which Mr. Masone was entitled for the 1983-84 school year. On February 23, 1984, I issued an Order in regard to Count III, directing that Mr. Masone receive a salary of $31,451 for 1983-84, and retaining jurisdiction over that amount of the 1983-84 salary which remained in dispute. That Order is attached to this decision and incorporated as if

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set forth at length. Briefs in regard to the issues of the 1982-83 increment and the amount of money still in dispute for 1983-84 were timely submitted. The record closed on March 29, 1984.

II
Testimony

Steve Masone testified in his own behalf. He has been teaching science for the Rutherford Board of Education since 1958. In the 1981-82 school year, he was assigned to the Pierrepont School. On March 1, 1982, he received notice that he would be receiving his increment and would receive $30,476 for the 1982-83 school year. Later that month, Mr. Masone filed an ethics complaint against four other 8th grade teachers with the NJEA Ethics Committee.

After this complaint was filed, Ms. Amorelli, Principal of the Pierrepont School, asked Superintendent of Schools Luke Sarsfield to remove Mr. Masone from the School. Yet, prior to 1981-82 Ms. Amorelli had given Mr. Masone outstanding evaluations. During the 1982 conference, he said she lost her temper and did not give him a good evaluation. Mr. Masone testified that Ms. Amorelli reviewed his plan book once a month and that she was concerned from September 30, 1981 on that his plans were inadequate and scanty, as they did not spell out details. Masone stated that his plan book for 1981-82 was no different from prior years. Furthermore, having taught the sciences for 20 to 25 years, he does not need specifics set forth in a plan book. The book is merely a guide to remind him what he has to teach. He said that other materials are available in the classroom to show the students and substitute teachers what had to be done, including a bulletin board listing reading assignments and current work.

Ms. Amorelli complained about Masone's lack of substitute plans. According to Masone, he has never had a substitute who was able to come in and teach and therefore the plan book is not for substitutes. If his absence is anticipated, students are given work ahead of time. If his absence is unanticipated, he has a standing plan that students are to

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read a science article and give a one-page precis . Substitutes leave a report on the plans that are available and work accomplished and, according to Mr. Masone, there was only one instance in the 1981-82 school year where a substitute teacher complained about lesson plans. According to Mr. Masone, the substitute folder did not change from the period when Ms. Amorelli approved it to 1981-82, when she disapproved it. He conceded that the plan book did not specifically show what his class was doing on a particular day, but that a substitute teacher could learn what the class was doing if he or she reviewed the bulletin board and the charts. In 1982-83, Mr. Masone submitted an outline and plan book to Ms. Amorelli, which was deemed acceptable in conjunction with the chart and bulletin board.

Mr. Masone asserted that the recommendation that his increment be withheld was not the result of poor or scanty plans, but the result of Ms. Amorelli's playing favorites with the four teachers against whom he had filed ethics complaints. These ethics complaints were dismissed by the NJEA without a hearing as lacking in substantial merit.

Mr. Masone conceded that on October 30, 1981, there were still no emergency plans on file when he received a second written notification in regard to plans. He said he was not familiar with school policy in regard to emergency plans. On January 11, 1982, Ms. Amorelli complained about Masone's lack of plans, and he conceded that his lesson plan would be inadequate for a teacher who was not in the science field. In February 1982 he again received a reminder about the poor plans. In March 1982 his professional improvement plan noted that he needed adequate lesson plans. It was at that time that there was a recommendation to withhold his increment. In May 1982, Mr. Masone told Ms. Amorelli that he was not able to alter the planning process because he did not have a faculty manual. He did know of her general instructions, but not exactly what she wanted.

Mr. Masone insisted that the plans he wrote served him well and that he did not intend to be defiant. He just felt that he has a flexible approach, and it is not necessary to give specifics to a substitute. He insisted that he tried, whenever he could, to file substitute plans if his absence was anticipated. He could not recall that he was reminded of inadequate plans at the beginning of the 1982-83 school year, although a review of the

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1982-83 lesson plan book shows that he was so informed on October 18, 1982, November 8, 1982, November 15, 1982 and December 16, 1982. It should be noted that his evaluations have improved in 1983. I note that Mr. Masone was very uncomfortable when answering the questions about the submission of emergency or substitute plans and about the continued reminders from Ms. Amorelli concerning scanty lesson plans.

Ms. Amorelli has been principal of the Pierrepont School for 13 years. She testified that the lesson plan is the responsibility of the classroom teacher, is required by the Board, and serves as a study guide and as preplanning for classroom work. Its function is to track the lessons for the teacher and to permit a subject-oriented substitute teacher to continue the learning process. It also gives the principal an opportunity to review what is happening in the classroom. The substitute folder must contain three lessons in the subject area, in case the plan book is not available or not followable. She said that the lesson plan format was discussed at the opening faculty meeting when page nine of the faculty manual was interpreted. She stated that the lesson plan book is self-explanatory, and that teachers are not restricted to the block approach, but can use a unit or outline approach in the alternative.

Ms. Amorelli testified that she specifically showed Mr. Masone how to write a plan in order to meet the minimal requirements. Mr. Masone's September 1981 plan had deficiencies in that no class schedule was in the book and no student list was in the book. The book was blank except for very brief comments. He did not explain how he was planning to teach the subject, which was unfortunate because the plan book should be clear enough for all substitute teachers to understand.

Mr. Masone was sick four or five times before he filed any emergency or substitute plans and on more than one occasion she asked him for such plans. The lack of these emergency/substitute plans led to a need to supplement and improvise, and had a deleterious effect on the students. They were deprived of their science lesson until one was put together for them by the principal and the substitute. No substitute/emergency plans were on file until January 29, 1982.

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On January 11, 1982, Ms. Amorelli told Masone not to insult her intelligence by continuing to hand in scant and inadequate plans without methodology, without directions in regard to the beginning and end of the lesson, without evaluative measures, without homework assignments and without any indication where class had stopped on the previous day. She noted again there were no plans in his book for March 16, 17 and 19, 1982. Ms. Amorelli saw no improvement during the 1981-82 school year even though she offered at least six times to help Mr. Masone with plans. On March 29, 1982, his annual performance report and professional improvement plan reflected the fact that he had no adequate plans. She recommended withholding his increment based on his failure to meet the Board's policy to submit plans after repeated verbal and written requests. Ms. Amorelli insisted that the recommendation to withhold his increment had nothing to do with the complaints of the four teachers against Mr. Masone and had nothing to do with Mr. Masone's ethics complaint with the NJEA. She noted that before Mr. Masone submitted said complaint to the NJEA she had spoken to Mr. Sarsfield about him. Superintendent Sarsfield reminded her on March 24 about the conversation on withholding Masone's increment. The four teachers received letters from Mr. Masone in regard to the ethics complaint on March 26. She learned about the complaint on the night of March 26, 1982.

Ms. Amorelli said that Mr. Masone was out 10 and one-half days between October 1981 and March 1982 without leaving adequate substitute lesson plans. She conceded that she lost her temper in a discussion with six 8th grade teachers in November 1981 in regard to a problem with 8th grade children walking directly to the high school for an assembly. That incident was not at all involved with her recommendation to withhold Mr. Masone's increment.

Ms. Amorelli testified that Mr. Masone's 1982-83 plan book (R-5) showed that problems continued with inadequacy of lesson plans until March 1983, when he submitted an outline, agreed to insert safety and time requirements, a seating chart and fire drill plan in his book. She did recall that in October 1982, he had a chart on his bulletin board concerning chapter and method. She does not remember seeing it in use in 1981. It was through a combination of the lesson plan outline and the bulletin board that Mr. Masone began to comply with her directions about Board policy. Ms. Amorelli conceded that the

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observations January 6 and February 8, 1982 indicated Mr. Masone's performance rating ranged from satisfactory to outstanding. Yet, on March 29, 1982, she indicated in his overall report that he need improvement in all areas. In 1983, Mr. Masone had a good annual report.

I note that Mr. Masone insisted that his chart was on the wall during 1981-82, in the same place it was during the 1982-83 and 1983-84 school years. He also insisted he had the chapter number on the side board, and put daily changes in regard to homework on the blackboard.

Dr. Sarsfield corroborated Ms. Amorelli's testimony that he wrote to her on March 24, 1982, about recommendations concerning the withholding Mr. Masone's increment. He did so as a result of discussions with Ms. Amorelli concerning the lack of, and scant, lesson plans. He had no knowledge of any charges filed by Mr. Masone with the NJEA and therefore said charges could have had no bearing on his recommendation to the Board that it withhold Mr. Masone's increment.

III
Evidence

The following items were marked into evidence during the course of the hearing:

C-1	Stipulation of facts and attached evidence
P-1	Letter from Mr. Masone to four 8th grade teachers - March 17, 1982
P-2	Memo of Ms. Amorelli to Superintendent of Schools Sarsfield - March 26, 1982
P-3	Memo from Mr. Masone to Superintendent Sarsfield in response to P-2
P-4	Memo from Mr. Masone to Ms. Amorelli - March 30, 1982
P-5	Memo of Dr. Sarsfield to Mr. Masone - April 2, 1982
P-6	Folder containing Mr. Masone's substitute lesson plans and evaluations by substitute teachers
P-7	"Happy gram" from Ms. Amorelli to Mr. Masone - January 29, 1982
P-8	Plan book of Ms. Fury - 1974-75 (for identification only)

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P-9	Chapter-by-chapter outline of items covered by Mr. Masone in his course
P-10	Letter detailing reasons to withhold the increment
R-1	Memo from Ms. Amorelli to Mr. Masone - October 30, 1981
R-2	Memo from Ms. Amorelli to Mr. Masone - February 12, 1982
R-3	Letter from Ms. Amorelli to Mr. Masone - March 22, 1982 and Mr. Masone's reply - March 22, 1982
R-4	Memo from Mr. Masone to Ms. Amorelli - March 30, 1982
R-5	Mr. Masone's lesson plan book - 1982-83
R-6	Page from policy book of Rutherford Board of Education
R-7	Memo to Ms. Amorelli from Dr. Sarsfield - March 24, 1982

IV
Arguments of Counsel

In regard to the issue of whether the 1981-82 increment should have been withheld, petitioner claims that the withholding of the increment did not have a rational basis and was arbitrary, capricious and unreasonable because it was really in retaliation for Mr. Masone's filing of an ethics complaint against four fellow teachers. Counsel also urges that Ms. Amorelli deliberately gave Mr. Masone a poor annual evaluation and professional improvement plan. Mr. Masone asks for restoration of the increments, and back pay and interest. In the alternative, Mr. Masone argues that the existing policy relative to the preparation and maintenance of lesson plans is "void for vagueness," as there are no specific standards set forth as to what a teacher must do in order to prepare valid lesson plans.

The Board argues that the testimony provides a complete and factual basis to support an affirmation of the withholding of the increment, citing the testimony of Ms. Amorelli and the various complaints to Mr. Masone and notations in his book regarding inadequacy of plans from September 1981 through March 1982. Therefore, the withholding of the increment was reasonable pursuant to the test of Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960).

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In regard to the 1983-84 increment, both attorneys agreed that Mr. Masone should be paid $31,451 for the 1983-84 school year. The issue still in dispute is whether he should be paid at the maximum step, MA + 30 and the applicable longevity increment. The amount in dispute is $1,639, the difference between $31,451 and the maximum salary, plus $500 longevity pay. The Board argues that its permanent withholding of the 1981-82 employment and adjustment increments must follow Mr. Masone throughout his career. In order for the permanent withholding of increments to have any meaning whatsoever, he has to remain one step behind on the salary guide. The Board argues that it has already given Mr. Masone $500 in longevity pay for 1983-84, as he is receiving $30,951, the salary for Step 17, MA + 30, Level 5, plus $500.

Petitioner argues that an increment withholding for a teacher who was at maximum pay can only deprive the individual of the adjustment on the maximum step for a given year and cannot be a permanent withholding. If no increment is withheld the next year, that teacher should be paid the maximum step of the applicable guide for that year. Accordingly, Mr. Masone should receive $32,590 plus $500; $33,090. Counsel argues that in the absence of successive withholding actions, Mr. Masone must be restored to maximum on the succeeding guide other than for the year for which his increment was withheld.

Respondent counters by arguing that there is no reason why a teaching staff member at maximum should be treated any differently than the teaching staff member who is not at maximum and whose increment has been withheld. The effect of the permanent withholding of employment and adjustment increments must be the same; to keep that employee one step behind unless and until a future Board determines to restore any withheld increments.

V

Findings of Fact

After having reviewed and considered the testimony and evidence, and having considered the demeanor and credibility of the witnesses, and having reviewed the cogent

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post-hearing briefs filed by counsel and after having considered their arguments and reviewing the applicable law, I make the following findings of fact:

1. I adopt the following stipulation of facts, agreed to by counsel and marked C-1 in evidence:

   A. Petitioner, Steve Masone, is a tenured teaching staff member employed by the respondent, Rutherford Board of Education.

   B. Respondent is the designated authority charged with the responsibility of administering the public schools of the Borough of Rutherford.

   C. On June 26, 1982, respondent resolved permanently to withhold petitioner's employment and/or adjustment increment for the 1982-83 school year.

   D. As a result of respondent's action, petitioner's 1982-83 salary was maintained at the annual rate he received for the 1981-82 school year ($27,687.00).

   E. On July 29, 1982, respondent's Board Secretary/Business Administrator notified petitioner that the reason his increment had been withheld was a "failure to comply with reasonable request for lesson plans and for the inadequacy of said plans."

   F. The parties consent to the entry of the following documents into evidence:
      (1) Memorandum, dated March 1, 1982, from Dr. Luke A. Sarsfield to Steve Masone;
      (2) Memorandum, dated May 2, 1982, from Dr. Luke A. Sarsfield to Steve Masone;
      (3) Letter, dated July 29, 1982, from Leone B. Auger to Steve Masone, together with extracts of two resolutions adopted by respondent at a special meeting held on July 26, 1982;
      (4) Letter, dated June 15, 1983, from Leon B. Auger to Steve Masone;

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(5) Observation Report, dated January 6, 1982;
(6) Observation Report, dated February 8, 1982
(7) Annual Performance Report, dated March 29, 1982 with petitioner's response;
(8) Professional Improvement Plan, dated March 29, 1982;
(9) Observation Report, dated May 18, 1983
(10) Annual Performance Report, dated May 18, 1983;
(11) Excerpt of Faculty Manual re: Information for Plan Books;
(12) Plan Book - 1981-82 school year with response of petitioner to memo

2. Mr. Masone has taught in the Rutherford school district since 1958. He is teaching 8th and 9th grade physical sciences at the present time, but has taught all the sciences. In the 1981-82 school year, he was assigned to the Pierrepont school, where Ms. Anna Maria Amorelli was principal.

3. In a letter dated March 17, 1982, received by four 8th grade teachers on March 26, 1982, Mr. Masone notified said teachers that he was filing an ethics complaint against them with the NJEA Ethics Committee as a result of an incident that occurred in January 1982.

4. The preparation of a lesson plan is the responsibility of the classroom teacher. The lesson plan functions as a study guide for teachers as it contains preplanned class work. It also serves as a guide which allows a subject-oriented substitute teacher to continue the classroom work. It permits the principal an opportunity to review what is going on in the classroom. Lesson plans are required by Board policy. The faculty manual discusses the lesson plans on page nine, "Information for Plan Books." That requirement is discussed at the opening faculty meeting of the school year.

5. The classroom teacher is required to prepare emergency substitute lesson plans for a substitute folder. Three lessons in the subject area are to be on file just in case the plan book is not available or not followable.

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6. Beginning in September 1981, Mr. Masone's lesson plan book was deficient in the following areas:

   A. It did not contain a schedule.
   B. It did not contain a student list.
   C. The pages were blank except for very brief comments.
   D. It did not indicate how he was to teach the subject.

7. Mr. Masone failed to file emergency substitute lesson plans until January 29, 1982, for the 1981-82 school year. This lack of emergency substitute plans had a deleterious effect on students as it deprived them of a science lesson when Mr. Masone was absent unless and until one was put together by the administration.

8. Ms. Amorelli notified Mr. Masone of deficiencies in lesson plans on September 30, 1981, October 30, 1981, January 11, 1982, February 12 1982, March 22, 1982, during the week of March 29, 1982 and March 30, 1982. When Mr. Masone was absent from school, in several instances there were no lesson plans on file or in his plan book for use by substitute teachers. This happened despite the fact Mr. Masone was aware of his anticipated absences. The dates of the absences for which there were no emergency substitute plans were October 13, 1981, October 14, 1981, December 18, 1981, January 25, 1982, February 12, 1982, February 23, 1982, February 25, 1982 and March 16, 17 and 19, 1982.

9. Ms. Amorelli offered to assist Mr. Masone in preparing lesson plans. She showed him samples of lesson plans, but told him he was not required to adhere to any one particular method such as the block approach, but could use unit or outline approach. As far as Mr. Masone was concerned, his plans were sufficient in light of his many years of teaching in the district and his experience and expertise in the science areas.

10. The Board policy in regard to lesson plans is sufficiently specific to alert Mr. Masone of the requirements for his plan book. Any lack of specificity in the faculty

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manual or written Board policy was cured by Ms. Amorelli's specific directions, verbally and in writing, to Mr. Masone.

11. Mr. Masone did keep a bulletin board in his class telling the students where in the chapter they were supposed to read and listing current work. He put homework assignments on the blackboard.

12. Even considering the bulletin board and blackboard listings, as of January 11, 1982, Mr. Masone's lesson plan book was scanty and inadequate. It did not contain methodology or directions for beginning and ending the class and it lacked evaluative measures and homework assignments.

13. It was as a result of his failure to file emergency substitute plans and as a result of his scanty and inadequate lesson plan book that Mr. Masone's annual performance evaluation and professional improvement plan of March 29, 1982 stated "needs improvement in all areas."

14. Problems with Mr. Masone's plan book continued until March 1983 when he submitted an outline and when he entered safety and time requirements, a seating chart and fire drill procedures in his book. By the spring of 1983, a combination of lesson plan, outline and bulletin board indicated his compliance with Board policy.

15. The recommendation by Ms. Amorelli and Dr. Sarsfield to withhold Mr. Masone's increment was based solely on his failure to submit required plans despite repeated verbal and written requests. The recommendation had nothing to do with complaints he filed against four 8th grade teachers or with complaints of said teachers against Mr. Masone. Dr. Sarsfield had no knowledge of the complaints. Ms. Amorelli had spoken to Dr. Sarsfield about withholding Mr. Masone's increment before Masone filed the complaints.

16. The withholding of Mr. Masone's increment was not in retaliation for his filing complaints against fellow teachers. His problems concerning the lesson plans began

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in September 1981 and continued until March 1983. Mr. Masone did not follow the directives of Ms. Amorelli until after his increment was withheld.

VI

Conclusions of Law

It is abundantly clear that a board of education possesses broad powers to withhold increments of a teaching staff member, pursuant to N.J.S.A. 18A:29-14. That statute provides, in pertinent part:

> Any board of education may withhold, for inefficiency, or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.

The authority of the Commissioner of Education to examine a board's decision to withhold an increment is clearly articulated in the leading case of Kopera v. West Orange Board of Education, 60 N.J. Super. 288. The Kopera court directed the Commissioner as follows:

> . . . we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellate.

at 396. The Appellate Division also taught that:

> . . . [T]he scope of the Commissioner's review is, . . . not to substitute his judgment for that of those who made the evaluation, but to determine whether they have a reasonable basis for their conclusions.

Id. at 296.

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It is noted that upon remand, the Commissioner of Education added a further dimension to consider when he said:

> . . . To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of the teacher sufficient to justify dismissal under the Teachers' Tenure Act.

Kopera, 1960-61 S.L.D. at 62. See also, Trautwein v. Board of Education of the Borough of Bound Brook, 1978 S.L.D. 445, aff'd by State Board, 1979 S.L.D. 876 rev'd App. Div. 1980 S.L.D. 1539, (unreported) certif. den. 84 N.J. 469 (1980), which reaffirmed the Kopera test and pointed out the the Commissioner has a de novo obligation to make an independent decision on the facts. 1980 S.L.D. 1592.

Applying the rational and guidelines of Kopera to the facts here, it is clear that Mr. Masone has the burden of proof to show that the underlying facts were not as claimed by the Board and, therefore, it was unreasonable for the Board to withhold his increments. Petitioner contends that the underlying allegations of the Board, scanty and inadequate lesson plans, lack of emergency substitute plans and refusal to comply with directives of the principal to remedy his lesson plan book and file substitute lesson plans were not true. Rather, petitioner contends that but for the hostility engendered by the other 8th grade teachers, his years of experience and top evaluations prior and subsequent to the year in question show that it was unreasonable to withhold the increments. Petitioner asserts that the withholding was a retaliatory move as a result of the ethics complaint he filed against four 8th grade teachers, and the real reason for the withholding of the increments.

I conclude that Ms. Amorelli's testimony, when coupled with the evidence in the lesson plan book and in the memos from her to Mr. Masone concerning the inadequate and scanty lesson plans, clearly establish that the underlying facts are as detailed by Ms. Amorelli and as relied on by the Board. There is no competent evidence in the record to show that these reasons were fabricated by Ms. Amorelli in order to retaliate against petitioner because of the ethics complaint he filed against four 8th grade teachers. To the contrary, Dr. Sarsfield's testimony, which I accept as credible fact, shows that the withholding of the increment was discussed before Mr. Masone wrote P-1 to the four

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teachers. Ms. Amorelli was a credible and honest witness and I accept her testimony as to the numerous times she spoke to Mr. Masone concerning the problems of his lesson plans. I also rely on the documents submitted by the parties, especially the notations in the 1981-82 plan book (C-1 in evidence). I therefore conclude, in regard to the first criterion posited by Kopera, that the underlying facts were as claimed by Ms. Amorelli, Dr. Sarsfield and the Board and that there exists sufficient competent and credible evidence in the record to show that performance problems did exist in regard to Mr. Masone's lesson plan book and emergency substitute plans.

I further conclude, in regard to the second Kopera criterion, that it was not unreasonable for the principal and the superintendent, after reviewing those underlying facts, which I have found not to be made as the result of bias of prejudice and not to be made in retaliation, and which were stated by someone familiar with the problem, to recommend that the increments for the 1982-83 school year be withheld. Even if this judge, theoretically, might have concluded differently, from a review of the facts presented to the Board, I cannot, and will not, substitute my judgment for that of the Board, so long as the Board rests its decision on a reasonable basis and so long as it is not arbitrary and capricious. See, Kopera, 60 N.J. Super. 296. This is especially true in light of the fact that the withholding of increments is the mildest statutory disciplinary measure available to the Board for which it is unnecessary to marshall the quantum of proof necessary to justify a suspension or dismissal. See, Hillman v. Board of Education of West Caldwell School District, Essex County, 1977 S.L.D. 218. However, in this matter I found that the Board's conclusion is especially reasonable in light of the fact that there were deficiencies with the lesson plan book beginning in September 1981, which were memorialized in writing in the book itself and in memos from the principal of the school, and which were not cured until the spring of 1983.

I therefore conclude that Board of Education did not violate N.J.S.A. 18A:29-14 when it withheld petitioner's employment and adjustment increments for the 1982-83 school year and that it did not act in an arbitrary, capricious, unreasonable or retaliatory manner. Therefore Counts I and II of the petition will be dismissed with prejudice.

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The last issue to be decided concerns $1,639 which is in dispute as a result of Mr. Masone's placement on the salary guide for the 1983-84 school year. The question presented is as follows: when Mr. Masone's 1982-83 annual increments were withheld permanently by resolution of the Board in 1982, and he was then at the maximum step on the salary guide, and when, thereafter, the salary guide was changed to include higher steps than the maximum level which existed in 1982-83, is Mr. Masone entitled to be placed on the maximum level of the new salary guide; Step 18, or is he only entitled to go to Step 17 from Step 16, the old maximum level which he retained for 1981-82 and 1982-83. A review of the arguments of counsel and the case law leads me to conclude that the Board acted properly in advancing Mr. Masone from the Step 16 level, the old maximum level which he held for the 1981-82 school year, and where he was kept in 1982-83 as the result of the withholding of the increments, to Step 17 on the new salary guide for 1983-84. This is because N.J.S.A. 18A:29-14 specifically states:

> . . . It shall not be mandatory upon the board of education to pay any such denied increment to any future year as an adjustment increment.

The Board of Education voted to permanently withhold both the employment and adjustment increments of Mr. Masone in 1982-83 as a result of certain conduct in 1981-82, which I have found to be fact. Unless the Board specifically takes action to restore the denied increments for 1983-84 or for any other future year, Mr. Masone can only move to the next step on the existing salary guide for the year in question. Cf. Ferraiolo v. Kinnelon Borough Board of Education, 1 N.J.A.R. 427 (1980), adopted Commissioner of Education, May 30, 1980, where that teacher was awarded an adjustment increment resulting from a revised salary guide because the intention of the Board in voting to withhold his increment was not clear. That is not the situation in the case at bar. The Board made its intention perfectly clear in the resolution in evidence before me. Not only did the Board make its intention clear that Mr. Masone's increment and adjustments would be withheld, but specifically stated it would be a permanent withholding. To place Mr. Masone at Step 18 of the new revised salary guide would be to negate the effect of the resolution passed by the Board and to negate the effect of N.J.S.A. 18A:29-14. See also, Garibaldi v. Toms River Regional School District Board of Education, 1977 S.L.D. 192.

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The cases reviewed indicate that it is only when the Board of Education does not speak specifically to the term of the withholding of the increment, that it is to be assumed that it is for one year only and that it would be possible for the teacher to regain the former position on the salary scale after passage of the year the increment was withheld. See, School District of the Borough of Red Bank v. Portia Williams, 3 N.J.A.R. 237 (1981) aff'd with clarification, Commissioner of Education at 246 (August 27, 1981), aff'd (N.J. App. Div., December 15, 1982 A4036-81T3) (unreported). Cf. Vandercher v. Piscataway Board of Ed., 1980 S.L.D. 288, where the Commissioner held that the ramifications of imposition of permanent withholding could possibly be excessively severe when it might last for over 20 years unless the Board determined to restore a denied increment.

Barelli v. Rutherford Board of Education, 1983 S.L.D. ____ (decided December 8, 1983), where the Commissioner directed that Board to compensate that petitioner the difference between the increment held in 1982-83 and the amount that would have been withheld had the action been effective for the appropriate school year, 1981-82, is inapposite to the case at bar. There is no language in the Commissioner's decision stating that the petitioner would automatically be restored to the place he had held before the increment was withheld. The conclusion of the judge in Barelli was reversed by the Commissioner because the petitioner's actions for 1980-81 could not form the basis for the withholding of increments in 1982-83, two years later.

I do not accept respondent's alternative argument that the Board could have placed petitioner at a salary of $30,476 for the 1983-84 school year, which salary level does not exist on the 1983-84 guide. The permanent withholding of the increments is reflected in the fact that Mr. Masone moved up but one step from 1981-82, 1982-83 and is sufficient to carry out the spirit and letter of the statute and of the resolution passed by the Board.

Accordingly, based on the foregoing analysis of testimony, findings of fact and conclusions of law, it is hereby **ORDERED** that the petition be, and is hereby, **DISMISSED**; and

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It is further **ORDERED** that the Rutherford Board of Education has correctly placed petitioner, Steve Masone, on Step 17 of the 1983-84 teachers salary guide and has properly awarded him an additional $500 a year because he has given more than 20 years of service to the Rutherford public school system.

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

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

DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

MAY 14, 1984

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 16 1984

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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

The Commissioner has reviewed the record of this controverted matter including the initial decision rendered by the Office of Administrative Law, Sybil R. Moses, ALJ.

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

Petitioner contends that the judge erred in determining that the Board was correct in placing him on Step 17 of the 1983-84 salary guide, avowing that proper placement is on Step 18. Petitioner asserts that his appropriate salary level for 1983-84 should be $33,090 which represents $32,590 for Step 18, Level V (MA+30), together with an additional $500 longevity sum for more than 20 years of service in the Rutherford school system.

The school year 1983-84 represents petitioner's twenty-sixth (26th) year of teaching in Rutherford. The Board did not withhold petitioner's increments for 1983-84; consequently, he contends he should be paid at the maximum step of the salary guide, having been paid at maximum for at least the two years prior. He asserts that there is no "step" for which he must lag behind since he was at maximum for all years in question in this controverted matter.

Petitioner avows that there is a fatal flaw in the Board's logic and Judge Moses' decision that placement at Step 17 is correct because of their failure to recognize the effect of a withholding of an increment for an individual at maximum, as opposed to a lower step on the salary guide. He argues that the Board's resolution with respect to his placement on the salary guide (Exhibit C-1), which states a reliance on Gallitano v. Ridgefield Board of Education, decided May 23, 1983, in establishing said rate of compensation, is a misapplication of the Gallitano case. Gallitano involved a teaching staff member who had not achieved maximum on the salary guide, thus rendering the case inapposite to the matter herein.

Petitioner points out that the Rutherford Board seeks to pull him off the maximum step, where he has been for a number of

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years, and pay him on a lower step of the current salary guide. Regarding this point, he asserts that the judge failed to recognize that the addition of steps to the 1983-84 guide was a matter of form only, and not of substance. He cites the certification of the Rutherford Education Association president that establishes the change in the guide was not intended to deprive staff members of year-for-year recognition of service in the district. That is to say, if in 1982-83 a teacher had 20 years of service, he or she would have been paid on Step 16, plus a super-maximum payment and a longevity payment while for 1983-84 that same individual would have been placed at Step 18 (maximum) of the new guide and would have received a longevity payment.

Petitioner argues that the initial decision does not address the fact that the Board's resolution explicitly relied on the Gallitano decision and that the resolution is void if the underlying legal support cited is inapplicable to the issue herein.

Petitioner also argues that Judge Moses erred when she relied on the Board's decision to "permanently" withhold his increment, contending that the Commissioner has held that future boards may not be bound to permanently withhold increments. He cites in support of this Borrelli v. Bd. of Ed. of Rutherford, decided September 26, 1983 and Colavita v. Bd. of Ed. of Hillsborough, decided November 9, 1983, aff'd State Board May 2, 1984.

In addition to the above, petitioner avows that the judge erred in concluding that the Board's withholding action had a rational basis. He contends that the principal's recommendation for the withholding of his increment not only lacked said rational basis, but smacked of arbitrariness, unreasonableness and retaliation. He rejects the principal's claim that the recommendation was based solely on his failure to submit satisfactory lesson plans. He asserts that the only requirement imposed by the Board for lesson plans is for "daily plans" and that the form of said plans is discretionary. Petitioner cites Pinkham v. Bd. of Ed. of South River, 1974 S.L.D. 1103 and the principal's own testimony that flexibility is needed with respect to plans.

Petitioner asserts that there is no suggestion by the Board or principal that he did not cover the course curriculum, avowing that it is only the principal who claimed she could not tell by looking at the plans exactly what was being covered on a given day. He points to the fact that his plans were supplemented by a wall chart, which indicated where in a unit a given class was, and the chalkboard, which detailed homework assignments, as well as the schedule for quizzes and tests.

Petitioner contends that the principal elevated form over substance and further argues that his 1982-83 plans (Exhibit R-5) were not more detailed than 1981-82, except that the topical listing of subject matter was provided to the principal in an outline

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(Exhibit P-9) as opposed to within the planbook itself. In addition, petitioner reiterates his claim that the source document setting forth the Board's requirement for daily plans lacks direct standards and definitions, thus rendering the policy vague on its face value. Although acknowledging factual differences with Basile et al. v. Bd. of Ed. of Elmwood Park, decided July 21, 1980, petitioner claims the legal theory employed therein to void the withholding action is on point in the instant matter because, as in Basile, the criteria employed to determine his withholding were arbitrary and unreasonable.

The Commissioner has carefully reviewed the record with respect to petitioner's arguments that the Board's action was arbitrary, capricious and retaliatory. He finds no merit in petitioner's position that the action was retaliatory. The record clearly indicates that, prior to the ethics complaints, there was concern with petitioner's lesson plans and the possibility of withholding action was discussed by the principal and superintendent. Nor does the Commissioner find merit in the argument that Pinkham is apposite herein, lesson plans not being an issue therein. While he does support the position that flexibility is necessary to enable a teacher to transform a course of study into "living reality" as stated in Pinkham, he also supports the position stated in Applegate v. Bd. of Ed. of Freehold Regional High School, decided July 15, 1980, aff'd with modification State Board, February 4, 1981, that holds the following with respect to the importance of the submission of proper plans:

> "***A plan book represents the formulation of subject matter goals determined by the teacher to be reached by appropriate teacher activities dealing with the course content of a body of knowledge to be presented over a period of time to a group of pupils.***" (Slip Opinion, at p. 10)

The Commissioner goes on to state in Applegate:

> "***The Board surely has the right to know, indeed the need to know, in written form what is planned for the instruction of pupils in every class by the submission of proper plan books. The Commissioner has previously addressed the importance of proper plan books In the Matter of the Tenure Hearing of Leonard Spangler, School District of Middle Township, Cape May County, 1979 S.L.D. ____ (decided August 16, 1979) and Charles Martin v. Board of Education of the Borough of Keyport Monmouth County, 1977 S.L.D. 1244.***" (Emphasis supplied.) (Id., at p. 11)

The Commissioner cannot help but consider as inconsistent petitioner's position that the source document relative to the

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Board's requirement for daily plans is vague on the one hand, while on the other espousing that flexibility is required. The record clearly indicates the Rutherford Board is flexible with respect to lesson plans but certainly not so flexible that one is unable to ascertain what is being taught and how. Clearly, the principal's standard for acceptable plans was an ability to ascertain what was occurring instructionally in petitioner's classes, which is not an unreasonable criterion. It is the opinion of the Commissioner that the plan book for 1981-82 (Exhibit C-1) does not meet any such reasonable standard. Further, he does not believe that the principal should be required to depend on a wall chart or chalkboard to be knowledgeable of the instruction occurring. As such, the Commissioner finds no merit in petitioner's argument that Basile, supra, is dispositive in the instant matter relative to vagueness or lack of standards in the criteria for withholding an increment.

The Commissioner is in agreement with petitioner's position that he is entitled to be placed at Step 18 of the 1983-84 salary guide by virtue of the fact that, prior to the withholding of his increment in 1982-83, he had been at the maximum step of the guide for several years (Step 16) and that all staff members with 20+ years' service in the district at that time moved to the new maximum, Step 18 of the new guide, in 1983-84. He can find nothing in the record to dispute the Education Association President's Affidavit (Attachment to Exhibit C-1) that individuals at Step 17 of the new guide were in their seventeenth (17th) year of service in the district. To place petitioner at Step 17 would be inappropriate since he had met the requirements for placement at maximum step several years prior to 1983-84 and prior to his withholding.

The Commissioner is constrained to point out, however, that the judge's analysis was correct with respect to a board not being required to pay any denied increment in any future year as an adjustment increment pursuant to N.J.S.A. 18A:29-14. Indeed, it is possible for a teacher to lag behind a step on the salary guide once an increment is withheld if a future board of education does not make an affirmative determination to advance the individual to the step he or she would have been at had the increment not been withheld. However, in the instant matter, the Commissioner finds merit in petitioner's argument that, having been at maximum prior to the withholding action, there is no step for him to lag behind, in that Step 17 represents 17 years of service in the district and is not a newly-created incremental step for those with 20+ years of service.

The Commissioner is further constrained to add clarification with respect to "permanent" withholding of increments. Recent case law has clearly held that a board of education cannot act to permanently withhold a staff member's increment (Blake, supra; Borrelli, supra) because the action of one board of education cannot bind future boards. Nor can the action of a board serve to "permanently" keep an individual a step behind on a salary guide because it is the sole discretionary authority of future boards to grant or

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not grant an adjustment to restore a staff member to the step or salary level he or she would have been at had the increment not been withheld. Therefore, petitioner is correct in asserting that the judge erred in ascribing any "permanence" to the Board's action in 1982 when it withheld his increment.

With respect to the matter herein, the Commissioner modifies the determination in the initial decision that petitioner was appropriately placed at Step 17 of the 1983-84 guide for the reasons noted herein. He affirms the determination that the Board's action to withhold his increment in 1982-83 was not arbitrary, capricious or retaliatory.

Accordingly, the Rutherford Board of Education is ordered to immediately place petitioner on Step 18 of the salary guide and to compensate him any differential in salary and longevity payment that may have been lost since September 1, 1983 due to his inappropriate placement at Step 17 of the salary guide.

IT IS SO ORDERED.

JUNE 28, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7690-83
AGENCY DKT. NO. 308-8/83A

ANGELA CORDASCO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
Respondent.

APPEARANCES:

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

Melvin Randall, Esq., for respondent (Love & Randall, attorneys)

Record Closed: April 24, 1984 Decided: May 10, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, a school teacher for the East Orange Board of Education since 1968, challenges the Board's action in not placing her at the appropriate level of the salary guide for the 1983-84 school year. More specifically, petitioner asserts that when the Board withheld her increment during the 1982-83 school year, it did not advance her from the 14th step to the 15th step; the Board then during the 1983-84 school year placed her improperly at the 15th step rather than the 16th step on the salary guide.

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Respondent insists that it did not act arbitrarily, capriciously, unreasonably or in violation of law by not advancing petitioner from the 14th to the 16th step on the salary guide for the 1983-84 school year.

On August 26, 1983, petitioner filed an appeal with the Commissioner of Education. On September 30, 1983, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on November 17, 1983, the following issues were identified:

a) Did the Board act arbitrarily, capriciously or unreasonably and/or in violation of N.J.S.A. 18A:29-14 in not advancing petitioner from the 14th step on the salary guide to the 16th step on the salary guide for the 1983-84 school year?

b) Should the petition be dismissed as being untimely filed in violation of N.J.A.C. 6:24-1.2?

c) If petitioner should prevail, what relief is she entitled to?

At the time of hearing, Issue #2 was dismissed from this case.

On March 16, 1984, the matter was set down for trial. On that date, the parties entered into a stipulation of facts which the court will set forth hereinafter. As a result of such stipulation, a trial became unnecessary. Post-hearing briefs were filed and received by the court on April 24, 1984, on which date the record was closed. The exhibit marked into evidence shall be set forth in the appendix.

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OAL DKT. NO. EDU 7690-83

STIPULATION OF FACTS

The following facts were stipulated to by the parties which this court incorporates as its **FINDINGS OF FACT:**

1. The petitioner has been in the employ of the respondent, East Orange Board of Education, since the 1968-69 school year. Petitioner has been employed by said Board of Education as a schoolteacher.

2. During the 1982-83 school year, petitioner would have been at the 15th year, 5th year level teacher's salary guide which was in effect at the time.

3. On or about June 1, 1982, the respondent, East Orange Board of Education, did vote to withhold petitioner's increment for the 1982-83 school because of excessive absenteeism.

4. The petitioner did not challenge or controvert the respondent's action in withholding her increment for the 1982-83 school year.

5. During the 1982-83 school year, petitioner's evaluations were satisfactory. Petitioner then requested that she be placed at the appropriate level of the salary guide (i.e., the 16th step for the 1983-84 school year, 5th year level).

6. Per letter dated June 23, 1983, Dr. Kenneth D. King replied to petitioner and indicated, "It has been determined that your increment will not be restored."

CONCLUSIONS OF LAW

As can be clearly seen from the facts, petitioner is contesting the fact that the Board improperly failed to move her from the 14th step to the 16th step of the teacher's salary guide during the 1983-84 school year. In other words, during the 1981-82 school year, petitioner was at the 14th step of the salary guide. During the 1982-83 school year,

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petitioner should have been at the 15th step of the salary guide; however, her increment was withheld during this school year. Petitioner does not contest the withholding of her increment. Thus, petitioner remained at the 14th step of the salary guide for the 1981-82 and 1982-83 school year. During the 1983-84 school year, petitioner was placed at the 15th step of the salary guide. She insists that she should be placed at the 16th step and not the 15th step. The failure to place her on such a step results in an excessively severe punishment.

Petitioner argues that when the Board voted to withhold her increment for the 1982-83 school year, it was not deciding to withhold it ad infinitum, but merely for that year. Petitioner's salary for 1983-84 should be determined as if there had been no withheld increment, advancing her to the 16th step. Respondent argues that a local board of education may withhold an increment permanently so that the employee would remain a step behind for the balance of her employment with the school district. Thus, respondent argues it is entirely within its legal right to freeze petitioner's increment permanently.

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

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within ten days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

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Initially, it must be clearly pointed out that I have nothing before me which would indicate that the Board, when it voted to withhold petitioner's increment for the 1982-83 school year, decided that such withholding was to carry on ad infinitum. I have no indication that the Board intended to have petitioner permanently behind on the salary guide. Absent this, the law seems to be clear that a petitioner should not be excessively punished for any deficiencies or inefficiencies in a particular calendar year.

In School District of the Borough of Red Bank v. Portia Williams, 3 N.J.A.R. 237 (1981), aff'd with clarification State Bd. of Ed. (February 3, 1982), aff'd (N.J. App. Div., December 15, 1982, A-4036-81T3) (unreported), the question presented to the State Board of Education was

> whether respondent is to suffer the loss of income from her withheld increment for one year only or in the alternative remain one increment behind on the salary scale for the duration of her employment with the school district.

The State Board of Education made it clear that when her increment

> is considered for the 1981-82 school year, respondent should be treated as if she had been allowed the salary increment for the 1980-81 school so that it will be possible for her to regain her position on the salary scale after the passage of the 1980-81 school year. Williams at 2; aff'd (N.J. App. Div., December 15, 1982) at 5.

The Commissioner of Education again addressed the question of the excessive severity of the withheld increment in Vandercher v. Piscataway Bd. of Ed., 1980 S.L.D. 288. The Commissioner stated that to continue to withhold an increment over the possible remainder of petitioner's teaching career of approximately 20 years would be an excessive punishment.

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In Beam v. Sayreville Bd. of Ed., 1975 S.L.D. 993, the Commissioner found and determined that the petitioner's salary rates for 1972-73 and 1973-74 were properly established but that petitioner's salary rates for 1974-75 and 1975-76 were improperly established. The Commissioner stated,

> . . . The discipline meted out to petitioner resulting from the tenure charges against him was clearly stated to cover the remainder of the 1972-73 year, carried over only for the 1973-74 academic year. Had the discipline been intended to carry on ad infinitum, the Commissioner clearly would have so stated. Beam at 995.

Accordingly, petitioner's salary for 1974-75 must be calculated according (if there was no withheld increment) to the 9th step of the then existing bachelor's scale, while for 1975-76 his salary must be determined according to the 10th step of such scale.

Applying the reasoning of Williams and Beam to the instant case, it is clear that the Board did not intend to withhold petitioner's increment ad infinitum, but merely for the 1982-83 school year. In order to place petitioner back on the proper step of the salary guide so that she will not be excessively punished, it is necessary to place her on the 15th step, 5th year level for the 1983-84 school year. The Board's failure to move petitioner from the 14th step to the 16th step of the salary guide for the 1983-84 school year was arbitrary, capricious, unreasonable and in violation of N.J.S.A. 18A:29-14.

Accordingly, it is **CONCLUDED** and **ORDERED** that petitioner be placed on the 16th step of the salary guide for the 1983-84 school year and remain on the proper step thereafter. Additionally, petitioner shall receive any difference in salary resulting from her improper placement on the 15th step for the 1983-84 school year.

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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.

5-10-84
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

MAY 14, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 16 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

EXHIBITS

J-1 Letter dated June 23, 1983

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ANGELA CORDASCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this controverted matter including the initial decision rendered by the Office of Administrative Law, Robert P. Glickman, ALJ.

The Commissioner notes that no exceptions were filed by the parties in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner, after careful consideration of the record and pertinent case law, is constrained to find that the Williams decision and Beam decision applied in the initial decision are not dispositive to the controverted matter herein. Both decisions were tenure cases wherein the withholding of increments was a penalty imposed by the Commissioner. The judge is correct in concluding, however, that the Board's action to withhold petitioner's increment was not intended to leave her permanently behind on the salary guide. Had the Board so acted it would have been contrary to Blake v. Bd. of Ed. of Bridgeton (decided December 30, 1982) and Borrelli v. Bd. of Ed. of Rutherford (decided December 8, 1983).

Notwithstanding the above, the Commissioner determines that it was within the discretionary powers of the Board to place petitioner at step 15 of the guide in 1983-84 rather than granting her a two-step advancement on the guide. Such action is consistent with N.J.S.A. 18A:29-14 which clearly and umambiguously states that it is not mandatory upon the board of education to pay any denied increment in any future year as an adjustment increment. The Commissioner has addressed the same issue at point in the instant matter in Garibaldi v. Bd. of Ed. of Toms River, 1977 S.L.D. 192; Damon v. Bd. of Ed. of Bradley Beach (decided February 17, 1983); and Gallitano v. Bd. of Ed. of Ridgefield (decided May 23, 1983). As the Commissioner held in Gallitano, the Garibaldi decision is controlling case law in matters that deal with the issue of one-step advancement on a salary guide in years subsequent to a withholding action as opposed to a two-step advancement as herein.

The Commissioner is compelled to emphasize that a board is clearly prohibited from freezing a staff member's salary at a given step/level permanently or ad infinitum, just as a board is prohibited from passing a resolution which stipulates that an indivi-

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dual is to be permanently behind a step on a salary guide. Nonetheless, this does not preclude a staff member from lagging behind a step on the guide in any year subsequent to a withholding action. The discretionary authority to decide whether to advance a staff member two steps in any year subsequent to a withholding action is the sole prerogative of the boards of education succeeding the board which originally withheld an increment. Thus, if a subsequent or future board does not make an affirmative determination to advance the individual two steps on the guide, it is possible for a staff member to continue to lag behind a step until he or she reaches the maximum step.

Therefore, the Commissioner reverses the determination and order rendered in the initial decision with respect to petitioner's placement at step 16 of the salary guide. The Petition of Appeal is herewith dismissed.

JUNE 28, 1984 COMMISSIONER OF EDUCATION

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ANGELA CORDASCO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 28, 1984.

For the Petitioner-Appellant, Oxfeld, Cohen & Blunda (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Love and Randall (Melvin C. Randall, Esq., of Counsel)

The State Board of Education affirms the Commissioner's determination that Petitioner-Appellant in this case was not entitled to a two-step advancement on the salary guide to compensate for salary loss resulting from the withholding of increment the previous year. However, in so holding, the Commissioner concluded that the Board's action was not intended to leave her permanently behind on the salary guide. Angela Cordasco v. Board of Education of the City of East Orange, decided by the Commissioner June 28, 1984, at 9. The State Board emphasizes, as we did In the Matter of the Tenure Hearing of Theodore Augustine Burns, decided by the State Board October 24, 1984, that a denial of increment is permanent for subsequent years unless a future board affirmatively acts to reinstate it. See North Plainfield Education Association v. Board of Education of the Borough of North Plainfield, Docket No. A-127 (decided June 28, 1984).

December 5, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6870-83
AGENCY DKT. NO. 261-7/83A

CAROL GUNDLAH,
Petitioner,
v.
BOARD OF EDUCATION OF THE EMERSON SCHOOL DISTRICT,
Respondent.

APPEARANCES:

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

Irving C. Evers, Esq., for respondent
(Parisi, Evers & Greenfield, attorneys)

Record Closed: April 12, 1984 Decided: April 17, 1984

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

Procedural History

This case involves a tenured elementary teacher's seniority rights conferred by statute, N.J.S.A. 18A:28-9 et seq., and corresponding regulation, N.J.A.C. 6:3-1.10. As a

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result of declining enrollment in the district, the Emerson Board of Education terminated the employment of petitioner Carol Gundlah for the 1983-84 school year. On July 25, 1983, Gundlah filed a petition with the Commissioner of Education alleging that the Board's action was improper. Gundlah contends that she has greater seniority than one Kathleen Egan, currently employed by the Board as a full-time elementary teacher; alternatively, Gundlah claims seniority over several teachers retained by the Board in part-time positions. She seeks reinstatement to her full-time position and an award of back pay. In its answer filed on August 15, 1983, the Board denied any violation of Gundlah's seniority rights.

On September 6, 1983, the Commissioner of Education transmitted this matter to the Office of Administrative Law for hearing 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 before the Office of Administrative Law was held on November 29, 1983. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Subsequently, the Board acknowledged in writing that Gundlah does "in fact have a greater seniority right than Kathleen Egan." Thus the Board now recognizes that its dismissal of Gundlah was wrongful. Both parties requested issuance of an initial decision to preserve Gundlah's seniority during the period of her dismissal. Upon receipt of additional exhibits, the record closed on April 12, 1984.

Undisputed Facts

All of the material facts are undisputed. From the evidence presented at the hearing, I **FIND:**

Petitioner Carol Gundlah was initially employed by the Emerson Board of Education as a third grade teacher in 1956-57. At the time of her employment, she possessed a valid instructional certificate endorsed as an elementary school teacher. She

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was reemployed by the district as a third grade teacher for the 1956-57 and 1958-59 school years. Then she voluntarily left her employment on maternity leave.[1]

Starting in 1973-74, Gundlah returned to the district where she has been continuously employed until her recent termination. Between 1973-74 and 1977-78, Gundlah worked as a part-time supplemental instructor. Her daily hours and the length of her work year were shorter than those of regular classroom teachers employed by the Board.[2] As a supplemental instructor, Gundlah provided extra teaching help to students classified as handicapped. Students enrolled in her program were attending regular classes in the district, but were released to receive supplementary instruction. Class size was small, consisting of no more than three students. Gundlah prepared an individual lesson plan for each child she was teaching. Unlike the classroom teacher, however, Gundlah did not correct homework, have lunch duty or attend after-school meetings. Often Gundlah stayed beyond her assigned hours to prepare for class or meet with teachers and parents to discuss a particular child.

As of 1978-79, Gundlah was transferred to a full-time elementary teaching position. During that year, she taught fifth grade. In 1979-80, Gundlah's time was divided between a Title I remedial class in the morning and a Kindergarten class in the afternoon. Again, her hours added up to a full teaching day. From 1980-81 to 1982-83, Gundlah continued her employment as a full-time elementary teacher. Before the end of the 1982-83 school year, the Board notified Gundlah that her position would be terminated for 1983-84.

---

[1]When she interrupted employment, Gundlah had not yet acquired tenure. Gundlah does not seek to credit her service from 1956 to 1959 toward her accrual of seniority. See Solomon v. Princeton Reg. Sch. Dist., 77 S.L.D. 650 (Comm'r 1977), aff'd 1977 S.L.D. 657 (St. Bd. 1977).

[2]In 1973-74, Gundlah worked only three hours per day compared to classroom teachers who worked approximately seven hours per day. Her school year was 12 working days less than the official school year. In 1974-75, Gundlah worked three hours for five months and six hours for four months. Her school year was 9 working days less than the official school year. In 1975-76 through 1977-78, Gundlah worked six hours per day. Her school year was 14 working days less in 1975-76; 34 working days less in 1976-77; and 38 working days less in 1977-78.

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Gundlah's chief rival for a full-time position is Kathleen Egan. Since November 1974, Egan has held dual certification as a teacher of the handicapped and as an elementary school teacher. According to the Board's personnel records, Egan was employed as a special education teacher for six years between 1976-77 and 1981-82. Her service as a special education teacher was performed under her teacher of the handicapped certificate. Special education teachers worked the same hours and were paid on the same salary scale as regular teachers. Their classes, however, were smaller and comprised exclusively of handicapped students. By comparison, supplemental instructors and Title I teachers were paid at an hourly rate for the number of hours worked. In 1982-83, the Board assigned Egan to an elementary teaching position for the first time. For the 1983-84 school year, Egan remained as a full-time elementary school teacher.

There are several other part-time teachers employed by the Board over whom Gundlah made a claim of greater seniority. But the parties have agreed to limit the present inquiry to a comparison of the seniority status of Gundlah and Egan.

Summary of the Dispute

Most of the disagreement between the parties centered on the method of calculating length of service for seniority purposes. To compare part-time and full-time service, both parties make a pro rata calculation of seniority based upon the total accumulated service in a specific category. The Board treats service as a supplemental instructor or Title I teacher differently than service as a special education or elementary teacher. With respect to her supplementary instruction and Title I service, the Board credited Gundlah only for the number of hours she worked. It did not count lunch periods, preparation time, or any other job-related time for which she had not actually been paid. When determining lengths of service for special education or elementary school teachers, however, the Board added an extra hour to the normal seven-hour school day. This extra hour was supposed to compensate the classroom teacher for time spent on attendance at

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meetings, preparation for classes, correction of homework and issuance of report cards. Using this approach, the Board credited Gundlah with four years of full-time service and 2.94 years of part-time service for a total of 6.94 years.[3] Petitioner objects to this unequal treatment. Instead, she contends that part-time service should be prorated on the basis of a normal seven-hour workday. Under her approach, Gundlah would receive credit for four years of full-time service and 4.11 years of part-time service for a total of 8.11 years.[4]

Each year of Egan's employment has been as a full-time teacher. Therefore, the problem of how to prorate her service does not arise. Both parties credit her with seven full years of service. However, they disagree on the nature of the "specific category" in which her tenure accrued. It is the Board's contention that all seven years of Gundlah's service should be counted toward the specific category of elementary teacher, which position Egan occupied at the time of the reduction in force. Gundlah interprets the seniority regulation as giving Egan 7.0 years of seniority in the category of teacher of the handicapped and only 1.0 year of seniority in the category of elementary school teacher.

Finally, the Board suggested that Gundlah had refused to accept an offer of a half-time position as a music teacher for the 1983-84 school year. Proofs show that there were discussions between the parties about the possibility of an opening in the district as a half-time music teacher for 1983-84. According to the Board's own witnesses, Gundlah was never formally offered a position as a music teacher for 1983-84. In any event, Gundlah took appropriate steps to mitigate her damages by accepting a full-time teaching position at a lower salary in another district.

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[3]At the hearing, the superintendent of schools testified that he credited Gundlah with .18 year for 1973-74; .44 year for 1974-75; .53 year for 1975-76; .54 year for 1976-77; .47 year for 1977-78; 1.0 year for 1978-79; .78 year for 1979-80; 1.0 year for 1980-81; 1.0 year for 1981-82; and 1.0 year for 1982-83.

[4]If Gundlah's approach is adopted, she would be credited with .41 year for 1973-74; .57 year for 1974-75; .80 year for 1975-76; .71 year for 1976-77; .69 year for 1977-78; 1.0 year for 1978-79; .93 year for 1979-80; 1.0 year for 1980-81; 1.0 year for 1981-82; and 1.0 year for 1982-83.

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Conclusions of Law

Based on the foregoing findings of fact and the applicable law, I **CONCLUDE** that the Board incorrectly applied the seniority regulations when it terminated Gundlah for the 1983-84 school year.

The Board recognizes that Gundlah has acquired tenure in the district as a teacher. See, Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). N.J.S.A. 18A:28-10 provides that dismissals of tenured teachers resulting from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." Further, N.J.S.A. 18A:28-13 directs the Commissioner to establish seniority standards "upon the basis of years of service and experience within ... field or categories of service." Pursuant to the statutory authority, the Commissioner, with the approval of the State Board of Education, has promulgated N.J.A.C. 6:3-1.0, which provides for the determination of seniority based on the number of years of employment "in specific categories." Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983); Howley v. Ewing Twp. Bd. of Ed., 1982 S.L.D. ___ (Comm'r 1982), aff'd (St. Bd. 1983). These "specific categories" are numerated in the seniority regulation, and include "elementary" and "additional categories of specific certificates."

Initially, the question arises whether Gundlah's and Egan's prior service should be put in the same or different "specific categories." As written at the time of Gundlah's dismissal, N.J.A.C. 6:3-1.10(k)(28) defined the elementary category to include:

> Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools.

At the time, N.J.A.C. 6:3-1.10(k)(30) described the other category as:

> Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.

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Both sides generally agree that Gundlah's service, performed under her certification as an elementary school teacher, falls within the elementary category. Their disagreement involves what is the appropriate category for Egan's service. Since Egan's assignment to a special education position depended on her certification as a teacher of the handicapped authorized by N.J.A.C. 6:11-8.4(c)(4), petitioner contends that Egan's service in that position must be attributed to the Special education certificate category. On the other hand, the Board credited Egan's entire service in the district to the elementary category.

An earlier decision of the Commissioner of Education deals with this identical point. In Dullea v. Northvale Bd. of Ed., 1978 S.L.D. 638 (Comm'r 1978), the petitioner claimed seniority in the elementary category based on her ten years of service as a special education teacher. Like Egan, Dullea had dual certification as an elementary school teacher and a teacher of the handicapped. Holding that Dullea acquired seniority in the category of special education teacher, the Commissioner observed:

> At all times during petitioner's employment a specific certificate issued by the State Board of Examiners was required for her to teach the class of handicapped pupils to which she was assigned ... It was only under the authority of those specific certificates, not the authority conferred by her elementary teaching certificate, that she could legally continue to teach and be paid for teaching. N.J.S.A. 18A:28-4.
>
> Accordingly, it must be concluded that petitioner's employment was in the category of a teacher of the handicapped, not that of elementary teacher.

Application of the seniority regulation as interpreted by Dullea requires that Egan's six years of employment as a special education teacher be counted toward seniority in the category of teacher of the handicapped. Additionally, N.J.A.C. 6:3-10.1(g) provides that a teaching staff member who moves from one category to another continues to earn

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credit "toward his seniority in any or all categories in which he previously held employment." Consequently, Egan's one year of service as an elementary school teacher also counts in the category of teacher of the handicapped. Her total seniority accrued in the category of teacher of the handicapped is 7.0 years. Egan has only 1.0 year of credit in the category of elementary school teacher, since she did not work in that capacity until 1982-83.[5]

Even if both Gundlah's and Egan's seniority are credited in the same category, Gundlah would nonetheless prevail. No rational basis exist for discriminating against supplemental and Title I teachers in the calculation of length of service. Testimony established that the time spent by individuals on extracurricular duties varies from teacher to teacher. Not every elementary teacher spent an extra hour each day on tasks outside the classroom. Some supplemental instructors, including Gundlah, worked longer hours than the time for which they received compensation. It is arbitrary to calculate seniority by adding an extra hour to the service of some types of teachers, while denying similar treatment to other types of teachers. Rather, the only practical and meaningful

---

[5]The outcome might well be different under the current seniority regulations. New regulations adopted by the Commissioner apply prospectively to all future seniority determinations as of September 1, 1983. See 15 N.J.R. 464 (adopted June 1, 1983). N.J.A.C. 6:3-1.1(l)(16) revised the category of "elementary" so that it now reads:

> ... Any person employed at the elementary level in a position requiring an education services certificate or special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special field endorsement. Persons employed in providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

Under this amendment, it appears that a teacher employed at the elementary level in a position requiring a teacher of the handicapped endorsement would acquire seniority "only in the elementary category." Of course, that issue is not presented by the instant case, which is still governed by the old seniority rules.

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way to make comparisons of full-time and part-time teachers is to convert their respective service into the common denominator of the normal seven-hour workday and the regular school year. Gundlah is entitled to 8.11 years of seniority compared to Egan's 7.0 years.

Order

It is **ORDERED** that the Board reinstate Gundlah to a full-time teaching position no later than the commencement of the 1984-85 school year;

Further **ORDERED** that the Board pay lost salaries and other benefits to Gundlah from the date of her termination to the date of her reinstatement. The amount of lost salary shall be measured by the difference between what Gundlah would have earned if she had not been dismissed and the amount she actually received from her employment by another school district.

And further **ORDERED** that the Board credit Gundlah for whatever seniority she would have accrued if she had not been dismissed.

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

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OAL DKT. NO. EDU 6870-83

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

May 17, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

MAY 18, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 22 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Carol Gundlah

2. Dr. Serge Angiel

3. Ann Taylor Wilks

List of Exhibits

No.		Description
J-1		Stipulation of facts, dated November 29, 1983
J-2	(a)	Copy of certificate of Kathleen Egan as elementary school teacher and teacher of the handicapped, issued November 1974
	(b)	Copy of certificate of Kathleen Egan as nursery school teacher, issued August 1983
P-1		Copy of employment record card for Carol Ann Gundlah
P-2		Copy of a letter to Carol Gundlah from Serge Angiel, dated April 26, 1983
P-3	(a)	Copy of school calendar 1973-74
	(b)	Copy of school calendar 1974-75

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(c) Copy of school calendar 1975-76

(d) Copy of school calendar 1976-77

(e) Copy of school calendar 1977-78.

(f) Copy of school calendar 1978-79

(g) Copy of school calendar 1979-80

(h) Copy of school calendar 1980-81

(i) Copy of school calendar 1981-82

(j) Copy of school calendar 1982-83

(k) Copy of school calendar 1983-84

P-4 (a) to (d) Copy of payroll stubs of Carol Gundlah for 1973-74

P-5 (a) to (d) Copy of payroll stubs of Carol Gundlah for 1974-75

P-6 (a) to (d) Copy of payroll stubs of Carol Gundlah for 1975-76

P-7 (a) to (c) Copy of payroll stubs of Carol Gundlah for 1976-77

P-8 (a) to (c) Copy of payroll stubs of Carol Gundlah for 1977-78

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P-9 (a) to (g)	Copy of payroll stubs of Carol Gundlah for 1979-80
P-10	Copy of employment record card for Kathleen Egan
P-11	Copy of employment record card for Louise Hahner
P-12	Copy of employment record card for Terry Alnor
P-13	Copy of employment record card for Donna Becker
P-14	Copy of employment record card for Josephine Thomsen
P-15	Copy of employment record card for Diane Biggs
P-16	Copy of seniority list as of March 24, 1983
R-1	Excelsior plan book
R-2 id.	Handbook for parents

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CAROL GUNDLAH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

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

Petitioner shall be reinstated to a full-time teaching position for the 1984-85 school year with remuneration for the period encompassing her dismissal, as mitigated, with seniority credit as though continuously employed in the Emerson School District.

JULY 2, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED MATTERS
OAL DKT. NO. EDU 6082-82
AGENCY DKT. NO. 150-5/82A and
OAL DKT. NO. EDU 7575-82
AGENCY DKT. NO.222-6/82A

IN THE MATTER OF TENURE HEARING OF DAVID BRODY, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY

APPEARANCES:

Jan K. Seigel, Esq., for petitioner

Emil Oxfeld, Esq., for respondent
(Rothbard, Harris & Oxfeld, attorneys)

Record: April 1, 1984 Decided: May 15, 1984

BEFORE **ROBERT T. PICKETT**, ALJ:

PROCEDURAL HISTORY

This matter comes before the Office of Administrative Law as a result of the filing of tenure charges by the petitioner, the Elmwood Board of Education (Board), against the respondent, David Brody. The petitioner has brought charges against the

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respondent alleging, inter alia, that the respondent engaged in conduct unbecoming a teaching staff member in that (1) (EDU 6082-82) on or about January 28, 1982, the respondent used corporal punishment without good cause against a student of the school district in violation of N.J.S.A. 18A:6-10 and (2) (EDU 7575-82) on or about March 1, 1982 the respondent assaulted, used profane language, intimated, slandered and verbally abused the Superintendent of Schools of the Borough of Elmwood Park. Resolutions and certificates of determination were served on the respondent pursuant to N.J.S.A. 18A:6-11 on May 5, 1982 on EDU 7575-82 and on June 15, 1982 on EDU 6082-82. The respondent filed an Answer and Statement of Position denying each of the charges in accordance with his right to do so. The Board seeks respondent Brody's dismissal. The Superintendent of Schools suspended respondent Brody on May 6, 1982 on the EDU 7575-82 charge. The petitioner did not suspend the respondent in accordance with N.J.S.A. 18A:6-14. Respondent Brody has been receiving his full salary in accordance with N.J.S.A. 18A:6-14. The tenure charges were certified and forwarded to the Commissioner of Education on or about May 6, 1982 and June 29, 1982, respectively. A formal Answer was filed with the Commissioner of Education by the respondent on June 15, 1982 and July 29, 1982, respectively, denying the charges and setting forth various affirmative defenses. The matters were forwarded to the Office of Administrative Law for determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 24, 1982. After a thorough review of the charges, arising out of the determination by the Board to certify tenure charges against the respondent, the court determined that the tenure hearing charges against the respondent should be consolidated in accordance with N.J.A.C. 1:1-14.3 and thereafter entered an order consolidating them on October 8, 1982. A prehearing order was entered on October 14, 1982.

The hearing in this matter, after several adjournments at the request of both parties, commenced on June 15, 1983, July 27, 1983 and November 4, 1983. The record was closed on April 1, 1984 to permit counsel to submit memoranda of law on all issues in the matter and to permit additional inquiries from the court and appropriate responses from counsel on certain issues in the proceeding. The corporal punishment charge has

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been denied and the unbecoming conduct charge has been denied and sustained in part.

SUMMARY OF TESTIMONY

The parties in this matter presented opposing testimony on the issue whether the respondent inflicted corporal punishment on K.P., contrary to N.J.S.A. 18A:6-1 arising out of the incident occurring on January 28, 1982 ("January incident"), engaged in conduct unbecoming a teacher in the matter involving the incident with the Superintendent of Schools on March 1, 1982. The petitioner presented the testimony of the alleged victim of the corporal punishment, K.P., one student eyewitness, C.S., Dr. Vito A. Farese and Alexander R. Maccia. On the charges of unbecoming conduct involving the Superintendent of Schools, the petitioner presented the Superintendent of Schools, John M. Santini, Dolores Wiarda, Leslie J. Gaulton, Lorraine Lengyel and Betty Stephens. The respondent presented the testimony of Sonia Freedman, Charlotte Colombo and himself in response to the charge of corporal punishment on K.P. Leon Nisenson and Charles Panella were presented in response to the March 1, 1982 incident. What follows is a brief summary of the testimony offered by each witness in the proceeding.

CORPORAL PUNISHMENT CHARGE
(EDU 7575-82)

C.S., a seventh-grade pupil, testified that he witnessed the alleged corporal punishment on K.P. involving the respondent, David Brody. C.S. testified that he had observed K.P. playing a song on his tape player called "Big Balls" by the popular rock band AC/DC, while standing and waiting for the school bus to arrive. While the song was playing, the respondent asked K.P. to turn the song off.* The respondent gave K.P. no reason for his request. K.P. appeared confused by the request; however, he complied with it. K.P. stopped the tape player and rewound the tape and played another song by AC/DC, the same group. When the new song started to play, the respondent said, "That's it" and initially grabbed K.P.'s jacket and dragged K.P. toward the school building. K.P. offered little resistance and did not try to break away. K.P. was carrying his books in his right hand. The respondent, after initially grabbing K.P.'s jacket, eventually grabbed K.P.

*Actually to turn off the tape player.

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around the neck, holding on to the jacket. The respondent did not touch K.P.'s skin. After the incident, C.S. did not complain to his parents about the incident or report it to the principal.

K.P. testified on his own behalf with respect to the alleged corporal punishment. K.P. acknowledged that he was standing at the bus stop with C.S. after school on January 28, 1982, waiting for the school bus. There were several younger female students waiting for the school bus also. While at the bus stop he played a song by the group AC/DC entitled "Big Balls" on his cassette player. The respondent asked him to turn off the cassette player, without any explanation. Instead of turning the cassette player off, he simply rewound the AC/DC tape and began, a short time later, playing another song from the same tape. After the next song commenced, the respondent stated, "That's it." and grabbed him by his coat on the right side with his left hand and led him toward the school. K.P. contends that at the halfway point near the school, the respondent changed positions and placed his hand on the skin of his neck and pushed him toward the school. K.P. acknowledged that the respondent's grip was "not too hard" and that it hurt "a little bit." K.P. acknowledged that he told his father about the incident that evening, and the next day indicated to his father that he had a pain in his neck, which presumably was a result of respondent's conduct. K.P. acknowledged on cross-examination that after respondent returned him to the school, he never told Dr. Farese, the school principal, that the respondent had grabbed him by the neck, but by the coat.

Sonia Freedman testified on behalf of the respondent. Freedman testified that she has two children who attend school in the district and she knows the respondent as a teacher. Freedman indicated that she observed the respondent on January 28, 1982 approach K.P. about playing his casette player. K.P. was playing the AC/DC's song "Big Balls." She indicated that she could not believe the song was playing, given the very nature of the song* and since girls were in the area. Freedman testified that the respondent approached K.P. and indicated to K.P. that that type of music should not be

*In her view, the song "Big Balls" had a sexually suggestive message in it.

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played around girls and if he didn't "shut it off," he (respondent) would have to take it away from him. Shortly thereafter, K.P. turned off the casette player and subsequently turned it on again, playing the same song. The respondent then told the student, "Guess we have to see Dr. Farese" and she observed the respondent hold the child by the shoulder and escort the child to the school building. Freedman indicated that the respondent was holding the child in a casual manner only to guide him and she did not observe respondent hit the child.

Charlotte Colombo testified on behalf of the respondent. Colombo is a babysitter for Freedman and also a bookkeeper. Colombo indicated that she had accompanied Freedman to the school to pick up her children. Colombo corroborated much of the testimony offered by Freedman with respect to the tape-playing incident and the respondent's escorting the child to the school building.

Dr. Vito A. Farese testified on behalf of the respondent. Dr. Farese was the principal at the school where the alleged corporal punishment incident occurred. Dr. Farese has been a principal for 24 years. Dr. Farese investigated the matter involving K.P. During the course of Dr. Farese's investigation, K.P. made no statement regarding his physical injuries as a result of the respondent's bringing him back to the school building. (Exhibit P-10). Dr. Farese indicated that K.P.'s parents did not advise him of any physical injury. Dr. Farese considers his report on the incident to be a comprehensive and a full report of the incident. Dr. Farese testified that had there been any mention of physical injury, that fact would have been mentioned in his report. Dr. Farese did not discipline the respondent for the way he handled K.P. However, he did caution the respondent to be careful with respect to future incidents. Dr. Farese considered the matter closed. Dr. Farese provided the Superintendent of Schools with a copy of his report as a matter of courtesy. Dr. Farese recalled that the respondent was present at a meeting with K.P.'s parents to discuss the incident. Dr. Farese, after a bit of hesitation, at first indicated that he had asked the respondent to leave the room after the meeting with the parents commenced because he felt that respondent had other things to do. Dr. Farese later acknowledged that he had asked the respondent to leave the room

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because respondent had become emotional regarding the incident and had, in his estimation, lost control of himself in front of K.P.'s parents. The respondent apparently felt that he was being unfairly criticized for the way he handled K.P.

The respondent testified on his own behalf regarding the alleged corporal punishment on K.P. The respondent corroborated the testimony offered by both Freedman and Colombo regarding their view of the incident on January 28, 1982. His principal concern that day in requesting K.P. to turn off his tape player, with the AC/DC song "Big Balls" playing, was to avoid exposing very young female children to the sexual, from his viewpoint, explicit lyrics of the the song. The respondent asked K.P. to turn off the song and when he did not, and apparently started playing the same song again, he thought he should take K.P. to the principal's office for discipline. The respondent testified that he did not grab, drag or hit K.P. while escorting him to the principal's office. He did place his hand on K.P.'s shoulder very firmly and escorted him toward the school building. He, in no way threatened, hit or touched K.P. in an offensive manner.

ANALYSIS OF CORPORAL PUNISHMENT CHARGE

At the outset, this court must note that prior school law decisions hold that the standard of proof in tenure-hearing matters is the preponderance of credible evidence. See, In The Matter of the Tenure Hearing of Madeleine Ribacka, 1978 S.L.D. 929, 936; In the Matter of Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526 aff'd. by the State Board of Education, 1979 S.L.D. 155; In the Matter of the Tenure Hearing of John Orr, 1973 S.L.D. 40, 48.

The testimony offered by the various witnesses on the corporal punishment charge would seem to indicate that on January 28, 1982, the respondent disciplined K.P. for playing a tape cassette player after he had asked him to turn off the player because of an objectional song by AC/DC. The witnesses diverged on their view of what happened after the respondent asked K.P. to turn off the tape player. On the one hand, K.P. and C.S. wish this court to believe that the respondent grabbed and dragged K.P. by the neck, hurting him, to the school office. On the other hand, Sonia Freedman, Charlotte

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Colombo, disinterested witnesses, and the respondent portray the respondent as attempting to hold the child, K.P., by the shoulder and escorting him to the school building for his failure to comply with the respondent's initial requests to turn off the tape player.

Here, especially on the issue of corporal punishment involving children, the outcome depends entirely upon resolving the question of credibility. The choice of accepting or rejecting the testimony of witnesses rests with the tryer of fact. Atkinson v. Parsekian, 37 N.J. 143 (1962); See, Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). To be believed, testimony must not only come from the mouth of a credible witness, but also must be credible in itself. It must be such as common experience and observation can approve as proper under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). Using these principles as a guide, this court has evaluated the testimony produced by the various witnesses.

Certainly, there are numerous school law decisions in which the Commissioner of Education has recognize the need to examine the testimony of children of tender age with great caution. See, In the Matter of Tenure Hearing of William Simpson, 1978 S.L.D. 368, 374, aff'd. by the State Board of Education, 1978 S.L.D. 377; In the Matter of the Tenure of John Birch, 1978 S.L.D. 63, 79; In the Matter of the Tenure Hearing of Edward J. Quinn, 1975 S.L.D. 397, 410-411; In the Matter of Tenure Hearing of Fredrick J. Nittel, 1974 S.L.D. 1269-1278—9, aff'd. by the State Board of Education 1975, S.L.D. 1111. Since the discussion in Palmer v. Bd. of Ed. of Audubon, 1939-40 S.L.D. 183, the Commissioner of Education has frequently stated:

> . . .testimony of children, especially those of ten years of age, against the teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against the teachers; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school year. If such testimony were not admissable, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of the children. Palmer at 188.

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If this court had only the testimony of the students, K.P. and C.S., before it in this matter, there would be very little choice but to believe their version of the facts, despite a few discrepancies. However, this court has before it, in addition to the testimony of students, the testimony of two disinterested individuals, a parent and her friend, who were eye witnesses to the events that unfolded on January 28, 1982.

It should be noted that C.S. in testifying as to precisely how respondent grabbed K.P., the victim of the corporal punishment, testified that the respondent initially grabbed K.P.'s jacket, subsequently grabbed K.P. around the neck holding onto the jacket and never touched K.P.'s skin. K.P., on the other hand, indicates that he was grabbed on his jacket by the respondent and subsequently was grabbed on the skin of his neck by the respondent while being pushed, although not too hard, toward the school building. However, the testimony of the other two witnesses, Freedman and Colombo, clearly indicate that the respondent merely placed his hand on K.P.'s jacket and pushed him slightly, in an effort to lead him toward the school building, for his failure to turn off the tape player. Both witnesses testified that they did not observe the respondent hit or offensively touch the student while escorting him to the school building. The respondent's view of the events seem to concur with those of Freedman and Columbo. To further complicate matters, the principal, Dr. Vito A. Farese, testified that K.P. did not complain to him regarding any physical injuries as a result of respondent's disciplinary action and his investigation concluded that the respondent had done nothing improper.

The question now becomes whether the conduct as testified to by the witnesses on January 28, 1982 regarding the disciplining of K.P. constitutes corporal punishment within the meaning of N.J.S.A. 18A:6-1. N.J.S.A. 18A:6-1 provides:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institutions; but 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;

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> (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, any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. . . .

From the testimony offered by the respondent and the apparent concern of witnesses Freedman and Colombo as well, his principal motive in disciplining K.P. was to protect a group of young female students from having to hear the sexually suggestive lyrics to the AC/DC song "Big Balls" while standing at the bus stop, waiting for the school bus along with K.P. The respondent's effort to discipline K.P. would, therefore, seem to fall within N.J.S.A. 18A:6-1(4)—for the protection of persons. Whether such protection was warranted is, of course, another question. Nonetheless, the respondent felt a legitimate need to protect young female students from, what he thought to be, sexually suggestive lyrics. This court will not second guess the respondent in that regard. Certainly the lyrics to the song "Big Balls" have sexual overtones to them that might warrant limiting the playing of the song around students, and the court so **FINDS** after listening carefully to the song during the course of the hearing.

Assuming, arguendo, that the respondent did not discipline K.P. pursuant to N.J.S.A. 18A:6-1(4) and sought to discipline him on the basis of his failure to listen to the instructions of a teaching staff member, this court cannot find anything objectionable, based on the testimony offered by Freedman and Colombo, in the respondent's conduct in an effort to escort K.P. to the school building to be disciplined by the principal for his failure turn off his tape player when instructed to do so. It appears that the respondent did, in fact, grab K.P.'s jacket, however hard or lightly, and did, in fact, aggressively direct, if you will, him toward the school building. This court cannot find, as a critical fact, that the respondent punched, hit, kicked or otherwise abused and engaged in corporal punishment upon K.P.

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After carefully reviewing all of the evidence and having observed the demeanor of the witnesses, this court hereby **FINDS** that:

1. On January 28, 1982, K.P. was standing outside the school building playing a song by AC/DC entitled "Big Balls" on his tape player, while waiting for his school bus to pick him up, along with several very young female students.

2. The song by AC/DC entitled "Big Balls" has sexually suggestive lyrics.

3. As K.P. was playing "Big Balls" by AC/DC, the respondent approached him, heard several of the lyrics and requested that K.P. turn off his tape cassette player.

4. The respondent was concerned about the young female students hearing the lyrics of the AC/DC song while waiting for the school bus.

5. K.P. stopped the tape player as instructed by the respondent and subsequently started playing the same song by AC/DC in defiance of respondent's instructions.

6. The respondent, after K.P. starting playing his tape player again, indicated that "That's it" and advised K.P. that he was going to be disciplined by the principal, grabbed K.P. by his jacket and escorted him without incident to the school principal's office.

7. The respondent did not grab K.P. around the skin of his neck nor in anyway injure K.P. while escorting him to the principal's office.

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8. The respondent disciplined K.P. in an appropriate, fair and reasonable manner under the circumstances.

9. K.P. did not complain to the principal, Dr. Farese, about any injuries as a result of respondent's discipline.

10. Dr. Farese considered the matter closed and did not formally report the incident to the Superintendent of Schools.

Therefore, this court **CONCLUDES** that the respondent did not engage in corporal punishment of K.P. and acted in a reasonable and fair manner in light of the circumstances on January 28, 1982; and

It is further **CONCLUDED** that the tenure hearing charges (EDU 7575-82) brought against the respondent regarding the corporal punishment charge is hereby **DISMISSED WITH PREJUDICE.**

UNBECOMING CONDUCT
(EDU 6082-82)

Alexander R. Maccia testified on behalf of the respondent. Maccia is a principal at 16th Avenue School and was principal when the respondent was employed at Gilbert Avenue School. Maccia recalled an incident involving a pupil. The child, S.B., had complained that respondent had struck him in the arm and that he felt it was intentional. Maccia discussed the matter in detail with the respondent. The child's parents were contacted. A meeting was arranged with the respondent and the child's father to discuss the matter. The respondent indicated that he had not struck the child intentionally. Maccia asked the child's father if he were satisfied with the explanation. The father indicated that he was satisfied. A report was made to the Superintendent of Schools. Maccia felt the matter was concluded and did not intend to pursue the matter as a corporal punishment infraction. Maccia later learned that the Superintendent continued to investigate the matter, did not request any additional information from him and held a meeting on March 1, 1982 with respondent to discuss the matter in more detail.

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John M. Santini, Superintendent of Schools for the petitioner, testified that he had called a meeting for March 1, 1982 in his office to discuss an incident involving a pupil that had occurred in December 1981. The incident was reported to him just prior to Christmas by a telephone call from the building principal, Alexander R. Maccia. The Superintendent felt that the incident required a full and complete report from the respondent. On or about January 8, 1982, the Superintendent requested the respondent to provide him with a report on the incident (Exhibit P-1). The respondent never responded. On or about February 11, 1982, the Superintendent again requested that the respondent provide a report in writing on the incident and a meeting with him (Exhibit P-2). After the February 17, 1982 request, the respondent provided the Superintendent with a written report on the incident (Exhibit P-3). An initial meeting was arranged to discuss the matter with the respondent for February 19, 1982, but that meeting was postponed to March 1, 1982.

On March 1, 1982, a meeting was held at the Board of Education building with the respondent and his representatives, Leon Nisenson and Charles Panella. The Superintendent asked Dolores Wiarda and Leslie J. Gaulton, Business Administrator and Board Secretary, to attend the meeting. The meeting was convened at approximately 3:30 p.m. During the course of the meeting, the Superintendent asked the respondent to tell him how the incident happened. The respondent did not respond directly to the inquiry but indicated that he felt that he was being harrassed by the Superintendent and felt that the meeting was "bullshit." The respondent also told the Superintendent that he was "not being a man" regarding a prior incident some months before between him and the Superintendent. The respondent made several other derogatory remarks toward the Superintendent including that the Superintendent was "keeping a file on him." The Superintendent testified that he cautioned the respondent regarding his remarks and asked him to be more civil. The Superintendent indicated that the respondent was very loud (shouting) and called him "chicken shit." The respondent's verbal tirade continued and later became highly emotional and charged. Respondent stood up and clenched his fists and made threatening remarks and movements with his arms. The respondent had to be restrained and removed from the room by Panella.

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The Superintendent acknowledged having received the report of the incident from his building principal, Maccia. The report from Maccia was incomplete and required additional information and he followed through. This, despite the fact that he did not request any further additional information from Maccia. The Superintendent acknoweldged that the Maccia report, on its face, seemed satisfactory, i.e., no conflicts in the presentation. The Superintendent felt that he had to follow up on the report; he had a responsibility to do so. The Superintendent acknowledged that he had no recollection of speaking to Maccia about his report or inviting him to the meeting with the respondent, nor did he communicate with the parents regarding the child, nor the child. The Superintendent acknowledged that the respondent had called him earlier after his initial request for a written report, and had indicated that it was not necessary for him to write a report on the incident. The Superintendent acknowledged that he insisted on a report from the respondent. The Superintendent testified that he could not recall requesting additional reports from his teaching staff when he received a report that was satisfactory to his building principal.

Dolores Wiarda testified regarding the incident on March 1, 1982. She corroborated the Superintendent's testimony with respect to who attended the meeting and indicated that the meeting lasted approximately 15 minutes. Sometime during the course of the meeting Wiarda testified that she heard profanity, and recognized that it was coming from the respondent, David Brody. Wiarda testified that she also heard someone say, "David, don't hit him" and heard a movement of furniture inside the conference room. Several seconds later, Panella escorted the respondent out of the conference room by the arm telling him to calm down. The respondent shortly thereafter indicated to Panella, "Chuck——I'll get him." On cross-examination, Wiarda testified that despite the fact that there were five other secretaries in the general area of the meeting room, only one other secretary, Betty Stephens, overheard the discussion and noises inside the conference room. Wiarda testified that she did not discuss the matter with the Superintendent or anyone else except the petitioner's attorney and the other secretary, Betty Stephens. After the respondent left the conference room, Wiarda observed the Superintendent in the conference room to be calm, nor did he appear to be nervous.

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Wiarda acknowledged she may not have overheard the entire discussion within the conference room because she was on the telephone on occasion. Also, after the respondent left the Board of Education conference, the Superintendent advised Wiarda that he intended to file charges against the respondent because of his behavior.

Leslie J. Gaulton next testified on behalf of the petitioner. Mr. Gaulton corroborated much, if not all, the testimony offered by the Superintendent with respect to the respondent's behavior and conduct on March 1, 1983. Several days prior to the scheduled meeting with the respondent on March 1, 1982, the Superintendent had asked Gaulton to sit in on the meeting. Gaulton testified that he observed on that date what he thought to have been an assault on the Superintendent by the respondent. Gaulton indicated that the Superintendent remained calm and professional throughout the meeting. It was Gaulton's view that had the respondent not been restrained, the respondent would have hit the Superintendent. Ms. Wiarda, after the meeting ended, advised him that she had overheard much of the discussion in the conference room. After he left the conference room, it was his assessment that the other secretaries, in addition to Wiarda had overheard much of the discussion inside the conference room by their reaction to what took place directly in the office.

Lorraine Lengyel was called to testify on behalf of the petitioner. Lengyel was called solely to testify what she heard outside of the conference room on March 1, 1982. Lengyel testified that her attention was drawn to the conference room when she heard the movement of chairs and later observed Panella holding the respondent by the arms escorting him from the conference room. She also testified that she heard the respondent's say, "I'll get John yet, I'll get him yet." The respondent was standing near the Superintendent's secretary's desk. Other then that statement by the respondent, Lengyel does not recall hearing or noticing anything unusual on March 1, 1982. She was not asked by anyone what she heard on that date nor did she tell the Superintendent or the School Board attorney about what she knew of the events. Lengyel noted that after the respondent left the office, the normal work of the Superintendent's office continued as usual.

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Betty Stephens was called to testify on behalf of the petitioner. Stephens testified that her desk was located two or three feet from the conference room where the meeting between the Superintendent and respondent took place. Stephens heard what took place in the conference room. She heard the loud movement of chairs, and later heard the respondent, as he was leaving the conference room with Panella, say, "I'll get you, John" or "I'll kill you." Stephens testified that she heard numerous loud voices within the conference room but could not distinguish the voices. Stephens testified that she also heard the respondent say after leaving the conference room that "I don't have to take this shit." Stephens denied talking about the incident with Wiarda and the other office secretaries.

Charles Panella next testified with respect to the March 1, 1982 incident. Panella testified that he had been asked by the respondent to accompany him to a meeting with the Superintendent regarding an incident involving a student which had occurred some months earlier. When he arrived at the meeting, Panella noted that Leslie Gaulton and Leon Nisenson were in attendance at the meeting, as well as with the Superintendent. After a few opening comments from the Superintendent regarding the purpose of the meeting, (the incident involving the student) Panella termed the meeting as, "This is bullshit." The Superintendent did not respond to his comment. Panella testified that he did not hear the respondent say, "Shove it up your ass." He heard the respondent say, "This is chicken shit." No threats were made by either party during the course of the meeting. Panella recalls that the meeting ended abruptly and he escorted the respondent out of the room with his arm draped around respondent while the respondent said to him, "They are out to get me." Panella denies saying to respondent "Don't hit him, Dave." Panella acknowledged that the respondent used profanity three or four times during the course of the meeting.

Leon Nisenson testified on behalf of the respondent. Nisenson testified that he was asked to attend the meeting by the respondent. He was aware of the purpose of the meeting involving a discussion of an alleged incident concerning a student some months prior. Nisenson testified that during the course of the meeting both parties, the Superintendent and the respondent used profanity. He heard the Superintendent say,

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"Fuck" several times. He did not observe anyone in the room threaten the other one physically. Nisenson acknowledged that the meeting ended abruptly at the Superintendent's request when the respondent became quite emotional and was escorted out of the room by Panella. Nisenson did not hear anyone say, "Don't hit him, Dave." After the respondent was escorted out of the room by Panella, Nisenson remained in the room with the Superintendent and Gaulton. Nisenson admitted that the exchange between the Superintendent and the respondent was quite heated. On cross-examination, Nisenson admitted that he was "not sure" what was said during the course of the meeting but remembers that there was a lot of yelling on both sides of the table.

The respondent testified on his own behalf regarding the March 1, 1982 meeting. The meeting was a result of an incident involving a student in which the Superintendent of Schools had received a copy of the report detailing the incident. The incident involved S.B. who alleged that he was intentionally struck by the respondent while the respondent was demonstrating a basketball technique. The matter was subsequently investigated, discussed with S.B.'s parents and resolved at the principal level. Alexander Meccia was the principal involved in the investigation. All parties, including the principal and the parents, seemed satisfied after a conference with the respondent that the incident was accidental. Nonetheless, the Superintendent of Schools received a copy of the report and immediately requested that Maccia obtain a full letter report from the respondent (Exhibit P-3). The respondent did not write the letter report immediately after being requested to do so by Maccia. The respondent sometime later talked with the Superintendent of Schools regarding the matter, and advised that he did not have to write a letter report. Again, sometime later, the Superintendent sent a letter by certified mail requesting a letter report. At this point, the respondent decided to write a letter report as requested by the Superintendent of Schools. The respondent felt that the letter report was satisfactory. The Superintendent of Schools subsequently requested a meeting with respondent to discuss the incident in detail. The respondent asked Charles Panella and Leon Nisenson to attend the meeting with him. As the meeting opened, the Superintendent reviewed the events leading up to the meeting and indicated that he felt that the respondent's report was incomplete and inadequate. The Superintendent threw the respondent's letter report at the respondent. At that point, words were exchanged

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between the respondent and the Superintendent. The situation became quite emotional and heated. The respondent later told the Superintendent to "Shove it." The respondent denies threatening the Superintendent and does not recall Panella saying, "Don't hit him." The respondent acknowledged saying, during the course of the meeting, that the meeting was either "chicken shit" or "bullshit." The respondent denies saying, "Fuck." The respondent acknowledges that he may have pointed at the Superintendent to make a point during the discussion but he reiterated that he never threatened the Superintendent.

ANALYSIS OF UNBECOMING CONDUCT CHARGE

The respondent has been specifically charged with conduct unbecoming a teacher, in that on March 1, 1982 he "did assault, use profane language, intimidate, slander and verbally abuse the Superintendent of the Elmwood Park School District."

It must be remembered that the March 1, 1982 incident was precipitated by the Superintendent's continuing requests for information from the respondent over a period of approximately two months, despite some indication from his school principal, Alex Maccia, that the incident was closed. There is no doubt that the respondent felt that the Superintendent's continued request for information, after having been supplied with information from the building principal and himself, was harassment. Nonetheless, the Superintendent was well within his authority to request a meeting with the respondent and asked the respondent to provide him with additional information as he deemed necessary and appropriate. We now come to March 1, 1982 when the Superintendent called a meeting with the respondent to further discuss the matter. Emotions were running high. The respondent was feeling harassed and the Superintendent was feeling as if his orders were being ignored. Both parties were at odds and an inevitable conflict arose.

Again, it must be noted that the outcome of this matter depends entirely on resolving the question of credibility. The choice of accepting or rejecting the testimony of the witnesses rest with the finder of fact. Atkinson v. Parsekian, 37 N.J. 143 (1962); See also, Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). To be believed, testimony must not only come from the mouth of a credible witness, but also be credible

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in itself. It must be such as common experience and observation can prove as proper under the circumstances. Spagnuolo v. Bonnet and Gallo v. Gallo. Using these principles as a guide, this court has evaluated the testimony produced by the petitioner and the respondent. After the meeting of March 1, 1982 commenced, the opposing parties presented distinctly different testimony on what occurred thereafter. The Superintendent testified that when he questioned the respondent at the meeting as to the incident of December 22, 1981, concerning a physical assault on a student and the respondent's failure to submit a written report as requested by the Superintendent, the respondent became extremely hostile and used profane language such as "chicken shit" "bullshit" and "shit" to express his outrage at the Superintendent's request. The Superintendent firmly believes that the respondent, when referring to his prior letter on the matter, told him to "Shove it up your ass." Shortly thereafter the meeting broke up with the respondent needing to be escorted out of the conference room by Charles Panella. Depending on who is testifying, one version of the facts has the respondent standing up leaning over the conference table threatening the Superintendent with his fists. Another version of the same incident has the respondent leaving the conference room in a quiet and restrained manner. The truth, no doubt, lies somewhere in between.

Charles Panella testified that he was the first one to ask at the outset of the meeting, "What is all this bullshit about?" Nisenson, on the other hand, testified that he heard someone use the expression "Fuck." The confusion, during the course of this incident, is quite apparent in the testimony of the other witnesses offered by both the respondent and the petitioner. Every witness has his or her version of what occurred. For example, Betty Stephens, one of the secretaries in the outer office, testified that she heard the respondent say as he left the conference room, "I'll kill him." The Superintendent denied ever hearing the respondent say or utter such a statement and so did Dolores Wiarda. It is, therefore, very apparent that what happened inside that conference room on March 1, 1982 was essentially a heated discussion between the respondent and the Superintendent. The discussion resulted in the respondent being escorted from the room by Charles Panella and the respondent uttering profanity at the Superintendent in an emotionally charged manner. There is little doubt that the Superintendent remained calm throughout this emotionally wrenching experience. The

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Superintendent did not participate on the same emotional level as the respondent did to the conference. The respondent, based on this court's observations of him, appears to be an emotionally charged individual who, if properly motivated, will respond to events and circumstances in a manner equally as charged as he did on March 1, 1982. This is further corroborated by his behavior involving the alleged charge of corporal punishment with K.P. (see prior discussion). It is interesting to recall the testimony of K.P., Sr. and Dr. Vito Farese on this particular point. According to K.P., Sr., the respondent lost complete control of himself during a conference with the principal to discuss the alleged corporal punishment involving K.P. The respondent had to be asked to leave the room by the principal. Dr. Farese, witness called by the respondent, initially denied that the respondent left the room because of his emotional state, but later changed the testimony and indicated that he had, in fact, asked the respondent to leave the room because he had, in his opinion, lost his composure. Dr. Farese further testified that when Leslie Gaulton attempted to serve the respondent with these charges, the respondent locked himself in his office for over 30 minutes, refusing to accept the charges. The respondent's behavior has been immature on occasions, in response to inquiries from his superiors regarding alleged incidents of corporal punishment. Both incidents reveal the characteristics of an emotionally charged individual who responded as the testimony of Panella, Nisenson, Gaulton and Santini suggest on March 1, 1982. Despite the respondent's emotionally charged character and the evidence adduced at the hearing, it does not suggest that the respondent assaulted, intimidated, slandered and verbally abused the Superintendent as indicated in the charges. What the evidence does indicate is that the respondent used profanity during the course of the conference. Despite his testimony to the contrary, the Superintendent's demeanor after the conference does not reflect or suggest that he was in any way intimidated or abused by the respondent's emotional outburst during the course of the meeting. That fact is corroborated by the testimony offered by Gaulton and Wiarda, who indicated that at the conclusion of the meeting, that the Superintendent appeared calm and professional in his manner.

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After carefully reviewing all of the evidence and having viewed the demeanor of the witnesses, this court hereby **FINDS** that:

1. On March 1, 1982, the Superintendent of Schools, John Santini, held a meeting with the respondent to discuss an incident involving a student which had occurred on December 1982.

2. The meeting was called after numerous requests for a written report from the respondent, which the Superintendent did not receive in a timely fashion.

3. The respondent requested that Charles Panella and Leon Nissenson accompany him to the meeting with the Superintendent on March 1, 1982.

4. After a short while, the meeting between the Superintendent and the respondent became quite heated, a number of expletives were uttered by the respondent toward the Superintendent and the respondent had to be escorted from the room as a result of his highly emotional outburst.

5. The respondent became quite agitated by the insistence of the Superintendent for a written report regarding the December incident, and became emotionally charged and had to be escorted from the conference room.

6. The respondent did not threaten, intimidate or in anyway abuse the Superintendent on March 1, 1982.

7. After the respondent was escorted from the conference by Charles Panella, the Superintendent of Schools remained calm and professional in his demeanor, belieing the fact that he had been

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threatened, assaulted, intimidated and/or verbally abused by the respondent.

8. The respondent did utter expletives/profanity toward the Superintendent.

9. The conduct of the respondent in uttering profanity to the Superintendent, as a result of the March 1, 1982 meeting, constitutes conduct unbecoming a teaching staff member.

Therefore, this court **CONCLUDES** that the respondent engaged in conduct unbecoming a teaching-staff member in that he uttered profanity to the Superintendent of Schools on March 1, 1982 during a conference to discuss an incident involving a student on December 22, 1982.

PENALTY CONSIDERATIONS

The petitioner has requested that the respondent be dismissed as a teaching-staff member as a result of his unbecoming conduct. Whether that conduct warrants a dismissal is, of course, another question. In this court's view, it does not warrant respondent's removal. Certainly, a teaching staff member is expected to conduct himself in a professional manner at all times—since his conduct reflects upon the school district.

Moreover, the Commissioner has previously held In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 in pertinent part that:

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

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There can be little question that the respondent's conduct on March 1, 1982, in using profanity toward the Superintendent, was inappropriate under the circumstances, despite the respondent's view that the Superintendent was "harassing" him regarding the December incident. The respondent had only to respond in a professional manner to the Superintendent. The Superintendent, of course, had the full right and authority to conduct an investigation into the December incident if he thought it appropriate.

The respondent has been employed with the school district for twelve (12) years. The respondent was previously cited for conduct unbecoming a teacher and corporal punishment. In the Matter of the Tenure Hearing of David Brody, School District East Paterson, 1972 S.L.D. 565, which was sustained in part and denied in part. The Commissioner of Education determined that a penalty of less than dismissal was appropriate and warranted under the circumstances. The Commissioner of Education reduced his salary as a result of his findings in that matter. Respondent was cited for insubordination. In the Matter of the Tenure Hearing of David Brody, School District of Elmwood Park, 1980 S.L.D. 49. On this matter, the Commissioner simply issued a reprimand. The two matters were separate by some eight (8) years. Nonetheless, in the insubordination matter the Commissioner ordered a copy of the decision placed in the respondent's personnel file and stated that:

> By so doing the Commissioner hopes that this action will serve as a reminder to respondent and others that unlawful acts, no matter when or where they occur, which rise to the level of unbecoming conduct, will not go unpunished. 1980 S.L.D. 456.

There appears to be mitigating circumstances which may explain the respondent's conduct and outburst on March 1, 1982. The Superintendent had a lot to do with what occurred on that day. His conduct, although appropriate, seemed calculated to elicit the emotional reaction from the respondent and cannot be ignored by this court. His testimony about the event, about what occurred and why he called the meeting, lacked credibility in certain instances. For example, the Superintendent admitted that he very rarely requested additional information about corporal punishment matters when his building principals were satisified with their investigations of the matter. The

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Superintendent could not recall a single request. The Superintendent attempted to explain his continued insistence for further information from the respondent. As a result of his "rare" insistance for more information, the respondent, rightly or wrongly, felt that that the Superintendent was harassing him and "building a file" on him for later use. The respondent, no doubt, may have unwittingly played directly into the hands of the Superintendent by virtue of his conduct on March 1, 1982.* During the course of the Superintendent's testimony, it was apparent to this court that the Superintendent has a distinct dislike, if you will, for the respondent. This appears to be based on an incident that occurred between them sometime earlier than March 1, 1982. From the facts adduced at the hearing, it appears that the Superintendent's continued insistance for additional information regarding the December incident created a most confusing and emotionally charged environment on March 1, 1982. That confusing and emotionally charged environment contributed in large part to the respondent's emotional outbursts.

The current charge of conduct unbecoming a teacher is not similar to any of the prior charges brought against the respondent (Exhibits P-7 and P-8). The March 1, 1982 incident seems to be unique only in that the respondent had never before been cited for using profanity toward the Superintendent or any other supervisory employee of the petitioner. Indeed, the testimony of Charles Panella indicates that he also uttered profanity at the Superintendent, but was not charged with conduct unbecoming a teacher. This court firmly believes that the respondent should not be dismissed in light of the rather unique circumstances leading up to the emotionally charged meeting on March 1, 1982. The respondent should be given one more opportunity to demonstrate his maturity and value to the school district. Petitioner has not questioned the respondent's apparent

*At the conclusion of that emotionally charged meeting, the Superintendent informed his secretary, Dolores Wiarda, that he intended to file charges against the respondent and sought to obtain affidavits from various individuals who were in attendance at the meeting or who heard what occurred during the course of the meeting. In addition, the Superintendent sought to gather other evidence against the respondent to support his conduct unbecoming a teacher charge. Although not an issue raised during the course of the March 1, 1982 meeting, the Superintendent subsequently filed charges against the respondent on the alleged corporal punishment involving K.P. The alleged corporal punishment investigation involving K.P. was available to the Superintendent in February 1982.

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satisfactory teaching record/performance. The respondent can, to use a baseball term, consider this matter as "strike two" and the next strike, a similar charge, will result in his likely dismissal. This court hereby **FINDS** and **CONCLUDES** that the respondent should not be dismissed as a teaching-staff member of the petitioner because of the unique circumstances leading up to the meeting with the Superintendent on March 1, 1982.

The respondent's conduct, however, cannot go unpunished. It is this court's view that the respondent should forfeit four (4) month's salary because of his conduct on March 1, 1982. Therefore, it is hereby **ORDERED** that respondent forfeit four (4) month's salary which he is entitled to receive retroactive to the date of his suspension.*

*Although not raised as an issue during the course of hearing, the petitioner never formally suspended the respondent in accordance with N.J.S.A. 18A:6-14

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OAL DKT. NOS. EDU 6082-82 and EDU 7575-82

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

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

MAY 15, 1984
DATE

ROBERT T. PICKETT, ALJ

Receipt Acknowledged:

MAY 16, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 18 1984
DATE
par /e

Ronald L. Parker /ph
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:

K.P.
C.S., student
Dr. Vito A. Farese
Alexander R. Maccia
John M. Santini, Superintendent of Schools
Dolores Wiarda
Leslie J. Gaulton
Lorraine Lengyel
Betty Stephens

For Respondent:

Sonia Freedman
Charlotte Colombo
David Brody
Leon Nisenson
Charles Panella

EXHIBITS MARKED IN EVIDENCE

P-1 Memorandum from John M. Santini, Superintendent of Schools, to the respondent, David Brody, dated January 8, 1981

P-2 Memorandum from John M. Santini, Superintendent of Schools, to the respondent, David Brody, dated February 11, 1982

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P-3 Memorandum from respondent to the Superintendet of Schools, dated February 17, 1982

P-6 Tenure charges on EDU 6082-82/March 1, 1982 incident involving the Superintendent of Schools

P-7 Commissioner of Education decision In the Matter of Tenure Hearing of David Brody, dated October 16, 1972

P-8 Commissioner of Education decision In the Matter of Tenure Hearing of David Brody, dated March 10, 1980 and May 6, 1980

P-10 Tenure charges filed against the respondent on EDU 7575-82/corporal punishment matter

R-1 Memorandum from A. Maccia, principal of Gilbert Avenue School, to respondent, dated January 7, 1982

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IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID BRODY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
ELMWOOD PARK, BERGEN COUNTY.	:	
	:	

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

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

Complainant Board excepts to the initial decision by the judge contending that the decision is so riddled with inconsistencies as to be totally in error warranting rejection by the Commissioner. The Board contends further that Respondent Brody committed corporal punishment and was guilty of conduct unbecoming a teacher such that the only appropriate remedy is dismissal. In these primary exceptions the Board lists a plethora of items which it contends:

a. are in error
b. were omitted entirely
c. were wrongly interpreted
d. were contradictory in nature
e. were incomplete
f. were improperly defined
g. were lacking in credibility (twenty or more).

The Board pleads for the dismissal of respondent.

Respondent's reply exceptions argue otherwise, supporting the determination by the judge but excepting to the penalty imposed on him. Respondent argues that the determination with respect to the corporal punishment charge is a question of fact thoroughly analyzed by the judge and laid to rest. Respondent contends that he made no attempt to avoid his responsibilities and that subsequent investigations must be considered in light of the tense relationship exemplified by the profane expressions between him and the Superintendent of Schools.

The Commissioner deems it important to firmly establish, accept and affirm the statement of the judge that "the choice of accepting or rejecting the testimony of the witnesses rests with the finder of fact." (ante) Atkinson, supra; Freud, supra As a consequence the Commissioner accepts and affirms the findings by the

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judge after he had viewed the demeanor of the witnesses and concluded that respondent engaged in conduct unbecoming a teaching staff member by his profanity to the Superintendent of Schools at a conference meeting on March 1, 1982 from which respondent had to be restrained and removed from the room by his colleague, Panella. Such imprudent and unbecoming behavior cannot be condoned.

The Commissioner cannot agree with the judge that such behavior does not warrant dismissal. The Commissioner is constrained to refer pointedly to the total record of respondent compiled over the approximately twelve (12) years with the school district during which on three separate occasions tenure charges have been certified to the Commissioner against Respondent David Brody. 1972 S.L.D. 565 (loss of four months' salary) Further, in 1980 S.L.D. 449 the Commissioner stated as follows:

> "The Commissioner has reviewed the salient facts and testimony adduced in the matter controverted herein including the initial determination of Judge Jack Berman, ALJ.
>
> ***
>
> "The conclusion of Judge Berman that respondent commited an act of insubordination after receiving a lawful order from a superior is, in the view of the Commissioner, obviously correct. The Commissioner adopts it as his own.
>
> "The penalty imposed on respondent is warranted and fair. It fits the level of offense in that it is a warning of more serious repercussions should such an unprofessional act recur. Accordingly, the Commissioner orders that a copy of this decision be placed permanently in respondent's personnel file so long as he is employed in Elmwood Park as a teaching staff member.
>
> "By so doing the Commissioner hopes that this action will serve as a reminder to respondent and others that unlawful acts, no matter when or where they occur, which rise to the level of unbecoming conduct, will not go unpunished."
>
> (at 456)

The Commissioner notes that David Brody has been accorded full due process in two previous tenure matters and could not fail to know and comprehend the warning which remained a permanent portion of his personnel file, ante.

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In the opinion of the Commissioner, in view of the present (and third) tenure hearing and with the finding that David Brody is guilty of unbecoming conduct, it is clearly obvious that such admonitory language has not served as a deterrent to the impetuous behavior of the teacher. In the instant matter again the teacher is guilty of conduct unbecoming for a third time. In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) it was held 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 may also be shown by many incidents.***" (130 N.J.L. at 317)

Moreover, the Commissioner has previously held In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 in pertinent part that:

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

The Commissioner notes that the judge, for his own reasons, compares the present matter by simile to the baseball term "strike two". In view of the full due process accorded respondent in two previous tenure hearings the Commissioner cannot agree. As ably phrased in the Board's exceptions set down in pertinent part:

> "The court analogizes the Respondent's actions, past and present, to a baseball game and indicates that the Respondent has two strikes. The court then states that the '...next strike, a similar charge, will result in his likely dismissal.' It is the Petitioner's position that the Respondent *** has received three strikes***." (at p. 12)

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The punishment fashioned herein by the Court is set aside. Accordingly, for the reasons previously stated, David Brody shall be and is released from employment of the Board of Education of Elmwood Park as of the date of this decision.

IT IS SO DETERMINED.

JULY 2, 1984

COMMISSIONER OF EDUCATION

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IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID BRODY, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
ELMWOOD PARK, BERGEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, July 2, 1984

For the Petitioner-Cross-Appellant, Matthew P. DeMaria, Esq.

For the Respondent-Appellant, Rothbard, Harris and Oxfeld
(Emil Oxfeld, Esq., of Counsel)

Commissioner's decision is affirmed for reasons expressed therein. As specified in the decision, Respondent's employment is terminated as of July 2, 1984, the date of the Commissioner's decision in the matter.

October 3, 1984

PENDING N.J. SUPERIOR COURT

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2232-84
AGENCY DKT. NO. 40-2/84

J. S., AS GUARDIAN OF K. S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,
Respondent.

APPEARANCES:

Richard J. Schachter, Esq., for petitioner (Schachter, Wohl, Cohn & Trombadore, attorneys)

Boyd Harbourt, Esq., for respondent (Harbourt & Duh, attorneys)

Record Closed: May 14, 1984 Decided: May 17, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, J.S., as guardian of K.S., asserts that the method of calculation used by the Board of Education of the Town of Phillipsburg is arbitrary, capricious, unreasonable and in violation of the Board's own guidelines and/or policies when it failed to deem K.S. eligible for membership in the National Honor Society. The Board contends that by reading several documents together, it is clear that the method of calculation used by it was proper.

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On or about February 24, 1984, petitioner filed an appeal with the Commissioner of Education. On April 2, 1984, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on May 1, 1984, the following issues were identified:

1. Is the method of calculation utilized by the Board arbitrary, capricious, unreasonable or in violation of the Board's guidelines and/or policies when it failed to deem K.S. eligible for membership in the National Honor Society?

2. If petitioner should prevail, what relief is he entitled to?

On May 1, 1984, oral argument was heard on petitioner's motion for summary decision. The court carefully reviewed all papers filed in support of and in opposition to said motion. The court requested additional documents from the parties by May 14, 1984. I have carefully reviewed all of the additional papers sent to me both in support of and in opposition to petitioner's motion.

FINDINGS OF FACT

The facts in this matter are not in dispute and are hereby adopted by me as my **FINDINGS OF FACT:**

1. Phillipsburg High School maintains a local chapter of the National Honor Society.

2. K.S. is a junior at Phillipsburg High School.

3. The following is an itemization of K.S.'s academic accomplishments during his freshman and sophomore years in high school:

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FRESHMAN YEAR

GRADE	LEVEL	CREDITS	GRADE WEIGHT	POINTS
B	II	5	4	20
B	II	5	4	20
B	II	5	4	20
B	II	5	4	20
B	III	5	3	15
TOTAL FOR YEAR		25		95
GRADE POINT AVERAGE FOR YEAR				3.8

SOPHOMORE YEAR

GRADE	LEVEL	CREDITS	GRADE WEIGHT	POINTS
A	II	5	4	25
B	II	5	4	20
B	II	5	4	20
B	II	5	4	20
B	II	7	4	28
TOTAL FOR YEAR		27		113
GRADE POINT AVERAGE FOR YEAR				4.185

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4. The guidelines published in the Student/Parent Handbook (paragraph E-3) dealing with eligibility for the National Honor Society states:

> Students are eligible for membership in the National Honor Society at the beginning of their junior year and senior year, who have attained a cumulative average of at least 4.0 for all classes.

5. On August 3, 1981, a document called ACTION ITEM - POLICY REVISION FOR HONOR STUDENT RECOGNITION (Annex "A" - Certification of Peter Merluzzi) was presented to the Board, which document states:

> . . . An accumulated average of 4.0 will be used to establish a candidate list for National Honor Society and honor graduates.

6. The respondent Board passed a revised policy for class average and class rank. (See, Certification of Peter Merluzzi dated April 30, 1984 and Annex B.) Under paragraph 6 of the policy, it states:

> Class rank will be calculated at the end of the third year of high school and again at the end of the third marking period of the senior year. The four yearly averages will be totalled and divided by four. The final average will be rounded to the fourth decimal point. Class rank will be determined by placing the class averages from the highest to the lowest figures.

7. On page 12 of the Student/Parent Handbook (see, Annex C of affidavit of Peter Merluzzi dated April 30, 1984), paragrah (e) dealing with grading system and ranking, the following language appears:

> Yearly averages are computed by multiplying the grade achieved at the noted course level, times the credits awarded. This product is totalled for all courses and the sum is divided by total number of credits achieved for that term.

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Paragraph 2 entitled "Student Averages and Honor Roll" states:

> . . . Students averages will be computed yearly and a yearly honor roll will be published based on those yearly averages. Class rank will not be computed until the end of the junior year. It will again be computed as a final ranking at the end of the third marking period of the senior year. Rank is based on the cumulative averages achieved while in the high school.

Calculations involving students' marks at Phillipsburg High School are used to ascertain the following: a) class rank (calculated yearly); b) honor graduates (validatorian and salutatorian); c) candidates for the honor roll (calculated yearly; d) candidates for the National Honor Society (see affidavit of Elaine B. Molnar dated May 8, 1984).

8. The method of computation used by the Board of Education in determining whether or not K.S. was eligible for membership in the National Honor Society involved taking K.S.'s grade point average for the freshman year of 3.8 and taking his grade point average for the sophomore year of 4.185 and then averaging the cumulative average for these two years, coming up with a grade point average of 3.9925.

9. Petitioner computes K.S.'s grade point average by taking his total points for his freshman year of 95 and his total points for his sophomore year of 113, adding the two together and reaching of 208 points. That total point is divided by the total number of credits for two years of 52 and arriving at a grade point average of 4.0.

CONCLUSIONS OF LAW

The narrow issue before me is which method of calculation is the proper one? If we use the Board's method of calculation, petitioner is ineligible for the National Honor Society. If we use petitioner's method of calculation, K.S. is eligible for the National Honor Society.

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Petitioner relies on the language in the Student/Parent Handbook which states:

> Students are eligible for membership in the National Honor Society. . . who have attained a cumulative average of 4.0 for all classes. Id. at 13.

Petitioner asserts that the use of the word 'cumulative' in the Student/Parent Handbook means that you must take his total points for the first two years and divide it by the total credits taken. It is pointed out that respondent, by using its method of calculation, uses the same numbers twice. Instead of obtaining the cumulative average for all classes and basing its decision on that, it obtains the cumulative average for each year and then adds those totals to obtain a yearly cumulative average. In other words, what respondent is doing is averaging the averages.

Respondent takes the position that the different guidelines and policies which deal with four different matters, i.e., class rank, honor graduates, candidates for the honor roll, and candidates for the National Honor Society, should be read in pari materia. Thus, in determining each one of the aforementioned matters, the same method of calculation would be used. If respondent is relying on this argument as its justification for its method of calculation for eligibility for the National Honor Society, I do not read its policies as so stating. The method of calculation contained in the revised policy for class average and class rank clearly, in my judgment, does not deal with eligibility for the National Honor Society. Nowhere are the words National Honor Society mentioned. The policy or guideline contained in the Student/Parent Handbook under E-1 and 2 on page 12 also does not deal with a method of calculation for eligibility for the National Honor Society. Those calculations deal with grading system and ranking, student averages and honor roll.

Respondent argued in oral argument before me that the ACTION ITEM - POLICY REVISION FOR HONOR STUDENT RECOGNITION, which states, "an accumulated average of 4.0 will be used to establish a candidate list for National Honor Society and honor graduates," should be read together with the revised policy for class averaging-class rank, as it was, in fact, information for Board members explaining what the revised policy for class average and class rank meant. However, I do not read the two documents and reach the same conclusion. The Board suggests that all of the aforementioned

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documents read together clearly point out that one method of computation is to be used for class rank, honor graduates, candidates for the honor roll, and candidates for the National Honor Society. All calculations are to be same, i.e., where more than one year's average is concerned, the yearly averages would be totalled and divided by the appropriate number of years to obtain the final result.

I do not read the Board's documents as stating what they claim they state. If respondent is relying on those documents to justify its method of calculation for eligibility for the National Honor Society, it is relying upon inappropriate and incorrect documents. The only applicable and relevant document which deals specifically with eligibility for the National Honor Society is the policy enunciated in the Student/Parent Handbook (paragrah E-3). The method of calculation used by petitioner is correct and in conformance with that policy or guideline. Respondent's method of calculation is incorrect and in violation of that policy and guideline. Respondent's method of calculation may be correct to determine eligibility for other matters such as class rank, honor graduate or candidate for the honor roll; but not for eligibility for the National Honor Society. It is clear and obvious that respondent violated its own policies and guidelines in utilizing the method of calculation that it did and in denying petitioner eligibility for the National Honor Society.

It is axiomatic that if there is some doubt as to the exact intent of the Board as a result of the promulgation of its policies and guidelines, this ambiguity should be construed against it, "it is a well known rule of law that a written document is to be construed most strongly against the one who drew it." See, Warsley v. Brtan, 114 N.J.L. 36, 38 (E. & A. 1934).

In conclusion, it is my judgment that the Board, in disregarding its own policies and guidelines, acted arbitrarily, capriciously and unreasonably in its refusal to admit petitioner into the National Honor Society. The method of calculation was in clear disregard of its own policies and guidelines. The fact that previous students did not question the method of calculation or that the Board for years utilized the same method of calculation has no bearing on the legitimacy on the Board's method of calculation.

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Taking into account the totality of the circumstances of this case, I hereby **CONCLUDE** and **ORDER** that the Board's action in refusing to admit petitioner into the National Honor Society was arbitrary, capricious, unreasonable and in violation of its own guidelines and policies.

Petitioner's motion for summary decision is hereby **GRANTED.**

Accordingly, I hereby **ORDER** that respondent declare that K.S. has a cumulative average of 4.0 making him eligible under its own guideline and policy for admission to the National Honor Society chapter at Phillipsburg High School. I further **ORDER** respondent to act promptly upon his application for admission.

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.

5-17-84
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

May 21, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 23 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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J.S. as guardian of K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, determinations and conclusions of law have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

It is observed by the Commissioner that determination by the judge is made that the Board, in denying petitioner eligibility for the National Honor Society, violated its own policies by its method of calculation of petitioner's grade point average. The Commissioner concurs with the determination that K.S. has a cumulative average of 4.0 making him eligible for admission to the National Honor Society at Phillipsburg High School which the Board shall note and expedite forthwith.

IT IS SO ORDERED.

JULY 5, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7190-83
AGENCY DKT. NO. 314 - 8/83A

JAMES SHERMAN,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent

APPEARANCES:

Wayne J. Oppito, Esq., for petitioner

Melvin Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: April 16, 1984 Decided: May 18, 1984

BEFORE **JAMES A. OSPENSON,** ALJ:

James Sherman, a tenured middle school principal employed by the Board of Education of the City of Orange, Essex County (Board), alleged the Board's action in withholding his salary and adjustment increments for 1983-84 was arbitrary, capricious,

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and unreasonable and otherwise contrary to standards and criteria of N.J.S.A. 18A:29-14. He sought judgment of the Commissioner of the Department of Education restoring the increment. The Board denied allegations of the petition generally, contending Board action was properly and lawfully predicated upon petitioner's violation and deviation from established Board policies and procedures concerning deposits into, use and audit of certain student activity and PTA fund accounts.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 9, 1983. The Board's answer was filed there on September 6, 1983. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on September 15, 1983 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 October 21, 1983 and an order entered establishing, inter alia, hearing dates beginning February 14, 1984. The matter was heard in the Office of Administrative Law on February 14 and 15, 1984. Thereafter, posthearing submissions having been completed by April 16, 1984, the record closed then.

At issue generally, is whether petitioner shall have established a preponderance of the credible evidence that Board action in withholding salary and adjustment increments for 1983-84 was arbitrary and/or not supported by evidence, contrary to standards and criteria in N.J.S.A. 18A:29-14.

EVIDENCE AT HEARING

It appeared without dispute that the Board acted at its meeting of June 28, 1983, to withhold petitioner's salary and adjustment increments for 1983-84.

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By letter dated July 1, 1983, Woodrow Zaros, superintendent of schools, informed petitioner as follows:

> In accordance with N.J.S.A. 18A:29-14, on June 28, 1983, the Board of Education voted to withhold your employment and adjustment increment for the 1983-84 school year for reasons of unprofessional conduct and the violation and circumvention of Board policy and audit procedures.
>
> As Principal of Orange Middle School, you have violated and circumvented established policy and have been unprofessional in your conduct. You:
>
> A. Knowingly and deliberately deposited monies in a PTA account in order to circumvent establish audit procedures of the Board of Education.
>
> B. Authorized field trips with Student Activity Account funds without the required approval of the Board of Education.
>
> C. Administered the Student Activity and PTA Accounts without securing reasonably required documentation to verify the collection of funds.
>
> D. Violated Board policy and audit procedures and directives by collecting monies on behalf of the Student Activity Account without timely and properly documenting or depositing these funds.

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E. Failed to deposit to any account certain funds for the Drama Club.

F. Authorized the existence of an unauthorized fund: the Industrial Arts Club Fund (separate bank account).

G. Used Student Activity Account funds for your own personal use, as relates to the rug transfer fund uncovered in the audit.

If you have any questions regarding the above, please do not hesitate to contact my office.

It appeared generally, during the spring of 1983, the Board had received complaints from the middle school PTA about petitioner's mishandling of certain PTA monies on deposit to its credit at Midlantic Bank in a checking account. Three signatories were required for withdrawals from it; the petitioner, Joseph Del Guercio, an assistant principal at Orange Middle School and PTA treasurer, and the PTA president. In a second account, Orange Middle School Student Activities Funds were on deposit at United Jersey Bank in an official school account. From that account only petitioner could draw by check. An additional complaint was registered by the PTA to the superintendent of schools by letter dated March 16, 1983. R-4. The complaint said petitioner had requested the PTA president to lend a teacher $1,000 until the teacher's overdue permanent substitute salary was paid him by the Board. According to testimony by the superintendent, he called petitioner and Del Guercio in for conference, in order to review both the school activities account and the PTA account and procedures employed in their operation and use. At that time, said the superintendent, he had no knowledge of the existence of the PTA account, or knowledge of it as one into which student funds were deposited. He himself had never authorized existence of such an account, he said, and

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was told at the time by petitioner that it was he, petitioner, who had opened the account in the early part of the school year 1982-83. Petitioner told the superintendent, as he later told the Board, he had authorized opening the PTA account in order to begin a process of securing greater and more active involvement by the PTA in school fund raising events. It was started, petitioner conceded, as a convenience for students and staff and, admittedly, according to petitioner, was designed to circumvent the regularly required audit procedures of the student activities account on behalf of the Board. Petitioner made such a statement expressly to the Board in June 1983. He conceded also he had never asked the Board for permission or authorization to establish any such account and that student activity funds were put into it ultimately at his direct authorization. The PTA account, naturally, he said, was exempt from the annual school audit, which was not the case for the official student activities account.

Having reported to the Board his inability to solve the intricacies of the intermingling of funds between the PTA account and student activities account, the superintendent, as he testified, reported to the Board seeking authorization to employ a regular auditor to conduct audit of student funds. The Board agreed. The audit was thereupon conducted by Kennedy, McGovern and Company, certified public accountants, and reported to the Board on June 27, 1983. It covered "transactions of Orange Middle School and Orange Middle School PTA Funds, July 1, 1982 through May 31, 1983." The audit is R-2 in evidence. The auditors reported their findings were subject to and qualified by certain limitations. Records of the PTA fund were not normally part of the annual audit of the school district; therefore, it was said, opening balances had not been verified. There were missing deposit slips of the PTA Fund. There was a lack of substitutive records of fund raisers and student trips which limited verification as to whether all funds had been properly handled and deposited. There was intermingling of student activities funds and PTA funds, which likewise limited verification of proper handling and deposit. Monies held by certain school personnel limited complete verification. In some instances, payments for goods and services appeared to have been paid for by cash never deposited or, therefore, accounted for. The review, said the auditors, uncovered existence of an authorized fund, the Industrial Arts Club Fund.

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The auditors were informed by the school principal, petitioner, that he was unaware of the fund's existence. The auditors found a lack of proper documentation of receipts and disbursements and, further, found that unauthorized fund raisers and field trips had existed. Subject to those limitations, among others, the auditors said, their review of the financial details followed.

The auditors made some 20 notes to their reports. They found three field trips not to have been given prior approval by the business office, a violation of Board policy. The trips were to Livingston Skating Rink, Great Adventure, and Circle Line. At the fund raisers, the auditors noted that without knowledge of the business office, petitioner and Del Guercio had agreed with the PTA to use the PTA account to transact business connected with Orange Middle School fund raisers of which some five occurred during the 1982-83 school year. The auditors found there was a $300 deposit in the PTA account apparently as a refund of a PTA gift to the Orange Middle School to purchase a rug. The deposit was in the form of $200 in cash and a $100 personal check from petitioner. The Orange Middle School had received the $300 gift from the PTA during fiscal year 1981-82. Petitioner advised the auditors, as indeed he testified at hearing, he placed the gift in the Orange Middle School safe and never deposited it into the official student activities account. Upon discovery of a used rug within the limit of the gift, petitioner used $100 of the gift as a deposit. The purchase was never made, however, and in March 1983, the entire $300 gift was returned to the PTA by petitioner at their request. He testified he used the $100 deposit as a credit for personal purchases and, therefore, wrote his own personal check for $100 to the order of the PTA to make up the balance of $300 returned. The auditors noted petitioner and Del Guercio had attempted to retransfer from the PTA account the $4,400 accumulated there to the Orange Middle School Student Activities Account. The sum represented a surplus that had been created from various fund-raising profits during the year, which were deposited into the PTA account for use as Orange Middle School special activities monies. As of the final date of audit, May 31, 1983, however, those funds still rested in the PTA account. The auditors estimated in their report the monies due the Orange Middle School Acitivity Account from the PTA account. The auditors found that during the 1982-83 the school Industrial Arts Club had opened a

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savings account at Hudson City Savings Bank, without the approval of the business office. The account was opened by the club coordinator, Robert Markel, for the purpose of handling the activities of the club. All related accountable receipts and withdrawals for activities of the club, with the exception of one, were transacted through the account. It appeared from audit that fund raisers held by the club during the year were without authorization of the business office. The auditors recommended the savings account be closed and the balance transferred to the Orange Middle School Student Activities Account, specifically earmarked for the Industrial Arts Club, which, the auditors said, was the proper procedure.

The auditors made some ten specific comments and recommendations in J-2. Among them were that all coordinators of student activities be briefed on all related Board of Education policies; that monies in the Industrial Arts Club be transferred to the Orange Middle School Student Activities Account for club use; that surplus monies in the Orange Middle School PTA account earned on behalf of Orange Middle School students be transferred to the Orange Middle School Activities Fund; that all school principals maintain their books and records so that all monies collected and disbursed have all proper documentation and approval and, further, that they be made available for audit and interim review; that all cash collected on behalf of student activity be deposited timely and with proper documentation (upon audit the auditors found some $1,700 in cash in the Orange Middle School safe in the form of cash and checks); that monies from student activities be only used for student activities, and not, as petitioner had done, for personal transactions for which he later reimbursed the PTA on return of the rug gift; that all field trips and fund raisers be approved by the business office; and that all schools receive approval of the business office prior to entering any agreement or contract for purchase of goods or services in excess of $100.

According to a procedural manual for handling student activity fund, which was dated July 1, 1978, and disseminated to all building principals (J-2), the cardinal principle to be observed in handling student activity funds, commonly called "school funds," is that they are like trust funds. The funds belong to the students and are to be used exclusively

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for their benefit. The principal and his staff function as trustees in administration of the funds. Records of funds should be kept up to date. The records should be in proper condition for audit at any time. Cash collected by teachers from students for specific purposes and accounted for in class rosters or specially designed forms should be periodically deposited. The test is one of reasonableness and prudent business practice. Deposit slips should be prepared and maintained in duplicate. The source and nature of individual items deposited should be clearly indicated on the deposit slips, which should be filed in chronological order for reference and audit purposes. A check-stub book should be maintained at each school, properly filled out as used. A cash receipt and disbursement record in bound book form should be maintained at each school, balances should be reconciled with bank statements with cash book and check book. Financial reports should be submitted at least annually for audit purposes. Principals have a fiscal responsibility for the school funds that goes beyond approval of vouchers and signing checks. They are primarily responsible as trustees for the funds. They should review records of the bookkeeper-secretary from time to time, require periodic statements for control purpose, and determine that Board policies and procedures regarding school funds are consistently carried out. When staff handles monies, the teacher or advisor should be required to make a complete written report or statement of gross receipts, expenditures made and balance turned over to the school fund or otherwise accounted for. [Id. at 1-12.]

Called by petitioner, a former assistant principal at Orange Middle School for 1982-83, Joseph Del Guercio, testified that in addition to his duties for discipline, scheduling, assembly, school calendar in that year at Orange Middle School, he was also school treasurer as appointed by petitioner as well as PTA treasurer as elected by the PTA. As treasurer of student funds in 1982-83, he said he used as his general procedure in working with the PTA to bring in certain fund raisers, a checking of the list of students who sold items in fund raisers. General procedure was for the classroom teacher to check as students sold fund raising items. Collected funds would then be given to the team leader for recording and then to Del Guercio to check and record. He would then deposit either the cash or checks in checking accounts of either the student activity fund or the PTA fund. If the activity were a PTA assisted fund raiser, monies went into the latter's

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account. If a regular school activities fund-raiser, the money went into the school account. PTA activities, he said, were always fund raisers; student activities included fund raisers but also monies collected for such things as caps and gowns or yearbooks. Del Guercio's role was to approve all fund raisers. The only fund raiser he did directly, he said, was a student magazine venture. Del Guercio said he never saw Board policy for accounting for elementary school funds (J-2), until June 1983. He said petitioner had never shown it to him or "shared it with him." Del Guercio resigned his position as PTA treasurer on March 25, 1983 (R-1) because he was told there was a conflict of interest in his holding that job as well as being school treasurer.

Officers of the PTA in March or April 1983, he said, went to the superintendent to complain of a confusion in the PTA account. The PTA president, petitioner and Del Guercio, he said, had drawn a PTA check to the order of the student activities account for some $4,000. Payment was stopped by the PTA president, although the check was intended as a mere transfer of funds from student fund raisers.

Called by petitioner, Robert Markel, said he has been Industrial Arts teacher at the Orange Middle School since 1975. His cocurricular duties included the American Industrial Arts Student Association and the yearbook staff. Shown J-5, a form of field trip request for approval by principal and assistant superintendent, he said the form was used many times for, among other events, a trip to the U.S. Mint at Philadelphia and a trip to a Broadway play. Those trips were approved by the assistant superintendent, the trips being funded by cookie and candy sales. For the cookie sales, for example, he said, a company sales representative gave a brochure outlining a plan by which student funds would be received and the sales would result in a 40-50 percent profit for the group. The students would bring monies to a teacher who kept a ledger sheet and who then disbursed cookie boxes to the students for the monies presented. The monies were deposited into an interest bearing savings account opened by Markel and another teacher at Hudson City Savings Bank in October 1982. The fund was, of course, separate from the student activity account and the PTA fund accounts. Markel never obtained prior approval from either the Board of Education or petitioner as principal for creation of the account, which

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was used twice, he said, once for a racing car sale and once for a candy sale. In the spring of 1983, Markel said, when called to the superintendent's office, he told the superintendent petitioner had not approved the account. He said he had never received specific instructions as to conduct of student fund raisers or deposits of monies generated thereby.

Called by petitioner, Karen Frank, said she had been employed by the Board as a mathematics and computer science technician at Orange Middle School for five years. A cocurricular activity in 1982-83 was as coadvisor to the Industrial Arts Club with Markel. When asked by the superintendent in June 1983, she told him petitioner had never authorized institution of the Industrial Arts Club Account at Hudson City Savings Bank. She said, moreover, she had never seen the written policy for accounting for elementary school funds, as in J-2.

Called by petitioner, Linda Epps-Moses, said she was a seventh-grade social studies teacher at Orange Middle School. In 1982-83, she was a team leader and was a liaison from the homerooms to administration in the seventh grade. As a team leader, she was involved in field trips. In that year, she said, field trips were taken to Symphony Hall in Newark, the Statue of Liberty on the Circle Line cruise, Livingston Roller-Rink and Great Adventure.

Her procedure as a team leader in collecting monies in school-wide fund raisers was to distribute forms to homeroom teachers who in turn would collect monies for delivery to her as team leader. In turn she would take monies to Del Guercio, and enter collections in a log book. Del Guercio, she said, was in charge of fund-raising.

She said her information was that the Livingston Roller-Rink trip, being on a Wednesday, after school, did not require Board approval as a field trip, in form of J-5. The same was true, she said she learned, for the Great Adventure trip, which was on Saturday.

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Marjorie Jackson, an English teacher at Orange Middle School, testified that one of her cocurricular activities in 1982-83 was as team leader no. 6 in the eighth grade and as supervisor of the Drama Club. As a team leader, she was involved in school-wide fund-raisers. In 1982-83, the Drama Club went to Hayden Planetarium, during school hours, in May of that year. A field trip approval form was filled out and approved. The trip was financed by a school production in February put on by the Drama Club. Proceeds from ticket sales by students were turned in and the monies were put into a safe in the school office by the secretary. The money stayed there, for safekeeping, she said, till the field trip in May. Ultimately, she said, she was given a check by the school secretary for trip expenses. No funds were left over, she said. A report of income and expenses was made; expenses were paid out against bills presented. No funds were deposited in a bank.

Called by petitioner, Mary Bankston, said she was a secretary assigned to petitioner as principal at Orange Middle School in 1982-83. In that year, teachers would bring funds collected from students to her and she would put the funds into the school safe. When so instructed, she would as secretary write checks for signatures by the principal, to be drawn on the School Activities Fund at United Jersey Bank.

Shown J-2, the policy for accounting for elementary school funds dated July 1, 1978, she said she attended a workshop on accounting procedures in June 1978. She did not know if the workshop had been attended by petitioner. An auditor met with her and showed her general procedures and went through the written statement of procedures. She said she never handled raw cash. Del Guercio, she said, made all bank deposits and would give her deposit slips. She had no involvement with PTA funds, rather only with the student activities account.

She said a copy of J-2 was on file in the school office.

Petitioner, James Sherman, testified he was presently principal of Park Avenue Elementary School in the district. Before that, he said, he was principal at Orange Middle School and was so employed in 1982-83. In that year, there were two assistant principals, W. Lawings and Del Guercio. Both assistant principals had delegated duties, he said. Lawings was in charge of seventh grade, field trips, a share of disciplinary duties, and

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observation of seventh grade teachers. Del Guercio was in charge of the eighth grade class in the same way, fund-raising, student activities and graduation. As principal, he had charge of all new teachers, overall discipline, parent relations, and special teaching problems, the school schedule, cafeteria and all residual duties generally.

As principal of Orange Middle School, Sherman said, he sat on the Executive Board of the PTA. At the beginning of 1982-83, he said, a conference was held with incoming PTA officers and a decision made to induce greater PTA involvement in school fund-raising. It was the policy of Orange Middle School, with Board of Education support in the form of funds, to enhance cultural activities of students by way of field trips. Later, he said, problems arose. At the PTA meeting someone asked what would happen to collected funds if a child were unable to go on a trip after the child had signed up. Petitioner said, when he responded a child would lose the deposit if the deadline passed, another teacher said that was not so and that the monies would go to the school funds. Petitioner reported to the parent's inquiry that he had made a mistake. The parents then went to the superintendent to complain, in February or March of 1983. Ultimately, he said, the superintendent asked him for the books and the school auditors then commenced an audit. He and certain staff members met with the superintendent. He and Del Guercio then met with the Board on June 28, 1983. Later, the result was, he said, his receipt of notice of withholding his increments by letter on July 1, 1983. J-1.

Concerning Item B on J-1, a charge petitioner denied, he said responsibility for field trips and authorization had been delegated by him to Mrs. Lawings, an assistant principal. He conceded, nevertheless, he had ultimate responsibility for insuring all field trips were properly approved by the Board beforehand in accordance with policy. He denied, however, ever approving field trips himself without Board approval.

Concerning Item C, petitioner said Del Guercio had the delegated responsibility for collecting funds. The procedure as he knew it, he said, was for an accounting of funds to be made in the homerooms, transmission to the team leader and then to Del Guercio for his deposit in the bank. He said the school business administrator's report in June 1983 of expenditures from the PTA account was contained in Exhibit J-3. Petitioner said it showed all funds were disbursed therefrom solely for benefit of the students.

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Concerning Item D on J-1, petitioner denied he violated Board policy and audit procedures and directives by collecting monies on behalf of the student activity account without timely and properly documenting or depositing funds. This was so, he said, because he was not the one to deposit funds in the account. Instead, he said, the assistant principal had that delegated function.

Concerning Item E, petitioner denied he failed to deposit to any account certain funds for the Drama Club. He said he knew there was cash and small change in the office safe but he never took time to count or deposit any funds. Instead, he said, the teacher in charge of a function or activity had responsibility for the monies. The teachers would count the monies in front of Del Guercio. Petitioner said the Drama Club had spent all its collected monies for benefit of students. He was informed the teachers in charge said they had spent all of the monies that way. Petitioner said he did not doubt their word.

Concerning Item F on J-1, petitioner denied he had authorized institution of the Industrial Arts Club Fund in a separate saving account at Hudson City Savings Bank. He denied any knowledge of the account.

Concerning Item G on J-1, petitioner said the PTA president in the school year 1981-82 informed him the PTA was going to give a rug for the school reading room and said the PTA had $300 for the purpose. Believing the money not sufficient for the purpose, petitioner neverthless accepted it and put the cash in an envelope in the safe. Later at an auction at Kenny's Old Town Auction in Plainfield, petitioner gave a $100 cash deposit on a rug to be purchased using one of the $100 bills from the PTA gift. Later, when inquiry was made by the PTA, which resulted in a request for return of the gift, petitioner returned two one hundred bills and gave his own personal check for $100, all of which he deposited into the PTA account.

Later, petitioner admitted, he then used the $100 credit at the auction store for himself, bit by bit, on purchases he later made. He said the PTA viewed the entire transaction as a "shady deal by me." Petitioner conceded he never told central office concerning the rug purchase. On inquiry, petitioner said he had permitted the $100 credit to rest at the auction store from June 1982 to March 1983 because he was waiting an estate to settle from which a suitable rug might be acquired.

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Concerning Board policy for accounting for elementary school funds generally (J-2), petitioner admitted he as principal had received the policy from the central office bookkeeper-business administrator in 1978. Mrs. Bankston, he said, was his secretary for more than seven years while he was principal. She did the bookkeeping almost full-time through 1983. Petitioner said as required under guidelines he considered the principal and his staff as trustees of school activity funds, all of which, he said, went to the benefit of students so far as he knew.

Concerning Item A on J-1, petitioner said he was responsible for creation of the PTA account in order to foster increased activity through the PTA in student fund-raising matters, an activity the PTA in 1982-83 had decided to embark upon. It was, petitioner said, designed to be a convenience for students and staff. Petitioner's purpose was to free up use of funds for student activities, by, for example, use of the PTA fund for expenditures for replacement with student activity funds generated, as if the PTA fund were start-up monies. At a June 1983 meeting of the Board, attended by petitioner and Del Guercio, the purpose of the meeting being inquiry into the PTA account itself, petitioner said he admitted establishment of the PTA account to circumvent the annual audit procedures of the Board of Education. At hearing, petitioner said he felt that was an emotional and intemperate statement he made under highly charged circumstances at the meeting. He admitted he had made the same statement to the superintendent before the Board meeting. He admitted he never asked the Board for permission to establish a PTA account and that student funds were indeed deposited into it at his direction, with his knowledge the PTA account was exempted from the annual school audit.

Concerning Item B on J-1, petitioner admitted there were two field trips made at Orange Middle School during 1982-83, one made after school and one made on a Saturday. Petitioner said he never knew the trip to the Livingston Skating Rink and to Great Adventure had been taken. He was informed later, he said, no prior field trip approval had been obtained from the Board.

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Concerning Item E on J-1, petitioner admitted, student cash monies collected were kept in the office safe for periods of time without deposit. He knew the Drama Club money was kept in that safe from February 1983 until May 1983. At the Board meeting on June 28, 1983, petitioner said he admitted he had lent money from the safe to teachers, for example, for pocket money. All such loans, he said, were returned by the teachers and had they not been so returned, he, petitioner, would have replaced the money.

Called by the Board, Woodrow Zaros, superintendent of schools for the past ten years, testified that in February or March 1983, three members of the PTA called him the same day concerning problems they felt existed with PTA funds at Orange Middle School. At that time, the superintendent said, he had no knowledge of a PTA account into which student activity funds were deposited. He himself had never authorized such practice. After telling the PTA members he could not act without a formal request, the PTA sent a letter to the Board and to him, specifically, concerning a transfer of some $4,000. When the letter was received, the superintendent undertook his own inquiry and spoke to petitioner and Del Guercio. He received books and accounts from them and attempted on his own to trace out transmission of any student activity funds. When he discovered he was unable to do so accurately, he requested the Board authorize a regular auditor to conduct an audit. He said petitioner specifically told him he had made deposits of student activity funds into the PTA account in order to circumvent the annual school audit of student activity funds.

The audit itself was conducted by Kennedy, McGovern and Company, certified public accountants, and was completed and filed with the Board on June 27, 1983. R-2. It was given to the Board 24 hours before the meeting of June 28, 1983. At the meeting, which the superintendent attended, petitioner was present with Del Guercio. The Board reviewed elements of the audit with them. The Board then acted to withhold petitioner's increments. Superintendent notified petitioner of the action and reasons therefor by letter on July 1, 1983.

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Concerning Item A of J-1, the superintendent's letter to petitioner on July 1, informing of increment withholding and reasons therefor, superintendent said petitioner himself told the auditors the PTA account was established by him in order to circumvent established audit procedure.

Concerning Item B on J-1, the superintendent said petitioner himself had acknowledged at least, two field trips had been taken without prior Board approval and that that was acknowledged to the Board itself at the June 28, 1983 meeting.

According to the superintendent, R-3 in evidence was a list of field trips together with proposed and actual expenditures prepared by the associate superintendent for curriculum on May 31, 1983 and reported to the Board before its June 28, 1983 meeting. Not included on the list, the superintendent said, were the field trips taken to Livingston Skating Rink, Great Adventure and Circle Line.

Concerning Item C on J-1, the superintendent said audit of the PTA account in R-2 proved the allegation. In meetings with principals chaired by the superintendent concerning fund-raising activities by students, it was never in any way implied that student activity funds would be deposited into either a PTA account or an Industrial Arts Club account. The only recognized account in the district, the superintendent said, was the student activities fund account.

Concerning Item D on J-1, the superintendent said the audit in R-2 demonstrated violation of Board policy and audit procedures and directives by collection of monies on behalf of the student activity account without timely and properly documenting or depositing the funds.

Concerning Item E on J-1, superintendent said petitioner had admitted failure of deposit of certain funds of the Drama Club to the Board at its June 28, 1983 meeting.

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Concerning Item F on J-1, the superintendent said existence of the Industrial Arts Club Fund in Hudson County Savings Bank was uncovered by audit in R-2.

Concerning Item G on J-1, the superintendent said the use of student activity account funds for personal use was readily conceded by petitioner to the Board, although there was no question petitioner had replaced the funds with his personal check for $100.

DISCUSSION

Petitioner argued the underlying facts in the matter did not support his having knowingly and deliberately deposited monies in a PTA account in order to circumvent established audit procedures of the Board. Specifically, petitioner pointed to J-2 as not containing any specific prohibition thereof. Petitioner argued, moreover, any student activity funds deposited into the PTA account here were "otherwise accounted for." To that extent, petitioner argued, he was faithful to his duties as trustee of funds for the benefit of the students at Orange Middle School.

Nothwithstanding that, however, one must note petitioner's clear testimony and prior statements to the Board that his establishment of the PTA account was to circumvent established Board procedures, the PTA account being established with knowledge by petitioner its use would be exempt from annual school audit.

Petitioner argued next, on the subject of Item B on J-1, all witnesses had testified petitioner had delegated the duty of field trip supervision to an assistant principal. Two of the trips made, argued petitioner, were after school and one was on a Saturday. The result, argued petitioner, was there was no need for prior Board approval and the circumstances showed he was not blameworthy in that respect. One may suggest,

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however, petitioner's duty as principal involved all ultimate responsibility for proper execution of Board policy for securing prior Board approval for field trips. Such ultimate responsibility in petitioner implies, as one may find, violation of policy by an assistant principal may not excuse the principal.

To similar effect, petitioner argued, as to Item C on J-1, the evidence showed the duty of administering student activity and PTA accounts had been delegated by petitioner to Del Guercio, an assistant principal, who, petitioner insisted, had ultimately if belatedly documented all transactions. No violation of trusteeship as outlined in J-2 was demonstrated, urged petitioner. Actually, he said, practices concerning cash collection by teachers and team leaders to assistant principal were consistent with Board policy (J-2 at 2).

Concerning Item D and E on J-1, petitioner argued both reasons for Board withholding of increments resulted from a single instance in which he was not himself involved, specifically, the Drama Club and its winter production. Petitioner argued all funds were properly accounted for ultimately and it was unfair, therefore, for the Board to have faulted him, even though, presumably, undeposited cash funds were kept undeposited for a three-month period in the winter and spring of 1983.

Concerning Item F on J-1, petitioner argued he had never authorized existence of the Industrial Arts Club Fund account at Hudson County Savings Bank, a circumstance confirmed by witnesses Markel and Frank, advisors for the Club during 1982-83. Petitioner argued, therefore, since he had never authorized that which others did it was unfair for the Board to have held him responsible for their unauthorized act.

Concerning Item G on J-1, though petitioner admitted the basic facts, he insisted that ultimately all monies in the PTA gift were accounted for when he returned the gift unexpended to the PTA. He denied impropriety and indeed, he said, no actual venality or defalcation was proven or even intimated.

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N.J.S.A. 18A:29-14, petitioner argued finally, empowers boards of education to withhold the salary and/or adjustment increments of staff members for inefficiency or other good cause. The generally relied upon standard is that in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), in which the court said:

> . . .[W]e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving of unreasonableness is upon the appellant [at 296-7].

Petitioner suggested the standard as construed is a two-tiered standard in which the Board must satisfy both tiers in order to be affirmed by the Commissioner. Here, argued petitioner, it was apparent the Board did not meet the standard, in that the reasons given by the Board to petitioner for withholding his increment were not supported by the actual facts. For its part, the Board argued the standard in Kopera was also qualified thus:

> . . .[T]he Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion. [Id. at 295].

The Board argued it had conducted a complete investigation and full review of the facts and circumstances leading to its decision to withhold petitioner's increment, an investigation and review done after it had received complaints about petitioner's mishandling of PTA monies and after a request for an independent audit of PTA fund account made by the superintendent. Petitioner himself, argued the Board, was given full opportunity to justify, explain and give reasons for his actions. In the view of the Board, petitioner failed in such justification before it and, in this proceeding, he similarly failed.

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From all of the above, I **FIND** and **DETERMINE** petitioner had indeed authorized creation and use of a PTA fund account in another local bank for the single and sole purpose of circumventing known audit procedures of the Board covering collection and use of official student activity funds. Indeed, petitioner's own testimony is an admission of such creation and use. Even without suggestion or imputation of venality or defalcation of funds, such a deliberate act by petitioner for circumvention of official procedures is in itself sufficient reason or "other good cause" for the Board to have acted to withhold his increments. Petitioner's defense that any unauthorized field trips or failure of documentation of collection of student activity funds were matters delegated by him to assistant principals cannot, in my view, legitimately excuse him. In the final analysis, even as petitioner has conceded, responsibility for proper fulfillment of administrative procedures rests alone with him. See, Accounting for Elementary School Funds, July 1, 1978, J-2, at 11:

> The principals have a fiscal responsibility for the school funds which goes beyond the approval of vouchers and signing of checks. They are primarily responsible somewhat as trustees for these funds. As such, they should review the records of the bookkeeper-secretary from time to time, require periodic statements from her for control purposes, and determine that Board policies and procedures regarding school funds are consistently being carried out. In this way they too perform an "internal auditing" function.

See also, Basic School Law, New Jersey School Boards Association, (1978), at 87:

> A comparison of the statutory powers of a local board of education with those of certain specific school officials reveals an unmistakable legislative design to place the policy-making responsibility on the former, and executive responsibility on the latter. The parceling of duties to the school district's top managers is basically made from a functional viewpoint in the statutes, and local boards are left with the responsibility of filling out the details of the inter-relationship among its key employees. Local boards are also left with the responsibility of specifying the obligations of their so-called middle-echelon managers, such as building principals, since the statutes, other than for an occasional functional mandate, are silent as to them. It is clear that the legislative scheme leaves much to the discretion of the local board, which would be remiss in not providing guidance to its management team.

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See also, N.J.S.A. 18A:19-14; N.J.A.C. 6:20-2.1 et seq.; and Palydowycz et al v. Bd. of Ed., City of Clifton and Aaron Halpern, Principal, 1976 S.L.D. 984, 985-6 (a school board and its agents, including a principal, are obliged to inquire into possible mismanagement, handling and accounting of pupil activity funds).

Finally, the circumstance that petitioner on his own admission accepted a cash gift from the PTA for a rug to be purchased, without properly accounting for that gift according to procedures he knew or should have known existed constitutes sufficient "other good cause" for the Board's disciplinary withholding action here. In my view, petitioner had no right to treat such an official PTA gift in such an unofficial manner and is not to be excused by the mere circumstance no loss occurred to the students or to the donor of the gift. The time lag between gift, expenditure and return of gift, from June 1982 until February 1983, represented time when a large sum was retained by petitioner as if it were his own, free from supervision or financial accounting. Such a practice is not to be condoned, and the act of the Board here in withholding petitioner's increments for having committed it is reasonable and well justified.

CONCLUSION

Based on all foregoing, having heard witnesses in testimony, having reviewed the documentary evidence, having considered arguments of the parties, I **CONCLUDE** Board action in withholding petitioner's salary and adjustment increments for 1983-84 was consistent with standards and criteria of N.J.S.A. 18A:29-14. I **CONCLUDE** the reasons advanced therefor by the Board were based on established underlying facts and were not shown here by petitioner to have been arbitrary, capricious or unreasonable. To that extent, therefore, the petition of appeal in this matter should be, and it is hereby, **DISMISSED** with **PREJUDICE.**

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OAL DKT. NO. EDU 7190-83

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

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

May 18 1984
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAY 22, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 24 1984
DATE

Ronald L. Parker/pr
FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

J-1 Letter of superintendent to petitioner, dated July 1, 1983, in compliance with N.J.S.A. 18A:29-14, detailing reasons for withholding of petitioner's salary and adjustment increments for 1983-84.

J-2 Manual of procedure of Board for Accounting for Elementary School Funds, dated July 1, 1978, as circulated to all building principals.

J-3 Audit of expenditures from Orange Middle School PTA's bank account by business administrator, dated June 9, 1983, directed to superintendent.

J-4 Series of bills invoiced to Orange Middle School for various charges in 1982-83.

J-5 Blank form of field trip request for approval by principal and assistant superintendent for all field trips.

J-6 Stipulation of cash balances in Orange Middle School Funds account for end of school years, June 30, 1979 through 1982.

R-1 Letter of J. Del Guercio to petitioner, dated March 25, 1983, resigning from position of PTA treasurer, effective March 25, 1983.

R-2 Audit of transactions of Orange Middle School Student Activity Fund and Orange Middle School PTA Fund by Kennedy, McGovern and Company, certified public accountants, for period July 1, 1982 through May 31, 1983; report dated June 27, 1983.

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R-3 List of field trips and proposed and actual expenditures therein submitted to associate superintendent for curriculum in 1982-83.

R-4 Letter of Orange Middle School PTA president to superindentent, dated March 16, 1983, concerning request of teaching staff member for loan of $1,000 until his retroactive check for permanent substitute salary comes in.

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JAMES SHERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed by petitioner within the timelines prescribed in N.J.A.C. 1:1-16.4a and b.

Petitioner argues that the judge erred in determining that the Board properly withheld his increment asserting that the three reasons cited as the basis for reaching such a determination are not supported by the underlying facts of this matter. The three reasons are summarized as follows:

(1) petitioner authorized the creation of a PTA fund account to circumvent known audit procedures;

(2) petitioner was responsible for the action or inaction of his assistant principals; and

(3) the circumstances involving a cash gift from the PTA for the purchase of a rug for the Middle School Reading Room.

N.J.S.A. 18A:29-14 empowers a board to withhold the increments of a teaching staff member for inefficiency or other just cause. The standard of review as dictated by Kopera, supra, requires that the Commissioner determine whether the underlying facts are as those who made the evaluation claimed and whether the board had a reasonable basis for its factual conclusion.

The Commissioner determines that there is sufficient information in the record to support that the underlying facts in this matter were as claimed by the Board and that its action in withholding petitioner's increment was not arbitrary, capricious or unreasonable. The recommended decision dismissing the appeal and affirming the Board's withholding action is adopted as the Commissioner's final decision for the reasons expressed therein.

JULY 6, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 9002-83
AGENCY DKT. NO. 382-10/83A

BRUCE E. CARLSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Christopher M. Howard, Esq., for petitioner (Sauer, Boyle, Dwyer & Canellis, attorneys)

Joseph J. Jankowski, Esq., for respondent (Hutt, Berkow, Hollander & Jankowski, attorneys)

Record Closed: April 10, 1984 Decided: May 24, 1984

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on October 21, 1983 with the filing of a Petition of Appeal, seeking, inter alia, a determination that Bruce E. Carlson (hereinafter petitioner) was entitled to additional payments for longevity pursuant to the negotiated agreement between the Woodbridge Education Association and the Board of Education of the Township of Woodbridge (hereinafter respondent). An Answer was filed on behalf of respondent on November 1, 1983, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was scheduled and was held on February 6, 1984, at which time the following were listed as issues for determination herein:

1. Does the Commissioner have jurisdiction to determine the issues set forth in the petition herein?

2. Is the petition herein barred by the regulatory statute of limitations?

3. Is the petition herein barred by the doctrines of estoppel and/or laches?

4. Is petitioner entitled to any additional payments for longevity; if so, when and how much?

The Prehearing Order also provided that written stipulations of fact would be submitted by the parties on or before February 21, 1984, and that either or both parties could submit a motion for summary decision on or before March 15, 1984. Responding papers to initial submissions were to be filed no later than March 30, 1984, and replies no later than April 10, 1984. The Stipulation of Facts, signed by both counsel, was received on March 14, 1984. Respondent's Motion for Summary Decision and supporting papers were received on March 19, 1984. Petitioner's Motion for Summary Decision and supporting papers were received on March 20, 1984. A reply to petitioner's initial submission was received on March 23, 1984. No reply having been received in response to respondent's initial submission, the record closed on April 10, 1984.

FINDINGS OF FACT

The relevant facts have been stipulated by and between the parties in a written stipulation of facts as follows:

1. Petitioner, Bruce E. Carlson, is a teaching staff member in the Respondent's school district.

2. Bruce E. Carlson has been employed by Respondent since academic year 1961-62 and has been so employed for each and every academic year except as noted in paragraph 3 below.

3. On or about August of 1963, the Petitioner entered the active military service and completed his military service on or about August of 1965. Because of his military service, Petitioner did not teach within Respondent's school district for academic years 1963-64 and 1964-65.

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4. Petitioner is currently employed by Respondent for academic year 1983-84.

5. The collective bargaining agreement between the Respondent and the collective bargaining agent for Petitioner contains a provision as follows:

> Teachers who have completed twenty consecutive years of teaching in Woodbridge Township schools shall be paid a $600.00 service maximum as set forth below:
>
> $300 in the twenty-first year.
> $300 in the twenty-second year.

A copy of the applicable contractual provision is attached hereto.

6. At the commencement of academic year 1981-82, Petitioner contended that on the basis of the combination of years teaching and years in the military service, the Petitioner was eligible for a longevity increment in the amount of $300.00. Request for longevity increment was denied by Respondent.

7. At the commencement of academic year 1982-83 the Petitioner contended that on the basis of the combination of years teaching and years in the military service, the Petitioner was eligible for a longevity increment in the amount of $600.00. Request for this longevity increment was denied by Respondent.

8. At the commencement of academic year 1983-84, the Respondent paid the Petitioner the amount of $300.00.

A copy of the contractual provision referred to in stipulation No. 5 was attached to the Stipulation of Facts and sets forth, in subsection 8.22 of the negotiated agreement, the exact language reported in stipulation No. 5.

APPLICABLE LAW AND DISCUSSION

Petitioner contends that paragraph 8.22 of the negotiated agreement, when read in conjunction with N.J.S.A. 18A:29-11, entitles him to receive a $300 longevity increment added to his salary commencing with the 1981-82 academic year, and another longevity increment in the amount of $600 at the commencement of academic year 1982-83.

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N.J.S.A. 18A:29-11 is the statute awarding credit for military service to teaching staff members and provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulations, or action of any employing board or officer, of this state, relating to leaves of absence.

In Wall Township Education Association v Bd. of Ed. of the Twp. of Wall, 149 N.J. Super. 126 (App. Div. 1977), the court determined that the issue of whether military service credit statutorily granted to teachers applied to eligibility for longevity increments contained in the collective bargaining agreement between the teachers' association and the school district was a matter of substantive law involving the construction of the statute and was, therefore, within the Commissioner of Education's jurisdiction over matters arising under the school laws. Accordingly, the Commissioner has jurisdiction to decide the matter herein.

In Lavin v Hackensack Bd. of Ed., 90 N.J., 145 (1982) the Supreme Court determined that credit for military service was a statutory entitlement, and therefore exempt from the operation of the statute of limitations. Since N.J.A.C. 6:24-1.2 is a type of regulatory statute of limitations, its provisions cannot be applied to bar petitioner's claims.

Nor is petitioner barred from asserting his claims by the doctrine of laches or estoppel. Petitioner did not fail to assert his claims for an unreasonable amount of time; he requested the payments from respondent in a timely fashion in 1981 and 1982 and his

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delay until October of 1983 in appealing respondent's refusal to pay to the Commissioner was not such undue delay as to cause resultant prejudice to respondent. Accordingly, we turn to the substantive issue herein.

The contractual provision reviewed by the court in the Wall Township case read as follows:

> Longevity Increments: An additional $450 increment for teachers entering their 15th and 18th years of teaching as a fully certified teacher.
>
> An additional $450 increment for teachers entering their 21st year of teaching in Wall Township.

The court agreed with the Commissioner of Education in holding that the credit awarded by the statute was not limited to the benefits of status on the salary guide but extended also to any other benefits granted to other teachers because of longevity experience in the teaching field. The court held that with respect to the longevity increment for the 15th and 18th year of "teaching as a fully certified teacher," a veteran was entitled to the same increments if his total service as a fully certified teacher plus his military service credits equaled the number of years required. With respect to the additional $450 increment for teachers entering their 21st year of teaching in Wall Township, on the other hand, the court determined that credit for military service could not be utilized in determining eligibility for this additional increment.

Respondent argues that the holding in Wall Township, supra, is dispositive of the issue herein, in that the provision in the negotiated agreement here in issue provides for a $600 service maximum for 20 consecutive years "in Woodbridge Township". I agree.

Petitioner's argument that his case is factually distinquishable from the Wall Township case is unpersuasive. Petitioner focuses on the court's language wherein it explains that the statutory credit applies as if the veteran had been employed for the period of his military service in "some publicly owned and operated college, school or institution of learning," and therefore concludes that since the military service is not equated in the statute with employment in the same school system, the credit could not be applied for eligibility for the extraordinary longevity increment due because of service in Wall Township. Petitioner concludes therefrom that he is "unlike the teachers of Wall

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who sought to apply years of teaching experience obtained in other school districts in order to satisfy the requisite number of years for an increment...", because he had always been within the employ of respondent with the exception of the two years he spent in the military. There is no support to be found in the Wall case, however, for petitioner's conclusion that any of the teachers therein were seeking to apply years of teaching experience in other school districts. The Appellate Division was merely indicating that the military service credit statute required that military service be considered equivalent to teaching experience somewhere, not any place in particular. Since the contractual provision in question requires that the service necessary to qualify for the extra payment* must be service rendered in a particular place - Woodbridge Township Schools - the present case is identical to, and therefore controlled by, the Wall Township decision.

Accordingly, petitioner has received all that the military service credit statute and the contractual provision entitle him to receive to date. Pursuant to the contractual provision, at the commencement of the academic year 1984-85 he will be entitled to another $300 payment which will complete respondent's obligation under the contract.

Accordingly, for all the foregoing reasons, it is **ORDERED** that petitioner is not entitled to the relief which he seeks, and the Petition herein is therefore **DISMISSED WITH PREJUDICE.**

---

* Petitioner states at pg. 14 of his written submission that the monetary remedy he seeks equals a total of $1200. It appears that petitioner is misreading the provision of the contract, since the payment provided for is a one-time $600 service maximum payment to be paid in two installments, $300 in the 21st year and $300 in the 22nd year. It does not appear to be an increment which would increase his base salary in the 21st year by $300 and then increase that already increased base salary in the 22nd year by another $300. The photocopy of the page from the negotiated agreement which was attached to the Stipulation of Facts sets forth a section 8.23 entitled Increments with several subsections thereunder. The provision in issue herein is set forth at paragraph 8.22, separate and apart from the increment section of the contract.

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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.

May 24, 1984
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 30 1984
DATE

Ronald J. Tabak
OFFICE OF ADMINISTRATIVE LAW

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BRUCE E. CARLSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The recommended decision of the Office of Administrative Law dismissing the appeal is adopted as the Commissioner's final decision.

JULY 9, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6903-83
AGENCY DKT. NO. 301-8/83A

ARTHUR J. LAUFFER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,
Respondent.

APPEARANCES:

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

Stephen R. Fogarty, Esq., for respondent (Aron & Salsberg, attorneys)

Record Closed: April 23, 1984 Decided: May 30, 1984

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

Petitioner, Arthur J. Lauffer, appealed to the Commissioner of Education alleging that respondent improperly terminated petitioner from his position as a custodian in violation of his tenure rights. The petition was filed on August 12, 1983, and on September 7, 1983 the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter on October 21, 1983, at which time the following issues were isolated:

1. Was petitioner properly terminated by respondent?

   a. Was petitioner a tenured employee at the time of the discharge?

   b. If so, did respondent violate N.J.S.A. 18A:6-10 et seq. (the tenure hearing law)?

   c. If the answer to a. above is in the negative, did respondent have just cause to discharge petitioner pursuant to the employment contract dated April 20, 1983?

   d. Did respondent properly comply with the open public meetings law in regard to the meeting or hearing held on May 17, 1983 concerning the discharge of petitioner?

Pursuant to the prehearing order, the parties provided the court with a stipulation as to all pertinent facts. The stipulation of facts is incorporated by reference herein and constitutes this court's findings of fact.

Based upon these stipulated facts, the matter has been submitted on cross-motions for partial summary decision. As outlined above, the primary issue for determination herein is petitioner's tenure status. In that regard, petitioner contends he had acquired statutory tenure pursuant to N.J.S.A. 18A:17-3 when he was appointed for an indefinite term to the position of maintenance man. More specifically, it is petitioner's position

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that he acquired tenure as of that date as a "janitorial employee," as prescribed by the statute and without regard to job subclassification. Petitioner therefore alleges that when he was later rehired on April 25, 1983 to a custodial position, he retained the tenure previously acquired by him.

Respondent did not seriously contest petitioner's acquisition of tenure in the position of maintenance specialist when, during the 1979-80 school year, petitioner was employed by respondent for an indefinite term. However, respondent did argue that the tenure rights which petitioner earned as a maintenance specialist were not transferable to the new position of custodian which petitioner assumed on April 25, 1983. In support of its position, respondent argues that the janitors tenure law does not contain a provision providing for tenure upon transfer or promotion akin to that which is provided for teachers. Moreover, respondent points out that petitioner was offered, and accepted, a position as custodian for a fixed period of time and, thus, pursuant to N.J.S.A. 18A:17-3 achieved no tenure rights in that position. (By accepting such employment, petitioner waived his rights to the acquisition of tenure.) In further support of its contention that petitioner has no tenure rights in the new position, respondent opines that the class of janitorial employees cannot be considered generic for tenure purposes, inasmuch as the two positions are highly specialized, require separate and distinct duties, and are clearly distinguishable.

This court has considered the arguments presented herein and must agree with the position espoused by petitioner. The accrual of tenure to janitorial employees of local school boards is governed by N.J.S.A. 18A:17-3 which provides in pertinent part 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 for neglect, misbehavior or other offense and only in the manner prescribed by N.J.S.A. 18A:6-9 et seq.

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In an effort to determine the applicability of the provisions of this statute to the issue at hand, this court has been guided by the Supreme Court's determination that "because of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends." Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). Considered in that light, this court is of the view that the tenure statute at issue must be read as conveying tenure status to a category or class of employment (i.e. janitorial) and not to a specific position. General support for this conclusion may be gleaned from Barnes v. Bd. of Ed. of Jersey City, 85 N.J. Super. 42 (App.Div. 1964). There, appellant argued that the statutory coverage of R.S. 18:5-66.1 and 5-67 (See, N.J.S.A. 18A:17-3 and 4, respectively) did not extend to the entire janitorial and custodial staff but was limited to the positions specified. Thus, appellant contended that an assistant janitorial supervisor was not covered, nor were utility men, nor groundskeepers. In overruling that argument, the court stated:

> Our consideration of the statutes in light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.

Further clarification of this basic principle is revealed by Brunner v. Bd. of Ed. of Camden, 1960 S.L.D. 155 in which petitioner contended that he had acquired tenure in his position as chief janitor. In accepting petitioner's view that he was protected in the position of chief janitor under the janitors tenure statutes, the Commissioner stated:

> While it is true that the specific title "chief janitor" is not mentioned in the law, the intent of the act is to extend protection in their employment to a general category of employees. . . . in the Commissioner's judgment, the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute.

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Of additional import to this court's determination is the Commissioner's reasoning in Brunner at 157. In that case, the Commissioner stated that even if he had erred in finding that the position of chief janitor is covered by the janitors tenure statutes and that petitioner had not acquired tenure in the position of chief janitor, petitioner would not have lost and, in fact, still retained the tenure rights acquired in his former position as janitor. In so finding, the Commissioner equated the tenure provisions for teachers and janitors in the following respect; i.e. a teacher who is called supervisor, coordinator, director, head teacher, vice principal, or other title, while not acquiring tenure in these named positions, continues to hold tenure as a teacher. Similiarly, a janitor could be named chief janitor without surrendering his tenure as a janitor. The Commissioner clarified this view as follows:

> The only comparable circumstances under which tenure would be voluntarily relinquished would be acceptance of an entirely different kind of position in a different category for which no tenure is provided. . . . Once tenure accrues in a designated category of employment, it is not nullified by the title given to a particular position. The Commissioner finds, therefore, that petitioner has acquired and still retains tenure as a janitor. Brunner at 157.

Clearly, tenure does not attach simply to a specific position but to a category or class of employment. See, Mackey v Bd. of Ed. of Boro of Ridgefield, OAL DKT. EDU 7446-82 (Jan. 18, 1983), adopted Comm'r of Ed. (March 2, 1983).

Applying the above-recited principles to the instant case, it is clear that petitioner has achieved tenure as a janitorial employee. Petitioner achieved tenure in that capacity when he was employed as a maintenance man for an indefinite period of time. Since his tenure status did not attach to a specific position (maintenance man), but instead to a category or class of employment (i.e. janitorial), petitioner's tenure remained with him when he was rehired as a custodian. As is clear from Brunner, the acceptance of the position of custodian did not serve as a relinquishment of tenure since it is clearly a position for which tenure as a janitor may accrue.

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For all the foregoing reasons, I **CONCLUDE** that petitioner was protected by tenure in his position as custodian in the school district of Leonia. Inasmuch as both parties acknowledge that if petitioner is so protected, the proper procedures to be utilized in regard to his removal, pursuant to N.J.S.A. 18A:17-3 and 18A:6-9 et seq., have not been followed, it is hereby **ORDERED** that petitioner's motion for summary decision be granted.

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.

May 30, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

May 31, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 04 1984
DATE

Ronald L. Parker/phb
FOR OFFICE OF ADMINISTRATIVE LAW

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ARTHUR J. LAUFFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes petitioner's argument of having accrued tenure as a janitorial employee pursuant to N.J.S.A. 18A:17-3. Further, the Commissioner notes with approval reliance by the judge on Barnes, supra, and Brunner, supra, in support of the determination that petitioner achieved tenure as a janitorial employee in a category or class, not in a specific position.

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

Petitioner's motion for summary decision is granted. Petitioner is accordingly protected by tenure (N.J.S.A. 18A:17-3) and may only be dismissed, suspended, or reduced in compensation pursuant to N.J.S.A. 18A:6-9 et seq.

JULY 16, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9411-83
AGENCY DKT. NO. 361-10/83A

JENNIFER C. FIGURELLI,
Petitioner,
v.
JERSEY CITY BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Carl John Kerbowski, Esq., for petitioner

Howard B. Cubberly, Esq., for respondent

Record Closed: April 23, 1984 Decided: June 6, 1984

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

This is an appeal by an employee of the Jersey City Board of Education who was involuntarily transferred from the untenured position of director of pupil personnel services to the position of school psychologist in which she had previously acquired tenure. On August 4, 1983, petitioner Jennifer C. Figurelli filed a verified petition with the

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Commissioner of Education alleging that her transfer was invalid on several grounds: First, Figurelli contended that the Board failed to comply with certain notice requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., also known as the "Sunshine Law," and, therefore, that its action was voidable; second, Figurelli complained that the transfer of a female from a supervisory position and her replacement by a less qualified male constituted sexual discrimination prohibited by N.J.S.A. 18A:6-6; third, Figurelli claimed that the Board's action was arbitrary, capricious and unreasonable. She sought reinstatement to the position of director of the pupil personnal services and money damages for the difference in salary. In its answer filed on November 16, 1983, the Board denied the allegations and defended its right to remove an untenured employee with whose performance it was dissatisfied.

Subsequently, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Hearings were held on March 26, 27 and 28, 1984. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of proposed findings of fact and conclusions of law submitted by the parties, the record closed on April 23, 1984. For the reasons which follow, Figurelli's statutory rights have been violated and she is entitled to the requested relief.

Undisputed Facts

Jennifer C. Figurelli holds a doctorate degree and is certified by the State Board of Examiners as a school psychologist. Additionally, she is certified as a principal/supervisor and as a director of student personnel services. Figurelli began working for the Jersey City Board of Education during the summer of 1969 as a consultant. Starting with the 1970-71 school year, Figurelli was hired by the Board as a full-time school psychologist. She continued in that capacity for 11 consecutive years until the end of the 1980-81 school term. Between September 1979 and June 1980, she temporarily assumed the role of chief school psychologist during the absence of the person who normally occupied that position. In September 1980, Figurelli resumed her regular duties. The Board acknowledges that Figurelli has attained tenure in the position of school psychologist.

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At the commencement of the 1981-82 school year, Figurelli received permission from the Board to take a one-year sabbatical leave. Due to the sudden departure of the individual who had been serving as the director of pupil personnel services, in January 1983 the Board asked Figurelli to cut short her sabbatical leave and return to fill the vacant position. Franklin Williams, deputy superintendent of schools who made the offer to Figurelli, testified that she was selected because of her proven "skills and accomplishments" and her prior experience in the field of special education.

Originally, Figurelli's appointment was only as interim head of the Bureau of Pupil Personnel Services until a permanent director could be chosen. By resolution adopted on February 23, 1982, the Board assigned her "to oversee management and supervision of the Bureau of Pupil Personnel Services effective January 26, 1982 at an annual salary of $34,700." A search of its own records by the Board failed to disclose any resolution conferring upon Figurelli the official title of "acting director" of pupil personnel services. Nonetheless, the parties agree that Figurelli actually functioned in that capacity for the remaining five months of the 1981-82 school year.

Meanwhile, the Board initiated the procedures established by contract for the filling of vacant supervisory positions. Under Article 16 of the agreement in effect between the Board and the Jersey City Education Association, promotions were to be made "in order of numerical ranking from appropriate eligibility lists" determined through a competitive examination.[1] Figurelli took the written examination on May 22, 1982 and

---

[1]Section 16-1.1 of the collective agreement covering September 1980 through August 1982, provides that:

> Numerical ranking shall be determined through competitive examinations conducted by the Board of Personnel Practices. The examinations shall consist of a written section which will have a weight of 40%. No person shall be allowed to take the oral section of the examination unless he has passed the written part. The oral interview shall have a weight of 60%. The Board of Personnel Practices conducting the oral interview shall include professional educators not regularly employed by the Board of Education.

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the oral interview on June 23, 1982. By letter dated August 19, 1982, she was notified that she had achieved the highest score on the competitive examination. Five other candidates also successfully completed the competitive examination, but received scores lower than her score. On August 25, 1982, the Board passed a resolution reassigning Figurelli to the new title of "director of the Bureau of Pupil Personnel Services" effective as of September 1, 1982. This resolution also purported to increase Figurelli's salary from $31,328 to $34,700. Later, on September 22, 1982, the Board adopted a second resolution clarifying that Figurelli's salary was already $34,700 and her salary in the new title of "director" remained unchanged.

As director of pupil personnel services, Figurelli was in charge of a staff of 620 employees and a budget in excess of $12 million. Her responsibilities, as set forth in a job description approved by the Board on March 23, 1982, included: coordinating the daily activities of the Bureau's staff; aiding in identifying and satisfying unmet pupil needs; assisting in the preparation of budgetary requests; helping to develop policy recommendations in her area of expertise; and assisting in the preparation of federal and state reports. Chain of command called for the director of pupil personnel services to report to the deputy superintendent of schools. Further, the job description specified that evaluation of job performance would be done by the deputy superintendent "in accordance with the provisions of the Board's policy on evaluation of professional personnel." This written policy provided that nontenured supervisory personnel must be evaluated at least three times annually.

Evaluations of Figurelli's job performance as director of pupil personnel services were highly favorable. Deputy superintendent Franklin Williams indicated that he had the opportunity to observe Figurelli's performance on numerous occasions and that in his words, "the only change I saw was growth." Three written evaluation reports prepared by Williams were entered into evidence. Each noted the substantial progress Figurelli was making and gave her a rating of "excellent." An annual performance report signed by Williams on June 23, 1983 also praised Figurelli's abilities and recommended her for reemployment and salary increment during the coming year. Nobody consulted with Williams prior to Figurelli's transfer.

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Despite such positive comments from her immediate supervisor, on August 24, 1983 the Board resolved to transfer Figurelli back to her former position as school psychologist and to reduce her salary from $38,900 to $36,500.[2] Both sides stipulate that Figurelli had not attained tenure in the position of director of pupil personnel services at the time of her transfer by the Board. Contemporaneously, the Board also voted to appoint one Henry Przystup to a position described as "principal assigned to Bureau of Pupil Personnel Services." Until then, Przystup had been employed by the Board as an elementary school principal. Regardless of the Board's choice of words, Przystup preferred to use the title "chief administrator" of the Bureau of Pupil Personnel Services to describe his new position. All of the evidence, including the testimony of Przystup himself,. suggests that his duties in the position were indistinguishable from those performed by Figurelli in her capacity as director of pupil personnel services. No job description exists for the position currently held by Przystup. Unlike the position of director which has a contract year of 11 months, the position of principal has a contract year of only 10 months. Nonetheless, Przystup intends to work an extra month during the summer of 1984 and apply to the Board for additional compensation beyond his regular salary.

Findings of Disputed Facts

The facts surrounding Figurelli's transfer are in dispute. My findings will be discussed under the appropriate headings.

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[2]Apparently Figurelli's salary would have been $38,900 if she had remained as director of pupil personnel services for 1983-84. During the hearing, Figurelli testified that her total salary for 1982-83 was approximately $37,000.

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(a) Notice of the Board Meeting

Much of the remaining controversy involves whether the Board followed proper procedure in giving notice of its proposed action to the Figurelli in particular and to the public in general. The recommendation to transfer Figurelli originated with Dr. Michael Ross, superintendent of schools. According to Dr. Ross, sometime during the week of August 15, 1983 he spoke to Figurelli about his concerns that someone else might be able to run the bureau more effectively. After listening to Figurelli's explanation of why she had done a good job, Dr. Ross promised to consider the matter further before taking any action. Figurelli remembered the same conversation. She insisted that Dr. Ross never mentioned the possibility that the Board might act upon her transfer at its next meeting. Instead, she too recalled that Dr. Ross told her he would think over her response before recommending any changes.

Normally, the Board holds a caucus meeting on the Monday immediately preceding its regular monthly meeting. The purpose of the caucus meeting is to acquaint Board members with the contents of the upcoming agenda. It so happened that Figurelli was present during the public portion of the caucus meeting on August 22, 1983 because the agenda contained items affecting the operation of the Bureau of Pupil Personnel Services. As far as Figurelli was aware, nothing which occurred at this caucus meeting gave her any reason to suspect that her transfer would be a topic for determination at the next regular Board meeting.

None of the witnesses claimed to have served prior notice on Figurelli that her employment status would be on the Board's agenda for August 24, 1983. James Jencarelli, the first assistant superintendent, confirmed that he had not caused such notice to be sent. Similarly, Arsenio Silvestri, board secretary, had not sent advance notice to Figurelli. For her part, Figurelli denied receiving any communication about her transfer until subsequent to the actual meeting.

With respect to public notice, the record contains affidavits of publication from two newspapers widely circulating in Hudson County. These affidavits attest that

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identical notices were published in The Jersey Journal on August 18, 1983 and in The Dispatch on August 20, 1983. Both notices invited the public to attend a meeting of the Jersey City Board of Education to be held "on Wednesday, August 24, 1983 at 7:00 p.m., at the Board Offices, Conference Room 310, 241 Erie Street, Jersey City, New Jersey." Included in the notices was the information that the tentative agenda would consist of "[b]ids, communications, reports, payment of bills, assignments, personnel, curriculum, appointments, and miscellaneous other business." Also, the notices informed the public that a caucus would be held "on Monday, August 22, 1983 at 7:00 p.m., at the Board Offices, Room 310, 241 Erie Street." The text indicated that "an Executive (closed) Session will precede the caucus to discuss personnel and contract matters." But the notices further emphasized that the caucus would be limited to discussions and that any "formal action will be taken at the Wednesday night meeting."

Insofar as the testimony may be regarded as conflicting, I **FIND** that Figurelli did not receive prior notice that her transfer would be considered at the August 24, 1983 meeting. Although Dr. Ross testified that he had engaged in "discussions about her work" and that he had spoken to Figurelli about various unspecified concerns, he never directly stated that he gave her prior notice of the transfer. Moreover, he admitted that he did not furnish Figurelli with a written statement of the Board's reasons for its decision until after the resolution had already been adopted. On the basis of these proofs, I accept Figurelli's contention that she was not given any opportunity to request that the Board's discussion of her employment status be held in public.

(b) Sex Discrimination

One major difference between the Board's treatment of Figurelli and Pryzstup involved the procedure for promotion. The Board had contractually obligated itself to fill vacant supervisory positions through competitive examination.[3] As previously indicated,

[3]There is no statute or regulation imposing upon local boards of education any requirement to fill vacancies by competitive examination. In the present context, it is unnecessary to consider the validity of a contractual undertaking by a school board to promote on the basis of a competitive examination.

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Figurelli took the competitive examination for the position of director of pupil personnel services and achieved the top score. In marked contrast, Przystup never took any examination for the same position. At the hearing, the Board attempted to justify this unequal treatment by describing Przystup's promotion as a "lateral transfer" from "principal of a building" to "principal assigned to the Bureau of Pupil Personnel Services." However, the Board acknowledged that Przystup assumed essentially the same district-wide duties which Figurelli had performed.

Another important difference involved the candidates' respective qualifications for the job. Both Figurelli and Przystup possessed appropriate graduate degrees and supervisor's certificates. An additional qualification in the Board's own job description was possession of a certificate for director of pupil personnel services. Figurelli satisfied this requirement at the time of her appointment to the position. Przystup never acquired the necessary additional certificate, although he claimed to have completed all the course work to qualify for its issuance. College transcripts or other evidence were never offered to substantiate Przystup's contention that he was eligible for certification as a director of pupil personnel services. Even though the work performed by the two was comparable, Przystup received a starting salary of $43,000 for the ten-month position. When she was transferred, Figurelli was earning only $37,000 for doing the same type of work on an eleven-month basis.

Of the approximately 2,500 instructional personnel employed by the Jersey City Board of Education, roughly 70 percent are female and 30 percent are male. Testimony showed that at the intermediate supervisory level (such as principal, assistant principal or subject supervisor) women occupy a substantial number of the positions in the district. At the higher supervisory level (director or above), men occupy all the positions. Figurelli was the only female to have reached that rank in the administrative hierarchy. Since her removal, the higher supervisory positions have been occupied exclusively by males.

From the evidence, I **FIND** that the Board's action in transferring Figurelli to a lower position constitutes discrimination based on sex. In making this finding, I expressly reject the Board's argument that Przystup's assumption of Figurelli's duties was not a

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promotion from building principal. What happened was that the Board removed a fully qualified female from a supervisory position and replaced her with an unqualified male. Figurelli's successor did not possess the necessary certificate which the Board's job description makes a qualification for the position. Nor did he take the contractually-mandated competitive examination, on which Figurelli had received the highest score among all candidates. Although Przystup did the same work for a shorter term, he was given a considerably higher salary. Significantly, the outcome of the Board's action was to remove the only female upper-level supervisor of a work force which is predominantly female. These factors amply support the determination that Figurelli's transfer was based on irrelevant considerations of gender rather than appropriate criteria related to suitability for the job and quality of performance.

(c) Arbitrary, Capricious and Unreasonable Action

A final area of factual disagreement involves the underlying reasons for the Board's decision. Admittedly, Dr. Ross had failed to read Williams' favorable evaluations of Figurelli's performance before making his recommendation to the Board. Nevertheless, Dr. Ross maintained that he had received numerous complaints about Figurelli's performance from other employees with whom she regularly came in contact. Dr. Ross indicated that he had personally discussed some of these complaints with Figurelli. Moreover, he had incorporated these complaints into a letter which he mailed to Figurelli at the time of the Board's action on August 24, 1983. This letter supplied the following six reasons as the basis of Dr. Ross' recommendation to terminate Figurelli's assignment:

1. Improper use of a Child Study Team;
2. Continuing problems with staff;
3. Repeated failure to respond to requests for important information required by the Office of the Superintendent and the Legal Department;
4. The loss of the services of a capable minority psychiatrist;
5. General inability of department to handle its part of the transportation tasks on a timely basis;
6. Other problems which affect the district and its children.

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Apart from Dr. Ross' testimony based largely on hearsay information, the record is devoid of any proof corroborating the truth of these various charges. No mention of these supposed deficiencies appears in the evaluations of Figurelli's performance prepared by Williams, who was her immediate supervisor. During the hearing, Figurelli was allowed an opportunity to respond to each of the charges against her. She denied that Dr. Ross had orally discussed them with her prior to the actual transfer. In her view, any complaints by other employees were in retaliation for the fact that she insisted upon compliance with state rules which previously had been ignored. Her explanations of specific incidents cited by Dr. Ross were plausible and convincing.

I **FIND** that the Board's decision was not the result of the purported reasons given in Dr. Ross' subsequent letter. If such reasons were truly the ones on which the Board acted, at least some of the criticisms would have found their way into the three formal evaluations made of Figurelli's performance. Evidence of a hearsay nature offered in justification of the transfer is insufficient to override my earlier finding that the real reason for the Board's action was Figurelli's status as a female. Again I adopt Figurelli's version that she was never informed of the seriousness of her supposed inadequacies until her transfer had become an accomplished fact. On the existing record, it is readily inferable that the Board did not limit itself to a proper consideration of available input about Figurelli's character, ability and past performance. Instead, it crossed over the line and took into account the irrelevant factor of her gender in determining her suitability for a supervisory post. By definition, that approach lies outside the legitimate scope of the Board's discretion and constitutes arbitrary, capricious and unreasonable conduct.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board violated Figurelli's statutory rights when it removed her from a supervisory position.

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Under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. (the "Act"), public bodies, including school boards, must comply with procedural rquirements designed to protect the public's right to participate in the governmental process. Its basic purpose is two-fold: to ensure that the public receives adequate advance notice of all public meetings, N.J.S.A. 10:4-9; and, to guarantee that, with few limited exceptions, meetings of public bodies shall be open to the public at all times, N.J.S.A. 10:4-12(a). Generally, strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred. Polillo v. Deane, 74 N.J. 562 (1977). The Commissioner of Education has incidental jurisdiction to determine issues arising under the Act as they relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, 187 (App. Div. 1979).

Figurelli contends that the Board's notice of its August 24, 1983 meeting was deficient in two respects.[4] Initially she argues that the Board failed to publish "adequate notice" of its meeting as defined in N.J.S.A. 10:4-8(d).[5] That statutory section defines "adequate notice" to mean:

> ...written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken.

[4] In addition, petitioner attacks the propriety of the Board's action for other alleged violations of the Act unrelated to adequacy of notice, such as failure to designate an "official" newspaper in accordance with N.J.S.A. 10:4-8(d)(2), and failure of the "person presiding" at the board meeting to make the public statement contemplated by N.J.S.A. 10:4-10. Since none of these issues were raised by the pleadings or the prehearing order, they are not properly addressed for the first time at this stage of the proceeding. Cf. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 454 (App. Div. 1982).

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Affidavits of publication from the two Hudson County newspapers establish that the 48-hour notice was legally sufficient. The notice contained the time, date and location of the meeting and a statement that formal action will be taken. Reference to "assignments," "appointments," and "personnel" matters is enough to satisfy the requirement that the notice contain "the agenda of the meeting to the extent it is known." Oliveri v. Carlstadt-E. Rutherford Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1978). See also, "Guidelines to the 'Open Public Meeting Law'," 98 N.J.L.J. 1081, 1094 (1975).

/5 This so-called "48-hour notice" is unnecessary where the public body has already included the date, time and location of the meeting in the annual notice governed by N.J.S.A. 10:4-18. Witt v. Gloucester Cty. Bd. of Chosen Freeholders, 94 N.J. 422, 432 (1983). Unfortunately the Board never published an annual notice of its regular meetings. On that ground alone, petitioner seeks to invalidate the action taken at the Board's August 24, 1983 meeting. Strictly speaking, the issue was never properly framed by the pleadings. In any event, N.J.S.A. 10:4-8 authorizes a public body to proceed with a "regular meeting" on adequate 48-hour notice, even if that meeting happened to be omitted from the annual notice or no annual notice was published. Witt, supra.

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Alternatively, Figurelli complains that the Board failed to provide her with the personal notice to which she was entitled under the Act. Nowhere does the Act itself expressly require public bodies to serve notice of pending action on any particular individual. N.J.S.A. 10:4-12(b)(8) creates an exception to the general requirement that all meetings must be held in public, limited to:

> [a]ny matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any ... current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected, request in writing that such matter or matters be discussed at a public meeting. (Emphasis added.)

Appellate courts have interpreted this provision, particularly the underscored language, to impose an obligation upon public bodies to notify its employees whenever action is contemplated which might adversely affect their employment status. Illustratively, in Rice v. Union Cty. Reg. High Sch. Bd. of Ed., 155 N.J. Super. 64, 73 (App. Div. 1977), the Court declared:

> The plain implication of the personnel exception to the New Jersey Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right and request a public hearing if they have reasonable advance notice so as to enable them to (1) make a decision on whether the desire a public discussion and (2) prepare and present an appropriate request in writing.

Accord, Oliveri v. Carlstadt-E. Rutherford Bd. of Ed., supra at 133.

As set forth in the factual findings, nobody gave Figurelli either oral or written notice of the contemplated change in her position even though the record reflects that the Board must have been aware, as early as the caucus meeting on August 22, that her transfer was one of the subjects under consideration at its August 24 meeting. Unlike Cole v. Woodcliff Lake Bd. of Ed., 155 N.J. Super. 398 (Law Div. 1978), Figurelli, who had received only favorable evaluations, had no reason to suspect that a decision regarding her transfer to a lower position was imminent. Clearly, then, Figurelli's statutory entitlement to notice was violated in this case.

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It does not necessarily follow, however, that the appropriate remedy for this violation of the Act is to invalidate the Board's action. Any corrective action taken to conform to the statute must consider "the nature, quality and effect of the noncompliance of the particular governmental body." Polillo, 174 N.J. at 579. Review of the record, including the transcript of the private portion of the Board's meeting, reveals that no significant discussions concerning Figurelli's employment status were actually conducted out of public view on August 24. While Figurelli's right to notice has been undeniably violated, she suffered no substantial harm as a result. If the notice deficiency were the only improper conduct by the Board, then the relief sought by Figurelli would be too drastic under the circumstances.

Turning to the merits of the dispute, one encounters a much more detrimental error by the Board. The standard of review applicable in such cases is well-known. Local school boards have broad discretionary authority in the granting of tenure. Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236, 241 (1974). Recently, the Appellate Division reiterated that, "[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982). Until acquiring tenure, a teaching staff member can be refused reemployment or transferred to another position on virtually any grounds, except for constitutionally or statutorily-protected ones.

New Jersey law plainly prohibits discrimination on the basis of sex in making promotions and transfers in the public school system. N.J.S.A. 18A:6-6 states:

> No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, state college, college, university, or other educational institution, in this State, supported in whole or in part by public funds...

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Without belaboring the point, this case involves a qualified female with excellent job evaluations who was paid less than her male counterpart for equivalent work. She was summarily removed from her supervisory position by the Board, which replaced her with a male lacking the required qualifications for the job. As a result, there are no longer any female directors in a school system where the vast majority of the instructional staff is female. In accomplishing its objective, the Board breached its own contractual provisions for promotions and violated the notice requirements of the Open Public Meetings Act. It is difficult to imagine a more clear-cut example of sex discrimination contrary to the State policy embodied in N.J.S.A. 18A:6-6. See, Flanders v. William Paterson College, 163 N.J. Super, 225 (App. Div. 1976).

Order

It is **ORDERED** that the Jersey City Board of Education forthwith reinstate petitioner to her position as director of pupil personnel services;

Further **ORDERED** that the Board promptly pay to petitioner any difference in salary between the amount she would have received and the amount actually earned between the period from August 24, 1983 to the date of reinstatement.

And further **ORDERED** that the Board restore any other benefits which petitioner lost as a result of the wrongful transfer.

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

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OAL DKT. NO. EDU 9411-83

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

June 6, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 8, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 11, 1984
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

al/le

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APPENDIX

List of Witnesses

1. James J. Jencarelli
2. Franklin Williams
3. Arsenio V. Silvestri
4. Henry R. Przystup
5. Michael Ross
6. Jennifer C. Figurelli

list of Exhibits

No.	Description
P-1	Board of Education's answers to interrogatories propounded by petitioner, certified March 5, 1984
P-2	Board policy statement on the evaluation of nontenured staff members, adopted December 20, 1978
P-3	Portion of an agreement between the Board of Education and the Jersey City Education Association covering the period September 1, 1980 to August 31, 1982, article 16, pps. 18 and 19

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(a) Copy of resolution No. 7.1.14 of the Board of Education, adopted March 23, 1982

(b) Job description of director of pupil personnel services

P-5 Copy of Notice of Promotional Examination, dated April 19, 1982

P-6 Copy of letter to Jennifer C. Figurelli from James J. Jencarelli, dated June 23, 1982

P-7 Copy of a letter to Jennifer C. Figurelli from James J. Jencarelli, dated August 19, 1982

P-8 Certified copy of resolution No. 7.7 of the Board of Education, adopted September 22, 1982

P-9 Copy of resolution No. 7.22 of the Board of Education, adopted August 24, 1983

P-10 Copy of a memorandum to Central Office Administrative Staff from Dr. Michael Ross, dated August 31, 1983

P-11 Agreement between the Board of Education and the Jersey City Administrator's and Supervisors' Association covering the period September 1, 1980 to August 31, 1982

P-12 Copy of a letter to Franklin Williams from Katherine H. Medley, dated June 28, 1983

P-13 Copy of an end of the year report of the Bureau of Pupil Personnel Services, dated July 1, 1983

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P-14 Copy of a memorandum to Dr. Michael Ross from Franklin L. Williams, dated May 10, 1983

P-15 Certified copy of resolution No. 7.1.9 of the Board of Education, adopted February 23, 1982

P-16 Certified copy of resolution No. 7.21 of the Board of Education, adopted August 25, 1982

P-17 Certified copy of resolution No. 7.21 of the Board of Education, adopted August 24, 1983

P-18 Copy of interoffice memorandum to Dr. Jennifer C. Figurelli from Dr. Henry R. Przystup, dated January 10, 1984

P-19 Copy of an administrator's and supervisor's evaluation report, dated March 10, 1982

P-20 Copy of an administrator's and supervisor's evaluation report, dated May 20, 1982

P-21 Copy of an administrator's and supervisor's evaluation report, dated June 3, 1982

P-22 Copy of an instructional annual written performance report, dated June 17, 1983

P-23 Copy of an envelope addressed to Dr. Jennifer Figurelli and postmarked August 25, 1983

P-24 (a) Transcript of the open portion of the caucus meeting of the Board of Education held on August 22, 1983, ps. 1 to 129

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(b) Transcript of the open portion of the caucus meeting of the Board of Education held on August 22, 1983, ps. 159 to 163

P-25 (a) Transcript of the closed portion of the caucus meeting of the Board of Education held on August 22, 1983, ps. 156 to 158

(b) Transcript of the closed portion of the caucus meeting of the Board of Education held on August 22, 1983, ps. 199 to 200 and 214 to 216

P-26 Transcript of the open portion of the regular meeting of the Board of Education held on August 24, 1983, ps. 1 to 92

P-27 id. Transcript of the closed portion of the regular meeting of the Board of Education held on August 24, 1983, ps. 93 to 122

R-1 (a) Copy of invoice from the Hudson Dispatch, dated August 22, 1983

(b) Copy of affidavit of publication from the Hudson dispatch, dated August 20, 1983

R-2 (a) Copy of invoice from the Hudson Dispatch, dated August 29, 1983

(b) Copy of affidavit of publication from the Hudson Dispatch, dated August 29, 1983

R-3 (a) Copy of invoice from the Jersey Journal, dated September 8, 1983

(b) Copy of affidavit of publication from the Jersey Journal, dated September 8, 1983

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R-4 (a) Copy of invoice from the Jersey Journal, dated September 20, 1983

(b) Copy of affidavit of publication from the Jersey Journal, dated September 20, 1983

R-5 Copy of letter to Dr. Jennifer Figurelli from Michael Ross, dated August 24, 1983

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JENNIFER C. FIGURELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision 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 Commissioner concurs with the findings and determinations rendered in the Office of Administrative Law. The orders to reinstate petitioner forthwith, to compensate her any difference in salary between August 24, 1983 and said reinstatement and to restore any other benefits lost as a result of her wrongful transfer are adopted as the Commissioner's final decision for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

JULY 23, 1984

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JENNIFER C. FIGURELLI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 23, 1984

For the Petitioner-Respondent, Carl John Kerbowski, Esq.

For the Respondent-Appellant, Margulies, Margulies and Wind (Seymour Margulies, Esq., of Counsel)

Respondent-Appellant's request for oral argument in this matter is denied because the party did not present in writing or otherwise any reason justifying the need for such procedure as required by N.J.A.C. 6:2-1.15. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 5, 1984

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INITIAL DECISION
OAL DKT. NO. EDU 1391-84
AGENCY DKT. NO. 31-2/84

ROBERT G. BONGART,
COUNTY SUPERINTENDENT OF
SCHOOLS, CAPE MAY COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF STONE HARBOR,
CAPE MAY COUNTY,
Respondent.

APPEARANCES:

Regina A. Murray, Deputy Attorney General, for petitioner (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

John H. Mead, Esq., for respondent

Record Closed: April 30, 1984 Decided: June 12, 1984

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

Action for an order of the Commissioner of Education directing that the Stone Harbor school district refund all tuition monies paid by pupils participating in the instrumental music program, cease permitting any further tuition charges to pupils or, in the alternative, to terminate the instrumental music program being conducted within the Stone Harbor school district.

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This matter was opened by the filing of a Petition of Appeal by the Cape May County Superintendent of Schools before the Commissioner of Education. The petition alleges violation of N.J.S.A. 18A:7A-4; 7A-2(a)(4); 38-1; 54B-1, and 54B-2 and N.J.A.C. 6:4-1.5(e). The Stone Harbor Board of Education filed an answer to the petition generally denying violations of any statute or provision of administrative code and denying that it charges tuition or offers the instrumental music course on the basis of social or economic status.

The matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on April 2, 1984. Agreement as to procedures and stipulations of certain facts were made. The matter proceeds to summary judgment on cross-motions for summary judgment.

The following facts are admitted or uncontroverted:

1. The Stone Harbor Board of Education is responsible for governing and managing the public schools of that district.

2. The Board is obliged to enforce the rules of the State Board of Education and to 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 Stone Harbor school district.

3. On March 16, 1977 the Stone Harbor Board of Education adopted goals for a thorough and efficient education for the pupils of that district. These goals for each pupil state, in part:

> To acquire the ability and desire to express himself/herself creatively in one or more of the arts, and to appreciate the aesthetic expressions of other people.
>
> Insure that specialized and individualized kinds of educational experiences are available for meeting the particular needs of every student.

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4. Since October 25, 1983, the Stone Harbor Board of Education has offered to its pupils an instrumental music program.

5. Instruction is provided by Instrumental Music Programs, Inc. of Wilmington, Delaware.

6. There is a charge made for participation in the instrumental music program.

7. The pupils participating in the instrumental music program receive one 30-minute lesson per week. The lessons are scheduled, in part, during the school day and, in part, immediately after school.

8. School facilities are utilized for these lessons and no rent is charged by the Board for that use.

9. Because of a rotational schedule, when they are excused early for instrumental music lessons, the pupils miss portions of several different classes per month, rather than the same class repeatedly.

10. The present charge for participation in the program for a year of instruction is $18 per month.

11. By letter dated November 3, 1983, the Cape May County Superintendent of Schools informed the administrator for the Stone Harbor school district that the operation of the instrumental music program was in violation of New Jersey constitutional, statutory and regulatory law.

12. The county superintendent recommended that the district cease charging tuition for the program and refund the amounts already charged or, alternatively, that the district terminate the instrumental music program.

13. The letter further stated that, if the Board chose not to follow his directions, it would be necessary for the county superintendent to take further action.

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14. By letter dated November 14, 1982, the administrator for the Stone Harbor district advised that the Board would consider the alternatives presented by the county superintendent at the November 3, 1983 meeting of the Board.

15. By letter dated November 28, 1983, the Board secretary advised the county superintendent that the Board had decided at its November 16, 1983 meeting to disregard the direction of the county superintendent and to continue the instrumental program as it was then structured, continuing to make a charge to the students participating therein.

I hereby adopt the foregoing as FINDINGS OF FACT.

On April 24, 1984, the parties stipulated additional facts by way of an affidavit by the school administrator. The affidavit states, and I FIND AS FACT the following:

1. The Stone Harbor Elementary School has an enrollment of 67 pupils excluding Kindergarten pupils.

2. The existing instrumental music program is available only to pupils in grades four through eight, a group which consists of approximately 40 pupils.

3. Thirteen of these forty pupils are now enrolled in the instrumental music program.

4. The administrator has received no information or complaints from students, parents, teachers, Board members or others as to the inability of any pupil to participate in the instrumental program for economic or financial reasons.

5. No pupils in grades four through eight in the Stone Harbor Elementary School are eligible for free or reduced price meals under the State School Lunch Program, N.J.A.C. 6:79-1.1 et seq.

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6. The administrator has attempted to provide instrumental music instruction for the pupils in question by alternate methods and has not been able to devise a program as cost effective as the present program.

In the opinion of the administrator, instrumental music program participation in Stone Harbor is above average. He also expressed the belief that he has not been able to devise a program of instrumental music instruction as cost effective as the present program because the school is small, because direct employment of a qualified person would result in less than a full-time position and because the district is somewhat remote.

I

The parties have timely filed their moving papers. The State on behalf of the county superintendent of schools, argues that a prerequisite to participation in the instrumental music program is payment of a fee to Instrumental Music Programs, Inc. The participating pupils receive one 30-minute lesson per week, which lessons are scheduled, at least in part, during the school day. School facilities are used for these lessons but no rent is charged by the Board to the company providing the lessons. Since Stone Harbor's instrumental music program violates New Jersey constitutional, statutory and regulatory law, it should be terminated and all tuition monies paid thereunder should be refunded to the parents of participating pupils.

The education clause of the New Jersey Constitution requires that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the age of five and eighteen years. N.J. Const., (1947), Art. VIII, Sec. IV, Par. 1.

The Legislature, in order to carry out its constitutional responsibility, enacted Title 18A, Education, and placed the responsibility of compliance upon the New Jersey State Board of Education and the New Jersey Commissioner of Education. N.J.S.A. 18A:4-10; 4-22, and 4-23. The Commissioner and State Board are aided in providing a system of education consistent with thorough and efficient principles by legislatively created local school districts which are primarily responsible for the provision of a thorough and efficient education within their districts. N.J.S.A. 18A:10-1; 11-1 et seq.

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N.J.S.A. 18A:7A-4 states that 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 . . . the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." And at N.J.S.A. 18A:7A-2, the Legislature has declared that "the sufficiency of education is a growing and evolving concept" and therefore the "definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein, depend upon the economic, historical and cultural context in which the education is delivered."

As found above, the Stone Harbor Board has specifically stated its intent to provide, as part of its regular school program, instruction which will assist students to express themselves creatively in one or more art form. The instrumental music program is therefore an essential part of a thorough and efficent education as defined by the Stone Harbor Board itself. The program may not be separated from the remainder of the regular school program by offering on a fee basis by an independent corporation. Rather, if offered within the district, the program must be free to the children within the Stone Harbor district who are eligible to participate. N.J.S.A. 18A:38-1.

As currently constituted, the program offered within the district not only violates the statutory law but it also contravenes two regulatory provisions. N.J.A.C. 6:4-1.5(a) specifically provides that no pupil shall be denied access to or benefit from any educational program or activity on the basis of social or economic status. N.J.A.C. 6:4-1.5(e) prohibits the separate offering of any course, including any music course, on the basis of economic status.

In Parsippany-Troy Hills Ed. Ass'n v. Parsipanny-Troy Hills Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983), the court held that boards of education have been granted broad discretion over their curriculum choices by the Legislature. Id. at 166-67. However, once a board has determined to offer a course to its students, where that course falls within the defintion of a thorough and efficient education, participation in the course may not be based on economic considerations.

Therefore, the Stone Harbor Board of Education must refund all tuition monies paid by pupils participating in the instrumental music program and must cease permitting any further tuition charges to these pupils for the instrumental music program.

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II

The Board argues that Parsippany-Troy Hills, above, stands for the proposition that a course not required in the school curriculum may be offered and a fee charged therefor without violation of the State Constitution's "thorough and efficient" clause. The county superintendent of schools seems to argue that the Stone Harbor Board, having drafted a list of goals for a thorough and efficient education, has somehow created a constitutional standard to be applied to it consisting of a more rigorous interpretation of "thorough and efficient" than that set by New Jersey courts. That is, it is being suggested that the meaning of the State Constitution is to be found in memoranda of local school districts rather than the courts.

The Board's adoption of a set of goals, while listing the ideals aspired to, does not constitute the establishment of a curriculum. A curriculum, in fact, need only comply with the New Jersey Constitution, Title 18A of the New Jersey statutes, and Title 6 of the New Jersey Administrative Code.

The county superintendent claims that N.J.S.A. 18A:38-1 requires the music program to be free. It does not. The section merely requires free attendance at public schools and is not concerned with specific courses or curriculum. It is further claimed that N.J.A.C. 6:4-1.5(a) and (e) had been violated because they prohibit denial of access to, or the offering on a separate basis of, courses on the basis of economic status. The school board has stated through its affidavit that no pupil eligible to participate in the music program is eligible for free or reduced price lunches under the State School Lunch Program, and that no person has complained as to any pupil's inability to take part in the music program for economic reasons. The county superintendent has not challenged these facts and has adduced no facts establishing that any pupils have been denied access to the program for economic reasons. That point, and N.J.A.C. 6:4-1.5 are, therefore, not in issue.

In Parsippany-Troy Hills, above, the court found that there was nothing presented to "compel the conclusion that behind-the-wheel drivers training is an essential or integral portion of classroom driver training in any legal sense," Id. at 168, and found that "such training must be provided in very small groups of students" Id. at 169.

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In the present case, there is a clear distinction between musical instrument instruction, which also must be given to small groups to be effective, and a general music class of a more passive or theoretical nature which may be included in the school curriculum. Not all students may be interested in or able to play a musical instrument and, thus, such training should not be included in the school's curriculum.

The alternatives demanded of the Board are impractical and unfair. If the Board were required to cover the cost of tuition for 13 out of 40 pupils in a non-curricular optional program, it would be unfair to the tax-paying parents of non-participating children and would be unfair also because there have been no complaints about the present arrangement. To terminate the program would deprive the participating children of the instruction they clearly want to have and would provide no benefit to any other party. Both courses of action are negative and discriminatory, whereas the current arrangement of the program is beneficial and there is no evidence that it is discriminatory.

The Supreme Court of North Carolina has upheld the charging of incidential course and instructional fees for the purpose of enhancing the quality of a school's education effort. The court held that this did not violate the State constitutional directive of "free public schools. . .wherein equal opportunities shall be provided for all students." Snead v. Greensborough City Bd. of Ed., 299 N.C. 609.

In Paulson v. Minidoka Cty. School Dist. No. 331, 93 Idaho 469, the Supreme Court of Idaho held that the Idaho constitution which requires "a general, uniform and thorough system of public, free common schools," did not prohibit setting fees for extracurricular activities for students who opted to participate in them.

Paulson, above, was cited in Vandevender v. Cassell, 208 S.E. 2d 436 (W. Va. 1974), in which the state constitution's "thorough and efficient" clause was stated as not prohibiting fees charged for extracurricular activities not necessary under the required curriculum.

The Stone Harbor Board states that it cannot refund fees paid because it did not receive the fees.

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On the basis of the New Jersey authority cited and authority from other jurisdictions, the Board argues it must be held that the present fee arrangement for musical instrument instruction is not violative of New Jersey law.

III

Under rules adopted by it, a board of education may permit the use of the schoolhouse or school rooms or school grounds when not in use for school purposes for: (a) persons giving and receiving instruction in any branch of education, learning, or the arts; (b) public library purposes; (c) holding such social, civic and recreational meetings and entertainment and for such other purposes as may be approved by the board; (d) such meetings, entertainment, and occasions where admission fees are charged as may be approved by the board, and (e) polling places, holding elections, the registration of voters and holding political meetings. N.J.S.A. 18A:20-34. A board of education is allowed to apply commercial rental rates for the use of its facilities. See, Resnick v. E. Brunswick Tp. Bd. of Ed., 77 N.J. 88 (1978).

Subject to certain conditions, the public schools generally are free to persons over five and under twenty years of age. N.J.S.A. 18A:38-1. Subject to rules and regulations promulgated by the State Board, boards of education may charge tuition for students to attend "enrichment programs" in the public schools. N.J.S.A. 18A:54B-2. "Enrichment program" means any summer school program offered by a public school for which a student does not receive credit for graduation and is unrelated to the curriculum content of the regular school program. N.J.S.A. 18A:54B-1.

Effective November 21, 1977, the State Board of Education provided at N.J.A.C. 6:4-1.5 that no student shall be denied access to or benefit from any educational program or activity solely on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status and further that no course, including but not limited to physical education, health, industrial arts, business, vocational and technical courses, home economics, music and adult education, shall be offered separately on the basis on race, color, creed, religion, sex, ancestry, national origin or social or economic status.

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The intent of the State Board seems clear: what the school offers, it must offer to its pupils free of charge. The Legislature appears to agree and in N.J.S.A. 18A:54B-1 et seq., above, very clearly delineates "enrichment program" to mean a summer school program for which a student does not receive credit for graduation and which is unrelated to the curriculum content of the regular school program.

Against these one must view Parsippany-Troy Hills, above. In the best of all possible worlds, behind-the-wheel driver education and instrumental music would be offered in appropriate facilities and in appropriate periods of time without charge to all pupils who wished to take them. But in the real world, the Appellate Division has said that the inclusion of driver education in the school curriculum is not mandatory, that behind-the-wheel training can be offered outside normal school hours and that a fee can be charged for that training. Furthermore, the instructors engaged in that training, outside the public schools, are not required to be certified by the State Board of Examiners.

The Parsippany-Troy Hills court examined at great length the statutory and code provisions concerning the delegation and distribution of control over educational issues among the State Board, the Commissioner and local boards of education. It found that determination of curriculum is actually the discretionary decision of these administrative bodies. The State Board has general supervisory powers over public education in this State. N.J.S.A. 18A:4-10. This includes the duty to make and enforce rules for carrying out the state school laws. N.J.S.A. 18A:4-15. The Legislature has delegated certain duties to the Commissioner of Education. See, e.g., N.J.S.A. 18A:4-24. See also, In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 273 (1981). Local school boards have the duty to enforce rules promulgated by the State Board. N.J.S.A. 18A:11-1. They also have been granted broad discretion over their curriculum choices by the Legislature. Parsippany-Troy Hills at 165-66.

After examining the "Legislative Finding" prefacing the public school education act of 1975, N.J.S.A. 18A:7A-1 et seq., the court found that these statutory provisions and the code regulations implementing them leave little doubt that the choice of which courses to offer and, necessarily, the contents of those courses, is a discretionary decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education. In such a case "the decision is

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entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965). And "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). Id., at 166-67.

The Parsippany-Troy Hills court specifically noted that the appellant therein had not presented any single instance where the thorough and efficient clause has mandated that a given course be included in a curriculum. Rhetorically, perhaps, the court said:

> Many skills not taught in public schools would open new employment opportunities to large numbers of students. Must every public school system offer a full range of computer science courses? Should the curriculum of each district reflect the career goals and expectations of all or most or some of its students? The problems flowing from courts reading mandatory curriculum content into the T & E Clause are legion. The policy reasons for mandating the inclusion of driver education are not sufficiently compelling for this court to break such new ground. Ibid.

The administrative law judge who held the original hearing in Parsippany-Troy Hills had found behind-the-wheel training to be an integral part of the driver education curriculum as included in the health program. However, he went on to find that nothing in New Jersey law indicated a de jure relationship between the two parts of driver education. The court noted that no one would argue with the ALJ's conclusion that behind-the-wheel instruction has a "de facto relationship" with the classroom instruction. The purpose of the classroom instruction is to make the students aware of the automobile, its operation, its maintenance and the rules and regulations pertaining to its use. Such instruction must be directly related in fact to "hands-on" training. However, the administrative law judge found no de jure relationship. Id. at 167-68. The administrative law judge and the appellant analogized driver education without "hands-on" training to a science course taught without integrated laboratory training. Unfortunately, neither the administrative law judge nor the appellant provided any support for this position.

The Appellate Division stated

> Courts cannot require schools to provide practical training for all topics the Board chooses to have discussed in the classroom. Neither the administrative law judge nor the [appellant]

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> demonstrated what legal implications must flow from a simple de facto relationship. The issue as to whether the driver education program can be bifurcated with the behind-the-wheel training portion offered at a time other than during the regular school hours was addressed in [Camp v. Glen Rock Bd. of Ed., 1977 S.L.D. 706] in a challenge to the legality of a curricular change authorized by a local board of education which resulted in the termination of employment of tenured teachers. As an element of that case the Commissioner was required to determine whether behind-the-wheel training could be relegated to nonschool hours and contracted on an hourly basis to be taught by persons other than salaried teaching staff members. Id. at 709. . . . [T]he Commissioner found in Camp that the board may legally relegate behind-the-wheel training to nonschool hours even when it was still considered part of the curriculum. Id. at 711. Camp recognized that behind-the-wheel training is qualitatively different from conventional academic studies: . . . We see nothing that would necessarily require behind-the-wheel training to be taught in regular school hours. It is noteworthy that such training must be provided in very small groups of students making scheduling of training . . . within regular hours very difficult. Id. at 168-69. The court rejected the premise that driver education, including behind-the-wheel-training, is a mandatory course. Ibid.

In the present case, my conclusions parallel those of the Parsippany-Troy Hills court. The standard established in Thomas, above, that the decision of a local board 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 has not been met. Furthermore, the decision of the Stone Harbor Board in this matter appears to rest on a rational basis and to be induced by the salutary motive of offering instrumental music instruction where the only alternative appeared to be no such instruction.

A statement that instruction will assist pupils to express themselves creatively in one or more art form does not mean the instrumental music program is therefore an essential part of a thorough and efficient education in the district. That is a leap that cannot be supported by logic.

Nor has there been any showing that any pupil has been denied access to or benefit from the instrumental music program because of inability to pay the fee.

I am well aware that the Parsippany-Troy Hills court concluded that the local board's decision not to offer behind-the-wheel training was a discretionary decision that had been reviewed and upheld by the Commissioner and State Board. Obviously, the second part of that conclusion, review and upholding by the Commissioner and State

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Board, is not present in this case. Nonetheless, the rationale clearly set forth by the court in Parsippany-Troy Hills is applicable to the present matter. No one would seriously argue the permissibility of charging fees for activities that are an integral part of classroom instruction and/or for which credit is given. Clearly, such is not the case here. Instrumental music is not an integral part of classroom instruction for which credit is given. I so **FIND.**

In consideration of the arguments of counsel and the analysis of Parsippany-Troy Hills, above, I **CONCLUDE** that the Stone Harbor Board of Education has not violated Constitutional, statutory or regulatory law by allowing conduct of the instrumental music program described above, such being within its legislatively created discretion. However, I further **FIND** and **CONCLUDE** that use of the school facility by the company providing the instrumental music instruction free of charge contravenes the intent of N.J.S.A. 18A:20-34 and the expression of the court in Resnick, above.

The Stone Harbor Board of Education is **DIRECTED** to establish a fair rental value for the use of its facility by the company providing instrumental music instruction and to assess the company such rental effective with the date of final decision in this matter. Retroactive application would constitute undue interference in a contract made at arm's length between the Board and Instrumental Music Programs, Inc., a contract that has all but run its course as of the date of this decision.

In all other respects, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

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OAL DKT. NO. EDU 1391-84

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

12 JUNE 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

June 13, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 15, 1984
DATE

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

ij

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ROBERT G. BONGART, SUPERINTENDENT OF SCHOOLS, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF STONE HARBOR, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b, and c.

There is no statutory or regulatory requirement that instrumental music be included in a school district's curriculum. Whether or not it is to be included falls within the discretionary authority of a local board of education. While there are many boards which decide to include instrumental music as part of the district's curriculum, there are many which do not. Clearly, where a board determines to include instrumental music as a part of the curriculum or considers it necessary for the provision of a thorough and efficient education, N.J.S.A. 18A:38-1 and the New Jersey Constitution would prohibit the charging of a tuition fee.

A focal issue in this matter is whether the Stone Harbor Board of Education, by virtue of the district's goals and conduct of the program in part during school hours, is prohibited from offering an instrumental music program on a fee or tuition basis. The rationale for such a prohibition would be based on the fact that (1) the program is necessary for the provision of a thorough and efficient education, given the stated goals of the district and/or that (2) it is operated during hours designated for the regular school program. The goals in question are repeated below:

> "***To acquire the ability and desire to express himself/herself creatively in one or more of the arts, and to appreciate the aesthetic expressions of other people.
>
> Insure that specialized and individualized kinds of educational experiences are available for meeting the particular needs of every student.***"
>
> (Initial Decision, ante)

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While it is reasonable to consider the instrumental music program a vehicle to help attain the two goals stated above, the controlling issue in this matter is the fact that the Board conducted the program as part of the regular school program by offering it, at least in part, during regular program instructional time. When the Board determined to offer the program as it did, it in effect made a determination that the activities associated with the instrumental music program were educationally significant enough to replace other portions of the regular curriculum/school program offered as part of the thorough and efficient education. When a board acts to conduct a non-mandatory program such as instrumental music during regular school hours, it must be considered part of its regular school program and curriculum.

The Parsippany-Troy Hills decision was relied upon by the judge in the initial decision to reach the conclusion that the instrumental music program may be offered by the Stone Harbor Board on a tuition/fee basis. However, the Parsippany-Troy Hills decision is clearly inapposite to the matter herein. That decision held that a board may offer non-mandatory courses on a fee basis outside of school hours; the driver education course offered by the board was part of its Adult Evening School and was a program clearly offered outside of the normal school day. The program in the instant matter is offered during and, consequently, as part of its regular school program, notwithstanding the fact a portion of it is offered immediately following regular instructional program time. When a board acts to include a non-mandatory course as part of its regular school program and curriculum, a fee or tuition is prohibited by N.J.S.A. 18A:38-1.

Notwithstanding the fact that fees may now be charged for field trips, the Willet v. Colts Neck Board of Education, 1966 S.L.D. 202 decision is also instructive with respect to the charging of fees or tuition by a board of education. As in the Parsippany-Troy Hills decision, Willet identifies the criterion "outside of the normal school day" as part of the standard to differentiate programs/activities for which a fee may be charged from those for which a fee may not be charged. It is significant that the Legislature found it necessary to enact specific statutes in order to permit the charging of fees for field trips as an exception to N.J.S.A. 18A:38-1. While the Legislature chose to make this exception, it safeguarded pupil participation in field trips when enacting N.J.S.A. 18A:36-23 which prohibits a pupil's access to such trips due to inability to pay, regardless of whether or not he or she meets the financial hardship requirements set forth in N.J.S.A. 18A:36-21.

While the Board has stated that no one objected to the fee charged for the instrumental music program in this matter and that no pupil was excluded due to economic or financial hardship, there is in fact no way of determining from the record if any pupil was

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denied access to the program, irrespective of the fact that none of Stone Harbor's pupils qualify for free or reduced price meals.

Because the Board in effect made a determination that the instrumental music program had sufficient educational significance to be offered during normal school hours and, therefore, must be deemed part of its regular school program and curriculum, it is the determination of the Commissioner that charging a fee for it was violative of N.J.S.A. 18A:38-1. Consequently, the recommended initial decision of the Office of Administrative Law is reversed.

The Stone Harbor Board of Education is ordered to compensate each parent/pupil whatever monies were paid to the independent contractor as fees for the course. The fact that the Board itself never received the fees is irrelevant. The amount of funds necessary to compensate for the fees paid by the parents/pupils should be no different than if the Board had contracted directly with the independent service provider to teach the program. The record indicates that the teacher held an appropriate New Jersey instructional certificate, therefore, no conflict with N.J.S.A. 18A:26-2 is present.

COMMISSIONER OF EDUCATION

JULY 30, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 3817-84
AGENCY DKT. NO. 181-5/84

ROBERT MONRO,
Petitioner,
v.
RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

APPEARANCES:

James P. Gagel, Esq., for petitioner (Aronsohn & Springstead, attorneys)

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

Record Closed: June 12, 1984 Decided: June 12, 1984

This is a transcript of an administrative law judge's oral initial decision rendered pursuant to N.J.A.C. 1:2-2.9.

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

I will now render what I deem to be a proper determination of Issue 1. I must preface this determination by distinguishing between the arbitrariness of a policy itself and/or a regulation in the application of same. I will deal solely with Issue 1 which is the regulation and the policy, not the application of same.

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I must also distinguish what I know of this case thus far from Weatherall and will try to avoid any references to the application policy. I do this only for the edification of those present. Weatherall was a case where both the policy was found to be arbitrary, even though the Board was well intentioned, and the application of the policy was also found to be arbitrary because, although there was a review committee in Weatherall, there was a review committee on paper only and not in function. It was one staff member who made the determinations without counsultations and I suspect that we may find an entirely fact pattern between the two by a thorough reading of Weatherall, as well as the cases referred to in Weatherall (as I recall, it was Vermous, Marnaricks and, of course, Wheatley, which happened to be in the same school district). We must distinguish between the Commissioner's dicta and a determination in a decision. It is true that the Commissioner made known his views as to the use of grading as an unwise penalty. He was of the opinion that that didn't accomplish what it intended to accomplish, which was to improve attendance. However, Commissioner also stated that an imposition of penalty was certainly justified.

Regarding the 180 days as part of the regulation, if a determination of a number of days of attendance for credit is arbitrary, one then could argue that the 180 days a school must be open was an arbitrary determination by the State Legislature. The number in itself cannot be construed here to be arbitrary, whether it is reasonable or not, ? may be argued and must be determined. But the selection of a numbered days of class attendance for credit purposes is not in itself arbitrary and would certainly come within the Board's authority, pursuant to N.J.S.A. 18A:11-1 which permits the Board and vests the responsibility in the Board to make and amend rules for the efficient operation of its schools. Whether the penalty imposed in this case is deemed to be arbitrary remains to be determined. A reading of the policy states that the Board will not grant credit when a pupil has not complied with the attendance regulation. The regulation itself then provides for a process and whether or not that process denies a student what has been argued as due process of law has yet to be determined. I suspect gentlemen that one of the

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problems we will encounter, and I certainly recognize one here, is that the policy and the regulation are being scrutinized by attorneys for the intent in what they say. As one construes the statute, it is undisputed it is not what was intended in it but what was said. Here we have a regulation that I suspect was not written by one with a legal background for writing documents that will be relied on, there was some very loose language. The policy itself is quite redundant with language that an attorney would have a problem with. The Board is a mandate to require, there is a little redundancy right there, where is the mandate coming from, I don't know. I think it's important that we look at what the Board is trying to do even though they might not say it the way we might like them to say it. What the professional staff is trying to do in implementing a policy decision of the Board and then determine whether or not there is any violation of what I would call "fundamental fairness" here.

Absenteeism without justification is not to be condoned. How do you get around it? Much of the examination here was, "How do you around this?" Well, we don't know if it's going to be necessary, we have some future findings to make, we need testimony before those can be made. Was this automatic? Policy itself says it will not grant credit which makes it a conclusion that could be made if its automatic, no credit, you can lose it. Then in that same sentence it says for courses when a pupil has not complied with the attendance regulation, then you go to the regulation. The words will not grant credit which someone decided should be underlined in the policy immediately raises a red flag that a more careful reading of what they're trying to accomplish does not in my view make it so automatic. We have to look at the process and we'll see the arbitrariness of the application of the policy and the regulation. The plaintiff complained about lateness, we don't have the student handbook in evidence, though there certainly was reference to it and was testified to on the record and a presumption is made that all students have access to a student handbook and know what it means. You know some particular student didn't stand up and say "Well I never got one," you have a duty to get one, they're made available." Maybe the student overslept that day and didn't get one when they're handed out, but there certainly a great deal of improvement can be made in the writing of this regulation and this policy.

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Article 10 - I'm not even so sure I agree with Mr. Gaygelson's interpretation of Article 10. There appears to be an excess between 10 A and what one would believe should be asterick note on the bottom and Article 10 seems to refer to permissive on the part of the students. Careful reading of it, students who have insufficient attendance may regain full credit status in the following manner. inaudible Well it seems pretty clear before 10A goes into operation there has to be an action to take credit away. The fact that it may be poorly worded does in itself make it arbitrary? Not in my view. The nature of the causes as in W must be pointed out in W I have very vivid recall of that hearing because I wrote it, I heard it. There was no communication that the kid was absent. Guidance counselor did not do anything at all. And the penalty there imposed was raising the passing grade. So Einstein couldn't get through Algebra and when it hit 50 there was no way Einstein could get credit. But there was no consideration by the Committee at all. Was consideration given here remains to be seen. You're talking about application. But the policy itself in W was found to be arbitrary because there's a double penalty imposed which was so unfair and so difficult. What they were doing there was 69 or 65 - I don't remember what it was, but for every ten absences it kept going higher and higher so that somebody would have to get a 90 if he had 45 days of absence. That was found to be extremely arbitrary. But the Board was commended for their efforts to try to develop policy to improve student attendance because what the Commissioner is concerned about is applicable here as well.

There is no Rule in New Jersey that said "just pass the course, we don't care if you come to school or not - public schools aren't law schools or maybe counsel present here may not have had to attend class. It's true. Then, you take a final exam - you can buy it, good for you. You're dealing with, presumably mature individuals. I think the Commissioner makes some comments about the age of maturity, how it is not a chronological age and how youngsters differ. So some consideration is to be given there. All of these will be considered in this matter and given consideration when we deal with the applicability. I would certainly suggest that counsel for the Board and this matter be viewed the wording of the policy and clean it up so that it spell its intent and avoid some ambiguities and so forth. But, reading the policy and what the Board's intent is and reading the process though I have some definite concerns in the way this is written. See,

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school administrators usually writes these things, and having been one I can recognize and admit to the fact that we talk a lot, and write a lot, but we never learn to write legal documents - they didn't do such a great job here. But, that is insufficient for me to determine the policy in the regulation - arbitrary, capricious or unreasonable. The determination here on Issue 1 is that the policy and regulation on its face are not arbitrary, capricious or unreasonable and we will proceed with Issue 2 relative to the application of same.

The decision made here is rendered as if it were a final decision. The parties know its an Initial Decision which is recommended for the consideration of the Commissioner. Only the Commissioner has the final decision in this matter. He may modify, accept or reject the Initial Decision.

The issue we are dealing with here is the arbitrariness, capriciousness and/or unreasonableness of the application of Policy 504 and/or Regulation 5040. A determination has previously been made in this decision that the policy, as well as the regulation, on their face has been deemed to be reasonable and is indeed not arbitrary or not capricious. Before getting into the substance of the decision, the parties here should be aware of the role of the Commissioner and I will not cite any decision or law, attorneys are very familiar with it. The Commissioner will not substitute his judgment for a local board. The discretionary authority is vested in that board by the State Legislature to make its rule and amend them for the efficient operation of the schools. The Commissioner has, however, on a number of occasions determined board actions to be arbitrary, capricious and/or unreasonable or unjust and has, in fact, deemed them null and void and has set them aside. We are talking about attendance in school and so that there is no misconception, the State Legislature has created law through proper process and in N.J.S.A. 18A:38-25 clearly places the responsibility on every parent, guardian or other person having custody in the control of a child to regularly attend the public schools. The

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Legislature saw fit to incorporate in that statute the ages between six and sixteen and does not address a pupil's responsibilities above the age of sixteen. The Legislature also promulgated, passed a bill, enacted it into law, which is codified as N.J.S.A. 18A:38-26, which says that:

> such regular attendance shall be during all the days and hours that the public schools are in session unless it is shown to the satisfaction of the board that the mental condition of the child is such that he cannot benefit from instruction or that the bodily condition of the child is such as to prevent his attendance at school. Nothing shall be construed as permitting the temporary or permanent exclusion by the board of any child between the ages of five and 20, except as explicitly otherwise provided by law.

Although in N.J.S.A. 18A:38-25 they exclude youngsters less than six and over sixteen, they expand on this age range going from five to 20 insofar as some limitation as to what a board can do. There were some mention during the course of the testimony concerning 180 days compulsory, just to clarify that, the pocket of 18A:36-1, it indicates, "Public schools in New Jersey are mandated by law to remain open for instruction for a period of not less than 180 days in the school year." It does not require that a youngster must be in school 180 days in order to get credit.

The leading case concerning policies and application of policies in Weatherall as has been previously cited in argument, which is actually Linda Weatherall and Norma Carnavale v. Bd. of Ed. of the Tp. of Burlington, 1974 S.L.D. 794. In there, there was some warning given concerning the broad use of previous decisions when a portion of a decision is in fact obiter? dictum, that means when the Commissioner coments concerning his philosphy and what he believes policies should be. There is indeed a distinction between the instant matter and Weatherall that in Weatherall the policy itself was determined to be arbitrary. That was sufficient to rule for the petitioner of that case. If the Commissioner finds that policy arbitrary, it makes it null and void. The Commissioner commended them for their efforts in developing this policy. They just went a little bit too far, and in addition to the commendation, the board was directed to review its grading

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policies and to promulgate such policies anew. "I like what you are doing, you went to far, ease off, make certain corrections." The application of that policy, however, was addressed at considerable length and it was done for the purpose of assisting boards, as the Commissioner often does, for their edification as they try to develop policies on school attendance. The modus operandi of the credit review board in Weatherall was found to be proper. In that instance, the committee was a one-man committee. Others were not consulted. One was told to give me some statistical data. But there was no input for committee determination and discussion and that is the purpose of a committee, to get the various disciplines providing input and then a consensus and then a recommendation. As was found in Weatherall, I certainly do not condone the absences of the petitioner here nor do his parents. It is interesting to note that regardless of the absences, the petitioner here is still passing the required courses. But that is really of no moment because if he is denied credit because of policy, the fact that he may be passing those courses is irrelevant.

My review of the testimony and the evidentiary documents lead to certain **FINDINGS OF FACT.**

I **FIND** that the petitioner violated Regulation 5040 by exceeding ten absences without medical excuse. By looking into that finding a little further, the Commissioner should be aware of some inconsistencies. Parents were noticed on November 15 by letter from Mr. Ogden, marked A-1 in evidence. That letter indicates that Robert has been absent from school five times. I emphasize school. There is no indication in that notice of tardiness to school that may have resulted in absence from class. However, the ten-day notice, marked A-2, creates the inconsistency in that our attendance records indicate that Robert has had ten absences from class. The five-day notice was absence from school, the ten-day notice was absence from class. It does not indicate what class since I think he takes five or six classes, including physical education. Any further absence must be accompanied by a medical excuse. Assuming that this notice was received by December 17, which might be quite an assumption with the U.S. postal service, like there was a receipt for certified mail but the date is not indicated on my copy, but nevertheless, we then look at what has happened since the parents were noticed. I **FIND** that there were five absences since that date

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There was a medical excuse provided from a doctor January 4 and 5. One was an absence without an excuse of any kind (January 13). Two were truancies admitted by the petitioner himself (December 23 and January 12). That in itself led to the finding of fact that there was indeed a violation of Regulation 5040. J-2, the notice of December 16, which indicated that absence from class and absence from school is looked upon the same way, came too late for the pupil or his parents to do much about the problem because there was an absence on December 16 itself, for which there was a note. But the ten days were exceeded on the 8th, that was the 10th day. So, he had already violated the policy. In that sense, it was too late for considering if you are tardy for school, that is an absence from class. So, there really was an absence of notice. This is not the heart of the decision, however, it is simply a finding of fact for the Commissioner's edification. The heart of this matter rest with the regulation itself and the action of the committee.

Again without any citation, counsel for the parties are fully aware of the rules for construing a statute. Those same rules are applied when you construe a regulation, which is codified in N.J.A.C., in education, it is Title 6, many different titles for different agencies. But I think it is equally applicable to a regulation or policy promulgated by board when the application of that policy or regulation is in dispute. The rule is clearly that if the language is clear, you look no further. It is not what was intended by the lawmakers, but what they said. If it is unambiguous, clear on its face, it needs no interpretation. Our problem is with Article 10. "Students who have insufficent attendance may regain status in the following manner. . ." and there are three options, A, B and C. The three lines following C by admission of Mr. Ogden are really an asterisk of A. Let us really analyze what is said there.

> The circumstances of each individual situation shall (in legal language, shall is mandatory, may is permissive; this regulation states shall) be adjudicated by the teacher involved together with the subject supervisor and administrator to determine whether A, B or C should be recommended.

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It does not say recommended to whom. Since the board has the policy-making authority, it may mean to the board. It does not mean the review committee because the testimony of Mr. Ogden clearly states by admission that the Regulation 5040 provides no decision-making authority for the committee. Here's what happened. The committee met without a member that is on a committee because of his role and responsibility in the school to provide input for the committee's consideration. The committee met, not only usurped the authority of the board but usurped the authority vested in a teacher, a subject supervisor and an administrator. To determine whether A, B, or C should be recommended. There was no such involvement in this instance. Mr. Ogden so testified. The committee, made up of two assistant principals and a subject supervisor not involved in any of the subject areas required for graduation, determined that the matter indicated in the introductory sentence in Article 10 would be B, attendance and successful completion of an approved summer school course. Now, we take a look at what that means and by testimony of the assistant principal, summer school attendance results in a P for passing or an F for failing. If it's P for passing, the youngster gets his grade as earned through the normal school year. What then is the purpose for attending summer school? If he is the greatest achiever in that summer class who received a D in English during the course of the year, he receives no better than a D in his transcript. Attending summer school must be construed here as punitive. It is ironic that this petition was filed because of an action taken by a board of education because a student violated Regulation 5040. I **FIND** that the committee violated that same regulation. The process is clear, it was not followed. It must be deemed to be arbitrary. This does not mean that the petitioner is scot-free. The record is absent of any indication that the board, after removing credit by formal action at a public meeting which it has every right to do, can possibly delegate authority to rescind that action to an agent. It may delegate investigative powers and recommendations, but if the superintendent or any staff members who are delegated such investigative and recommending authority, then it recommends that credit be regained through a process, only the board may rescind its own action. I so **FIND**. The Commissioner has certainly addressed punitive action in previous decisions, all incorporated in Weatherall.

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I must **CONCLUDE**, without condoning the attendance and the tardiness of petitioner, and I must also point out that even with the finding of arbitrariness of the application of this policy, I commend the committee, the assistant principal and the board, for the results. This kid has been in school and has an excellent attendance record since you took your action. And I implore, as I did on issue number 1, a review with the assistance of counsel to word a policy that is clearly understood by all and followed. If you do that amd are reasonable in the application of that policy and come back here again, there will be a different result. But in the instant matter, I **CONCLUDE** that the board's action in removing credit from Robert Monroe based on an arbitrary committee recommendation is also arbitrary and must be set aside. I deem the board's action to be null and void and the credits earned by petitioner will be afforded him according to his achievement as determined by his teachers.

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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OAL DKT. NO. EDU 3817-84

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

DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

June 15, 1984

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 3817-84

I, MARGARITA DIAZ, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ward R. Young's oral decision rendered in the above matter on June 12, 1984.

June 12, 1984
DATE

Margarita Diaz
MARGARITA DIAZ

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WITNESSES

George A. Ogden, Assistant Principal
Milton W. Monro, father of petitioner
Robert Monro, petitioner
Vincent P. Minelli, Guidance Counselor

EVIDENTIARY DOCUMENTS

P-1	1/25/84 and 4/18/84 petitioner's attendance printouts
P-2	Absence excuses
P-3	Minutes of closed Board meeting of 3/8/84
J-1	11/15/83 letter, Ogden to Monro parents
J-2	12/16/83 letter, Ogden to Mr. Monro
J-3	Review Committee decision of 1/23/84
J-4	Attendance Review Committee Report of 1/23/84
J-5	1/27/84 letter, Ogden to Monro parents
J-6	2/13/84 letter, Salt to Monro parents
J-7	3/12/84 excerpt of Board meeting minutes
J-8	3/13/84 letter, Riley to Monro parents
J-9	3/14/84 letter, Watson to Monro parents
J-10	Regulation 5040 (3 pages)
J-11	Board Policy 504
J-12	4/17/84 Student Report Card
J-13	Excerpts from 1983-84 Student Handbook
R-1	6/8/84 memo, Filey to Salt re P.E.

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ROBERT MONRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT	:	
	:	

The record and oral initial decision as transcribed have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

This matter basically stems from the allegations of petitioner concerning the Board's attendance policy. The Commissioner observes that the adminstrative code N.J.A.C. 6:8-4.2(d)2, states:

> "District boards of education shall establish pupil attendance requirements appropriate to each of the particular educational programs."

This requirement provides local districts with the opportunity to effectively deal with chronic absentees and truants. The local policy should be for the minimum number of days in attendance in order to receive a passing grade in the subject area. This is not a waiver of the 180-day requirement for the provision of instruction.

The code language was structured so as to allow different attendance requirements for different programs if a local district felt the need for such differentiation. The local district may opt to set all or most program attendance requirements at the same level.

Local districts are advised to establish their policies at a high level such as 165 or 170 days with a provision for local administrative waiver for special cases. The requirement may be stated in terms of a set number or percentage of unexcused absences. A student may perform well and meet all course requirements yet contract a serious illness twice during the school year. Latitude must be built into the requirement for judging such unique cases. (See Guidelines For High School Graduation Requirements, New Jersey Department of Education, July 1980.)

There can be no question that the Board, in compliance with law, established Policy No. 504, Student Attendance, herewith set down in full:

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"STUDENT ATTENDANCE

"The Ramapo Indian Hills Regional High School Board of Education has a mandate to require that Ramapo Indian Hills Regional High School students be present in order that they may be taught. Compulsory attendance at school is regulated by State Law. Regular attendance is an absolute necessity if the prescribed courses of studies are to be properly taught in order that the maximum benefits of the Regional District educational program be realized.

"The Regional Board cannot condone, excuse or encourage absenteeism by students. The Board, in the interest of the educational welfare of its pupils and the integrity of its program, will not grant credit for courses when a pupil has not complied with the attendance regulation. The Board deems a lack of attendance as a derogation of the long-standing State policy for compulsory and maximum attendance.

"The Board further avers the learner has the major responsibility to learn, and as such, the pupil is accountable for faithful school attendance. Therefore, the Superintendent of Schools is directed to prepare regulations that will insure that the intent of this policy is implemented.

"Such regulations will insure that:

1. No pupil who is absent from school because of a religious holiday may be deprived of any award or of eligibility or opportunity to compete for any award because of such absence.

2. If a pupil misses a test or examination because of a religious holiday, he must be given the right to take an alternate test or examination.

3. To be entitled to the privileges set forth above, the pupil must present a written excuse signed by a parent or person standing in place of a parent.

4. Any absence because of a religious holiday must be recorded in the school register or in any group or class attendance record as an excused absence.

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5. Such absence must NOT be recorded on any transcript or application or employment form or on any similar form.

"Implementation Procedures for Student Attendance Policy:

I. Students in the Ramapo Indian Hills Regional High School District shall follow the prescribed course of study.

II. Awarding credit, shall be dependent upon 170 days of class attendance. All absences for religious holidays, as approved annually by the Commissioner, under the authority of Chapter 322, Public Law 1951, or as approved by the building principal, shall be exempt from these provisions. In each full year course or a proportionate number of days for courses less than a full year, absences beyond ten (10) days must be confirmed by medical excuse.

III. The maximum allowable days absence are as follows:

Full Year Courses - 10 Days
Half Year Courses - 5 Days

IV. Any student under the age of 18 must produce, upon return, a written excuse from his parent or guardian explaining his absence. Students over the age of 18 may sign their own notes. The administration reserves the right for verification of all notes.

V. All assigned work must be completed to the satisfaction of the student's teachers. Teachers are not required to provide make-up tests for students illegally absent when a test is given.

VI. Any student whose name appears on the absentee list, and who is in school shall be regarded as truant from any class not attended, unless the student can produce a bona fide excuse for having his name on the absentee list.

VII. Students who are ill or injured must be excused by the nurse before leaving the building.

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VIII. Cutting or truancy will continue to result in punitive action as indicated in the Student Handbook.

IX. In accordance with due process of law, the following steps shall be taken:

A. Parents will receive notification by regular mail after the fifth absence, and by certified mail after the tenth absence, outlining what the policy provides should absences exceed the number of allowable absences.

B. A Review Committee shall be established in each high school whose duty it shall be to examine the validity of both excused and unexcused absences when questioned. This committee shall be composed of the assistant principal and such administrative assistants as may be on the staff. The decisions of each committee shall establish the standards of excused absences for the student body in general conformity with practicable application of state law.

C. Both high school Review Committees should be as consistent as possible in their consideration of the Student Attendance Policy, and should periodically reconfirm this unified attendance administration.

D. The decision by the Review Committee is subject to appeal and review by the Principal. The Board wil make the final decision before a student is withdrawn from a course(s). The student shall remain in good standing during the time the review is taking place.

X. For those students who have been withdrawn from a course because their unauthorized and unexcused absences exceed the number allowed, the transcript will indicate a withdrawn-passing or withdrawn-failing grade depending on the student's academic progress at the time of withdrawal.

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XI. Students who have insufficient attendance may regain full credit in the following manner:

A. Fulfillment of such additional requirements for course completion as outlined by the teacher and approved by the department chairperson and administration;

or

B. Attendance and successful completion of an approved summer school course;

or

C. Re-enrollment in the course or courses in the succeeding school year or semester as applicable.

The circumstances of each individual situation shall be adjudicated by the teacher involved, together with the department chairperson and administrator to determine whether A, B, or C should be recommended.

XII. Definition of 'excused' absence:

A. Illness
Death in family
Religious holiday

Privileged absences (prior administrative approval)

a. Medical and dental appointments
b. (3) College visitations (Seniors)
c. Drivers examination
d. Court appearance

18-year-old students will be held accountable for their own attendance. However, the administration reserves the right to accept or reject any notes inconsistent with the facts.

B. Assigned school work missed, for whatever reason, must be made up through student-initiated teacher contact within a ten-day-school period. Uncompleted work will result in academic penalty.

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C. Any absence because of a religious holiday shall be recommended as an excused absence, and such absence shall not be included as an absence on employment applications or any similar form which requires a recommendation of school attendance.

To be eligible for the request listed above, a student must present to the principal, in advance, a regular excuse signed by a parent or a person standing in place of a parent.

"Absence Procedure

When you are reported absent from homeroom in the morning, the school may call your home to verify the absence and determine the reasons. After every absence, no matter what the reason, your homeroom teacher will expect you to submit an absence excuse. This should include:

1. Your name
2. Date(s) of your absence
3. Reason for absence including the nature of any illness.
4. The signature, in ink, of your parent or guardian if you are not age eighteen.

After the note has been received a route slip signed by homeroom teacher will be issued. You are obligated to present it to all those teachers whose classes you have missed and arrange to make up work missed. Route slip is returned to homeroom teacher who will file it with your absentee note.

If you do not bring an absence excuse from your parent within three days your parent will be contacted by office.

Students 18 years, or older, may write absence excuses subject to acceptance by school authorities.

"Truancy:

'Any child between the ages of 7 and 17 years who shall repeatedly be absent from school and any child found away from school during school hours whose parent, guardian or other person having charge and control of the child is unable to cause him to attend

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school, and any pupil who is incorrigible shall be deemed to be a juvenile disorderly person and shall be proceeded against as such.' Any unexcused absence can be considered as Truancy.

Penalties:

1. First offense: Students will lose class participating credit for the subject missed and a total of 6 detentions will be assigned.

2. Second offense: Students will be suspended up to three days.

A parent conference will be necessary for readmittance following both offenses, if the student is under age eighteen."
(Emphasis in text.) (J-13)

The Commissioner observes that due process safeguards for students and parents were provided while maintaining means to effectively deal with chronic absentees and truants. The built-in safeguards for students and parents were, in main, followed in the present matter insuring the accordance of due process. (J-1 through 10).

A review of the record reveals that there can be no question that petitioner exhibited a pattern of attendance warranting the application of the action described in the attendance policy as applicable in such cases. The argument now advanced by petitioner that the Review Committee did not precisely follow the policy or that the difference between tardiness to school resulting in absence from class and full day absence remains unclear is of such nature as to place form over substance and should not prevent the Board from implementing its absence and attendance policy. The Commissioner further observes that the due process provisions for parents were carefully followed and the Board's decision is entitled to a presumption of correctness. Boult and Harris v. Board of Education of Passaic, 1939-40 S.L.D. 7, aff'd. 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948). He further notes that any lack of clarity or precision in the policy as contended by petitioner in no way disadvantaged him in pursuing his rights.

The Commissioner notes the reliance herein by the judge on the case properly cited by spelling and year as Linda Wetherell and Norma Carnivale v. Board of Education of the Township of Burlington, 1978 S.L.D. 794. The Commissioner finds that the application of the Board's policy as noted herein does not encompass any of the deficiencies noted in Wetherell, namely the use of grades as punitive procedure. Nor can the Commissioner agree with the judge that attending summer school herein is punitive. Rather, the Commis-

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sioner finds that summer school provides pupils an opportunity to obtain credits necessary to graduation or, alternatively, to enrich their curriculum. The Commissioner further notes that he has consistently upheld policies which withhold or remove credit for excessive absenteeism from both individual classes and the full day, provided such policies were not arbitrary or applied in a manner which was arbitrary or violative of principles of fundamental fairness. (See G.G. v. Board of Education of New Providence, 1975 S.L.D. 75, Debra Rubertone v. Board of Education of the Township of Lyndhurst, decided July 11, 1979; F.W. and D.W. v. Board of Education of the Borough of South Plainfield, decided July 8, 1982.)

For all the foregoing reasons the Commissioner finds that the Board acted properly at its meeting of March 12, 1984 to remove the credits questioned due to unsatisfactory attendance. The determination of the judge is accordingly set aside except for his admonition to the Board to carefully restructure the wording of the attendance policy so as to remove any lack of clarity which may exist.

IT IS SO DETERMINED.

JULY 30, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2688-84
AGENCY DKT. NO. 93-4/84
OAL DKT. NO. EDU 2689-84
AGENCY DKT. NO. 89-4/84
(CONSOLIDATED)

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY

APPEARANCES:

Janet M. Ressa, petitioner, pro se

Gaetano M. De Sapio, Esq., for petitioners Fred H. Marigliano and Richard B. Kwiakowski

Kenneth S. Meyers, Esq., for respondent Green Brook Board of Education
(Nichols, Thomson, Peek & Meyers, attorneys)

Record Closed: June 4, 1984 Decided: June 12, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner Janet M. Ressa, an unsuccessful ballot candidate, and petitioners Fred H. Marigliano and Richard B. Kwiakowski, unsuccessful write-in candidates for the the April 3, 1984, Township of Green Brook Board of Education election, seek an inquiry into alleged violations of statutorily prescribed procedures pursuant to N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1.

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As a result of a letter written on April 5, 1984, by Gaetano M. De Sapio, Esq., attorney for Marigliano and Kwiakowski, and as as result of a letter written prior to April 10, 1984, by Janet M. Ressa, seeking an inquiry into the school board election held in the Township of Green Brook on April 3, 1984, the matters were transferred to the Office of Administrative Law on April 16, 1984, for determination as contested cases pursuant to N.J.S.A. 52:14F-1 et seq.

Hearings were conducted on May 14 and May 23, 1984, at the North Plainfield Municipal Building, North Plainfield, New Jersey. Post-hearing documents were requested to be submitted by June 4, 1984, on which date the record was closed. The witnesses who testified and the exhibits marked into evidence are set forth in the appendix.

I hereby take judicial notice of the Commissioner of Education's decision of May 22, 1984, concerning the recount previously conducted on April 16, 1984, involving the ballots cast on April 3, 1984, in the school district of the Township of Green Brook. Where appropriate, I will make reference to the Commissioner's decision on recount.

DISCUSSION OF FACTS

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school board election held April 3, 1984, in the school district of the Township of Green Brook, Somerset County, were as follows:

Ballot Candidate	At Polls	Absentee	Total
Theodore E. O'Keefe	209	0	209
Laurie A. Fitchett	198	0	198
Janet M. Ressa	178	0	178
Write-In Candidates			
John D. Klein III	184		184
Fred H. Marigliano	183		183
Richard B. Kwiakowski	178		178

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After the election, Janet M. Ressa wrote a letter to the Commissioner of Education which was received on April 10, 1984, requesting a recount and indicating the following discrepancies or irregularities:

1. There were multiple improper spellings of the write-in candidates' names which were counted.

2. There were only three positions opened, yet several names were written in the fourth position.

3. A sample ballot for the write-in candidates was distributed and used by voters in the polling booth.

4. At one point during the voting someone removed the clear plastic insert covering the voting instructions inside the polling booth and wrote in pencil the names of three write-in candidates. This is in violation of NJSA 18A:14-72 which states it is illegal to deface a polling booth.

On April 5, 1984, Gaetano M. De Sapio, Esq., attorney for Fred Marigliano and Richard B. Kwiakowski, unsuccessful write-in candidates, wrote a letter to the Commissioner indicating the following irregularities:

A. There were no adequate instructions posted as to how a voter could write-in a candidate's name.

B. Voters who asked at the polls for instructions and assistance in utilizing the write-in procedure were denied such assistance by the officials conducting the election.

C. The slots which were to be used for writing in candidates were not operating on the voting machines at all times.

D. The pencils used for writing in names became blunt and when voters asked that they be sharpened so that they could be used, election officials were told that it was improper to sharpen them or for the voters to use their own writing implements. It took four hours for a ruling to be received which permitted officials to sharpen pencils.

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E. Handicapped individuals who requested assistance in voting were denied help.

F. Election officials originally gave instructions that voters did not have to be registered in order to vote at the election. On information and belief, my clients have been informed that people who appeared at the polls early were permitted to vote upon proof of residence without being registered. Subsequently, a ruling was made that this was prohibited. We are still investigating this aspect and trying to determine the extent to which this had occurred.

G. On information and belief, we have received information that an employee of the Board of Education acted as the judge of the election in contravention of N.J.S.A. 18A:14-6.

Fourteen statements from voters in the election were attached to De Sapio's letter to the Commissioner of Education.

Seventeen witnesses testified during the two days of trial before me. The threshold issue before me is whether or not the School Board election of April 3, 1984, should be set aside and a special election ordered because of the existence of irregularities which may have affected the outcome of the election and thwarted the will of the people.

PRINTED INSTRUCTIONS

Dr. John Kolchin, Superintendent/Board Secretary for the Green Brook Board of Education, prepared and supplied certain written instructions designed to explain the write-in procedure. These instructions were available to voters throughout the day. The written instructions (R-1) state:

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NOTE TO GREEN BROOK RESIDENTS
PLEASE READ BEFORE VOTING

Three names appear preprinted on the voting machine ballot in positions No. 1A, 2A and 3A. The tab located above the area may be lifted to write in a vote.

If you wish to register votes for the candidate(s) who appear(s) on the printed ballot use the levers provided.

If you wish to register one or more write-in vote(s), use the tab(s) above the candidate(s) whom you do not wish to vote for. A write-in vote for a printed ballot candidate will not count.

Note of Caution: Once the write-in tab on Position 1A, 2A or 3A has been lifted, even if you do not write in a name, you can no longer vote for the candidate in that ballot position as the voting lever automatically locks. Your decision to write in cannot be recalled.

The above-mentioned instructions were incorrect, namely, that part of the written instructions which indicated that if a voter lifted a slot to register a write-in vote, he would then be unable to vote for the ballot candidate immediately below that slot. According to the testimony of Janet Hoffner, the supervisor of the Somerset Board of Elections, and Willa Cwik, County School Business Administrator for Hunterdon and Somerset Counties, State Department of Education, those written instructions were inaccurate in that the lifting of a slot would not prevent a vote for a ballot candidate immediately below the slot but would rather permit the voter to vote for two more candidates irrespective of where they were located. In other words, the machine would lock out after three votes.

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WRITE-IN CANDIDATES' NAMES ADDED TO VOTING MACHINE

At the warehouse after the election, Willa Cwik examined the voting machines while conducting a recount. On the voting machine used for District 2 and 3, the names of the write-in candidates were written in pencil on a card which was slipped into the front of the voting machine.

OPERABILITY OF SLOT FOR WRITE-IN CANDIDATES

At the time of the recount, Willa Cwik also observed that the voting machine for District 1 had a note on it indicating that one of the levers was difficult to raise. Several voters testified that the levers for the write-in voting slots were difficult to move.

UNREGISTERED VOTER

One unregistered voter was allowed to vote in this election. This voter showed proof of residency in the Township of Green Brook, signed an affidavit and then was permitted to vote (P-1). However, afterwards, as a result of calls to Ms. Hoffner and Ms. Cwik, it was ascertained that an unregistered voter would not be able to vote. In other words, the position taken with regard to the unregistered voter who voted was changed so that no other unregistered voters could then vote. Only one unregistered voter voted in this election.

USE OF PENCILS FOR WRITE-IN CANDIDATES

Testimony was elicited at the trial that numerous complaints were made during the election concerning the pencils that were used in the voting machines. Jean A. Mullen, an election worker, testified that she was instructed by Mr. Lant, judge of the elections, that only the pencils which were located inside the machine could be used for write-in candidates. One voter told Mullen that the pencil point was broken. She then sharpened it. A lot of people complained to her about the pencils. At some point, Ms. Mullen took it

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upon herself to sharpen the pencils because the points were dull. Mr. Lant informed her that she may have invalidated the whole election because of her action. At approximately 6:00 p.m., after the voting polls had been opened for four hours, she was told that she could now sharpen the pencils and that the voters could use any writing instrument they had with them.

According to Willa Cwik, at least one write-in vote was disqualified because of the difficulty of reading it due to the writing instrument.

USE OF SLOTS ONE AND FOUR ON MACHINES FOR WRITE-IN CANDIDATES

The testimony indicates that slot one on the machine is larger than slots two through 40. This would enable a voter to write more than one name on slot one. Willa Cwik testified that the dimensions of box one are 2-1/2 inches by 2-1/4 inches whereas all of the other boxes are smaller. Thus, by lifting the lever for box one, a voter could write in three names. As a matter of fact, according to Willa Cwik and the Commissioner of Education's decision on recount rendered on May 22, 1984, there were approximately 12 or 13 instances in which a voter wrote in more than one name in column one. Because of this, the Commissioner of Education, in his recount on May 22, 1984 excluded from the tally all of those votes cast in column one which contained more than one write-in candidate. Additionally, an illegible name was written in in column four. Willa Cwik, conducting the recount for the Commissioner, recommended that any name written in column four be discounted since such a write-in in that column would have made it possible for the voter to vote for more than the required number of candidates in the remaining columns one, two and three. See, Commissioner's Decision dated May 22, 1984, at p. 9.

As a result of voters being able to vote in the write-in slots in columns one and four, as well as write-in votes in columns 20 and 21, the Commissioner found 15 instances requiring disqualification. With several other instances of disqualification involving votes that were impossible to read, the Commissioner deducted the following votes from the write-in candidates (see, p. 10 of Commissioner's decision):

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John D. Kline III	6 votes
Richard B. Kwiakowski	3 votes
Fred H. Marigliano	21 votes

As a result of the recount, the tally of votes stands as follows:

Theodore E. O'Keefe	209
Laurie A. Fitchett	198
Janet M. Ressa	178
John D. Kline III	174
Richard B. Kwiakowski	164
Fred H. Marigliano	151

The seat previously won as a result of the original count on April 3, 1984, by John D. Kline III, has now been won by Janet M. Ressa as a result of the recount.

The reason given for disqualifying voters who voted in columns one and four for write-in candidates was that theoretically, if three candidates were voted for in column one, then two more candidates could be voted for in other slots, allowing one voter to vote for five people.

FAILURE TO PROVIDE ASSISTANCE AND INSTRUCTIONS TO VOTERS

Kenneth Lant, Sr., served as judge of elections on April 3, 1984. He was in charge of the overall operation. Approximately 50 percent of the people who voted asked Mr. Lant how to cast a write-in vote. He told the majority of the people to look at the instruction papers and to look at the model machine. As has been previously discussed, the printed instructions for voting were incorrect. Also, the model machine contained no instructions on how to cast a write-in vote nor did it contain any slots through which a practice write-in vote could be cast. At least 545 write-in votes were cast according to the original count of the vote on April 3, 1984 (See, Commissioner's decision at p. 1). After the recount, the total number of write-in votes was reduced (See, Commissioner's decision at p. 10.)

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Even after the voters read the instruction sheet, they still asked Mr. Lant how to cast a write-in vote. Mr. Lant told all voters who asked him that he could not show them how to vote. He either showed them the instruction sheet or told them to look at the model which had no instructions on how to cast a write-in vote. Lant testified that a lot of concerned people could not find or understand where the levers were for casting a write-in vote. Mr. Lant also received instructions from Somerville and told his workers that they could not sharpen pencils for the casting of a write-in vote. At least 50 people told Lant that they could not find the write-in lever. Lant indicated that he checked the machines 30 or 40 times during the day. He never saw the names of the write-in candidates on the inside of the machine in a slot.

One person told Lant that he could not write properly because of the bluntness of the pencil.

Several voters, Brenda Ferguson, Maryann Talbot, Arildo Dos Santos, and Luci Dos Santos, testified that after they entered the voting booth, they found there were no instructions in the machine to direct them as to how to cast a write-in ballot and that they requested assistance only to be told to refer to the top part of the machine to find where to cast a write-in vote. These instructions provided little guidance. As a result, these people left the voting booth without casing a vote for write-in candidates whom they had intended to vote for.

FINDINGS OF FACTS

Based on a careful consideration of the testimony and evidence, I make the following **FINDINGS OF FACT:**

1. The annual school board election was held on April 3, 1984, in Green Brook, New Jersey, to elect three members to the Board of Education for three-year terms.

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2. The three candidates on the ballot for the election were Theodore E. O'Keefe, Laurie A. Fitchett and Janet M. Ressa. There were also three write-in candidates for the election: John D. Kline III, Fred H. Marigliano and Richard B. Kwiakowski.

3. Two voting machines, supplied by the Somerset County Board of Elections, were used at the election. They were machines number 79728, used for District 1, and number 79729, used for voting in Districts 2 and 3. The warehouse personnel of the Somerset County Board of Elections set up the voting machines.

4. The first three write-in slots were to be left open for casting write-in votes, while 19 or 20 slots were to be locked out. There are 40 write-in slots altogether. Slots No. 4, 19 and 20 were not locked out. Additionally, slot 1 was left operable for write-in purposes.

5. After the election on April 3, 1984, the following results were certified:

Candidates	Number of Votes
Theodore E. O'Keefe	209
Laurie A. Fitchett	198
John D. Kline III	184
Fred Marigliano	183
Richard B. Kwiakowski	178
Janet M. Ressa	178

6. The first three names, Theodore E. O'Keefe, Laurie A. Fitchett and John D. Kline III, were certified as the winners and were subsequently sworn in as Board members.

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7. Marigliano and Kwiakowski, unsuccessful write-in candidates, and Janet M. Ressa, unsuccessful ballot candidate, requested a recount, pursuant to N.J.S.A. 18A:14-63.2, and requested an inquiry, pursuant to N.J.S.A. 18A:14-63.12.

8. As a result of a recount conducted by the Commissioner of Education and pursuant to his decision dated May 22, 1984, the new results of the election were as follows:

Candidates	Number of Votes
Theodore E. O'Keefe	209
Laurie A. Fitchett	198
Janet M. Ressa	178
John D. Kline III	174
Richard B. Kwiakowski	164
Fred H. Marigliano	151

9. There were at least 12 instances of disqualifications of write-in votes due to more than one write-in vote being cast in slot number one.

10. There was one instance of disqualification due to a write-in vote being cast in slot number four.

11. There were at least two instances of disqualification due to a write-in vote being cast in columns 20 and 21.

12. The written instructions left for the voters were incorrect.

13. One nonregistered voter was allowed to vote and that vote was counted as part of the total vote.

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14. On one voting machine, a piece of paper was left indicating, "Write-in slot, hard to open."

15. On the other voting machine, the names of the three write-in candidates were placed inside of the machine in a slot.

16. For at least four hours, the voters were told that they could not use their own writing instruments nor could the pencils which were inside the voting machines be sharpened.

17. At least five voters did not cast their vote for a write-in candidate because they did not understand nor were they instructed how to cast such a vote.

18. There were no instructions on the model machine on how to cast a written write-in vote nor could a voter practice casting a write-in vote on the model machine.

19. At least one write-in vote was not counted because it was illegible due to the writing instrument.

20. At least 50 percent of the voters asked the workers how to cast write-in votes.

21. No election workers showed the voters how to cast a write-in vote. The workers were instructed not to aid or instruct the voters other than to show them the written instructions and direct them to the model voting machine which contained no instructions on casting a write-in vote.

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CONCLUSIONS OF LAW

This action is brought before me pursuant 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, or, in the case of a question, proposition or referendum, upon petition of ten qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine that such violations occurred and if they affected the outcome of the election.

The requests for inquiries by Fred H. Marigliano, Richard B. Kwiakowski and Janet M. Ressa were consolidated for trial.

There are certain rules of law which are applicable to all school board elections. One clear principle of law 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. 18A:14-56 and N.J.S.A. 19:14-1 et seq.

It is well settled that the Commissioner of Education will not set aside the results of a contested election unless it can be shown that the irregularities charged affected the outcome of the election. In the Matter of the Election Inquiry in the School District of the Borough of South River, Middlesex Co., 1974 S.L.D. 1040. See also, In re Wene, 26 N.J. Super. 363 (Law Div. 1953). Also, where improper instructions were given by election officials to voters during the election regarding the use of write-ins, the will of the people could not be discerned with respect to their choice of write-in candidates and the election results should be voided. In the Matter of the Annual School Elections Held in the School District of the Borough of Helmetta, Middlesex Co., 1977 S.L.D. 695.

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Similarly, where voting machines were incorrectly prepared for write-in votes so that if a voter wrote in a name he was precluded from casting a vote for one of the three candidates whose names were printed on the ballot even though he was to choose three candidates, the election would be set aside. In the Matter of the Annual School Election Held in the School District of the Borough of Pompton Lakes, Passaic Co., 1977 S.L.D. 586.

In one decision, the Commissioner held that all local boards should provide written instructions for election board officers regarding write-ins so that they can properly instruct voters about the write-in procedure. In the Matter of the Annual School Election Held in the School District of South Orange-Maplewood, Essex County, 1974 S.L.D. 1049.

Any judge should be extremely cautious in setting aside an election. It is only where irregularities occur which in a judge's mind are of such significance to lead to the conclusion that the will of the people has been thwarted should a judge set aside an election. In the matter before me, I **CONCLUDE** that the will of the people of Green Brook has been thwarted and that the election should be set aside.

There were multiple irregularities during the election process on April 3, 1984. At least 189 concerned citizens appeared at the polls in order to cast write-in votes for candidates whom they felt could best serve them on the Board of Education. Five additional voters did not cast their votes at all for their write-in candidates since they did not understand how to cast them. There were at least 12 instances where votes were disqualified because voters, without being instructed to the contrary, cast all three write-in votes in slot one. There was at least one instance where the dullness of a pencil, which was not sharpened at the direction of the election judge, resulted in the disqualification of a vote because that write-in vote was illegible. There were write-in votes cast in slots 4, 20 and 21 which were disqualified.

The atmosphere of the voting on April 3, 1984, was tense and filled with confusion. Voters were given instruction sheets which were inaccurate. Voters were directed to look at the model voting machine to understand how to cast a write-in vote when the model voting machine had no write-in instructions nor did it have slots which would aid the voter

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in casting a write-in vote. A nonregistered voter was allowed to vote by merely signing an affidavit of residency (P-1). Later, this decision was overruled so that no other nonregistered voters could vote. However, the one nonregistered voter's vote counted. A decision was made not to allow voters to use their own writing instruments. Four hours later, this decision was overruled. A decision was made not to allow pencils attached to the voting machines to be sharpened. Four hours later, this decision was overruled.

Slot number 1, which is bigger, and would seem to permit the writing in of three names, was not locked. This slot should have been locked. No voters should have been allowed to write in the name of more than one candidate in slot one. No instructions were given indicating that only one write-in candidate's name should be set forth in each slot. This lack of instructions and the failure to lock slot 1 created confusion and resulted in the disqualification of at least 12 instances of voting.

Even though Mr. Lant testified that he went inside the voting machines and checked them out at least 30 to 40 times during the day, machine number 79729 had the names of the three write-in candidates written inside it and placed in a slot. This is in violation of N.J.S.A. 18A:14-72. It is conceivable that voters might have been offended by seeing the names of the write-in candidates on the machine.

I do not read Title 18A or Title 19 as prohibiting 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 by the election workers is to be contrasted with losing their impartiality and instructing the voters whom to vote for. In the instant case, with the confusion that occurred, with at least 50 percent of the voters asking how to cast a write-in vote, with the written instructions being incorrect, with the sample voting machine not containing any instructions on how to cast a write-in vote, it became incumbent upon the election workers to assist the voters so that the atmosphere would not be filled with confusion and uncertainty. The election workers, and especially Mr. Lant, attempted with such diligence to be impartial that they, in fact, added to the confusion and uncertainty. Everyone recognizes that the casting of write-in votes is oftentimes confusing and difficult. The will of those voters who attempted to and did not cast write-in votes was definitely thwarted.

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I do not **FIND**, under all of the circumstances, as suggested by counsel for the Board, that the incorrect instructions, no instructions on the sample write-in machine, coupled with the failure of the election workers to help the confused voters cast their write-in votes, was harmless error. There are at least 20 instances where votes were not counted (12 for multiple voting in column one, one for voting in column four, two for voting in column 20 and 21, and five voters who did not cast their votes for write-in candidates at all because they did not understand how to do so). If these votes were counted for those candidates for whom they were cast or for whom they were to be cast, the election may have resulted in different winners.

I am satisfied that petitioners have proved by a preponderance of the credible evidence that the existence of the irregularities is sufficient, looked at together, to have thwarted the will of the electorate.

If there were a model voting machine, which election officials could have directed voters to, so that the voters could practice their write-in votes on that machine, perhaps there would have been less confusion, and then, the will of the people would not have been thwarted. N.J.S.A. 19:50-3 states:

> For instructing the voters on any election day there shall, so far as practical, be provided by the county board of elections or the superintendent of elections or the municipal clerk, as the case may be, having custody of voting machines, for each polling place a mechanically operated model of a portion of the face of the machine. Such model, if furnished, shall, during the election, be located on the district election officers' table or in some other place which the voters must pass to reach the machine and each voter shall, before entering the voting machine booth, be instructed regarding the operation of the machine and such instruction illustrated on the model, and the voter given opportunity to personally operate the model. . .

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This section of Title 19 is made applicable to school board elections by N.J.S.A. 18A:14-56 which states:

> In districts in which voting machines are used, the election shall be conducted and the votes shall be cast by the use of such machines in the manner prescribed by Title 19, Elections, of the Revised Statutes in elections held under that title.

Looking at the totality of the irregularities, coupled with the Commissioner's decision on recount, which changed the initial outcome of the election, it is my **CONCLUSION** that the election should be set aside and a new election held as soon as practicable, pursuant to the provisions of N.J.S.A. 18A:12-15(d). Because of the recount, the two dates of hearing for the inquiry and based on the date the record was closed in this matter, the 60-day provision of N.J.S.A. 18A:12-15(d) should be deemed inapplicable.

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.

6-12-84
DATE

ROBERT P. GLICKMAN, ALJ

June 14, 1984
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 18 1984
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

WITNESSES

Janet M. Ressa
Paul Behory
Brenda Ferguson
Florence K. Larkin
Mary E. Byers
Helen Lant
Luci Dos Santos
Dr. John Kolchin
Laurie A. Fitchett
Janice Hoffner
Rev. Ralph N. Walter
Maryann W. Talbot
Joseph Tammaro
Kenneth Lant, Sr.
Arildo Dos Santos
Jean O. Mullen
Willa Cwik

EXHIBITS

J-1 Instruction sheet

R-1 Instruction for write-in candidates
R-2 Instruction placed on machine
R-3 Memorandum from Attorney General, 1975

P-1 Affidavit of unregistered voter
P-2 Copy of document prepared by county superintendent's office
P-3 Copy of document prepared by county superintendent's office

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF GREEN BROOK,	:	DECISION
SOMERSET COUNTY.	:	
	:	

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

In accordance with the provisions of N.J.A.C. 1:1-16.4a, b and c, the Board has filed exceptions to the findings and recommendations set forth in the initial decision. Petitioners Fred Marigliano and Richard Kwiatkowski have filed reply exceptions.

The Commissioner notes that nine points of exception to the initial decision have been filed by the Board. These exceptions focus upon those findings of fact set forth in the initial decision, ante. The Commissioner has reviewed these exceptions as well as petitioners' reply exceptions filed thereto.

In the Commissioner's judgment his decision of May 22, 1984 on the recount of the votes cast in the instant matter speaks for itself. In that decision the Commissioner affirmed the decision of his authorized representative not to count those votes when more than one name was written in the write-in slot in column one of the voting machines in question. The Commissioner further determined that write-in votes cast on the machines would not be counted unless they were cast in the appropriate write-in slots in columns one, two or three on the voting machines which appeared above the names of the formally-announced candidates.

In this regard the Commissioner relied upon the provisions of N.J.S.A. 19:49-5 and the written instructions given to the voters before entering the voting machines (R-1) as well as those instructions regarding casting write-in votes which appeared on the voting machine (R-2) inside the voting booth.

While it is observed that the judge found the written instructions given to voters before they entered the voting machine booth (R-1) to be technically deficient, the Commissioner does not concur that this was one of the "irregularities" to be considered fatal to the conduct of this election.

The Commissioner finds that the instructions to the voters (R-1 and R-2) regarding the manner in which write-in votes were to be cast on the voting machines were in substantial compliance with the law and that they did not represent a procedure which departed from those instructions given at prior school elections.

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As indicated by the Commissioner in his decision on recount rendered in the instant matter on May 22, 1984, the instructions handed out to the voters at the polls (R-1) as well as those appearing on the face of the voting machines (R-2) were sufficient to instruct the voters not to cast more than one write-in vote in slot one on the machines notwithstanding the size of that particular write-in slot.

The Commissioner further finds and determines that while the failure of the county election workers not to have locked write-in slots 4, 15 and 21 was not consistent with the provisions of N.J.S.A. 19:48-1, such failure was not attributable to the Board of Education and the election workers employed by the Board. The Commissioner further determines, based upon his previous decision, In the Matter of the Annual School Election Held in the School District of the Township of Green Brook, Somerset County, decided May 22, 1984, that such irregularity did not contribute to result of the election as it related to petitioners herein.

Finally, it is the Commissioner's considered judgment that the remaining charges advanced by petitioners herein, which are found to be factually true to some extent, are insufficient to establish that the instances of such irregularities were sufficient to have influenced the outcome of the annual school election held in Green Brook Township or to provide a basis for the Commissioner to direct a new election. These remaining allegations of petitioners specifically pertain to the following:

1. write-in candidates' names attached to voting machine
2. operability of slot for write-in candidates
3. unregistered voter
4. use of pencils for write-in candidates.

Accordingly, for the reasons set forth herein the recommended findings and determination in the initial decision of this matter are hereby set aside and the consolidated Petitions in this matter can be and are hereby dismissed.

IT IS SO ORDERED.

JULY 30, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 0737-84
DKT. NO. 453-12/83A

JAMES BREE,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, Morris County,

Respondent

APPEARANCES:

Douglas B. Lang, Esq., for petitioner
(Katzenbach, Gildea & Rudner, attorneys)

Frederic J. Sirota, Esq., for the Board
(Wiley, Malehorn and Sirota, attorneys)

Record Closed: June 5,1984 Decided: June 21, 1984

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

James Bree, a tenured teaching staff member employed by the Board of Education of the Township of Boonton, Morris County, since 1970, alleged the Board unlawfully reduced his salary for the 1983-84 school year, and alleged subsequent action by the Board in withholding any salary increase for 1984-85 also was unlawful. Gravamen of the dispute was the Board's placement of Bree on Step 6 of the salary guide upon his employment for the 1970-71 school year based on five years' teaching experience, as recommended by the Superintendent of Schools, and subsequent Board actions reducing and freezing his salary for 1983-84 and 1984-85, respectively, on the basis that he was improperly granted salary credit for two years of teaching experience acquired while he was still an undergraduate student.

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The Board argued its initial action was an appropriate corrective action and that subsequent salary freeze to correct and recoup from the error in salary placement was proper. The Board alleged a misrepresentation by Bree of his teaching experience, which Bree denied.

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 February 1, 1984. A prehearing conference was held on March 5, 1984. The matter was heard on May 2, 1984 at the Morris Township Municipal Court.

Motions and cross-motions for dismissal, declaratory judgment, and summary judgment were filed by the parties. Because the expiration of time for responses would have occurred beyond the hearing date, the hearing proceeded without decision on motions in order to expedite the adjudicatory process. N.J.A.C. 1:1-9.2 and N.J.A.C. 1:1-3.9.

RELEVANT TESTIMONIAL EVIDENCE

Bree testified he did not receive a 6.5% salary increase for 1983-84, pursuant to negotiated agreement. He stated a question arose in February 1983 about his teaching experience as a result of an administrative survey for experience data. There were several previous occasions, at negotiations times, when similar surveys were taken, but that was the first time since his employment in 1970 that his experience was questioned. He testified the Superintendent requested experiential verification, which Bree sought from St. Anthony's school in Florida, a former employer. He stated that school authorities responded no employment records of 13 years ago were retained; the administrator at that time had married and left the school. He did receive verifications from parents of children he taught.

Bree listed his St. Anthony's experience on his application for employment in the Boonton Township school district but did not list a salary since his work was voluntary. He stated that he taught physical education in grades 4-8 and coached football

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during his last two years as an undergraduate at St. Leo's College; and that his teaching schedule was made to avoid conflicts with his college schedule.

In order to distinguish his teaching experience at St. Anthony's from student teaching, he stated that the latter was done in teaching freshman English at St. Leo's.

Bree testified he had no recall of the extent of the Superintendent's questioning during two interviews with him, but the information he provided upon request, he said, was accurate, truthful and given in good faith. He said he presumed the salary offered to him by the Superintendent reflected his declared previous experience.

The Superintendent of Schools testified that his practice is not to grant salary credit for experience other than full-time. The Board and Association eliminated a salary guide through the collective bargaining process on June 9, 1976; salaries are set each year according to bargained percentage increases and increased professional preparation. The question of Bree's teaching experience was called to his attention in February 1983 by principal DeNola.

The Superintendent further testified that he requested experience verification of Bree and set Bree's 1983-84 salary at a calculated two fewer years of experience because of Bree's unsatisfactory response.

Concerning the initial interview with Bree in 1970, the Superintendent said he did not recall asking Bree any questions about his teaching experience; but he did check with Bree's prior employer at the time and was advised of Bree's five years of experience.

The Superintendent also testified that he reviews all applications before interviewing candidates, and in fact reviewed Bree's application (P-9) and a September 3, 1970 employment data sheet (P-10). He said he did not give attention to dates incorporated therein.

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The Superintendent said that teacher experience surveys included out-of-district experience; that several such surveys had been made; and that only full-time experience was considered for salary credit.

On cross-examination, the Superintendent did state that he does credit part-time experience.

RELEVANT DOCUMENTARY EVIDENCE

P-1 is an acceptance by Bree of his 1982-83 salary of $22,530, including $240 longevity, which was approved on March 11, 1982 and signed by the Board president and secretary (base salary $22,290).

P-2 is the negotiated agreement which incorporates Appendix B, revised September 1, 1983, which establishes percentage salary increases for 1983-84, 1984-85 and 1985-86.

P-3 is an excerpt of the minutes of the Board's September 8, 1983 meeting, which establishes Bree's 1983-84 base salary at $22,466.

P-9 is Bree's application for employment in respondent's school district. A review of it indicates the absence of years attended data for elementary and undergraduate school attendance. It does list two years of teaching experience from September 1965-April 1967 at St. Anthony's school.

P-10 is an information form filled in by Bree showing his graduation from St. Leo's College with a B.A. degree in April 1967. Student teaching experience is not distinguished from regular teaching experience on the application excepting for "beginners," which Bree was not.

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NEGOTIATED SALARIES AND BREE'S 1983-84 SALARY

The Superintendent testified that salary guides were eliminated through the negotiation process on June 9, 1976. Although not an initial issue in this dispute, it is noted the Commissioner of Education has deemed salary agreements fatally defective without a guide "that provides a placement schedule . . . which indicates a salary range . . . , recognizing years of teaching experience . . . for the purpose of salary placement and salary expectations on a "step" basis." West Orange Supplemental Instructors Association v. Board of Education of the Town of West Orange, 1984 S.L.D. ____ (decided February 23, 1984) (slip opinion at 15). See also N.J.S.A. 18A:29-5 and Margaret Wentworth v. Board of Education of the Township of Parsippany-Troy Hills, 1984 S.L.D. ____ (decided April 13, 1984).

Bree's 1983-84 salary was determined by a "calculated" process by which two years of experience were deducted from what his salary would have been if he were granted the negotiated 6.5 per cent increase.

Although Bree's 1983-84 salary reflected a constructive reduction, his base salary was actually an increase of $176. See P-1, P-2, P-3.

DISCUSSION, ARGUMENTS, AND FINDINGS OF FACT

It was difficult for witnesses precisely to recall details of an employment process some 13 years ago. The only persons present at the employment interview were Bree and the Superintendent. Neither recalled any discussion of teaching experience, but the Superintendent did recall a call to Bree's former employer who verified five years of experience.

The credibility of Bree was not shaken. That of the Superintendent was insignificantly tainted in cross-examination when he indicated he sometimes credited part-time employment. On direct examination, he had denied the practice.

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In my view, Bree did not misrepresent his teaching experience for salary credit. Whether the Superintendent and the Board wished to credit Bree for teaching experience gained while he was a college undergraduate was a management prerogative. There is no prohibition concerning the offer of salary for initial employment above the statutory minimum. If an error was made in the offer of Step 6 guide placement, it was not of Bree's making.

The application for employment (P-9), although not entirely complete, was reviewed and accepted by the Superintendent. The Superintendent could easily have required completion of it at the interview. Certainly the information sheet (P-10) filled out by Bree clearly established his St. Leo's graduation in April 1967. Corrective action certainly could have been taken then.

After careful review of all testimonial and documentary evidence and observations of the demeanor of witnesses, I make the following FINDINGS OF FACT:

1) Bree was offered and accepted initial employment for the 1970-71 school year at Step 6 of the salary guide in recognition of five years of teaching experience.

2) Bree made no misrepresentation of his teaching experience for salary credit.

3) Bree in fact had five years of teaching experience although two such years were acquired while he was a college undergraduate.

4) If an error in salary placement was in fact made, it was unilateral and responsibility for it lies with the Board and its agent.

5) Bree did not receive the negotiated 6.5 per cent salary increase for the 1983-84 school year.

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6) Bree's 1983-84 salary was not reduced in violation of N.J.S.A. 18A:6-10 or 18A:28-5 since his salary actually increased by $176.

7) Bree's withheld salary increase for 1983-84 was not consistent with provisions of N.J.S.A. 18A:29-14 and was therefore arbitrary.

THE LAW

The Board argued it had every right to correct for an error made in salary determination, citing Stiles v. Bd. of Ed. of the Borough of Ringwood, 1974 S.L.D. 1170.

The Board's reliance on Stiles is misplaced. Non-degree nurses had been placed on a degree salary guide, and then had their salaries reduced as for a mistake in law. The Commissioner reversed the Board and ordered compensation in the amount reduced, leaving to the Board any determination to hold them at those salaries until the guide entitled them to their next increments.

If an error was made in Bree's 1970-71 salary guide placement, it was not a mistake of law.

The Commisisoner discussed the law concerning salaries and mistakes in Stiles in references to Harris v. Bd. of Ed. of Pemberton Township, 1939-49 S.L.D. 164 (1938); James Doherty v. Bd. of Ed. of the Borough of West Paterson, 1967 S.L.D. 297; Robert Ansan, et al. v. Bd. of Ed. of the City of Bridgeton, 1972 S.L.D. 638 and Albert DeRenzo v. Bd. of Ed. of the City of Passaic, 1973 S.L.D. 236.

In Galop v. Bd. of Ed. of the Township of Hanover, 1975 S.L.D. 358, the Commissioner restrained the Board from reducing and recouping salary payments made in error and said:

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> The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matters should be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and unnecessary litigation occasioned by careless and inadvertent error (at 365).

In that decision, a hearing examiner made reference to comments by Judge Kimmelman in Kawaida Towers v. City of Newark, Essex Cty, Sup. Ct., Feb. 23, 1973, affd. by App. Div.:

> In effect, we have an admission by elected officials that when they voted they were not in possession of all the facts - - facts which they now deem material to the proper consideration of the issue.
>
> Unfortunately, a government, whether it be a City Council, State Legislature or Congress, is not permitted to function in a loose or cavalier fashion . . . They are bound to investigate, know, appreciate and understand matters which come before them and which require their vote . . . .
>
> Once they have cast their vote upon a particular matter and vested rights of parties have materialized they are powerless to undo their deed . . . (at 361-362).

THE AMENDED PETITION

The Board acted on April 19, 1984 to approve Bree's 1985-85 salary with no increase over his 1983-84 salary. Although counsel represented the action was taken partially to recoup salary overpayments, no such reference thereto is made in Board minutes. See C-1. The minutes reflect the action was taken "until pending court case has been settled."

SUMMARY OF FINDING OF FACTS - CONCLUSIONS OF LAW

I **CONCLUDE** the Board is estopped from setting Bree's salary as it did for 1983-84; Bree did not fraudulently or otherwise misrepresent his pre-1970 teaching experience

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for salary guide placement; Bree's salary interest vested after the Board acted in establishing his guide placement for 1970-71; and the Board acted unlawfully in establishing Bree's salary for both 1983-84 and 1984-85 school years.

I **CONCLUDE**, therefore, Bree is entitled to the 6.5 per cent salary increase over his 1982-83 salary for the 1983-84 school year, as well as the negotiated increase for the 1984-85 school year.

The Board is hereby **ORDERED** to compensate Bree for the difference between salary received and his entitlement for 1983-84 and to establish his 1984-85 salary consistently with determinations herein.

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

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

21 June 1984
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

June 22, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 26 1984
DATE

Ronald L. Parker/phr
FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 0737-84

ADDENDUM

Witnesses

James J. Bree, petitioner
James A. Bolan, Superintendent of Schools

Evidentiary Documents

P-1: March 11, 1982 acceptance for 1982-1983 school year at $22,530
P-2: 1983-85 negotiated agreement (Appendix "B")
P-3: Board resolution minutes of September 8, 1983
P-4: February 15, 1983 document, signed by Bree, a "check" on experience
P-5: August 24, 1983 letter - Bolan to Bree
P-6: August 25, 1983 letter - Bree to Bolan
P-7: Three parental letters of alleged verification at St. Anthony's
P-8: Jefferson Township, October 14, 1983, letter re' experience
P-9: June 21, 1970 - Bree application in Boonton
P-10: September 3, 1970 - employment data sheet
P-11: Bree employment data-school business record

R-1: Sr. Germaine Bevans's affidavit
R-2: June 25, 1970, Board minutes

C-1: Board minutes of April 19, 1984 meeting
C-2: April 20, 1984 letter, Gallo and Bolan to Bree

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OAL DKT. NO. EDU 0737-84

JAMES BREE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision 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 Commissioner concurs with the conclusion of the Office of Administrative Law that the Board is estopped from setting petitioner's salary as it has. The record supports that petitioner did not fraudulently or otherwise misrepresent his pre-1970 teaching experience. The application petitioner completed in 1970 (P-9) clearly indicates that no salary was received for the teaching experience at St. Anthony's School during 1965-67. As indicated by the judge, there is no statutory prohibition concerning the offer of salary for initial employment above the statutory minimum. There is nothing to prevent a superintendent or board from crediting teaching experience gained as an undergraduate or volunteer teacher if so desired. The record clearly shows that petitioner's placement on the salary guide in the district of employment prior to Boonton was at step 5; thus, it would appear that the prior board had credited the 1965-67 experience which was within its management prerogative.

While the application itself (P-9) does not state a college graduation date, the employment data sheet completed by petitioner (P-10) on September 3, 1970 does state a graduation date of April 7, 1967.

Clearly, as early as September 3, 1970 there was information available to administration and the Board to make any correction to petitioner's placement on the salary guide if the teaching experience credited did not meet the Board's expectations.

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If there were any questions or concerns about the information contained in the application, there was clearly not only an opportunity, but also an obligation on the part of administrative staff to resolve those questions or concerns at the time petitioner was interviewed, but certainly no later than upon his initial employment when the employment data sheet was completed. In that the application form in this matter appears to have been the document upon which the salary guide placement was determined, the Galop principle unquestionably applied. In Galop v. Bd. of Ed. of the Township of Hanover, 1975 S.L.D. 358, aff'd State Board 366, it is stated in part:

> "***The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matters should be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and unnecessary litigation occasioned by careless and inadvertent error.***"
> (at 365) (Emphasis supplied.)

Clearly, the Board is estopped from trying to recoup monies from petitioner's salary thirteen years after his initial employment when no misrepresentation or fraudulent action by him is supported by the record. The Commissioner concurs with the finding and determination of the judge that the withholding of petitioner's salary increase is violative of N.J.S.A. 18A:29-14. The recommendation ordering the Board to compensate petitioner the difference between salary received and his entitlement for 1983-84 and to establish his 1984-85 salary consistent with the determinations reached herein is adopted as the Commissioner's final decision in this matter.

AUGUST 6, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 8610-83
AGENCY DKT. NO. 339-9/83A

CAMDEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL BOARD OF EDUCATION,
Petitioner,
v.
CORNELIUS TAYLOR,
Respondent.

APPEARANCES:

William C. Davis, Esq., for petitioner (Davis, Reberkenny and Abramowitz, attorneys)

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: May 7, 1984 Decided: June 21, 1984

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

The Board of Education of the Camden County Vocational and Technical School District (Board) certified four charges of conduct unbecoming with the Commissioner of Education for determination against Cornelius Taylor (respondent), a teacher with a tenure status in its employ. After the matter was transferred on October 27, 1983 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted by Steven Reback, ALJ, on November 21, 1983. A plenary hearing was conducted March 6, 7, and 29, 1984 in the

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Camden County Hall of Justice, Camden, New Jersey. The record closed May 7, 1984 upon the submission of briefs by the parties. Respondent denies the material allegations of unbecoming conduct against him. Alternatively, he contends that any conduct he committed which may be deemed inappropriate for a teacher is the result of deviation from normal mental and emotional health which was caused by stress of his personal life.

Prior to a recitation of the testimony heard and documentary evidence adduced by the parties it is noted that on February 15, 1984 an Order was entered on respondent's motion to exclude from evidence in support of the charges testimony of two Board proposed pupil witnesses, K.T. and P.B., and to partially exclude proffered testimony of another pupil witness, B.W. The basis of the Order is that such testimony went beyond the scope of the present charges which are viewed as having been narrowly drawn in respect of the pupils against whom respondent's conduct is deemed by the Board to be unbecoming. During the course of the evidentiary hearing, the Board certified additional charges of unbecoming conduct against respondent on the strength of the excluded evidence. Prior to that date, however, respondent's salary had resumed under the provisions of N.J.S.A. 18A:6-14. When the Board certified the additional tenure charges on February 16, 1984, it also acted to continue respondent's suspension from his teaching duties and it suspended his salary, which had resumed under the cited statute.

Respondent then brought a motion, which was granted, to compel the Board to resume his salary under N.J.S.A. 18A:6-14, notwithstanding the second certification of charges on February 16, 1984. The second set of tenure charges is held in abeyance pending disposition of the present charges.

CHARGES

The charges certified by the Board to the Commissioner of Education for adjudication against respondent and as filed with it by the Superintendent of Schools, are as follows:

> 1. The said Cornelius Taylor has sexually harassed a female student in his class, to wit, K.J. This harassment has included inviting the said K.J. to his house to do homework; touching K.J. on her hips and making suggestive remarks to her; inviting the said K.J. to his house to drink with him. Said conduct by Cornelius Taylor has caused K.J. to avoid his classes and to avoid him in the hallways and lunchroom and

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has further affected her grades on her report card and conduct and attitude. Mr. Taylor has also been observed patting or smacking K.J. on her behind. Such conduct on behalf of Cornelius Taylor is improper, reprehensible and conduct unbecoming a teacher. In support of this charge I [the superintendent] rely upon the statements of R.L., K.J., L.R. attached hereto.

2. The said Cornelius Taylor has engaged in improper conduct and conduct unbecoming a teacher in that he has followed a female student around the halls in the school building, to wit, D.F. causing her to attempt to avoid him by retreating to girls' locker room. During the course of this conduct which occurred on or about May 16, 1983 the said Cornelius Taylor addressed D.F. as BB which D.F. says means "bubble butt." Said conduct is reprehensible and constitutes conduct unbecoming a teacher. In support of this charge I rely upon the statement of D.F. dated May 16, 1983 attached hereto.

3. The said Cornelius Taylor has sexually harassed a female student, to wit, J.C. in that he has, during lunch period, inquired of said J.C. what she was doing after work and as to what time she finished with work in the evening. The said Cornelius Taylor has also invited J.C. to visit him at his trailer park in Centerton, New Jersey on the weekend. Said conduct by a teaching staff member is reprehensible, improper and constitutes conduct unbecoming a teacher. In support of this charge I rely upon the statement of J.C. dated May 17, 1983 attached hereto.

4. On May 16, 1983, the said Cornelius Taylor approached a female student, to wit, P.D. as she was exiting the girls' locker room. P.D. told Mr. Taylor to stay away from her. However, despite her request, he continued to approach her at which time she threw a container of orange juice at him which Mr. Taylor in turn picked up and threw back at the student. Mr. Taylor then grabbed and pushed the said P.D. Other students who were involved in this incident included J.C., who observed and same and D.F. whom Cornelius Taylor had previously chased into the girls' locker room. Said conduct on behalf of the teaching staff member is reprehensible, improper and constitutes conduct unbecoming a teacher. In support of his charge I rely upon the statement of J.C., P.D. and D.F. which are attached hereto.

It is noted that the superintendent, in his statement of charges filed with the Board, contends that the above conduct

> This * * * sets a poor example of conduct to the students and is detrimental to the orderly administration of the school and interfers with the respect that students are supposed to hold for their teachers. The conduct represents the highest form of

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> unprofessional attitude and conduct which constitutes conduct unbecoming a teacher and a total disregard of professional responsibilities and duties to the students and the public trust.

Though the charges generally are presented in chronological order as the conduct is alleged to have been committed by respondent, all of the complained of conduct surfaced as a result of respondent's alleged conduct on May 16, 1983 in regard to D.F. and P.D. and as is set forth in Charges 2 and 4. That is, while the alleged conduct complained of in Charges 1 and 3 was to have occurred during a large part of the 1982-83 academic year prior to May 16, neither of the principal pupils in those charges, K.J. nor J.C., complained of respondent's conduct to school officials until D.F. and P.D. reported, on May 16, 1983, respondent's alleged conduct of that day. Consequently, the respective proofs on Charges 2 and 4, combined, shall be initially discussed, and the respective proofs of Charges 1 and 3 shall then be discussed. Findings of fact shall be presented thereafter on Charges 2 and 4, followed by separate findings of facts on Charges 1 and 3.

CHARGES 2 and 4

A fair reading of Charge 2 discloses that on May 16, 1983 respondent is alleged to have followed D.F. around the school building while addressing her as "BB", an acronym for "bubble butt," an apparent reference to the physical size of D.F.'s posterior, with the result that D.F. retreated to the girls' locker room in an "* * * attempt to avoid him * * *." A fair reading of Charge 4 discloses the allegations that P.D. was in the girls' locker room as D.F. entered in her "* * * attempt to avoid [respondent] * * *". As P.D. exited the locker room with a container of orange juice in her hand, respondent is alleged to have approached her. P.D., the charge states, threw the container of orange juice at respondent after he allegedly failed to honor her request to "* * * stay away from her * * *." Respondent, it is further alleged, then threw the container of orange juice at P.D., grabbed and pushed her.

PROOFS

Respondent has been employed by the Board as a teacher of related technology for 12 years. During that time, he was assigned, in addition to his classroom duties, monitoring duty in the corridors, smoking area, homeroom duty, and pupil suspension duty.

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The conduct complained of here is limited to the 1982-83 year. Respondent has also been assigned by the Board as homebound teacher for extra compensation and he was assigned by the Board to teach welding at the adult evening school for extra compensation.

D.F. is presently in the eleventh grade of the Board's vocational school, and she has known respondent since he was her teacher of mathematics in the ninth grade. D.F. testified that respondent often calls her "bubble butt" in the hallways and outside smoking area. D.F. admits calling respondent "pervert" but denies calling him "Yogi Bear", a nickname respondent says was given him by pupils since his first year of teaching. The appellation "pervert" was used by D.F. because respondent allegedly told "dirty jokes" to her and her friends.

On May 16, 1983, D.F. testified that after lunch she was entering the school from the smoking area when respondent began following her in the hallway and calling her "bubble butt." D.F. went into the girls' locker room where she met her friend, P.D., who was changing clothes. Respondent, D.F. says, followed her to the door of the locker room. D.F. complained to P.D. of respondent following her and of the name "bubble butt." D.F. says she picked up a container of orange juice, which was on a ledge in the locker room, gave it to P.D., who was leaving the locker room, and instructed P.D. to throw the orange juice at respondent if he was still in the outside hall.

P.D., it is noted, was graduated during June 1983 from the Board's vocational school. She was recently fired from her employment for fighting with another employee. P.D. did not take any courses from respondent during her years in the Board's schools. However, P.D. explained she had known respondent and of his reputation for harassing female pupils.

P.D. testified that on May 16, 1983 she entered the locker room to change clothes and that she had taken a container of orange juice with her from the school's bake shop. When she finished changing, P.D. testified she exited the locker room with her changed clothes and the container of orange juice in her hand. P.D. intended to go to her hall locker, then to the outside smoking area. At no time, P.D. says, did D.F. give her the orange juice container nor did D.F. tell her to throw the orange juice at respondent. P.D. testified that after having observed respondent chasing D.F. into the locker room, she decided she would throw the orange juice container at respondent if he came after her in

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like, or similar fashion. P.D. testified that when she left the locker room, respondent approached her in the hallway. She told respondent to stay away from her but that respondent continued his approach. P.D. testified she then threw the orange juice container at him and that respondent grabbed for the container with the result that some orange juice was spilled on her. P.D. testified that D.F. was then in the hallway and had observed what just occurred and that D.F. was laughing silently. D.F. denies that she was laughing during the incident.

B.W., a pupil enrolled in the eleventh grade in the Board's school and who was a friend of D.F., testified that on May 16, 1983 she and D.F. were leaving the girls' bathroom when respondent, who was standing nearby, made a remark. B.W. testified that D.F. hit him on the arm and that respondent proceeded to chase her. B.W. testified that D.F. then ran into the girls' locker room and respondent followed into the locker room. After the locker room door closed, respondent came back out. Shortly thereafter, D.F. and P.D. exited the locker room. P.D., who was carrying the orange juice container, instructed respondent on several occasions not to come any closer to her. B.W. testified that P.D. threw the orange juice at respondent, respondent grabbed for the orange juice container which then fell to the floor, whereupon D.F. retrieved the container from the floor and threw the orange juice at respondent. While B.W. testified some pupils refer to respondent as "Yogi Bear" she has not heard D.F. make such reference. Finally, B.W. testified that she did not observe respondent throw orange juice on D.F.

J.C., a post-secondary student enrolled in the Board's culinary arts program, and who is the subject of Charge 3, testified that on May 16, 1983 she was in the girls' locker room when D.F. arrived. D.F. complained that respondent was following her and calling her "bubble butt." J.C. testified that P.D. told D.F. to tell respondent to stop. D.F. responded that respondent would not stop. J.C. says that D.F. then left as did P.D., who was carrying the orange juice. In the corridor, J.C. testified that she observed P.D. throw the orange juice container on respondent but only after respondent kept approaching P.D. which caused P.D. to back up. J.C. says that respondent tried to grab the orange juice container, that the orange juice spilled, and that D.F. picked up the container and threw it at respondent. J.C. says respondent did not throw the orange juice container at P.D.; rather, the orange juice was spilled on P.D. when he tried to get the container from her.

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Respondent testified that May 16, 1983 was a rainy day. As part of his hall monitoring duties, respondent testified he positioned himself at a double-door outside exit which was close to the girls' locker room. He observed D.F. standing in the exit vestibule with other pupils. He engaged the group in general conversation. D.F. left the group and proceeded to the girls' locker room. Respondent testified he proceeded into the hallway whereupon D.F. exited the girls' locker room and said "I'm going to throw orange juice at you." Respondent testified he merely shrugged and began walking away. Respondent testified that he then heard P.D. say "I'll do it". At that, respondent explains he turned around and walked toward P.D. saying "No you are not." P.D. backed up and respondent put his hand out to retrieve the orange juice container from her and at that point she threw the container at him. The bell rang for the change of class and the hallway filled with pupils. Respondent testified that he told D.F. "I'll see you later." Respondent proceeded to his next assignment, which was in-school pupil suspension, located in the vice-principal's office. Though he was angry at P.D. and D.F., he explained he did not report the incident to the vice-principal because P.D. was a senior and he did not want to prevent her from being graduated. Moreover, respondent explains that he attempts to handle his own disciplinary problems.

Respondent denies that he chased D.F. through a hallway or towards the girls' locker room and he denies that D.F. hit him on the arm as B.W. testified. Finally, respondent testified he did not intentionally throw orange juice on either D.F. or upon P.D.

In respect of the appellation "bubble butt", respondent first denied ever referring to D.F. in that manner. However, respondent then admits referring to D.F. as bubble butt although he has no idea how many times he made such reference. Specifically, respondent testified that he used that appellation towards D.F. in the smoking area when she would "get on his case." Finally, respondent explains that D.F. never told him not to call her "bubble butt."

Both D.F. and P.D. became concerned following the incident that respondent would report the matter to school authorities. Consequently, they both reported the incident to the principal, who, in turn, had P.D. and D.F. prepare written statements of the incident (P-1) (P-2). This, in turn, led the principal to seek out other female pupils who felt harassed by respondent, which led to K.J. and J.C. filing statements. Their latter statements form the basis for Charges 1 and 3, respectively.

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While both D.F. and P.D. prepared the statements in the same room and at the same time, both testified that neither knew what the other was writing. Those statements are in substantial compliance with the testimony reported above.

DEFENSE

Respondent contends that the Board failed to show by a preponderance of credible evidence that he followed D.F. around the school halls, thereby causing her to retreat to the girls' locker room and that, by virtue of his denial, the Board failed to establish that he referred to D.F. as "bubble butt" that day. This contention, it is noted, is made notwithstanding that respondent admittedly addressed D.F. as "bubble butt" on prior occasions. In respect of the actual throwing of orange juice, respondent contends that the Board failed to establish by a preponderance of credible evidence his conduct was in any way responsible for the orange juice incident. To the contrary, respondent contends that both versions of the incident according to P.D. and D.F. are inherently suspect because P.D. is, by her own admission, a consistent troublemaker, as is evidenced from her termination of employment for physically fighting with another employee. In respect of D.F., respondent contends that D.F. is a good friend of P.D. and that D.F. and P.D. fabricated their recollection of the incident so as to cause respondent embarassment.

FINDINGS

I have considered the testimony of all of the pupils who testified before me in respect of Charges 2 and 4, and I have independently considered respondent's testimony in regard to those same charges. While there are some minor inconsistencies in the pupils' testimony regarding the precise sequence of events, respondent's explanation, by comparison, of the same incident leaves too many gaps for me to be persuaded by his version. First, respondent denied addressing D.F. as "bubble butt" only to later admit that he did in fact address her as "bubble butt." I am not persuaded that respondent's admission of addressing D.F. as "bubble butt" was intended at the time given, to deny that he did address her in that manner on the day in question here. Taking respondent's version that it was raining on May 16, 1983 and that he had positioned himself near the outside double-door exit and that D.F. was standing in the exit vestibule with other pupils, there is no rational explanation as to why, according to respondent, D.F. would leave that group,

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proceed to the locker room, exit the locker room, and say to him, in effect, "I'm going to throw orange juice at you." No evidence of any prior school conduct by D.F. was submitted which would lead me to believe that D.F. is capable of committing such an unprovoked act.

I am persuaded that respondent did, in fact, refer to D.F. as "bubble butt" while she was standing near the exit vestibule and that she left respondent's area to proceed to the locker room. D.F. met P.D. in the locker room and explained to P.D. what had just occurred. P.D., notwithstanding that she was recently terminated from her employment for an altercation with another employee, is perceived to be a person who does not intend to take what she considers abuse, real or imagined, from anyone. P.D., having been apprised of what respondent had just done to D.F., exited the locker room with the intent of preventing respondent from backing her up or, in any fashion, subjecting her to even the threat of what she considered offensive behavior. When respondent began to approach P.D., thereby causing her to retreat if even for a few steps, P.D. then proceeded to throw the container of orange juice at respondent. Respondent, in an attempt to prevent the orange juice from striking him, reached out to grab the container which then fell to the floor. D.F. picked up the container and threw the container at respondent.

There is no evidence to establish, as the Board charges, that respondent "* * * followed [D.F.] around the halls in the school building * * *", nor is there a preponderance of credible evidence to show that respondent "* * * grabbed and pushed P.D. * * *". In all other respects, however, I find the Board has established, by a preponderance of credible evidence, that respondent committed the conduct as is alleged in Charges 2 and 4.

CHARGE 1

By this charge, the Board alleges respondent committed unbecoming conduct by sexually harassing K.J. The specifications of the charge are as outlined above.

PROOFS

K.J. is a female pupil presently enrolled in the tenth grade of the Board's schools. She was assigned to respondent's mathematics class during her ninth grade in 1982-83. K.J. testified that throughout the course of that year, respondent would invite

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her to his home on Friday evenings to drink and/or to do homework. Respondent was to have expressed this invitation in front of other pupils. Notwithstanding the fact that K.J. never accepted the invitation, respondent would , on the following Monday, say in hearing range of other pupils, "Wasn't that fun" allegedly implying that K.J. did in fact accept the invitation and appered at his home the preceding Friday evening.

K.J. testified that on at least two occasions, respondent was to have stated to her, in hearing range of other pupils, that he would like to put "hickeys" all over her hip-pointers. When K.J. said to respondent she did not know what "hip-pointers" were, respondent allegedly placed his hands on K.J.'s ilium, the top crest of each hip bone. It should also be noted that K.J. testified that on at least one of two occasions when respondent touched her, he squeezed her hips.

K.J. testified that in order for her to leave respondent's classroom to go to the bathroom, which was kept locked, she had to first secure the bathroom keys from respondent. She admits that she used the bathroom facility on more occasions then anyone else in the classroom. K.J. explained that on occasions when she requested of respondent the keys to the bathroom, he would throw them on the floor so that she would have to pick them up; told her to get the keys from his trouser pocket; and, on at least one occasion, threw the keys down her shirt. K.J. testified that the course of conduct of respondent was such as to cause her to avoid him in the corridors and lunchroom, and that his conduct has deleteriously affected her grade received from him in conduct and attitude. K.J. testified that respondent advised her that "he is nice and sterile" and that he has the habit of reading labels on her jeans. Finally, it is noted that K.J. was, as a member of the culinary arts program, requested to serve luncheons in the school cafeteria, which caused her to miss many of respondent's classes. K.J. testified that respondent complained of her missing too many of his classes which resulted in her not being assigned luncheons. K.J. admitted that she became angry at respondent for that result. K.J. also testified that she was angry with respondent as the result of the grade she received from him.

R.L., presently a pupil in the tenth grade in the Board's schools who was a classmate of K.J. in respondent's class, testified that he heard respondent invite K.J. to his house on Friday evenings quite a few times. R.L. testified he heard respondent invite K.J. to his house on Friday evenings in order to "drink" which comment, it is noted, was to have been made in the context of a discussion of a party with K.J. R.L. testified he observed respondent put his hands on K.J.'s hips a few times throughout the year.

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L.R., presently a pupil in the tenth grade of the Board's schools and who was a classmate of K.J. in respondent's classes, testified that she observed respondent, after being asked by K.J. for the bathroom keys, throw the keys on the floor and that she heard and observed respondent direct K.J. to retrieve the keys from his trouser pockets. L.R. testified that she heard respondent say to K.J. that he, respondent, would "* * * love to give you [K.J.] hickeys all over your hip-pointers"; L.R. heard respondent invite K.J. to his home for drinks; respondent told K.J. "* * * I love touching your hip-points"; and, L.R. testified, that from time to time, respondent would whisper in K.J.'s ear. L.R. also testified that she observed respondent smack K.J. on her posterior.

Respondent testified that he was a teacher who tried to be a friend of all of his pupils. While he may have said to K.J., and other pupils as well, to come to his house on Fridays, such invitation was never intended to be a serious invitation. Furthermore, respondent specifically denies inviting K.J. to his house on Friday nights because, generally, his girlfriend and her child were usually there. Furthermore, respondent contends it would have been impossible for him to have intentionally made such an invitation because he attended a computer class on Fridays between 6:00 p.m. to 8:00 p.m. While respondent denies making such an invitation to K.J., he did admit that on one occasion he recalls K.J. discussing with him a difficult homework assignment. He recalls that he said to K.J. "Well, any problem, come on over to my house." Respondent testified that he and K.J. then laughed.

Respondent denies ever making a statement in respect of his alleged desire to put hickeys on K.J.'s hip-pointers. Respondent denies ever touching K.J. on her hips. Respondent explains that he does recall one occasion during 1982-83 that K.J. had appeared in class with a hickey on her neck. Respondent explains that, after he observed the hickey on K.J.'s neck, he said to her "if you are going to have hickeys, get them where you cannot see them like on your hip-pointers." K.J. then inquired, "What's a hip-pointer" to which, respondent testified, he showed her by touching her ilium.

Respondent denies saying to K.J. that "He's nice and sterile" or that he said he has a habit of "reading labels on jeans" or that he said "reading labels on jeans are best". However, respondent states that several years ago he did make a similar remark that that is what male pupils enjoy doing.

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Respondent, in respect of the keys incident, testified that while he did toss the bathroom keys to K.J. on occasion because he was at the chalkboard teaching, he did not at any time throw the keys at K.J. nor did he ever place the bathroom keys in K.J.'s shirt. Respondent does explain that on one occasion when K.J. asked for the bathroom keys, he told her the keys were in his trouser pocket. Respondent justifies that remark by explaining he was then presently lecturing and he did not want to be interrupted. Respondent hastens to point out that when he told K.J. the bathroom keys were in his trouser pocket, she said "never mind."

DEFENSE

Respondent contends that the Board failed to establish, by a preponderance of credible evidence, that he sexually harassed K.J. Respondent suggests that the testimony of K.J. is suspect because she made no complaints until the time following the orange juice incident, described above, when her friends, D.F. and P.D. solicited her assistance. Furthermore, respondent contends that K.J.'s testimony must be suspect because notwithstanding the fact that she had complained of respondent to her parents, her parents took no action on such complaints. Rather, they instructed K.J. to report to her guidance counsellor, which K.J. did not. Respondent also points to K.J.'s admission that she was angry with him because of his complaint that she was missing too many of his classes and that she was angry with him because of the grade she received in math.

FINDINGS

I have considered the testimony of K.J., R.L. and L.R. in respect of their versions of the complained of incidents surrounding this charge. I have also considered the testimony of respondent in respect of his denials of some of the substantive allegations, and his almost immediate reversal of some of those denials to admit that some incidents occurred but with explanation.

In my view, the testimony of the three pupils, found here to be credible witnesses, is overwhelming evidence that the incidents complained of did, in fact, occur. Respondent admits that on at least one occasion he advised K.J. that hickeys should be on a portion of her body where they cannot be seen and that that portion of her body was

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demonstrated by his touching the crest of her hips. To the extent that respondent admits that he committed that touching of K.J.'s body, following such advice from him to her in respect of the location of hickeys, leads me to believe that K.J.'s version of the incident is more accurate. That is, I find that there is a preponderance of credible evidence in the record to demonstrate that on several occasions respondent talked with K.J. in respect of his desire to put hickeys on her hip-pointers and that on several occasions respondent did, in fact, touch the body of K.J. Furthermore, respondent admits that he had, in a lighthearted fashion, invited pupils to his home on a Friday evening. Though he denies ever extending such an invitation to K.J., he immediately admits that on one occasion he instructed her to come to his house if her homework assignment was too difficult. The testimony of K.J., R.L. and L.R. is more persuasive than the explanations and justifications given by respondent.

In respect of the incident with the bathroom keys, respondent admits that on at least one occasion he instructed K.J. to retrieve the bathroom keys from his trouser pockets on the excuse that he was busy lecturing and did not want to be interrupted. Such excuse, or justification, is simply not persuasive that the incidents with the bathroom keys did not occur as K.J. and R.L. described. Respondent's course of conduct in respect of the incidents of keys is found to be as complained of in Charge 1. The question of whether such conduct constitutes sexual harassment shall be reserved until later.

CHARGE 3

This charge deals with an allegation that respondent has committed conduct unbecoming a teacher by sexually harassing J.C., a female pupil, during lunch period by inquiring what she was doing after work, the time she finished work in the evening, extending an invitation to J.C. to visit him at his home on the weekend.

PROOFS

It is noted that J.C. is a post secondary pupil in the Board's schools who is 19 years of age. A fair review of her testimony and her statement in support of this charge shows that J.C. testified respondent would occasionally inquire of her during lunch time what she was doing that evening or what time she would finish work that evening. On other occasions, respondent would, according to the testimony and statement of J.C., inquire whether she would visit with him at his home on the weekend.

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These conversations were to have occurred while J.C. was serving lunch to respondent in the teachers' cafeteria as part of her responsibility in the culinary arts program. Subsequent to such conversation, respondent would move along the cafeteria line, pay for his lunch, and proceed to sit down to eat his lunch.

DEFENSE

Respondent points to the fact that J.C. is a post secondary student in the Board's schools and that as such she is to be treated as an adult. Respondent likens his alleged conversations with J.C., and it is noted that the conversations are not denied as described by J.C., with conversations he would have with adults. Respondent contends that had the orange juice incident not occurred, as recited above, that his communication with J.C., in the manner described, would not form the basis for a tenure charge against him. Finally, respondent contends that even if the conversations did occur as described that he had no intent to carry out whatever may have been implied through such remarks.

FINDINGS

I have considered the testimony of J.C. and the testimony of respondent in respect of Charge 3. There is no question that the Board established by a preponderance of credible evidence the truth of the conduct complained of in Charge 3. That is, respondent did, from time to time, inquire of J.C. what she was doing on particular evenings, and what time she finished work on particular evenings. It is also established by a preponderance of credible evidence that respondent, from time to time, would inquire of J.C. what she was doing on a weekend and extended an invitation to her to visit with him at his home. That J.C. is a post-secondary student does not excuse, nor license, such communication between a public school teacher and a public school pupil.

ISSUE

The issue in the matter is whether the conduct complained of, if proven to be true in fact by a preponderance of credible evidence, rises to the level of conduct unbecoming a teacher and, if so, what discipline, if any, should be imposed. It has already

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been found and determined that respondent did, in fact, commit the conduct complained of in Charge 1, as set forth above, in respect to K.J. It has also been found that respondent has substantially committed the conduct complained of in Charge 2, as set forth above, with the exception of following "* * * a female student around the halls in the school building * * *". It has also been found that respondent substantially committed the conduct complained of in Charge 3, as set forth above. Finally, it has been found that respondent has committed the conduct complained of in Charge 4, as set forth above, with the exception that there is insufficient evidence to establish that respondent " * * * grabbed and pushed the said [P.D.] * * *."

The question of whether such conduct, taken together, rises to the level of conduct unbecoming a teacher must be addressed. It is recognized that respondent's defense to the charges includes his representation that he always attempted to be available for assistance to his pupils, and that he wanted his pupils to consider him to be a friend. While those are admirable qualities in respect of relationships which should exist between a teacher and his or her pupils, it must be recognized that an appropriate distance must be maintained between teachers and pupils in order to achieve an orderly operation of public schools and the freedom of pupils from offensive touching or remarks. In this case, respondent, by virtue of the findings following Charge 1, did in fact commit an offensive touching of the person of K.J. when he placed his hands on her hips. That touching is exacerbated by the discussion initiated by respondent prior to such offensive touching, or vice-versa. In either case, it cannot be reasonably expected that a teacher of the ninth grade, or of any grade, would discuss with a pupil the occurrence of "hickeys" to be more appropriately placed on a female's anatomy. That is, for respondent to have initiated uninvited conversation, or even invited conversation, in respect to appropriate places for "hickeys" to appear on K.J., it is not the role of a public school teacher to proffer advice as to where such manifestations of perceived pupil behavior should appear and aggravate the seriousness of such conversation, by placing his hands on the female's body. Moreover, this conduct is also aggravated by the fact that respondent asserted his desire that he would "love to place hickeys all over K.J.'s hip-pointers." Such conduct is wholely inappropriate for a public school teacher in respect of his relationships with any pupil under his charge. It is immaterial, in my view, that K.J. took no affirmative action in respect of complaining to school authorities upon the first of several occurrences of such conduct by respondent. K.J. is a tenth grade pupil, comparatively of tender years to respondent, and is certainly in no way of the same maturity which respondent is expected to exhibit.

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On a prior occasion the Commissioner has said:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher * * * violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. In re: Ernest Tordo, Jackson Twp. School District, 1974 S.L.D. 97, 98-99.

That K.J.'s parents did not take action upon their daughter's complaint of respondent's behavior does not lessen the seriousness of respondent's behavior in regard to K.J. Neither parents, the school community, nor the citizens of this State expect public school teachers to offensively touch the person of any pupil in their charge, either in conjunction with or without offensive remarks being made to the pupil. Furthermore, it is of no moment that responent did not have the "mens rea" to intentionally complete whatever was intended by inviting K.J. to his house on a Friday evening. Respondent contends that because there is an absence of mens rea, the charge must be dismissed. While that argument may hold true in a criminal prosecution in respect of an act which requires the requisite mental intent, such an element is not necessary in an administrative tenure proceeding. Here, what is essential is that the act was committed and that the affected pupil was offended. It is clear that respondent committed the acts complained of in Charge 1 and that K.J. was offended.

In respect of Charge 2, it is unreasonable to expect that a public school teacher could, with impunity, refer to female pupils as "bubble butt" when that reference is obviously to the physical size of the affected pupil's posterior. It is immaterial whether respondent followed D.F. around the school corridors while referring to her as "bubble butt" for the mere reference to a female pupil as "bubble butt", signifying a specific part of the female anatomy, is sufficient by itself to rise to the level of conduct unbecoming a teacher. Pupils attend public schools in this state with the reasonable expectation that public school teachers will treat them with the same courtesy with which the teacher expects to be treated. While that equation does not always necessarily hold true in respect of pupils' conduct toward teachers, a pupil's conduct cannot justify the teacher's conduct found to have been committed here. Moreover, there is no evidence in the record before me to suggest that D.F.'s conduct in any way contributed to respondent referring

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to her as "bubble butt." And even if such evidence of D.F.'s conduct did exist, I cannot imagine a situation by which respondent would have license to refer to any pupil by a name other than the pupil's given name or some variation thereof deemed acceptable. "Bubble butt" with its connotation, is not acceptable.

In respect of Charge 3, the proofs show that respondent did, from time to time, inquire of J.C. what she was doing on a particular evening, what time she was finished at work, and whether she would visit with him on the weekend at his home. Perhaps if this charge were a singular charge brought against respondent by the Board, it would fall. However, the proofs which establish that the other conduct complained of did, in fact, occur this finding must be seen in light of the course of conduct apparently adopted by respondent during at least the 1982-83 year. Respondent, it has been found, has committed offensive touching of a female pupil, has made offensive remarks to female pupils, and has referred to female pupils in an offensive manner. These findings make the conduct complained of in Charge 3 more eggregious. The conduct, found to be true in fact, in this charge is an extension of the unbecoming conduct exhibited by respondent as already found to have been true in fact and, accordingly, this conduct does rise to the level of conduct unbecoming.

Finally, the orange juice incident would not have occurred if respondent did not refer to D.F. as "bubble butt" in the first instance. When respondent referred to D.F. in that manner, that remark set off a chain of events which were destined to run until completed. That is, D.F. retreated to the girls' locker room; she informed P.D. what had just occurred; P.D. took umbrage at what occurred and resolved that a similar circumstance would not occur to her; P.D. exited the locker room; respondent approached P.D.; P.D. advised respondent because of his reputation to stay away from her; respondent failed to refrain from approaching P.D.; P.D. threw a container of orange juice at respondent. Little wonder that respondent did not report the incident to school authorities immediately for respondent knew at that time that had he not referred to D.F. as "bubble butt" the incident would not have occurred.

In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), the Court held that:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the 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. Fitness may be shown either way * * *

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In this case, I find that respondent has, in several instances, violated the trust given him as a public school teacher to treat his pupils with care, dignity and respect. Respondent has shown such violation in the manner in which he addressed pupils, in the invitations expressed to pupils and the offensive touching and offensive remarks visited upon K.J.

In respect of the charge of sexual harassment of K.J. and J.C. as an independent charge, I know of no authority under Education Law, N.J.S.A. 18A:1-1 et seq. by which such a charge may be brought by a board against a teacher. It is recognized that a charge of sexual harassment may be brought against an employer in the context of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000e-1 et seq. Generally, as has been noted, a charge of sexual harassment is brought in the employer-employee relationship. Here, the relationship is between that of teacher and student. As such, the charge of sexual harassment, as an independent charge against respondent, distinct from conduct unbecoming a teacher, is misplaced. It is sufficient for a board of education in similar circumstances to charge the affected teacher with unbecoming conduct under the provisions of N.J.S.A. 18A:6-10. Consequently, I find that a separate charge of sexual harassment in these circumstances is inappropriate and, to the extent that the charge of sexual harassment is seen as an independent charge, that charge is **DISMISSED.**

PENALTY

Respondent contends that even if the Board established by a preponderance of credible evidence he committed the conduct complained of his mental health at the time the conduct was committed was such that he did not have the appropriate mens rea to suffer dismissal from his tenured employment. In this regard, respondent produced the testimony of a psychologist and a psychiatrist, each of whom have treated him in the past several months.

The psychologist, Dr. Bobrow, diagnosed respondent as suffering from atypical personality disorder stemming from his personal history which includes multiple failed marriages, failed work experiences and abuse he suffered as a child. As a consequence, Dr. Bobrow proffered that respondent has a low sense of self-esteem, a lack of basic trust in his environment, an inability to deal with emotional situations, an extreme hypersensitivity to any thoughts of rejection by others, and, a tendancy to be overly dramatic in his behavior and to do things to draw attention to himself.

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The psychiatrist, Dr. Holl, testified that based on two meetings he had with respondent in August and September 1983, he finds respondent is suffering from a neurotic conflict which results in his self-defeating conduct. Dr. Holl explained that such conduct will tend to occur episodically and that such conflict manifests itself in a perversion symptom. Both Dr. Holl and Dr. Bobrow agree that respondent is in need of psychiatric intervention. Dr. Bobrow senses that respondent can control his behavior with psychiatric intervention, while Dr. Holl suggests that respondent's mental problem has a better prognosis for cure if he were not to undergo any type of treatment. In either case, both Dr. Bobrow and Dr. Holl agree that respondent's difficulty with respect to his control of his conduct has as an element his rejection of authority figures.

Respondent contends that under these circumstances a discipline less than dismissal is warranted and he points to the relief awarded in In re Grossman, 157 N.J. Super. 165 (App. Div. 1978) wherein the Commissioner, having found that Grossman was incapacitated, directed that Grossman be placed on disability retirement under the Teachers Pension and Annuity Fund. Alternatively, respondent contends that his mental condition is such that dismissal is not warranted but, in lieu thereof, he is entitled to be declared ineligible to teach for a temporary period of time until he furnishes satisfactory proof of recovery pursuant to the holding of the Commissioner in In Re Bernstein, 1967 S.L.D. 73, whereupon he would resume his employment.

Finally, this case differs from Trenton City Board of Education v. Evelyn Cohn, 1983 S.L.D. _____, because in Cohn the conduct complained of was directed at a school secretary, in a specific incident, which a beginning and with an end, when the evidence was clear that Cohn was specifically suffering from great mental stress. Here, respondent's conduct is directed at female pupils over whom, as a teacher, he exercised authority and the conduct was not an isolated incident but a course of conduct he knowingly adopted. While respondent's history of stress may be unfortunate and may be sufficient for him to require treatment, I find nothing in his history to excuse the conduct committed.

Firstly, I am not persuaded by the testimony of either Dr. Bobrow or Dr. Holl that respondent's specific conduct found to be true in fact, regarding behavior pupils identified in the charges is the result of a deficient mental condition. Rather, I find respondent's conduct here to be a knowing and willful election of a course of conduct he decided was appropriate to create a friendly pupil-teacher relationship. That course of

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conduct has no place in the public schools, particularly where there is offensive touching and offensive remarks made to pupils, or pupils are extended inappropriate invitations, or pupils are subjected to the indignity of being addressed by inappropriate appellations. Furthermore, there is evidence in the record to show that respondent has, as early as February 1976, been a patient at the Carrier Clinic, at which time he was diagnosed as being in need of therapeutic treatment. However, respondent at that time refused such therapeutic treatment. Respondent's present committment to engage in psychiatric treatment, if the penalty of dismissal is not imposed, is simply not persuasive that respondent is desirous of controlling his behavior and his conduct in the future. In my view, the seriousness of these charges demand the discipline of dismissal.

Accordingly, having found that the charges of unbecoming conduct certified by the Board against Cornelius Taylor have been proven to be true in fact, and having found that such conduct is a course of conduct adopted by respondent, it is hereby **DIRECTED** that the employment of Cornelius Taylor as a teacher with a tenure status in the employ of the Camden County Vocational and Technical School Board of Education /be and is hereby **TERMINATED**. The second set of tenure charges certified by the Board against Cornelius Taylor are hereby **DISMISSED** as moot.

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

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OAL DKT. NO. EDU 8610-83

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

6/21/84
DATE

Daniel B. Mc Keown /CEB
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

June 21, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 26 1984
DATE

Ronald L. Parker/sm
OFFICE OF ADMINISTRATIVE LAW

ij

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EXHIBITS

P-1	P.D. statement
P-2	D.F. statement
P-3	K.J. statement
P-4	B.W. statement
P-5	L.R. statement
P-6	R.L. statement
P-7	J.C. statement
P-11	Attendance record
P-12	Memorandum
P-13	Curriculum Vitae, Dr. Holl
P-14	Letter report
P-15	Letter report
P-16	Letter
P-20	Summary
P-21	Transcript

R-8	Letter of Termination of Employment

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IN THE MATTER OF THE TENURE	:	
HEARING OF CORNELIUS TAYLOR,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY VOCATIONAL-	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
CAMDEN COUNTY,	:	
_____	:	

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

Respondent generally contends that the judge erred in his findings and conclusions in each of the four charges of conduct unbecoming certified with the Commissioner of Education. Respondent contests every credibility determination made by the judge and contests the appropriateness of the penalty set down by the judge. Respondent contends that, because of his personality disorders, the judge erred in finding his conduct unbecoming a teacher and further proposes that the Board has a responsibility to keep respondent on duty while he undergoes psychiatric and/or psychological treatment. The Commissioner cannot agree, finding such arguments singularly inappropriate. The Commissioner regrets the problems evidenced by respondent herein or, as circumstances dictate, as may occur with any employee. However, in the present case the Commissioner finds the proven conduct of respondent to be of a nature so repugnant and reprehensible to that evidenced by a normal pupil-teacher relationship as to be indefensible.

Further, the Commissioner knows of no law or responsibility applicable to the Board that requires it to retain a teaching staff member with admitted personality disorders on active duty during the period of treatment for such mental and/or emotional dysfunctions. As is cited in Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203 (Chan. Div. 1973):

> "***The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health

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is without question not only a valid legislative concern but one classifiable as a compelling state interest.***" (at 212)

The Board has a responsibility to maintain the best education it can provide for the pupils of the district. As has been said in Clinton F. Smith et al. v. Borough of Paramus Board of Education, 1968 S.L.D. 62:

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

'The public schools were not created, nor are they supported, for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***" (at 67)

Further, the Commissioner affirms the credibility determinations herein by the judge considering "***'the proofs as a whole' with due regard to the opportunity of the one who heard the witnesses to judge their credibility***." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); and State v. Johnson, 42 N.J. 146, 162 (1964)

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

The charges of unbecoming conduct certified by the Board against respondent, having been proven true in fact, the Commissioner determines that Cornelius Taylor shall be removed from the employ of the Board of Education of the Camden County Vocational and Technical Schools as of the date of this decision.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 6, 1984

PENDING STATE BOARD

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IN THE MATTER OF THE SENIORITY RIGHTS OF CERTAIN TEACHING STAFF MEMBERS EMPLOYED BY THE OLD BRIDGE TOWNSHIP BOARD OF EDUCATION AND THE EDISON TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECLARATORY JUDGMENT

Petitioners jointly appealed to the Commissioner for a declaratory judgment concerning the application of N.J.S.A. 18A:28-11 et seq. and N.J.A.C. 6:3-1.10 et seq. Further, the New Jersey Education Association and the New Jersey School Boards Association jointly requested permission to intervene amicus curiae. The joint petitioners in this matter submitted fifteen separate counts with each individual count setting forth a set of factual circumstances regarding the service and certification of an individual teacher whose seniority entitlement was in question. In order to clarify the seniority regulations and so that petitioners in this matter might be guided as to how to make their decisions for the 1984-85 school year relative to the above-cited fifteen individual circumstances, the Commissioner issued a seniority advisory pursuant to the provisions of N.J.S.A. 18A:28-11. The cover letter attached to said advisory informed the parties that a Declaratory Judgment, if still regarded as necessary by the parties, would be considered as an appeal for the advisory opinion. Subsequent to the rendering of the advisory, counsel for NJEA and its local affiliate, Old Bridge Education Association, filed a brief setting forth its interpretion of certain portions of N.J.A.C. 6:3-1.10 et seq. The brief submitted by counsel sets forth three specific issues, each of which shall be addressed herein. These issues are as follows:

1. What are the seniority rights of teachers assigned under elementary endorsement to grades 7 and 8 in departmentalized settings in either elementary schools or junior high schools or to teach common branch subjects in grades 9-12?

2. What are the seniority entitlements of teachers assigned to teach simultaneously in two categories?

3. What are the seniority entitlements of persons serving under special subject field endorsements or educational services certificates who were initially assigned to serve at the secondary level and transferred to the elementary level, or vice versa?

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ISSUE NO. 1

Petitioners in their brief at page 2 contend that "[t]eachers holding elementary certification who are assigned to teach grades 7 & 8 obtain seniority in the secondary category for all service in the district." Such conclusion, it is argued, is based upon the following:

> "***Under the plain language of NJAC 6:3-1.10(1)(15), there can be no doubt that irrespective of certification held, teachers assigned to teach in a departmentalized setting in grades 7 & 8, or junior high schools, necessarily acquire secondary seniority.***"
>
> (Petitioners' Brief, at pp. 2-3)

Petitioners further urge such conclusion by referring to the regulations relating to authorization of persons serving under elementary endorsement (N.J.A.C. 6:11-6.2). Petitioners contend as follows:

> "***Any doubt regarding the above conclusion is necessarily predicated upon a misconception of the nature of elementary certification. At the present time, the rules governing authorization to teach under elementary certification are precisely the same as they were prior to amendment of the seniority regulations. At no time have these certification regulations been amended. The elementary endorsement authorizes the holder thereof to teach all subjects, grades kindergarten through 8, (including reading), NJAC 6:11-6.2(a), Berl v. Bd. of Ed. of Borough of Oceanport, Monmouth County, 1984 SLD (decided January 19, 1984). The regulations also authorize the holder of an elementary certificate to teach all common branch subjects in grades 7-12, NJAC 6:11-6.2(b). The only limitation is that the holder of elementary certification can only devote half of his time to teaching certain subjects not here relevant (music, physical education, art, etc.) NJAC 6:11-6.2(b). Thus the suggestion that elementary certified teachers cannot properly teach in the secondary category is plainly wrong. In addition, on numerous occasions the Commissioner has recognized that elementary teachers are properly certified to teach all subjects in grades 7 & 8, and common branch subjects in grades 7-12. Irrespective of changes in the seniority regulations, these cases are perfectly valid in defining the scope of elementary certification. In particular, see Berl v.

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Bd. of Ed. of Oceanport, supra, Jarrett v. Bd. of Ed. of Borough of Watchung, 1981 SLD (decided October 5, 1981), Prysianzny v. Bd. of Ed. of the Borough of Sayreville, Middlesex County, 1980 SLD (decided [May] 5, 1980), see also (as to common branch subjects) Marianne Polaski v. Bd. of Ed. of Burlington Vo. Tech. School District, 1977 SLD [346]. All of these cases support the above conclusion concerning the scope of elementary certification.***" (Id., at pp. 4-5)

Petitioners further set forth the following rationale:

"***In addition to the above, the idea that teachers assigned to 7th & 8th grade departmentalized settings can only acquire seniority in the elementary rather than secondary category is educationally ludicrous. That reading of the regulations would lead to teachers who have never taught in self-contained settings (grades K-6, or 7 & 8 self-contained), bumping more experienced elementary teachers. That is precisely the opposite of what was intended by the new regulations. This would also penalize elementary teachers who could be bumped by less experienced teachers through no fault of their own. Clearly, this is not what the State Board had in mind when the seniority regulations were amended.

"Finally, the scope of seniority for such teachers must be determined. It is well established that a person acquires seniority in all subjects covered by the certificate which he is assigned under. Proebstle v. Bd. of Ed. of Burlington County Vocational Technical High School, Burlington County, 1982 SLD (decided October 29, 1982), Berl v. Oceanport, supra. The remaining issue under the new regulations concerns the extent of seniority obtained by elementary certified teachers assigned to teach in grades 7 & 8 departmentalized. Such teachers are eligible to teach common branch subjects grades 7-12, and, when employed in a secondary category, get seniority in all subjects covered by their certification, Polaski v. Burlington County Voc. Tech., supra.. See also Proebstle v. Bd. of Ed. of Burlington County Vo Tech, supra.. Accordingly, elementary teachers who have been assigned to grades 7 & 8 departmentalized, have seniority in all subjects in grades 7 & 8, as well as common branch subjects in grades 7-12.***" (Id., at pp. 6-7)

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ISSUE NO. 2

Petitioners set forth the proposition that teachers who serve simultaneously in two categories obtain a full year's seniority in both categories. Petitioners point out that the seniority regulations in effect prior to September 1, 1983 provided that persons serving in two categories simultaneously got seniority only in the category in which they spent the majority of their time. If the time were equal in each category, the individual was permitted to select the category in which seniority would accrue. Petitioners point out, however, that effective September 1, 1983 the regulations provide:

> "Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed. (Emphasis supplied.) (N.J.A.C. 6:3-1.10(f))

Such modification of language, in petitioners' view, makes it clear that the State Board intended no limitation on the seniority of persons serving simultaneously in two or more categories. The first sentence of said portion of the regulations, in petitioners' view, "***was intended to assure that not more than one year's seniority in any category was acquired in any one year.***" (Petitioners' Brief, at p. 9)

Any other construction, contend petitioners, would lead to an absurd and unfair result as illustrated below:

> "***[A] teaching staff member who had been employed six years, assigned half time as a guidance counselor and half time as a social studies teacher *** would have three years seniority in each category. Suppose than (sic) a RIF occurred in each category, there were no non-tenured teachers employed, but one tenured person employed in each category, with three years and one day service (the minimum for tenure). Both of those persons, although employed only three years and one day, could bump the six year employee, who would have been employed nearly twice as long in a full-time capacity. Similarly, the same individual could be employed nine years, serving one-third as a guidance counselor, one-third as a social studies teacher and one-third as an LDTC. In the same situation, that person could be bumped in each category by a person who had been employed three

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> years and one day, just bearly (sic) one-third of the time that person had been employed. This in effect would result in a person having served many years and acquired tenure, but, having only a few years seniority in any category. This was not the intent of the new regulations, and is inconsistent with the seniority regulations generally. See for example NJAC 6:3-1.10(h), which provides that when a person changes categories, he continues to accrue seniority in all categories in which he previously held employment, and NJAC 6:3-1.10(1)(15), which prevents a person from acquiring seniority under a subject endorsement until he has served under such endorsement, but counts all subsequent service, even under new endorsements, towards seniority under those endorsements under which he previously has served. Surely a person serving in two categories simultaneously is entitled to no less than a person no longer serving in a category.***" (Id., at pp. 10-11)

ISSUE NO. 3

Petitioners contend that persons employed under special subject field endorsements or educational services certificates once assigned to either the elementary or secondary category and then transferred to the other category obtain district-wide seniority for their entire period of service within the district. Petitioners' position is predicated upon the following reasons:

> "***First, the authority of such persons to teach on a K-12 basis has not been affected in any manner by the amendment to the seniority regulations. The certification regulations remain the same. Second, the language of the regulations themselves reveal that their intent was to permit all prior service to be credited on a district-wide basis, once a teacher has served both in the elementary and secondary grades. The positions in question remain as distinct categories for seniority purposes, NJAC 6:3-1.10(1)(17). However, under the current regulations, persons in these categories can be assigned to the elementary level, in which case the regulations appear to state that seniority is only acquired at the elementary level, or conversely, such persons may be assigned only to the secondary grades, in which case the regulations purport to say that seniority is only accrued at the secondary level, NJAC 6:3-1.10(1)(16). However, the regulations go on to provide that persons who have served on

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a district-wide basis under such endorsements or certificates acquire seniority on a district-wide basis. The regulations include no limitation in terms of the amount of such seniority, i.e. whether it is for all of the service in the district. However, it is obvious that such seniority credit is for all service in the district. The difference between serving in different grades within one specific certificate is, as compared to assignment under different certificates, relatively insignificant. When the seniority regulations themselves are reviewed, it is clear that a change to a different category (example physical education teacher to guidance counselor), results in the person only acquiring seniority as a guidance counselor from the date he begins service as a guidance counselor, rather than for all of his time in the district, NJAC 6:3-1.10(h). This makes sense, since the service is in a totally different position, under a different certificate, classified differently for tenure purposes, NJSA 18A:28-5. The same is true under the current seniority regulations for teachers holding dual certifications or endorsements in the secondary category. Contrary to the prior regulations, when a teacher holds English and Social Studies certification, and is assigned to teach Social Studies, such teacher cannot acquire English seniority until actually assigned to teach English, NJAC 6:3-1.10(1)(15). All of the teacher's service in the district does not count toward his employment serving under his second certificate. This makes some sense, since the teacher has never served under the second certificate. However, those portions of NJAC 6:3-1.10(1)(15) & (16) concerning persons serving under educational service certificates or special subject field endorsements include no such language. Nothing in the regulations limit their accumulation of seniority for all of the service in the district, once they have been assigned on a district-wide basis. This difference in language demonstrates that no such limitation was intended.

"If there is any doubt, this conclusion is required by the Appellate Division's recent decision in Mulhearn v. Bd. of Ed. of Sterling Reg. High School District, Camden County, [Docket No. A-5123-81T2 N.J. Superior Court, Appellate Division, October 31, 1983]. In Mulhearn, the Court reversed a State Board decision which had affirmed the Commissioner's decision, which had

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held that persons with multiple secondary certification only acquired seniority in the fields they were certified in at the time they commenced employment, and that seniority could not be gained in areas of later obtained certification until actual assignment to such areas and only from that point forward. In reaching that decision, the Court rejected the Commissioner's analysis in Morer v. Bd. of Ed. of Teaneck, 1976 SLD 963, and Dedrick v. Bd. of Ed. of Hammonton, 1977 SLD 1043. The Court relied upon the 'plain language' of NJAC 6:3-1.10(k)(27). In effect, the Court held that since that seniority regulation did not limit acquisition of seniority in a secondary subject based upon the date certification was obtained, no such limitation could be imposed. Similarly, unlike other portions of the seniority regulations, those portions of NJAC 6:3-1.10(1)(15) & (16) do not limit the extent of a teaching staff member's district-wide seniority once assigned on a district-wide basis. If such a distinction was intended, it would have been included. Furthermore, the duties performed by a person holding a specific certificate as contrasted between the elementary and secondary level, are substantially similar, so that any distinction dividing the seniority entitlement among one certificate is tenuous at best. In any event, the regulation in no way limits such seniority, and as Mulhearn makes clear, absent a specific limitation, no such limit can be imposed.***" (Id., at pp. 13-16)

CONCLUSION

The Commissioner has carefully reviewed the brief submitted in this matter, as well as the specific language of the regulations and the position paper issued by the Department of Education setting forth the clear intent of both the Commissioner and the State Board of Education at the time of the adoption of the aforesaid regulations. (See Revision of Seniority Regulations: A Position Statement of the New Jersey State Department of Education, June 1983.)

Based upon the foregoing review, the Commissioner renders the following Declaratory Judgment relative to each of the issues raised by the parties.

ISSUE NO. 1

Petitioners place their emphasis upon the exact language of the revised definition as of September 1, 1983 between the elementary and secondary categories as a basis for concluding that

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teachers holding elementary certificates and assigned to teach in departmentally-organized grades 7 and 8 obtain seniority in the secondary category in any subject in grades 7 and 8 as well as common branch subjects in grades 7-12. The Commissioner views such interpretation as inconsistent with both the intent of the State Board as it applies to the manner in which service prior to September 1, 1983 in the elementary category would accrue for seniority purposes and also with the basic thrust of the revision of the seniority regulations which limits seniority entitlement to the subject or the category in which an individual has actually served. Consistent with the above-cited thrust of the revised regulations, it cannot be argued that a person with an elementary endorsement teaching social studies in a departmentally-organized grade 7 or 8 would by virtue of said endorsement have seniority claim to a science position or a math position in grade 7 or 8, as well as to any position as a remedial teacher of common branch subjects anywhere within the secondary category. Since the revised seniority regulations make it absolutely clear that a person with two or more subject area endorsements receives seniority only in the subject area actually taught, it would be clearly inappropriate to argue that an elementary-endorsed person has a seniority claim anywhere within the scope of his or her endorsement if he or she had not actually taught that specific subject or in that category.

Given the above-cited circumstance, if one were to accept petitioners' reliance solely upon the exact language of the revised definition of the secondary category, the sole seniority entitlement of the teacher of social studies holding an elementary endorsement who served ten years as a teacher of a departmentally-organized seventh grade would be as a teacher of social studies in grades 7 and 8 since the elementary endorsement would not permit him or her to teach that subject above grade 8, nor would that individual by virtue of such narrow interpretation be permitted to assert a claim to a K-6 self-contained class. At no time did the new regulations intend to suggest that the years of elementary seniority which these teachers had earned under the old regulations were wiped out or somehow converted to secondary seniority rights. The clear intent of the State Board was to permit said elementary-endorsed persons to continue to accrue seniority in the elementary category.

In reaching such a conclusion, the State Board recognized that as a matter of equity a redefinition of all categories had to take into consideration the years of service and experience both prior to and subsequent to the implementation of the regulations. While recognizing that an individual who had taught exclusively in a departmentally-organized grade 7 under an elementary endorsement did not fully meet the criteria of having had experience in a self-contained classroom situation, the State Board had to take cognizance, as a matter of fundamental fairness, that the service rendered in a departmentally-organized grade 7 or 8 was, prior to September 1, 1983, actually in the elementary category as then

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defined and that these teachers were actually earning experience within their elementary endorsement and in the elementary category as then defined.

For the above-cited reasons, the Department has maintained that those elementary-endorsed teachers teaching specific subjects in departmentally-organized grades 7 and 8 whose performance was satisfactory could continue to teach in the departmental setting and could count, for seniority purposes, all time served prior to September 1, 1983 in the elementary category. Additionally, the Commissioner finds that such persons are also by virtue of the revised definition of the secondary category entitled to accrue seniority in the departmentally-organized grades 7 and 8 limited to the specific subject actually taught. (N.J.A.C. 6:3-1.10(l)(15)) Pursuant to the "tacking" provision of the regulations, N.J.A.C. 6:3-1.10(h), all periods of employment in the secondary category subsequent to September 1, 1983 would be:

> "***credited toward his or her seniority in any or all categories in which he or she previously held employment."

In the Commissioner's view, the above-cited interpretation provides the equitable result intended by the State Board for a limited number of teachers who through no fault of their own were caught in the changed definition of categories.

ISSUE NO. 2

Based upon a careful review of petitioners' arguments, as well as the clear intent of the regulations, petitioners' conclusions as to the seniority entitlement of persons serving simultaneously in two categories are entirely supported by the language of the regulations themselves and by the fundamental principle by which both the Commissioner and the State Board were guided in their adoption of revised seniority regulations. That significant principle which was involved in the aforesaid revision was that seniority would be based solely upon actual experience in a subject area or category and would no longer be awarded upon the mere possession of a certificate endorsement.

Petitioners' contention is further buttressed by the conscious deletion of the language in the prior N.J.A.C. 6:3-1.10(l) which limited seniority entitlements to the category in which the individual spent the greatest portion of his or her time.

Further, it may be noted that the State Board provided additional proof of its intent to provide full seniority in all categories or subject area endorsements served when it further amended the regulations at its November 1983 meeting to strike a sentence concerning the seniority rights of teaching principals because that sentence was inconsistent with the intent of the full paragraph. The sentence removed was as follows:

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"The seniority rights of principals who teach shall be counted in the appropriate principal's category."

Such further deletion makes absolutely clear the State Board's intent that principals who teach should receive seniority both as principals and teachers.

The Commissioner further adopts petitioners' reasoning as it relates to the acquisition of a full year's seniority in each category or subject area endorsement taught, provided such teacher was a full-time teacher. The Commissioner agrees with petitioners' reasoning that the limitation of "[n]ot more than one year of employment may be counted toward seniority in any one academic or calendar year" was meant to assure that no more than one year's seniority in any category was acquired in any one year. (Petitioners' Brief, at p. 8) Any other conclusion would result in the actual punishment of versatility and flexibility. The teacher, as illustrated by petitioners, who actually taught in more than one subject field or category would be disadvantaged by virtue of such versatility. Further, pro-ration of seniority under such circumstances would provide opportunities for abuse wherein seniority could be manipulated to advantage or disadvantage of one individual as opposed to another.

ISSUE NO. 3

Upon examination of petitioners' arguments as they relate to the seniority entitlement of individuals serving under special subject field endorsements or educational services certificates, the Commissioner rejects petitioners' contention that such individuals once transferred from elementary to secondary category would be permitted to count all time served on a district-wide basis and thus have "bumping rights" over any less senior person with the same endorsement regardless of category. The Commissioner finds such position to be inconsistent with the language of the regulations which specifically limits the acquisition of seniority entitlement to the category in which the person has actually served pursuant to the special subject field or educational services endorsement. Of course, pursuant to the "tack on" provision embodied in N.J.A.C. 6:3-1.10(h), an art teacher who served five years in the elementary category and then by virtue of transfer served five additional years as an art teacher in the secondary category would have acquired ten years of seniority in the elementary category and five years of seniority in the secondary category. Seniority on a district-wide basis for persons serving under special subject field or educational services endorsements would be limited to those persons whose actual duties were assigned on a district-wide basis, such as a child psychologist who as a member of a child study team provided services to children on a K-12 basis.

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Petitioners' arguments relative to scope of certificate are in the Commissioner's view irrelevant since the guiding principle of the revised seniority regulations is actual experience in the subject field or category. The Commissioner's unquestioned intent as subsequently embodied in the regulations adopted by the State Board of Education is set forth in the "Overview" to the Revision of Seniority Regulations: A Position Statement of the New Jersey State Department of Education as follows:

> "3. The Commissioner's proposal also applies the distinction between 'secondary' and 'elementary' categories to special subject teachers like art, music and physical education, as well as to non-instructional service personnel like school nurses and librarians. Thus, a special subject teacher or the holder of an educational services certificate hired by a local board for service in the elementary schools will not acquire seniority at the secondary level (even though his or her certificate endorsement is for grades K-12) unless he or she teaches at the secondary level.
>
> "Existing regulations make no distinction in this regard. Thus local districts are frequently required to retain an individual at the secondary level [whom] they had specifically hired years before for service at the elementary level. This can result in the replacing of a teacher who might be better suited by way of experience and expertise for a particular level of instruction."
> (at p. 2)

The Commissioner similarly rejects petitioners' reliance on Mulhearn, supra. Unlike the circumstances cited in Mulhearn, the State Board of Education when adopting N.J.A.C. 6:3-1.10(1) (15) and (16) did specifically and deliberately limit the scope of seniority entitlement of persons serving under special subject field or educational services endorsement to the category actually served. Further, by its inclusion of the language recognizing the rights to seniority on a district-wide basis for those who actually serve in such capacity, the State Board was in effect creating a district-wide category in addition to the already existing elementary and secondary categories.

COMMISSIONER OF EDUCATION

AUGUST 6, 1984

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 6874-83
AGENCY DKT. NO. 249-7/83A

MARY R. WALTON,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF SHREWSBURY,
Respondent.

APPEARANCES:

Stephen B. Hunter, Esq., for the petitioner (Klausner & Hunter, attorneys)

Bunce C. Atkinson, Esq., for the respondent (Atkinson & DeBartolo, attorneys)

Record Closed: May 30, 1984 Decided: June 20, 1984

BEFORE AUGUST E. THOMAS, ALJ:

Petitioner appealed the determination of the Board of Education of the Borough of Shrewsbury (Board) which reduced her teacher/librarian position from full-time to .675 percent time. Petitioner asserts that she has tenure and seniority in her position and because of her seniority status is entitled to her full-time, or another full-time, position.

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. After a prehearing conference on November 15, 1983, the litigants agreed that the matter could be disposed

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of by Summary Decision. Accordingly, the salient facts are set forth in the litigants' statements of fact. Petitioner filed a letter brief, with exhibits, in support of the motion for Summary Decision on February 9, 1984. On March 20, 1984, respondent filed a letter brief in support of its cross motion for Summary Decision and in opposition to petitioner's motion for Summary Decision. Thereafter, the matter was held in abeyance pending settlement discussions. On May 25, 1984, notification was received by the undersigned stating that settlement was no longer possible.

Finding that the salient facts are not in dispute, I **CONCLUDE** that the matter is now ripe for Summary Decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner is a tenured employee. At the time of her employment, which commenced in September 1974, it is conceded that she held an instructional certificate in the specific categories of teacher/librarian (now education media specialist) and elementary school teacher.

In January 1974, petitioner applied for the position of librarian (See, affidavit, Respondent's Exhibit (RE)-A). The minutes of the Board, dated May 14, 1974, show that petitioner was hired as a librarian. All of her contracts for the period September 1974 through the present show that she was hired as a librarian (RE-C and D-1-3 and F-1 and F-2). The Board asserts that petitioner has never been assigned to duties under the category of elementary school teacher. On May 10, 1983, the Superintendent provided all teachers, including petitioner, with an Experience Form. The form delivered to petitioner shows that her experience was as the media specialist and librarian. The notice advised that if there were any additions or corrections that petitioner should advise the Superintendent (See, RE-H-1 and H-2).

Petitioner has also indicated on official records maintained by the Board that her only assignment has been as a librarian and has never indicated that she was assigned as an elementary school teacher (RE-I). RE-I indicates that petitioner has reported each and every year that her assignment has been in the library or media center. At no time has petitioner indicated that she has performed in any other subject matter.

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The petitioner has asserted a right to teach the subjects of mathematics and/or English in the seventh and eighth grades. These subjects have been departmentalized by the Board, which has required teachers to hold subject matter certification or to have teaching experience in these subjects. At the present time the positions are held by two non-tenured teachers, K.Y. and C.R., who have the subject matter endorsements for the English and mathematics positions in the seventh and eighth grades (RE- J-1 and J-2 and K-1 and K-2). Petitioner also contends that she is entitled to teach in a part-time library position and as a part-time English or mathematics teacher in the seventh and eighth grades. The affidavit of the Superintendent indicates that such a system would disrupt the school schedule and would not be in the best interest of the students.

Petitioner contends that during the course of employment with the Board, she has not only fulfilled the duties required of a librarian and/or associate media specialist in the elementary school district concerning the school library itself, but, also, has had responsibilities involving the area of language arts, with specific emphasis on creative writing and original poetry (Petitioner's Exhibit (PE)-A). In addition, petitioner asserts that she was one of two teachers responsible during the 1977-78 school year for the drafting of the K-8 language arts curriculum guide (PE-B). Petitioner asserts also that she has been assigned duties relating to students within the school district's gifted and talented program in the area of language arts.

Petitioner also claims that during the course of her employment in the school district, she has been involved in the teaching of: (1) specific kindergarten skills regarding shape and color recognition and the learning of the alphabet; (2) geography and history of different countries, along with their customs, to children in grades K-8; (3) classroom units to grades K-8 regarding, among other topics, the American Indian and the history of books; and (4) computers by working with students both during school hours and after school hours; this has specific applicability within all the common branch subjects offered within the elementary school context. In addition, petitioner asserts that she has been involved in numerous co-curricular and extracurricular assignments as a teacher/librarian within the district.

In a letter dated April 28, 1983, petitioner was advised by the Superintendent that the Board had voted on April 26, 1983, to reduce the position of full-time librarian within the district to .675 percent of a full-time position with an attendant loss of salary

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for the 1983-84 school year. Despite efforts on the part of petitioner to have the Board rescind its decision to reduce her full-time employment status, the Board on June 28, 1983, reaffirmed its intention to eliminate the full-time librarian position and create a .675 position in its place. The Board maintains that any instructional duties performed by petitioner were subsumed within her position as a school librarian within the district.

It is uncontroverted that the Board retained several full-time, non-tenured elementary school teachers for the 1983-84 school year while it reduced petitioner's employment status to a two-thirds' time position within the district. Petitioner asserts that her full-time employment could easily have been accomplished for the 1983-84 school year without any realignment of class schedules and without impairment of the Board's flexibility to organize the school's programs.

At issue is whether the action of the Board in failing to reemploy petitioner within the district as a full-time teaching staff member for the 1983-84 school year was arbitrary, capricious and unreasonable and in violation of her tenure rights pursuant to N.J.S.A. 18A:28-5 and her seniority rights under N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10.

Petitioner demands judgment as follows: (a) reinstatement in a full-time position within the district for the 1983-84 school year; (b) full back pay and all other rights, benefits, privileges, and emoluments due her as if she were retained in a full-time position within the district for the 1983-84 school year; and (c) such other and further relief as the Commissioner may deem appropriate.

Petitioner contends that she is entitled to judgment in the instant matter as a matter of law and that there are no disputed factual issues in the instant proceeding which would warrant an evidentiary hearing.

For the purpose of this decision it is assumed that the Board is correct in its contention that petitioner did not perform classroom duties in the category of elementary school teacher. Petitioner asserts that she is nevertheless entitled to judgment as a matter of law.

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CONCLUSIONS OF LAW

N.J.S.A. 18A:28-9 et seq. provides that the Commissioner is authorized to promulgate rules and regulations governing seniority and tenure. Accordingly, N.J.A.C. 6:3-1.10, in effect during the 1982-83 school year, describes the standards for determining teacher seniority. It provides that "seniority . . . shall be determined according to the number of academic or calendar years of employment . . . in the school district in specific categories as hereinafter provided." N.J.A.C. 6:3-1.10(b).

The regulations also state that "any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate . . ." N.J.A.C. 6:3-1.10 (K)(27). The regulations make no similar provision for holders of elementary certificates, but an assumption that elementary teachers do not need protection from the effects of departmental instruction is implicit in the description of "elementary" and "secondary" education. See, N.J.A.C. 6:3-1.10(k) (27) and (28).

This language has been interpreted several ways. In Polaski v. Bd. of Ed. of the Burlington Cty. Voc. Tech. High School, Burlington Cty., 1977 S.L.D. 346 and Miller v. Bd. of Ed. of the Tp. of Mendham, Morris Cty., OAL DKT. EDU 5029-81, decided, State Bd. of Ed. (February 1, 1983), cases cited by the petitioner, teachers functioning under special certificates which required a standard teacher's certificate were awarded tenure in all of the areas in which they were qualified. The reasoning behind these opinions was that although the Board had not asked these individuals to teach general classes, they could have been asked to do so at any time. Further, they concluded that because the instructional certificate is a prerequisite to a teacher/librarian certificate, these functions were "inherently inseparable." This reasoning was approved in an unpublished decision of the Appellate Division, Mulhearn v. Bd. of Ed. of the Sterling Reg. High School District (N.J. App. Div., October 31, 1983, A-5123-81T2) (unreported). (Although appellant had taught only French, her seniority entitled her to a full-time position as an English teacher because of her certification.)

Respondent cites several cases in which the regulatory language was interpreted differently. In Berkhout v. Bd. of Ed. of the Borough of Roseland, 1978 S.L.D. 534 and Dullea v. Bd. of Ed. of the Borough of Northvale, 1978 S.L.D. 638, teachers with specialized certificates sought seniority under their more general certificates. In both cases, the Commissioner reasoned that the regulations gave teachers seniority for years

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of employment rather than certification in specific categories and that, consequently, teachers accrued seniority rights only in those areas in which they were actually employed.

Although each of the cases cited is distinguishable on certain levels, they represent inconsistent conclusions. Given this dichotomy, I **CONCLUDE** that the Polaski line of cases should govern as the better reasoned. When a teacher's special certification requires the capacity to do certain things, they are subsumed as part of the duties in the specialized field. Because the capacity to teach is an element of performing as a teacher/librarian, a librarian may be considered to have "used" her teaching certificate during her entire tenure as librarian. This accords with Judge Errickson's conclusion in Miller that, whether asked to function as an ordinary elementary teacher or not, a teacher/librarian is available for such work under his or her contract.

Moreover, the seniority regulations speak in terms of "employment" rather than "experience." A teacher may be employed in all the capacities required for his or her job without actually functioning in each capacity. Finally, the regulations have been changed to reflect more accurately the Commissioner's perception that seniority should be granted on the basis of experience rather than certification. This change indicates that under the prior regulations, those applicable to the matter at hand, an individual could acquire seniority through certification and employment rather than through actual experience.

As the Appellate Division stated in Mulhearn, the plain language of N.J.A.C. 6:3-1.1-(k)(27) entitles a certified teacher to seniority in areas in which he or she has not taught. The regulatory section on elementary education does not contain similar language. This distinction is not fatal, however, because it is likely that the drafters of the regulations wished to accomplish roughly similar goals for elementary and secondary school teachers.

I **CONCLUDE** from the above that the appropriate categories in which petitioner accrued seniority are elementary and teacher/librarian; both are endorsements on her instructional certificate.

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In Polaski, the Commissioner went on to conclude as follows:

> It is noticed that by virtue of petitioner being in possession of a teacher/librarian certificate . . . she also had to possess a regular teaching certificate at all times material herein. This being so, petitioner is eligible for assignment to any position in the employ of the Board teaching the common branch subjects of reading, writing, arithmetic, and spelling. N.J.A.C. 6:11-6.2(b).

Accordingly, petitioner holds seniority as an elementary teacher and is entitled to teach in any of the common branch subjects notwithstanding the Board's desire to have teachers certified in subject areas in those positions.

None of the cases cited by the Board can alter this conclusion; consequently, its holdings, if contrary to this decision, are without merit as applied to the facts of this case.

The Board's argument against Summary Decision need not be addressed because it was assumed for the purposes of this decision that the Board is correct in that petitioner was never assigned any classroom teaching duties.

For all of the above reasons the petitioner's motion for Summary Decision is granted.

The Board is directed to: 1) reinstate petitioner in a full-time position commensurate with her certification and, 2) award the difference between full back pay and all other emoluments due to petitioner that she would have received had she been employed full-time for the 1983-84 school year.

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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.

20 June 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

June 21, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 25 1984
DATE

Ronald L. Parker/sho
OFFICE OF ADMINISTRATIVE LAW

ks

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DOCUMENTS IN EVIDENCE

1. Exhibits A, B, C, D, attached to petitioner's brief

2. Exhibits A, B, C, D-1, D-2, D-3, E-1, E-2, E-3, E-4, E-5, F-1, F-2, G, H-1, H-2, I, J-1, J-2, K-1, K-2, L, attached to respondent's brief

3. Chief School Administrator's Affidavit in support of Cross Motion for Summary Judgment in favor of the Board of Education and in Opposition to petitioner's Motion for Summary Judgment.

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MARY R. WALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision 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 determination of seniority rights in this case is governed by N.J.A.C. 6:3-1.10(b) which specifies that accrual of seniority is determined within the specific categories delineated in N.J.A.C. 6:3-1.10(k), now 6:3-1.10(l). More specifically, petitioner's employment as a librarian falls under N.J.A.C. 6:3-1.10(k)(30), now 6:3-1.10(l)17, "[a]dditional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification***." Although Lichtman v. Bd. of Ed. of Ridgewood, 93 N.J. 362 (1983) and this matter are distinguishable, there is a similarity in that both concern seniority governed by N.J.A.C. 6:3-1.10(k)(30), the employment in both being that of teacher-librarian/educational media specialist (educational services certification). Lichtman is instructive insofar as the Supreme Court held that Lichtman's seniority depended upon the amount of service accumulated under the particular category of her teacher-librarian certification. Lichtman also possessed other instructional certification but the Court did not acknowledge accrual of seniority in any category other than N.J.A.C. 6:3-1.10(k)(30).

N.J.A.C. 6:3-1.10(k)(27), in effect prior to September 1, 1983, was the only category which permitted accrual of seniority for all subjects or fields covered by an individual's certificate. To interpret the seniority regulations in any other manner would constitute an inappropriate reconstruction of the regulations, the language of which is quite clear.

The Commissioner determines that Mulhearn, supra, is inapplicable to this matter because it dealt with the secondary category, the only category wherein an individual prior to September 1, 1983 was able to accrue seniority based on certificates held, regardless of whether or not one had actually served in all subjects covered. Miller, supra, is not deemed applicable either because the

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petitioner in that case had actually served in the secondary category for a number of years under her English certificate; at no time did the issue in Miller deal with seniority for an endorsement not served.

Polaski, supra, is not seen as applicable because it is inconsistent with subsequent case law which specifically dealt with seniority rights accrued pursuant to N.J.A.C. 6:3-1.10(k)(30) as herein. Such cases include the Supreme Court decision in Lichtman, supra; Berkhout, supra; Dullea, supra; Ebel v. Bd. of Ed. of South Amboy, 1980 S.L.D. 158, aff'd State Board 171; Greiner v. Bd. of Ed. of Shamong, decided April 7, 1983; Wendelken v. Bd. of Ed. of Demarest, decided May 3, 1984. Each of these cases, with the exception of Dullea, dealt with educational services certificates which have a regular instructional certificate as a prerequisite. In none of these cases did the Commissioner determine that mere possession of a prerequisite certificate entitles an individual to seniority under the prerequisite.

Consequently, it is the determination of the Commissioner that petitioner accrued seniority pursuant to N.J.A.C. 6:3-1.10(k)(30), having served in this category for the duration of her employment with the Shrewsbury Board of Education. Therefore, the Commissioner reverses the recommended decision of the Office of Administrative Law granting summary judgment to petitioner. The Petition of Appeal is, accordingly, dismissed with prejudice.

The Commissioner finds no merit in petitioner's request that, in the event the recommendation in the initial decision is rejected, the matter be remanded to the Office of Administrative Law for determination of whether she performed duties under her elementary certificate. Even assuming arguendo that she had been assigned and fulfilled duties which would fall under the domain of her elementary certificate, seniority would have accrued under the librarian position according to N.J.A.C. 6:3-1.10(e) in effect prior to September 1, 1983 which reads:

> "***Whenever a person shall hold employment simultaneously in two or more categories, seniority shall be counted in the category in which he spends the greatest percentage of his time. If the percentage of time spent in two or more categories shall be equal, the person shall be permitted to elect in which category his seniority shall be counted.***"

Even if petitioner did in fact fulfill responsibilities under her elementary certificate, the only way that she could lay claim to seniority in that category would be (1) if she spent the greatest percentage of time fulfilling such duties or (2) if she had elected the elementary category over the educational media specialist category as a result of equal time in both categories.

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Nowhere in the record does petitioner put forth a legal argument either that (1) she spent the greatest percentage of her time fulfilling elementary teacher duties or (2) that she in any way disclaims her seniority as an educational media specialist/librarian under the provisions of N.J.A.C. 6:3-1.10(e). Consequently, the Commissioner finds no basis in the record upon which to remand this matter for further determination.

COMMISSIONER OF EDUCATION

AUGUST 6, 1984

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 6158-83
AGENCY DKT. NO. 260-7/83A

CHERRY HILL SUPPORTIVE STAFF ASSOCIATION and CHERRY HILL ASSOCIATED SERVICE PERSONNEL,
Petitioners,
v.
CHERRY HILL TOWNSHIP BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Joel Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

Kenneth D. Roth, Esq., for respondent (Davis & Reberkenny, attorneys)

Record Closed: May 17, 1984 Decided: July 2, 1984

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

The issue to be resolved in this case is whether public school janitors, custodians, maintenance personnel, and/or security personnel may, as part of their assigned duties, be required to engage in hands-on searches of school buildings and grounds for explosive devices regardless of whether such personnel were afforded prior training in the nature and recognition of explosives, and proper procedures to employ during a search.

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PROCEDURAL HISTORY

The issue was originally presented by the Cherry Hill Supportive Staff Association, the statutory[1] majority representative of a negotiating unit which includes all custodians, janitors, stock clerks, grounds keepers, warehouse persons, maintenance persons, utility persons and ground crew personnel in the Board's employ and the Cherry Hill Associated Service Personnel, the statutory majority representative of a negotiating unit which includes, inter alia, all security personnel employed by the Board,[2] to the Superior Court of New Jersey, Chancery Division, by way of a Four Count Verified Complaint, accompanied by an Order to Show Cause and Temporary Restraining Order by which immediate relief was sought on behalf of janitors, custodians, maintenance personnel, and security personnel who were allegedly assigned to search school buildings and grounds for explosive devices. It was alleged that the procedure required of such persons to search for explosive devices was equivalent to the disposal of such devices and that the requirement imposed upon them to perform such duties was beyond the scope of their job descriptions for such positions. Petitioners, on behalf of the persons occupying such positions, contended that because the job descriptions were an implied part of the individual contracts of employment between each person and the Board, the Board violated those individual contracts of employment by imposing such duties upon persons occupying the named positions. Though the temporary restraint was denied, the Honorable Neil F. Deighan, Jr., J.S.C., following a hearing May 12, 1981 on the show cause order, entered an Order on May 14, 1981 by which the Board was enjoined from requiring persons in the named positions to participate in any bomb search procedure, except for inspections which are totally visual in nature, until such time as the persons received specific instruction and training from qualified personnel in techniques appropriate for carrying out complete bomb searches.

Petitioner appealed to the Superior Court, Appellate Division, from so much of the order of Judge Deighan which allowed the Board to require its employees to conduct physical searches for explosive devices after training, while the Board appealed the whole

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1 N.J.S.A. 34:13A-1, et seq.

2 Since the matter was originally filed, the Board no longer employs security personnel or "special officers" pursuant to N.J.S.A. 18A:17-42 et seq. Consequently, no justiciable issue is presented in regard to security personnel.

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of the Order entered. On June 7, 1983, the Appellate Division, in a per curiam decision, vacated the Order and, without expressing its opinion as to the substance of the Order entered, transferred the cause of action to the Commissioner of Education, on jurisdictional grounds, for consideration and determination.

The matter was refiled before the Commissioner of Education who, in turn, transferred the action on August 16, 1983 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on October 7, 1983 before the late Honorable Eric G. Errickson, ALJ whereat the precise issue for adjudication was declared to be:

> Whether petitioners, within existing laws of this state, may be required to engage in hands-on searches for [and dispose of] explosive devices, with or without training.

It is noted that that part of the issue in brackets - "and dispose of" - was subsequently deleted by stipulation of counsel.[3] It was further agreed at the conference conducted by Judge Errickson that the issue was to be decided by cross-motion for summary decision on the record which then and now consists of the pleadings, affidavits, and other documents as set forth in the attached list of exhibits and incorporated herein as if set forth in full. Finally, counsel to the parties were granted leave by Judge Errickson to file briefs in support of their respective positions on the above stated issue.

Upon Judge Errickson's death, the matter was assigned this administrative law judge. Thereafter, counsel to the parties stated their position that the matter should proceed as agreed at the prehearing conference before Judge Errickson.

The record in the matter closed May 17, 1984 upon receipt of the current negotiated agreement between the Board and the Cherry Hill Supportive Staff Association as a joint exhibit to be made part of the record.

This concludes a recitation of the procedural history of the matter.

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[3] Letter dated November 16, 1983 from counsel to petitioners; Judge Errickson's letter dated November 21, 1983; stipulation filed by counsel to the parties, January 23, 1984.

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FACTS

The record discloses the following uncontroverted facts. Cherry Hill school district is comprised of two senior high school buildings, three junior high school buildings, and 12 elementary school buildings. There are approximately 11,500 pupils in attendance, and the Board employs approximately 1,300 full-time and part-time persons. The school buildings are located throughout 25 square miles of Cherry Hill Township. Around 1972, the then-superintendent of schools promulgated what is called Administrative Procedure No. 2 which is entitled "Bomb Threats — Procedure." The procedure, which is essentially a directive to be followed upon receipt of bomb threats by any school in the Township, contains five categories. The first category delineates the procedure to be followed by the person who receives the telephone bomb threat; the second category identifies the search procedures to be followed by specific employees; the third category advises of action to take when a suspicious device is discovered; the fourth category assigns responsibility to the principal to secure emergency squads and other medical help, if necessary; and, the fifth category assigns duties to orient the total staff to the bomb threat procedure. Note that the whole of the "Administrative Procedure" is the superintendent's policy; it is not "policy" formally adopted by the Board.[4]

Between 1972 through April 1981, the Administrative Procedure was followed. Category two of the procedure, entitled search procedures, and which is contested here, is reproduced here in full:

> Custodians, security and maintenance personnel will be given specific assignments to search:
>
> 1. Corridors
> 2. Receptacles
> 3. Closets
> 4. Lavatories
> 5. Outside of the building
>
> a. Receptacles

---

[4] The parties refer to the administrative policy as if it were adopted by the Board as Board policy. However, the superintendent is clear in his testimony that the administrative policy is not Board policy. (Tr. 52)

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b. Shrubbery
(specific assignments will be provided by the operational supervisor.)

Professional personnel who are unassigned at the time that the bomb threat is received will be requested to remain in the faculty lounges, all-purpose room, or other areas where they may be at the time of the emergency until they are notified to provide assistance via the school intercommunication system.

In practical terms, when a bomb threat was received at one of the Board's schools, the recipient of the call would follow the procedure outlined in category one. That is, the recipient would memorialize whether the caller had an adult voice or a child's voice; whether the caller related specific information in respect of the location of the purported bomb; whether the recipient could detect a note of urgency or other unusual characteristic of the caller's voice; and, whether the recipient developed the sense that the threat was real. Next, the superintendent, in consultation with the recipient of the call and other administrators, would determine whether there was a likelihood that the threat was real. The superintendent operated upon the premise that if there was an explosive device placed in the building that it would be most likely placed in a corridor, hallway or other common area easily accessible to an outsider. The superintendent explained that because most, if not all, bomb threats are hoaxes, immediate evacuation of pupils and personnel from the school building upon receipt of each such bomb threat would result in a total disruption of the education process by encouraging additional threats. Accordingly, category two of the procedure would be implemented. That is, janitors conducted searches as outlined above. It is noted that the superintendent registered surprise at the hearing before Judge Deighan that the janitors were in fact required to conduct hands-on searches of lockers, waste baskets, and garbage cans. (T. 58). Following such a search, if a suspicious device were to be located, the superintendent would then order an evacuation of the school building if the evacuation could be reasonably carried out without adding to the potential danger of injury to pupils and personnel.

Prior to April 1981, at least 100 bomb threats were telephoned to various schools in the Cherry Hill district and the procedure set forth above was carried out following each such bomb threat. (Tr. 54) Each such threat received prior to April 1981 was a hoax.

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On April 13, 1981, a live explosive device was discovered at Cherry Hill High School East by pupils and a teacher who happened to be walking through the corridor and noticed smoke coming from a vacant locker. (Tr. 65) The Cherry Hill police were notified who, in turn, secured the services of a Philadelphia bomb squad to remove the device. Though this device was not discovered by custodians, security or maintenance personnel following the search procedures set forth above, it was that discovery which caused the custodians, security, and maintenance personnel to become acutely aware of the risks they were taking by engaging in hand-off searches for explosive devices as required by the search procedures outlined above.

Sharon Meng, presently employed by the Board as a janitor for four years, testified before Judge Dieghan that while she received no training whatsoever on how to conduct searches for bombs and had not been made aware that she was responsible to search for bombs until April 30, 1981 when the school received another threat, explained her duties to search for explosive devices as follows:

> Q. Can you tell the Court what you are required to do in conducting a search for any explosive devices which is in the building at East?
>
> A. Supposed to check the bathrooms, take a plastic bag, empty out garbage cans, check the Kotex boxes —
>
> Q. Let me stop you for a second, how do you empty out a garbage can, what do you have to do?
>
> A. Got to take the lid off, and you take the trash can and look through it and then put the trash in the bag. Dump the trash in the plastic bag and check through it.
>
> Q. What else do you have to do?
>
> A. Check lockers.
>
> Q. How do you check lockers?
>
> A. The lockers that haven't got a lock, you've got to open them up and check inside.
>
> Q. Do you move around materials in those lockers?
>
> A. I don't.
>
> Q. Do any of the other custodians have to do that?
>
> A. I've seen the men do it.
>
> (Tr. 21-22)

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James A. Cryer, employed for 14 years by the Board as a special officer, attests that on April 30, 1981 he too was directed to search the building for bombs after the building was evacuated. Though Cryer received no training in explosive detection, he understood his responsibility in searching for bombs to include opening closets in classrooms, looking into trash cans, and opening lockers which were without padlocks. Cryer attests he assisted in bomb searches on prior occasions. John Cluelow, employed as a janitor for three years by the Board, attests that he was directed to search lockers for a bomb. He explains "I started to do so, but then stopped when I realized that I lacked training, I had no way of knowing whether or not I might do something which would trigger a bomb, I was afraid for my family, as well as for myself." (Cluelow's affidavit, p. 2) Mollie Gibson, employed by the Board as a janitor for 14 years, attests that "I have been informed by my supervisor, Tom Hopper, that in the event of a bomb threat, I am to go through the trash cans in the bathrooms, pull out the materials in the cans and notify Mr. Hopper in the event I locate any bomb." (Gibson's affidavit, p. 2) Theresa DiTullio, employed by the Board as a janitor for nine years, attests that she was informed by supervisor Hopper "* * * that in the event of a bomb threat, I am to check all the trash cans in the bathrooms for bombs. I was told to pull out all of the papers and rubbish in the trash cans if necessary in order to determine whether or not there is a bomb." (DiTullio's affidavit, p. 2) Gertrude Shinn, employed by the Board as a janitor for nine years, attests that "In the event of a bomb threat at school, I have been directed to go into the bathrooms, check the trash can for bombs, and also, to check lockers for bombs. I was told to open the locker, and to remove as many items as required in order to determine whether a bomb is present." (Shinn's affidavit, p. 2) The affidavit of Sharon Meng, employed by the Board as janitor for four years, attests that she too was directed to search trash cans for bombs by looking through the trash if necessary. It is noted that affiant Cryer completed the eleventh grade in school, is married and has one daughter presently in college. Affiant Cluelow is married and has one child. Affiant Gibson, who is self-supporting, has not attended school since the third grade. Affiant DiTullio attended public school until the eighth grade, is self-supporting and, in addition, she supports her brother who is mentally retarded. Affiant Shinn attended public school until the tenth grade and, with her husband, helps support four children. Affiant Meng supports herself, her child, and is four months pregnant.

The transcript of testimony taken before Judge Dieghan shows that petitioners called Ralph Bush to testify as an expert in the field of explosive devices. Mr. Bush was resident agent in charge of the Camden Bureau of Alcohol, Tobacco and Firearms between

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1961 through 1976. Bush spent a month in training at the White Sands proving grounds in El Paso, Texas during 1970 for bomb investigation. Thereafter, Bush, in conjunction with the explosive ordinance detachment at Fort Dix, trained police officers and industry personnel in the investigation of explosives. Bush has taught courses for the New Jersey State Police, the Camden County Police Academy, Burlington County Police Academy, Bergen County Police Academy and he trained federal treasury agents in the mid-Atlantic region on bomb security. Bush, upon retirement in 1976, served as a consultant in explosives with Aerospace in Washington, D.C. and in 1978 he began his own business as a bomb security consultant. In this role, Bush counts as his clients Harrah's International of Atlantic City, Leeds - Northrup, in Pennsylvania, Deborah Hospital in Browns Mills, the Delaware Valley Association of Manufacturers, RCA, Campbell Soup and Pillinco, in Fort Washington, Pennsylvania. On a prior occasion, he was recognized as an expert in explosives in a judicial proceeding in Camden County.

Bush's opinion was elicited whether any "threat or danger" is created by a requirement imposed upon persons hired as janitors, custodians, or security officers, who are not informed at the time of first hire that they would be required to search for bombs following receipt of a threat, but who are thereafter required, without prior training, to engage in bomb searches by the opening of locker doors, removal of materials or the transfer of materials within the locker, the moving about of contents and emptying of trash cans, or by walking through various areas of a school building to determine whether there was a change in the location of articles in the area. In general, Bush's expert opinion was that if an actual live bomb existed, that a clear danger would be presented to the janitors, maintenance and security personnel, in addition to the children and to anyone else in the building. However, Bush explained the obvious that no amount of training will prevent injury or death to any police officer, security person, or anyone who goes near a package or container which holds a bomb timed to go off, which does, in fact, explode.

More specifically, Bush identifies three basic elements to what he considers appropriate bomb search procedures. First, Bush says persons who are familiar with the area to be searched should conduct bomb searches. Second, such persons must be adequately trained in bomb search procedures. Third, such persons must be "volunteers" if assigned to do more than conduct visual inspections of the surroundings.

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Addressing the issue of who should conduct bomb searches following a telephone threat, Bush says that the federal government and private industry emphasize, as does he, that the persons involved in the building should conduct visual searches. That is,

> If it's a school, the teachers, the administrators, the custodian, the people that work in the boiler room are the people who know best, what belongs there; and if there's a strange package that doesn't belong there that's strange to them, they are much more qualified than local police or fire department coming in [to conduct the search.] (Tr. p. 31)

Training, Bush says, is essential because of the sophistication of explosive devices available today. As an example, Bush notes that a device can be placed in a closed locker, with a time delay and with a photocell. The time delay will activate the bomb mechanism to explode once the photocell is exposed to light by the opening of the locker door. In addition, Bush notes that several books are being sold over the counter which inform the reader how to make explosive devices and where to get necessary materials.

In respect of the third element of what Bush considers an appropriate bomb search procedure, that the persons to conduct the search be "volunteers", Bush explains that volunteers are necessary to avoid the situation whereby a bomb scare occurs, non-volunteers are directed to search the building, the building is or is not evacuated, the non-volunteers perform a cursory search and merely report no bomb has been found, the building is evacuated becomes reoccupied, and the possibility results that pupils may be occupying an area where a live bomb does in fact exist.

The chief of police of Cherry Hill Township testified he has insufficient manpower to conduct searches for explosive devices following bomb threats at schools or anywhere in the community but that the police stand ready to assist the target of such threat should a suspicious device be located.

The Board's official job description for its position of janitor states the job goal of that position is "To maintain cleanliness and condition of assigned areas to a high standard of excellence and to provide a desirable physical environment for all persons in the building." A janitor's performance responsibilities are stated as follows:

1. Peform all of the cleaning functions associated with assigned areas in the manner prescribed * * *

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2. Sanitize specific areas as assigned utilizing prescribed germicides * * *

3. Arrange furniture as specified for optimum utilization of space.

4. Perform minor repairs as assigned.

5. Perform emergency and special duties as assigned.

Throughout the eight page job description, the entire emphasis of the responsibilities of janitor is to perform cleaning functions in their assigned areas and the performance of minor repairs as assigned. The "emergency and special duties as assigned" responsibility is explained, at page 8 of the job description, in the following manner:

n. Emergencies:

1. Shall respond to emergencies dictated by conditions of unusual nature, such as shoveling snow, mopping or picking up water at the discretion and direction of the Head Custodian or his/her designee.

Nowhere in the job description is the duty of hands-on searches for potentially explosive devices mentioned nor can such responsibility be reasonably inferred from any of the specific duties stated in that description.

It is upon the foregoing uncontested facts of the matter, which I find to be the facts of the matter, petitioners contend that so much of category two of the Administrative Procedure which requires them to conduct hands-on searches for potentially live explosives is contrary to the public policy of the State, an unreasonable exercise of the Board's authority to assign them duties, and, that such assignment is in clear contravention of the Board's job description for the position janitor and, consequently, such assignment is in violation of an implied term and condition of employment.

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ARGUMENTS OF THE PARTIES

Petitioners contend that the conduct of a hands-on search for explosive devices is a hazardous activity which, by statute, may be conducted only by police officers, fire fighters, or others specifically trained in such procedure in order to minimize the risk of danger to themselves, to others, and to public property. Petitioners contend that standards for the conduct of such searches are to be established by local, county and state governmental authorities who are vested with police power to protect the public health, safety, and welfare. Petitioners cite N.J.S.A. 2C:58-7 et seq., which requires one who possesses explosive devices to notify local or state police, and vests police officers with the authority to seize such explosive devices for inspection and N.J.S.A. 21:1A-128, which regulates explosives for legitimate commercial use, to show public policy considerations preclude them from being assigned such duty by the Board.

Furthermore, petitioners contends that because hands-on searches for explosive devices are extremely hazardous that police officers and fire fighters, specifically authorized by statute to conduct such searches, are entitled to special compensation beyond worker's compensation for injuries resulting from that hazardous duty. No such special compensation exists for janitors and petitioners draw the inference that janitors cannot be delegated that responsibility. Finally, petitioners contend that the compulsory assignment of janitorial employees to conduct physical searches for explosive devices, without training and in a non-volunteer manner, is arbitrary, unreasonable, and an abuse of discretion.

The Board, to the contrary, contends that the administrative procedure is a proper exercise of its discretionary authority and that that procedure is reasonably related to the Board's responsibility to protect the health, welfare and safety of the students in its charge. The Board disputes petitioners' contention that the public policy of the State is such so as to prohibit the use of employees for the conduct of searches in their work area in response to a telephoned bomb threat. The Board explains that the statutes to which petitioners make reference address the possession of legitimate commerical explosives, while it must deal with individuals who obtain or manufacture an explosive device in violation of the law and threaten detonation around or in a public school with an intent to injure the occupants therein or to destroy public property. Curiously, the Board contends that the administrative procedure does not require "* * * and, in fact, prohibits employees from touching or disposing of explosive devices if they

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are found through the search procedure" (Board's brief, at p. 15). This latter contention does not comport with category 2 of the search procedures as outlined above. That category requires janitors "* * * to search: * * * [receptacles inside and outside the building] * * * shrubbery * * *." Moreover, the unopposed affidavits of each of the janitors who had conducted such searches disclose that they were expected to, or at least they understood they were expected to, and that they did conduct physical searches of containers and lockers. Furthermore, the Board's own superintendent expressed surprise that janitors, without training, were required to conduct hands-on searches.

DISCUSSION

It cannot be seriously argued that a hands-on search by untrained janitors for an explosive device, following a communicated threat from an unidentified person, is not an abnormally dangerous duty to be assigned an untrained person. Nevertheless, it is recognized that the superintendent's testimony of having received over 100 such threats in recent years demonstrates that such threats are a significant problem in the community of Cherry Hill. Each such threat generally must be instantaneously analyzed for its real potential for harm, and such analysis by school authorities must be made with meager information. The recipient of the call completes a report which indicates the caller as being of pupil age or adult, their voice inflection, and the caller's seeming knowledge of the school and the sincerity of the threat. School authorities must then determine whether it is likely that a device has been left in the school building and, when pupils are present, whether to evacuate the building. In view of the fact that one, possibly two, of the 100 threats received were not hoaxes, it is understandable why school authorities would not immediately evacuate the building. To cause immediate evacuation would, in turn, encourage those who are bent on disrupting school operations. On the other hand, school authorities have the responsibility of providing for the safety and welfare of pupils in their charge. Consequently, each such call received by the Cherry Hill schools does pose a threat. The risk of harm, however, particularly if the device is "live", is increased by having untrained persons conduct hands-on searches.

Bush noted that there are several books being sold today over the counter, how-to books, in respect of the construction of explosive devices. Not only do such books provide step-by-step instructions, they also show sources of where to serve necessary

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equipment and supplies. The sophistication of homemade explosive devices is increasing so much so that an otherwise innocent-looking object can be, in fact, a deadly device. An untrained person who is conducting a hands-on search for an explosive device increases the risk of harm which may occur should such device exist because the untrained person would not be able to distinguish an innocent-looking package from an explosive device. A trained person, on the other hand, would have the necessary knowledge on how to distinguish between an innocent package and an innocent-looking package hiding explosives.

Bush's three part process for bomb searchs is persuasive because it is sensible. School authorities must make some kind of preliminary determination following a communicated threat in respect of further action to be taken. A preliminary visual search of the location where the threat is received must be conducted for the decision-maker to have some basis upon which to decide further action. In this regard, Bush's view that the people best suited to conduct visual searches are those who are involved in the building on a regular basis. That is, administrators, janitors, and other adult persons who may be assigned specific areas to visually observe. The object of such visual observation is to determine whether a package or other object is new on the scene or in a location where it should not otherwise be. Such visual observation would, of course, provide some information to the decision-maker as to the next steps which should be taken. The next steps, however, cannot be to have untrained persons handle the suspicious object or package. The risk of harm created by an untrained person engaging in the handling of an object which may trigger a potentially explosive device is too great to be countenanced. While it is found that the conduct of a hands-on bomb search by untrained persons is an abnormally dangerous duty, the danger would be lessened if proper training were provided. What constitutes proper training is best left to the persons doing the training, the Board, and the person being trained.

The question arises whether the Board can continue to assign janitors the duty to conduct hands-on searches if it affords proper training. Petitioners say that only those who wish to volunteer for such duty can be assigned. While there is specific authorization in Title 18A, Education Law, for boards of education to employ janitors, N.J.S.A. 18A:16-1, there is no statutory delineation of the duties to be assigned such position. However, that does not mean that the Board has unlimited discretion in respect of the duties it assigns janitors. The position of janitor has been historically held to encompass

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the duties of keeping the school clean and in good repair, the operation of the heating plant, opening and closing of school buildings, and other related duties such as clearing snow from sidewalks. See, In the Matter of the Tenure Hearing of Joseph McDougall, School District of North Vale, 1974 S.L.D. 170, 178-79. In the same fashion that a board would not assign a person employed as janitor to perform secretarial duties for lack of training, it is unreasonable for a board to assign untrained janitors the duty of conducting hands-on searches for explosive devices. It is implicit in the relationship between an employing board and the school janitor that the school janitor will perform those duties generally associated with the historical and traditional role of janitor. There is nothing in the Board's adopted job description for the position of janitor which, directly or indirectly, suggests that a janitor may be assigned the duty of conducting a hands-on search for potentially explosive devices.

It is recognized that petitioners are represented by the Cherry Hill Supportive Staff Association under the provisions of N.J.S.A. 34:13A-1 et seq. As such, the subjects of the assignment of janitors to conduct hands-on searches, following training, and the training itself, should be a matter for negotiations between the Association and the Board. The issue of assignment of the duty to conduct hands-on seaches for explosive devices is a topic that affects the work and welfare of the janitors. It is not a question, it seems to me, of the Board establishing governmental "policy" within the realm of its managerial prerogatives. Petitioners' argument that the per se assignment of janitors to conduct hands-on searches for explosive devices in contrary to public policy is found here to be without merit. The underlying policy surrounding the statutes cited by petitioners in support of its public policy argument is that explosive devices are closely regulated and, while the statutes admit of legitimate possession of explosive devices, explosives are inherently dangerous and must be properly regulated. Here, we are dealing with possible explosive devices for an illegitimate purpose. The question then becomes the process to be used to determine whether an explosive device exists on school property and, if so, how and by whom is that device to be discovered.

In sum, I **FIND** that the Board, through its assignment of untrained janitors to conduct hands-on searches for explosive devices following the communicated threat of such a device to be on school property, creates an abnormally dangerous duty which it improperly imposes upon petitioners. I further **FIND** that such assignment even if appropriate trainning is afforded but not voluntarily entered into by the janitor is without

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prior negotiation between the Board and the Association, an improper assignment of duty beyond the scope of its own job description for the position of janitor and, by implication, contrary to the accepted terms and conditions of employment for a school janitor. I **FIND** that it is proper for the Board to require petitioners to visually observe the area in which they are assigned for suspicious packages or objects following a telephone or otherwise communicated bomb threat. I **FIND** the question of proper and appropriate training, together with the question of whether janitors should be volunteers or simply assigned the duty to conduct hands-on searches following proper and appropriate training, to be a matter subject to negotiations between petitioners' majority representative and the Board.

I **CONCLUDE** that the Board and its administrators are presently without authority to assign untrained janitors to conduct hands-on searches for explosive devices in school buildings. I further **CONCLUDE** that the issue of whether, following proper and appropriate training, school janitors may be assigned such duty is a matter suited for negotiations. Accordingly, insofar as the Board and its agents are restrained from requiring untrained janitors to conduct hands-on searches for explosive devices and the issue of whether janitors can be assigned such duty following appropriate and proper training is a matter subject to negotiation, so much of petitioners' requested relief is **GRANTED.** There is nothing, however, which precludes the Board from requiring its employees to conduct visual searches of the areas of school buildings with which those persons are familiar following the receipt of a communicated bomb threat. A visual search does not include opening locker doors, moving contents of wastebaskets, nor opening containers.

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.

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE July 3, 1984

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE JUL 05 1984

OFFICE OF ADMINISTRATIVE LAW

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CHERRY HILL SUPPORTIVE STAFF ASSOCIATION AND CHERRY HILL ASSOCIATED SERVICE PERSONNEL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner concurs with the judge's conclusion that (1) the Board and its administrators are presently without authority to assign untrained janitors to conduct hands-on searches for explosive devices in school buildings and (2) that there is nothing to preclude them from requiring janitors to conduct visual searches. However, he is not in agreement with that portion of the initial decision which determines that the issue of whether janitors can be assigned such duty following appropriate and proper training is a matter subject to negotiation. Such a determination goes beyond the purview of the Commissioner's jurisdiction in that it does not fall under any educational statute or regulation. While the Commissioner has on numerous occasions exercised jurisdiction over negotiation issues that are pertinent to education statutes or regulations, it is his belief that the Public Employment Relations Commission (PERC) is the appropriate agency to render a determination with respect to the negotiability of the particular issue remaining in this matter.

COMMISSIONER OF EDUCATION

AUGUST 16, 1984

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2996-84
AGENCY DKT. NO. 63-3/84

PARENTS FOR STUDENT SAFETY, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

APPEARANCES:

David B. Rand, Esq., for petitioner (Rand & Algeier, attorneys)

Frederic J. Sirota, Esq., for respondent (Wiley, Malehorn & Sirota, attorneys)

Record Closed: July 9, 1984 Decided: July 11, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Parents for Student Safety, Inc., is a non-profit corporation whose purpose is to engage in activities furthering the welfare and safety of school students within the Morris School District. The individual petitioners are all residents of the Morris School District and have children attending non-profit private schools within the boundaries of the district. Petitioners contend that the actions of the Board in not providing courtesy (i.e., non-remote) transportation for their youngsters was improper, illegal, arbitrary and in violation of the equal protection clause of the Federal Constitution.

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On June 11, 1984, the Morris School District amended its transportation policies to establish that no transportation would be provided to any private school students unless the transportation is required by law. (Exhibit C attached to affidavit of Harry A. Galinsky, dated June 12, 1984.) The District further established by resolution that for the 1983-84 school year, no courtesy transportation would be provided any private school pupils and that courtesy transportation would be provided public school pupils. (Exhibit D attached to the affidavit of Harry A. Galinsky dated June 12, 1984.)

As a result of this amendment, the Morris School District seeks a determination that:

1. Transportation by public school districts of private school pupils residing less than remote from their schools is violative of law; or,

2. Transportation of private school pupils living less than remote from the schools they attend is not mandatory upon the public school district even in the event that the public school district provides such transportation to its own public school students residing less than remote from their schools.

The resolutions passed by the Board on June 11, 1984, are set forth in the appendix.

Based upon a careful consideration of all of the papers filed in this matter, I feel that this matter is ripe for decision on respondent's motion.

On March 27, 1984, petitioners filed an appeal with the Commissioner of Education. On April 23, 1984, respondent filed an answer, counterpetition and petition for declaratory ruling with the Commissioner of Education. On April 26, 1984, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on May 22, 1984, the following issues were identified:

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A) Is a Board obligated to provide courtesy transportation to private school students if such transportation is provided to public school students?

B) Has the Board acted arbitrarily, capriciously, unreasonably or unlawfully discriminatorily by denying transportation to petitioners who live less than remote from their public schools?

C) Is the use of "attendance zones" for purposes of transportation of less than remote students to private schools arbitrary, capricious, unreasonable or unlawfully discriminatory?

D) Is the different treatment of public and private school students within the context of this case a denial under the equal protection clause of the Federal and State Constitutions?

E) Do petitioners have standing to institute the within suit?

F) Should the petition be dismissed as being untimely filed in violation of N.J.A.C. 6:24-1.2?

G) Is the relief sought by petitioners in violation of the New Jersey Supreme Court decision of Jenkins v. Tp. of Morris School Dist. & Bd. of Ed., 58 N.J. 483 (1971) and subsequent decisions relating thereto?

H) If either petitioners or respondent/counter-petitioner prevail, what is the appropriate remedy?

As a result of the Board's action on June 11, 1984, amending its transportation policies and, essentially, deciding to cease courtesy busing to private school students, it is now proper and appropriate for me to decide respondent's motion for summary decision. Specifically, I am addressing myself to the following two issues:

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1. Is transportation by public school districts of private school pupils residing less than remote from their schools a violation of law?

2. Is transportation of private school pupils living less than remote from the schools they attend not mandatory upon the public school district even in the event the public school district provides such transportation to its own public school students residing less than remote from their schools?

All other issues raised are without merit in light of the Board's action in amending its transportation policies on June 11, 1984.

DISCUSSION OF FACTS

The Board of Education of the Morris School District has amended its policy to cease courtesy busing to private school students. Prior to its amended policy of June 11, 1984, the Board initially set forth in Section 500.7 of its policy.

> Private and Parochial School Pupils
>
> The Law, effective July 1, 1967 (Chapter 74, Laws 1967), requiring transportation to non-profit private schools up to 20 miles away will apply to Morris School District. (Local school districts have the prerogative of transporting pupils to the 20 mile destination or reimburse [sic] parents up to $220, whichever is the cheaper.) (Rev. 10/21/76)
>
> 500.7-1 Less Than Remote Pupils (Rev. 10/21/76)
>
> Transportation services shall be provided under the same criteria and conditions as that available to the public school students of Morris School District to private and parochial school students who are residents of Morris School District and whose residence is less than remote from the school which they attend. In no instance shall the annual cost to transport private and parochial school pupils whose residence is less than remote from the school which they attend be more than $200, nor shall any cash reimbursement be made to such less than remote resident pupils.

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In April 1984, the aforementioned policy, particularly subsection 500.7, was amended to read as follows:

500.7 Private School Pupils

The Law, effective July 1, 1967 (Chapter 74, Laws 1967), requiring transportation to non-profit private schools up to 20 miles away will apply to Morris School District. (Local school districts have the prerogative of transporting pupils to the 20 mile destination or reimburse parents as provided by law, (Rev. 4/9/84), or whichever is cheaper.) (Rev. 10/21/73.)

Applications for reimbursement must be filed by May 1 of the year preceding the school year for which the reimbursement is claimed (Example: May 1, 1983, for the September 1983-June 1984 school year.) The Board shall not be responsible for payments when applications are filed late. (Rev. 5/9/84.)

500.7-1 Less Than Remote Pupils (Rev. 4/9/84)

Transportation services shall be provided private school students residing less than remote from private schools located within Morris School District attendance area in which said students reside pursuant to criteria and conditions applicable to public school students. The attendance areas affecting the particular private school student shall be that attendance area established for the public school most analogous to the private school the student attends.

On June 11, 1984, Section 500.7 was amended to read as follows:

500.7 Private school pupils

The Morris School District shall provide transportation to pupils attending non-public (private) schools only to the extent the same is required by law.

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> With respect to such non-profit, non-public (private) school pupils who may qualify for "remote" transportation pursuant to N.J.S.A. 18A:39-1, applications for reimbursement must be filed by May 1 of the year preceding the school year for which the reimbursement is claimed. (Example: May 1, 1983 for the September 1983-June 1984 school year.) The Board shall not be responsible for payments when applications are filed late.

On June 11, 1984, the Board passed a resolution containing, in part, the following language:

> NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Morris School District in the County of Morris as follows:
>
> 1. That the Morris School District, in accordance with its Transportation Policy, will provide, during the 1983-84 school year, transportation to public school students residing less than remote from their schools and not provide transportation to any non-public (private) school students living less than remote from their schools.

CONCLUSIONS OF LAW

This case involves an examination of the concept of courtesy (i.e., non-remote) busing for private school students. In order to put this matter in its proper context, the following legal sources must be considered:

1. The New Jersey Constitution, Article VIII, § 4, par. 3, states:

> The Legislature may, within reasonable limitations as to distances to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school.

2. Based on this article of the New Jersey Constitution, the legislature passed two statutes dealing with the transportation of students:

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(a) N.J.S.A. 18A:39-1 deals with the transportation of pupils remote from schools. The first paragraph of the statute states:

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

(b) The legislature enacted another statute generally recognized as dealing with the transportation of pupils who are non-remote. N.J.S.A. 18A:39-1.1 states:

> In addition to the provision of transportation for pupils living remote from any schoolhouse, and for handicapped children, the board of education of any district may provide, by contract or otherwise, in accordance with law and the rules and regulations of the state board, for the transportation of other pupils to and from school.

3. For the purposes of State aid, the legislature has defined remote as follows:

> Such aid shall be paid for elementary pupils who live beyond 2 miles from their school attendance and secondary pupils who live beyond 2 1/2 miles from their school of attendance. N.J.S.A. 18A:58-7.

The New Jersey Administrative Code has also defined remote as follows:

> N.J.A.C. 6:21-1.3
>
> (a) The words "remote from the schoolhouse" shall mean beyond 2 1/2 miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through 8), except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.

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(b) For the purpose of determining remoteness in connection with pupil transportation measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned.

The issues before me deal with what is known as "courtesy" transportation; i.e., transporting pupils to schools less than remote. My focus in this case is not in interpreting a board policy dealing with transportating remote from the schoolhouse (more than two and one-half miles for high school pupils and more than two miles for elementary school pupils). As a matter of fact, the Supreme Court of New Jersey in West Morris Regional Bd. of Ed., et al. v. Sills, et al., 58 N.J. 464 (1971), specifically dealt with the issue of providing transportation to children living remote from the schoolhouse. The court held that a school district must transport public school students living remote from their assigned schools, and if such transportation is required the district must also provide transportation for students living within the district who attend a remote private school. A private student attending a remote private school will or will not receive transportation depending upon the school district of his residence. The plaintiffs in West Morris argued at the trial level that many remote private school students received no public transportation and that this result denied them equal protection of the law. A unanimous Supreme Court disagreed with the position of plaintiffs and essentially held that there was no denial of equal protection under the facts and circumstances in West Morris.

ARGUMENTS OF RESPONDENT

The attorney for respondent seeks a declaration that its policy passed on June 11, 1984, wherein it ceases to provide courtesy transportation is legal and proper. Putting it another way, the transportation by the Morris School District of private school pupils residing less than remote is violative of law; or, in the alternative that transportation of private school pupils living less than remote is not mandatory upon the public school district even in the event that the public school district provides such transportation to its own public school students residing less than remote.

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Counsel for respondent cleverly constructs an argument that all courtesy busing of private school students is illegal. He asserts that the constitution itself contains a directive to the legislature that transportation of students to private schools need only be provided "within reasonable limitations as to distance to be prescribed." Article VII, § 4, par. 3, of the New Jersey Constitution. Counsel argues that the "reasonable limitations" have been prescribed by the legislature to be "remote from the schoolhouse." N.J.S.A. 18A:39-1. In other words, as set forth in both N.J.A.C. 6:21-1.3 and N.J.S.A. 18A:58-7, the legislature permits school districts to transport elementary school students beyond two miles and high school students beyond two and one-half miles. Construing the Constitution and statutes, counsel for respondent concludes that transportation of remote private school students is permitted and less than remote transportation of private school students (i.e., courtesy transportation) is constitutionally prohibited. The reason it is prohibited is because it is outside of the "reasonable limitations" which is set forth in the Constitution of New Jersey. To buttress his argument, counsel for respondent insists that the Supreme Court in West Morris specifically dealt with this proposition.

Counsel relies heavily upon the following language in West Morris:

> We digress for a moment to deal with the question of whether Article VIII, § 4, paragraph 3, quoted immediately above, interdicts the statutory scheme here involved. As we mentioned in footnote 1, supra, the trial court found that the statute violated this provision. 110 N.J. Super. at 251 and 254. The thesis of that finding is that the phrase 'within reasonable limitations as to distance to be prescribed,' sets forth the exclusive basis upon which the legislature may differentiate or classify students. But the purpose of this constitutional provision being to make it clear that the legislature may (but need not) transport students to private schools, the quoted phrase seems clearly to be a restriction upon the amount of transportation which may be furnished rather than a prescription of a single basis upon which the beneficiaries of a transportation program may be determined. Hence, this section of the Constitution does not bear upon the issue in this case [at 471].

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Counsel for respondent insists that the Supreme Court in West Morris determined that distance was a limitation on the transportation that can constitutionally be provided private school students. In other words, transportation could not be provided to private school students who did not reside remote from the school they attended. Thus, courtesy busing of all private school students which is outside the remote limitation (i.e., non-remote) is constitutionally prohibited.

Additionally, respondent argues that assuming arguendo that the New Jersey Constitution does not prohibit courtesy transportation of private school students, a public school is not obligated to provide courtesy transportation to private school students even if it provides courtesy transportation to public schools students and such distinctions and classifications do not violate the equal protection clause of the Fourteenth Amendment.

ARGUMENTS OF PETITIONER

Petitioner asserts that no case has held that courtesy busing is unconstitutional. West Morris dealt only with an interpretation of N.J.S.A. 18A:39-1, the statute dealing with the transportation of students living remote. If courtesy transportation is provided public school students pursuant to N.J.S.A. 18A:39-1.1, the district must provide similar transportation to private school students. The failure to provide private school students with courtesy transportation, where the same is provided to public school students, would violate the equal protection clause of the Fourteenth Amendment.

CONCLUSIONS OF LAW
COURT'S DISCUSSION

The law is quite clear that transportation of public and private school students living remote from school appears to be mandatory. See, Bd. of Ed., etc., of West Amwell v. State Bd. of Ed. of N.J. 5 N.J. Misc. 152, 135 A 664 (Sup. Ct. 1927), Bd. of Ed. of Woodbury Hts. v. Gateway Reg. H. S., 104 N.J. Super. 76, 84 (Law Div. 1968), West Morris Regional Bd. of Ed., et al. v. Sills, et al., 58 N.J. 464, 475 (1971), cert. den. 404 U.S. 986 (1971). This mandatory busing is required by N.J.S.A. 18A:39-1. In West Morris, the Supreme Court in construing N.J.S.A. 18A:39-1 held that a school district must transport

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public school students living more than remote and, if such transportation is thus required, then the district must also provide transportation for students living within the district who attend a remote private school. The Supreme Court pointed out in West Morris that a private student will or will not receive transportation depending upon the district of his residence. If a particular district does not transport remote public school students, it has no obligation to transport remote private school students. Conversely, if it transports remote public school students, it must transport remote private school students or the district will be violating the equal protection clause of the Fourteenth Amendment. It must be emphasized that West Morris dealt with an interpretation of N.J.S.A. 18A:39-1 which deals with pupils residing remote from any schoolhouse. The court did not deal with the issue of courtesy busing, i.e., transporting youngsters living non-remote to private schools nor did it deal with an interpretation of N.J.S.A. 18A:39-1.1. Thus, West Morris is not on point nor is it dispositive of the issues before me. The language relied on by counsel for respondent is merely dicta.

I do not agree with respondent's contention that the New Jersey Constitution, Article VIII, § 4, par. 3, prohibits courtesy transportation of all private school students. I do not read the Supreme Court's decision in West Morris as holding that the Constitution permits the transportation of remote private school students and prohibits transportation of private schools students less than remote, i.e., courtesy transportation. This is merely a clever and creative interpretation by respondent which is not supported by the Constitution, statutes or case law.

It is evident, and I so **CONCLUDE**, that if a school district pursuant to N.J.S.A. 18A:39-1.1 elects to provide courtesy transportation to public school students, it must provide the same transportation to private school students who are similarly situated or such board of education policy will violate the equal protection clause of the Fourteenth Amendment.

The Commissioner of Education in a well-reasoned decision has had occasion to discuss the very issue before me. Donlan v. Bd. of Ed. of the Boro. of Merchantville, et. al., 1979 S.L.D. 140 is right on point. In Donlan, the board had a policy that provided transportation to all pupils who attended Pennsauken Junior and Senior High Schools. The

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policy also provided that the board may in its discretion provide transportation to any pupil who attended a private school so long as such pupil lived remote from the designated schoolhouse. The implementation of the policy resulted in the following:

1. The board provided transportation to all its pupils who attended ninth grade at Pennsauken Junior High School, even though none of the pupils resided remote from the schoolhouse.

2. The board provided transportation to private school pupils enrolled in the ninth grade only if they lived remote from the schoolhouse.

3. The board provided transportation to all pupils attending tenth, eleventh and twelfth grades at Pennsauken Senior High School since all pupils lived remote from the schoolhouse.

4. The board provided transportation to all private school pupils enrolled in the tenth, eleventh and twelfth grades who lived remote from their respective schoolhouses.

The hearing examiner in Donlan found that the board's policy with respect to pupil transportation was discriminatory on its face. The Commissioner, in upholding the judgment of the hearing examiner, concluded that the board policy did not exclude transporting any public school pupils who attended either the Pennsauken Junior or Senior High Schools from transportation benefits by reason of distance. However, the board limited transportation of private school pupils enrolled in grades nine through twelve only if they lived remote from the designated private schools they attend.

As the Commissioner stated at page 146, to limit transportation of private school pupils similarly situated in grades nine through twelve on the basis of distance is, in the Commissioner's judgment, discriminatory on its face. N.J.S.A. 18A:39-1.1 does not, as argued by the board, tolerate the adoption of a policy which discriminates improperly among and between pupils.

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As stated additionally by the Commissioner at page 147:

> Thus, if the board is to continue to transport non-remote public school pupils enrolled in the ninth grade, it must provide a similar benefit to all pupils who reside in grades nine through twelve. Should the board decide to establish classifications between ninth grade pupils and tenth, eleventh and twelfth grade pupils, it must evaluate its own conditions which would necessitate and justify such classifications.

It is axiomatic that once a district undertakes to provide students with transportation to less than remote public schools, it must evenhandedly provide non-public school students within the district with similar transportation. See, Shields v. Bd. of Ed., Boro. of West Paterson, et al., 1980 S.L.D. 1004, Comm'r's Decision (August 28, 1980) at 1016.

A key to analyzing classifications such as public school versus private school students is the absence of invidiously disparate treatment between or within classifications of students similarly situated. Certainly, local boards have broad authority to determine which less than remote students should be bused because of hazardous road conditions or other good reasons. In Shields, the Commissioner said,

> Prior administrative decisions consistently hold that school boards have broad authority to determine which less-than-remote students should be bussed because of hazardous road conditions or other good reasons.

Beggans v. Bd. of Ed., West Orange, 1974 S.L.D. 829, aff'd State Board, 1975 S.L.D. 1071, aff'd New Jersey Sup. Ct., App. Div. 1975, 1071; Pepe v. Bd. of Ed. Livingston, 1969 S.L.D. 47, 49. It is well established that the Commissioner of Education will not substitute his own judgment for that of a local board in matters within the exercise of its discretionary authority or intervene unless there is a clear showing of abuse of such discretion. Pepe at 50. A board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation taking into account differences in the degree of traffic and other conditions existing in various sections of the district. Schrenk v. Bd. of Ed. Ridgewood, 1961 S.L.D. 185, 188. Similarly, the

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Commissioner will not disturb the good faith decision by the local board to locate bus stops at certain places rather than others. Centofani v. Bd. of Ed. Wall Tp., 1975 S.L.D. 513 and Baldanza v. Bd. of Ed. Titan Falls, 1976 S.L.D. 362 or to select one bus route as distinguished from an alternative route, Walters v. Bd. of Ed. Mendham Tp., 1977 S.L.D. 854, regardless of the Commissioner's personal view regarding the wisdom of the board's particular action. (Shields at 9).

In the instant matter, the board's policy is clearly discriminatory, arbitrary and unreasonable. There is an invidiously disparate treatment between the treatment of the public and private school students. Such a policy and the classifications set forth therein must be struck down. The Fourteenth Amendment equal-protection clause requires that similarly-situated students be treated equally. Accordingly, if a district elects to transport non-remote public school students, it must transport similarly-situated non-remote private school students. Treating those similarly-situated school youngsters differently is a violation of the equal-protection clause of the Fourteenth Amendment. A board of education must provide courtesy transportation to private school youngsters if it provides it for public school youngsters. A policy which fails to do so will not be condoned and must be invalidated. I **CONCLUDE** that the transportation policy of the Morris School District enacted on June 11, 1984, is discriminatory on its face.

Reason and logic dictate that it is a violation of the Fourteenth Amendment equal-protection clause to treat both remote public school students differently from similarly situated remote private school students as well as non-remote public school students differently from similarly-situated non-remote private school students. Nothing in either N.J.S.A. 18A:39-1 or N.J.S.A. 18A:39-1.1 or the cases interpreting those statutes would indicate a different result.

Accordingly, based upon what has just been enunciated, it is my determination and declaration that:

1. transportation by public school districts of private school pupils residing less than remote (i.e., courtesy transportation) is not unconstitutional; and

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2. transportation of private school pupils living less than remote from the schools they attend is mandatory upon the public school district in the event that the public school district provides such transportation to its own public school students similarly situated who are residing less than remote.

All other issues are deemed to be either decided by this decision or to be without merit.

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

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

July 11, 1984
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

July 13, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 17 1984
DATE

Ronald L. Parker/pro
FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

RESOLUTION

WHEREAS, the Board of Education of the Morris School District has considered the law with respect to its provision of transportation to and from school for those students residing within the District attending private schools; and

WHEREAS, the Board of Education of the Morris School District has concluded that the provision of said transportation to private school students residing less than remote from the school attended is violative of law, or, in the alternative, not required of the District even in the event it provides transportation to and from school for public school students residing less than remote from the schools they attend; and

WHEREAS, the Board of Education desires that its Transportation Policy reflect the foregoing:

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Morris School District in the County of Morris as follows:

1. Section 500.7 entitled "Private School Pupils" of Section 500 entitled "Transportation" of the Policies of the Morris School District is hereby amended to read in its entirety as follows

500.7 Private School Pupils

The Morris School District shall provide transportation to pupils attending non-public (private) schools only to the extent the same is required by law.

With respect to such non-profit, non-public (private) school pupils who may qualify for "remote" transportation pursuant to N.J.S.A. 18A:39-1, applications for reimbursement must be filed by May 1 of the year preceding the school year for which the reimbursement is claimed. (Example: May 1, 1983 for the September 1983-June 1984 school year.) The Board shall not be responsible for payments when applications are filed late.

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OAL DKT. NO. EDU 2996-84

RESOLUTION

WHEREAS, the Board of Education of the Morris School District has considered the law with respect to its provision of transportation to and from school for those students residing within the District attending private schools; and

WHEREAS, the Board of Education of the Morris School District has concluded that the provision of said transportation to private school students residing less than remote from the school attended is violative of law, or, in the alternative, not required of the District even in the event it provides transportation to and from school for public school students residing less than remote from the schools they attend; and

WHEREAS, in the event said transportation is not required of the District, rather than prohibited, it has been determined not to provide the same based upon its desire to allocate the limited resources of the District, financial and otherwise, to the needs of public school pupils; and

WHEREAS, the Morris School District has determined to provide, during the 1983-84 school year, transportation to public school students residing less than remote from their schools and not provide transportation to any non-public (private) school students living less than remote from their schools.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Morris School District in the County of Morris as follows:

1. That the Morris School District, in accordance with its Transportation Policy, will provide, during the 1983-84 school year, transportation to public school students residing less than remote from their schools and not provide transportation to any non-public (private) school students living less than remote from their schools.

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PARENTS FOR STUDENT SAFETY, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision 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.

The Board acknowledges that Donlan, supra, is on point with respect to the instant matter, namely the issue of whether the provision of public school courtesy transportation requires private school courtesy transportation; however, it urges that the issue is of such significance that a new and full consideration by the Commissioner is warranted. It asserts that Donlan contains no analysis of the substantial constitutional issue, the decision itself relying upon prior Commissioner's decisions. The Board reiterates its legal argument that West Morris, supra, established that provisions of transportation to less than remote private school students is violative of the New Jersey Constitution, Art. VIII, sec. 4, par. 3 and that even assuming it is not, the Fourteenth Amendment of the United States Constitution does not require the provision of courtesy transportation to private school students even when a board is providing it for its public school students, asserting that this issue and analogous issues have been so determined by a "substantial number of courts, including state supreme courts and the Supreme Court of the United States." (Board's Exceptions, at p. 3)

The portion of the West Morris decision, supra, which the Board relies on to demonstrate the unconstitutionality of courtesy transportation of private school students is repeated below:

> "***We digress for a moment to deal with the question of whether Art. VIII, [sec.] 4, [par.] 3, quoted immediately above, interdicts the statutory scheme here involved. As we mentioned in footnote 1, supra, the trial court found that the statute violated this provision. 110 N.J. Super. at 251 and 254. The thesis of that finding is that the phrase, 'within reasonable limitations as to distance to be prescribed,' sets forth the exclusive basis upon which the Legislature may differentiate or classify students. But the purpose of this constitutional provision being to make it clear that the Legislature may (but need not) transport students to

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> private schools, the quoted phrase seems clearly to be a restriction upon the amount of transportation which may be furnished rather than a prescription of a single basis upon which the beneficiaries of a transportation program may be determined. Hence, this section of the Constitution does not bear upon the issue in this case.***" (at 471)

The Board argues that courtesy transportation of private school pupils is prohibited because it falls outside of the "reasonable limitations" set forth in the New Jersey Constitution. The Commissioner cannot agree with the Board that the above-cited passage signifies a determination by the New Jersey Supreme Court that non-remote or courtesy transportation of private students is unconstitutional. West Morris dealt with the issue of remote transportation, N.J.S.A. 18A:39-1, not with courtesy transportation, N.J.S.A. 18A:39-2. If the passage does signify unconstitutionality, it certainly is not clearly and unambiguously conveyed. Further, in the Commissioner's opinion, it is doubtful that the Supreme Court would have cloaked such a significant issue in such obscure and unclear terms. Certainly, the Superior Court in Beggans v. Board of Education of West Orange, 1975 S.L.D. 1071 did not apply such an interpretation of the West Morris decision when it held that the West Orange Board's policy regarding non-remote transportation of private school pupils was not discriminatory.

Until the courts render a decision to the contrary, the Commissioner will continue to hold as discriminatory any transportation policy which treats similarly situated pupils in a different manner.

Therefore, the determination of the Office of Administration Law declaring that transportation of non-remote private school pupils is mandatory when a district provides such transportation to its own public school students similarly situated is accepted by the Commissioner. Further, it is ordered that such non-remote/courtesy transportation of private school pupils must be provided on the same basis and under the same criteria as the Board provides it to public school students similarly situated.

COMMISSIONER OF EDUCATION

AUGUST 24, 1984

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 1814-84
AGENCY DKT. NO. 44-3/84

C.D. BY HER PARENTS M. & S.D.;
C.L. BY HER PARENT M.L.; K.F. BY HER
PARENT J.F.; S.B. BY HIS PARENTS
P. & L.B.; C.M. BY HIS PARENT D.M.;
J.S. BY HIS PARENT M.S.; C.F. BY HER
PARENT B.F.; AND K.P. BY HIS PARENT E.P.,
Petitioners,
v.
LENAPE REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,
Respondent.

APPEARANCES:

David H. Dugan, III, Esq., for petitioners

Arthur F. Risden, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: May 18, 1984 Decided: June 26, 1984

BEFORE **JOSEPH LAVERY,** ALJ:

This is an appeal by eight minor children through their parents (hereinafter "petitioners") from a decision to implement a Modified Planned Schedule (hereinafter "Staggered Overlap Plan") at Shawnee High School. The schedule will begin in September, at the onset of the 1984-85 school year. It will continue in use for that year and the three

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following consecutive school years, ending with completion of the 1987-88 school year. The Staggered Overlap Plan was the result of a decision by the Lenape Regional High School District Board of Education (hereinafter "Board") in December 1982.

Petitioners seek the following relief:

1. An order enjoining respondent Board from implementing the Staggered Overlap Plan.

2. Delay of implementation of the Staggered Overlap Plan for one year while the case is reviewed and adjudicated by this administrative law judge and the Commissioner of Education.*

3. A permanent order directing the Board to develop, adopt and implement a redistricting plan which would alter the attendance area boundaries in the Lenape Regional High School District (hereinafter "District"). This alternative would move some Medford students living nearest Lenape High School into that school's attendance area.

PROCEDURAL HISTORY

This matter was initiated by a verified complaint seeking an order to show cause within interim relief filed March 8, 1984. The Commissioner of Education treated the matter as a motion for stay and expedited hearing. He then forwarded it to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., filing it with OAL on March 16, 1984. The dispute was then scheduled for expedited hearing to be held March 28, 1984. Following a hearing before this administrative law judge on that date, an order was issued on April 9, 1984. It (a) denied petitioners' motion for temporary restraint and permanent order directing a new redistricting plan, (b) granted petitioners' motion for an early hearing date, and (c) denied the Board's cross motion to dismiss or in the alternative to grant summary judgment. The case was then set down for plenary hearing.

* This relief is sought through amendment of pleadings, permitted at the plenary hearing on May 4, 1984.

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The hearing was held on May 4, 1984, in the Trenton hearing rooms of OAL. At the close of hearing, after petitioners' amendment of their original complaint to include the second item of relief sought above, briefs followed. Included in the briefs on the merits were a motion by the Board and cross motion by petitioners. The Board asked to supplement the record to meet the amended complaint. On receipt of the final submission by counsel, filed on May 18, the record closed.

MOTIONS

Prehearing Motion

Before the onset of hearing, petitioners moved for temporary restraints and a permanent order directing a new redistricting plan. Additionally, they requested an early date for hearing. In response, through cross motion, the Board asked for an order of dismissal or, in the alternative, a grant of summary judgment. It argued that the petitioners were barred from further appeal by laches and the 90-day rule, N.J.A.C. 6:24-1.2, because the Board's first decision was taken on December 21, 1982.

An Order issued from this administrative law judge on April 9, 1984, denying petitioners' motion for temporary restraints and a permanent order but granting an early hearing. The Board's motions were similarly denied.

Post-hearing Motion

At the conclusion of hearing, petitioners moved to amend the complaint. They requested that the Board's action be postponed for one year as a result of the testimony of the superintendent. In response, the Board subsequently moved to supplement the record. It offered additional information buttressing its stance that a one-year delay should be rejected.

This issue is moot as a result of today's ruling and its underlying reasoning. This initial decision is based on the factual record accumulated solely up to and including the hearing.

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ISSUES

The issue in this case, generally stated, is whether the Board acted within its statutory and regulatory authority when it established a Staggered Overlap Plan for Shawnee High School, one of the three high schools in its district. More specifically, the question is whether the Board may lawfully create for use during the next four years an afternoon schedule for ninth grade students only, which eliminates lunch and study hall for most of them.

Burden Of Proof:

Petitioners must demonstrate by a preponderance of the credible evidence that the Board's action was arbitrary, capricious and unreasonable or taken in bad faith. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

Undisputed Facts:

The material facts not in contention were presented in largest measure by the Superintendent of Schools, K. Kiki Konstantinos. The superintendent was called at the hearing as petitioners' witness, but was cross-examined by counsel for the Board. This was the sole live testimony presented. Thus, these facts are undisputed except with respect to their legal, as opposed to factual, significance. The opposing arguments of law will be treated separately below.

The eight minor petitioners attend school in the Lenape Regional High School District. The District is serviced by three high schools: Lenape, Shawnee, and Cherokee. The District in which these high schools are located occupies a rural area. Some of the District is within the jurisdiction controlled by Pinelands legislation. The students who attend these high schools reside in seven "sending districts," also known as "attendance areas." The high schools and their association with the sending districts may be listed as follows:

Cherokee:	Evesham Township only
Lenape:	Mount Laurel and Southampton
Shawnee:	Medford, Medford Lakes, Tabernacle & Shamong

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These high schools have an enrollment capacity which is fixed by the State of New Jersey:

Cherokee	-	1,525 capacity
Lenape	-	2,036 capacity
Shawnee	-	1,575 capacity

As of September 30, 1983, the actual enrollment of students amounted to:

Cherokee	-	1,538 enrollment	
Lenape	-	1,744 enrollment	
Shawnee	-	2,053 enrollment	[Exhibit R-4]

The differences in numbers of students as compared to the capacity for enrollment at each school was thus:

Cherokee	-	13	students over capacity
Lenape	-	92	students under capacity
Shawnee	-	478	students over capacity

One of the three high schools, Shawnee, from as early as 1973, when it exceeded "capacity," has been faced with the problem of overcrowding. In a memo to the Board sent November 11, 1975, the superintendent so informed Board members. He cautioned them that the enrollment at the time, 1,992 students, completely utilized the school plant. The superintendent continued to update the Board annually with related information. The Board then held public meetings in November and December 1976 to discuss alternatives. Thereafter, various proposals were generated by ad hoc committees interviewed by the Board with the assistance of the superintendent (Exhibit R-2).

Eventually the Board in November 1982 decided to hold public hearings in an effort to settle on an approach to resolution of the problem. At its meeting of December 21, 1982, after having considered 18 different propositions from ad hoc committees, a decision was made. It involved a choice between two of the most acceptable courses of action: (a) the Modified Schedule Plan (Staggered Overlap Plan) or (b) a redistricting plan, which would alter attendance area boundaries of the sending districts. This plan would have excised part of the student population residing only in Medford Township.

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The Board determined to adopt the Staggered Overlap. In the form of a resolution, it publicly listed its reasons for that decision, which were ten:

1. The problem of extreme overcrowding appears to abate at the conclusion of the 1987-88 school year. The problem is temporary in nature extending over a four (4) year period beginning in 1984-85 and terminating at the end of the 1987-88 school year.

2. Using the "staggered-overlap" schedule for the four years would enable the district to avoid tremendous upheaval of redistricting on a four (4) year phase-in schedule and then face the real likelihood of phasing-out for the next four (4) years.

3. The Modified Schedule Plan would affect all four (4) municipalities equally. It would not disturb present community boundaries of those who attend Shawnee High School. This should reduce the potential friction, animosity, and fractionalizing of the constituents comprising Shawnee High School.

4. The committee is aware of the very positive community support for programs, budgets and building referenda that has been traditionally forthcoming from the people of the community of Medford. It is apparent the people of Medford are not generally supportive of splitting their township and/or moving their children from Shawnee High School to another district school. Thus, it would seem politically insensitive to negatively affect a positive support base by splitting or using Medford alone to resolve a regional problem.

5. The district has used a form of the proposed Modified Schedule Plan on at least five (5) different occasions and there were no demonstrable differences in academic instruction and/or achievement.

6. The "staggered-overlap" would affect only the incoming ninth (9th) grade class for one year. Most curricular and extra-curricular programs for ninth (9th) graders are not generally assimilated within the upperclass programs.

7. Co and extra-curricular activities will be developed, as in the past, to accommodate the present ninth (9th) grade programs.

8. The Modified Schedule Plan will have little or no effect upon the present upperclass program (grades 10-11-12). In fact, the overall program may be enhanced because of the reduction of numbers utilizing the building simultaneously.

9. The cost factors to operate the "staggered-overlap" are minimal compared to several of the alternative plans.

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10. In answer to the concern espoused at the public hearing relative to the 9th grade student being home alone in the morning while parents are in the work place, these same youngsters are home alone in the afternoon until those same parents return from work later in the evening.

    It has been our experience that students scheduled to begin the school day later usually stay in bed later, have less opportunity to organize parties, as they would during the school day, for after school hours, and many will be in school early in the morning participating in athletic practices, etc.

Armed with the Board's decision, the superintendent then moved ahead to implement the Staggered Overlap Plan, to be fully effective in September of the 1984-85 school year. This included hiring a librarian. These preparations also included revision of bus transportation schedules and routes, coordination of the sports schedules with various schools to accommodate the Staggered Overlap, and preparation of the master class schedule to reflect the new arrangements.

Notwithstanding these continuing efforts, the Board took notice of renewed petitions by some residents of the district. It reopened the matter to review these residents' positions. It invited further public comment at its meeting of December 20, 1983. Having done so, it chose to uphold its earlier decision and to continue to implement the Staggered Overlap Plan in the school year of 1984-85. The vote was 5-3 (Exhibit P-9).

After the Board's confirmation of its 1982 decision, the petitioners filed an appeal, and the instant proceedings ensued.

Background to the Board's Decision to Accept Staggered Overlap:

Beyond the foregoing testimony and supplementary exhibits, the superintendent observed that the Board had struggled with various studies and alternatives throughout the years since 1976. It had been amply informed of the pressures and resulting professional suggestions concerning Shawnee High School overcrowding (Exhibit R-2). It was only after consideration of all th material, including 18 separate optional plans, that the December 1982 decision was taken. Moreover, the statistical material on which the Board relied was kept current each year. It was a base for the decision which followed the Board's consideration of later petitions on December 20, 1983, as well.

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The superintendent stated that both he and the Board assayed the problem from every conceivable perspective. However, he focused on three main areas of consideration: (1) district school population pressures, (2) the Staggered Overlap Plan impact, and (3) redistricting impact.

(1) School Population Pressures Affecting Shawnee and Lenape High Schools:

The superintendent noted that the State designated "capacity" of the particular schools did not reflect actual scheduling potential. For example, Shawnee can accommodate comfortably 1,700 students. It can, with great strain, absorb as many as 2,100 students in all-day sessions. Since Shawnee is now in the throes of this strained population level, the Board saw a need to realistically cope with the population impact in the coming years. It noted that as of September 30, 1982, the Shawnee attendance area (including transfer students at Lenape) would increase from a population of 2,497 in the 1983-84 school year to a maximum of 2,902 in the 1985-86 school year. It would reduce to 2,681 in the 1987-88 school year (Exhibit P-11). With the current attendance policy intact as of September 30, 1982, the projected total population for Shawnee extended from 2,092 in the 1983-84 school year, down to 2,326 in the 1987-88 school year (P-12). As of September 30, 1983, the projections ranged from 2,211 to 2,383 students during the same time frame, with the enrollment policy intact (Exhibit R-4).

The Board had made other attempts to remedy the overcrowding. In 1979, under "Plan A," it ruled that all children moving into the Shawnee attendance area would be assigned to the nearest high school with room availability. Real estate agents were notified of this fact (P-2). In addition, under Policy 802, it ruled that eighth grade students in the Shawnee attendance area could elect to attend Lenape High School (Exhibit P-7).

In the end, the superintendent attested, the Board was persuaded by the projections that student population would be increasing at Lenape and decreasing to tolerable levels at Shawnee after the 1987-88 school year (Exhibits R-2, R-4, R-5, R-6, Konstantinos' Affadavit - E). Consequently, it concentrated its scrutiny on the Shawnee attendance area.

(2) The Staggered Overlap Plan:

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Restricting attention to Shawnee prompted adoption of the Staggered Overlap Plan.* In the Board's view, this was not a "split session" as petitioners suggested. Only ninth grade classes were involved. Intermingling occurred as well through periods seven and eight (Exhibit R-3, Appendix A).

The superintendent described the plan stressing that the tenth, eleventh, and twelfth grades would follow the normal schedule available to students attending all-day sessions. For these grades, class sessions would extend from 7:25 a.m. through 1:50 p.m. Ninth grade students on the other hand, with certain exceptions, would arrive in the seventh period at 12:23 p.m. and end their day in the twelfth period at 4:53 p.m. They would attend all their normal classes, with the exception of lunch and study hall. Ninth grade teachers would adhere to the same schedule.

There were exceptions. The superintendent stated that lunch would be provided for those involved in athletics. Students who qualified for a seventh course would be assured enrollment, notwithstanding the Staggered Overlap Plan. The superintendent emphasized his belief that no educational detriment accompanies a loss of study hall. Study hall is a functional deference to lack of classroom space. It is marked not by quiet, but by chaos. He pointed out that the program would terminate in four years and would affect only incoming ninth grade students for one year. The intermingling of children during the seventh and eighth periods did expose the students to other grades even when they did not engage in extracurricular activities or sports.

Highlighting the impossibility of change at this point, the superintendent testified that alteration of the master schedule would encompass: 4,000 class reschedules; a complete disruption of the competitive sports program (many non-district schools have arranged their schedules to conform with Shawnee's staggered overlap); a total rearrangement of the bus schedule; and the layoff of one librarian.

The magnitude of inconvenience to students was discussed by the superintendent with respect to: (a) extracurricular activities, (b) athletic activities, and (c) busing:

* For the clearest visual exposition of "staggered overlap" refer to Appendix A of this Initial Decision or its enlarged version at Exhibit R-3.

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(a) Extracurricular activities:

All clubs, with the exception of the DECA Club (an exclusively senior organization) would be available to freshmen. There would also be access to the library. Buses would be dispatched for these activities.

(b) Athletic activities:

Of the 31 sports for which teams are formed at Shawnee, only one, the girls' tennis team, is lacking for ninth graders. However, a conceded drawback is, in those instances where freshmen are skilled enough to achieve varsity status, that they would be unable to practice on those varsity teams which do so in the afternoon.

(c) Buses:

The District busing system transports 7,000 children daily over long distances. Throughout the entire District, some children who are closer to any of the three high schools travel longer than those farther away. There is a policy on the other hand of trying to drop off those children first at night who were picked up earliest in the morning. The bus runs to be initiated in September 1984 include:

1. The early morning regular run for tenth, eleventh and twelfth graders to arrive during first period at 7:25 a.m.

2. The sports run.

3. The extracurricular activities run.

4. The regular run for ninth graders to arrive during seventh period, at 12:23 p.m.

5. The late, late run at 6:15 to transport activities students.

Commenting that special runs are not unusual, the superintendent stated that special bus trips are provided now for vocational and catholic school children. He added that there was no need to purchase additional buses for the Staggered Overlap Plan.

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Increased financing of $32,000 is also reimbursed up to 75% by the State. The cost to the District is only $8,000. This amount must be viewed against the background of an overall District budget amounting to $23,000,000. The superintendent was certain that, overall, some children will ride longer on buses than others no matter what plan is in place.

(3) The Redistricting Impact:

In the superintendent's recollection, the Board had examined the concept of redistricting in detail. It had done so since 1976 when petitions opposing such a plan were received in great numbers. Since the onset of this litigation, calls from parents had been received indicating that these opposing petitions would be renewed should Staggered Overlap be discarded. Further, the Board had carved out existing attendance areas after careful consideration of community and housing development boundaries. Recognizable landmarks, such as streams and highways, served as demarcations.

The Board was persuaded that disruption and unwanted mass movement would emerge from redistricting. Over 300 Shawnee area students now attending school outside the Shawnee attendance area would return. Under petitioners' proposal, well over 1,100 high school age students who grew up and attended Medford Middle School together would be separated. That division would be occasioned by lines redistricting children who lived on opposite sides of the same street. Such a result was unacceptable to the Board. It was particularly unpalatable in light of a probability that the process would be repeated in four years. The growing population at Lenape and the decline in population at Shawnee because of the effects of the Pinelands Act and the sewer bans imposed by environmental agencies would at that time generate a new redistricting. The attendant outcries and confusion would again upset the District. Redistricting was therefore rejected by the Board as an alternative.

In addition to the testimony of the superintendent and associated exhibits, both counsel stipulated answers to certain of the Board's interrogatories. Specifically, answers to questions 5, 6, 9, 14, 15, 16, 17 20 and 21 were entered. Essentially, they indicate that both parents and one single parent of each of the minor petitioners work outside the home. Each child travels by bus. Time on the bus ranges from twenty to sixty minutes over a minimum of four miles and a maximum of eight miles. Six of the children engage in sports. Five participate in extracurricular activities. Three children will attend religious training on schedules not yet established.

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FINDINGS OF FACT

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

As **UNDISPUTED** facts, I **FIND** those designated on pages 4 through 7 of this opinion.

As to matters which are disputed or **CONTESTED,** pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. The current student population is well beyond the official capacity figure of 1,575 students set for Shawnee High School. It also significantly exceeds the "comfortable" population level of approximately 1,700 students. This condition will decrease to acceptable levels after the 1987-88 school year.

2. Petitioners' proposal to carve out a portion of the Medford Township student population in a redistricting effort departs from longstanding Board policy. That policy is to set attendance area boundaries only after maintaining as far as possible the integrity of District communities and housing developments.

3. Children traveling on buses throughout the District in all sending areas spend considerable time being transported. Some students throughout the District who live close to the three high schools travel longer than those who live farther away.

4. Under any redistricting plan, these time/distance disparities would continue.

5. The Board policy governing busing includes an effort to drop off students first at night who travel longest in the morning.

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6. Freshmen team participation is available for all ninth grade students under the Staggered Overlap Plan. The exception is the girls' tennis team. Tennis teams do not exist at Shawnee or the other three high schools.

7. Freshmen who are skilled enough to make varsity teams may not be able to practice with the varsity team if the specific team practices in the afternoon.

8. Extracurricular activities are available to all ninth grade students. An activity bus is provided for that purpose in the morning.

Adversary Arguments:

Apart from the factual presentation, both parties offered legal arguments through briefs:

Petitioners' Argument:

Petitioners contend as a matter of law that the Commissioner of Education has unequivocally specified the evils which attend split or double sessions:

> [T]he Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconvenience which are placed on pupils, homes and staff, the Commissioner deplores the necessity to resort to a double session organization. [Bd. of Ed. of Bradley Beach v. Bd. of Ed. of Asbury Park, 1959-1960 S.L.D. 159, 162-163]

> . . . while unusual conditions may require the use of short sessions from time to time, the Commissioner has always deplored the inevitable loss which children suffer as a result of such curtailment of the school program. [Wassmer v. Bd. of Ed. of Wharton, 1967 S.L.D. 125, 128]

Petitioners assert that the policy of the State is that "split" or short sessions are to be utilized only as a last resort. Where a reasonable alternative to such a plan

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exists its use must be found to be "arbitrary" and "without rational basis." Kopera, supra. Petitioners contend that the facts of record illustrate the unreasonableness of the Staggered Overlap Plan, as opposed to redistricting, which would guarantee full-day sessions. Lack of lunch, curtailed activities, both extracurricular and athletic, extensive and expensive busing, as well as the prospect of children being left at home alone and a student's natural inability to perform at peak level in the afternoon verify the plan's unreasonableness.

The appropriate alternative to this unreasonable decision, in petitioners' opinion, is redistricting. Part of the northern Medford attendance area could be annexed to the Lenape attendance area. A redistricting of grades nine through eleven for the 1984-85 school year would allow all Shawnee seniors to graduate. Redistricting of grades nine through twelve could follow through 1985-86 and beyond. The advantages of this plan (despite the transfer of students in the ninth and tenth grades to another high school) are:

a. Every student in the district (every grade level in all three high schools) can enjoy a normal school day, with lunch and study period.

b. Every student in the district can take full advantage of sports or other extracurricular activities.

c. Overcrowding at Shawnee can be eliminated and enrollment at Lenape brought up to capacity.

d. The neighborhood school concept can be restored.

e. Policy 802 (voluntary transfer to Lenape) and the January 1, 1979 policy (mandatory enrollment at Lenape) can be terminated.

f. The volume and cost of busing can be cut substantially.

g. All this can be achieved simply by moving a few neighborhood areas of Medford, as neighborhood units, from Shawnee to Lenape.

Petitioners concede that they lack the data or expertise to (a) specifically define what students should be involved or (b) to draw with exactitude the new attendance

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area lines. However, a delay of the Staggered Overlap at Shawnee by one year would at least permit review of the proposal. It would also gain time to devise a more detailed method for thorough and efficient education of the students involved.

Respondent Board's Argument:

The Board, in its hearing and post-hearing briefs, cited numerous Appellate Division and administrative decisions in support of its legal argument. The standards to be satisfied here according to these cases are:

1. Whether the Board was arbitrary, capricious, unreasonable or acting in bad faith when it voted to implement the Staggered Overlap Plan in 1982.

2. Whether a presumption of correctness which attends this decision has been overcome by a preponderance of the credible evidence disclosing such arbitrary, capricious, unreasonable or bad faith motivation.

3. Whether petitioners are barred by laches from pursuing an appeal from a decision rendered in 1982 first.

The Board argues that the questions raised by these legal tests must be answered in favor of the Board. It contends that since 1976 it has made every effort to explore the problem and achieve reasonable solutions (Exhibit R-2). It ultimately settled upon the Staggered Overlap Plan after two public hearings. It promulgated ten underlying reasons in December 1982. Anyone would support its decision (Exhibit P-2). The temporary inconvenience of some ninth grade students for one year over a temporary four-year span cannot be held unreasonable. Varied adjustments through schedules and busing have avoided detriment to student education. The absence of lunch or study hall is not harmful. In contrast, redistricting, more than the current plan, would pit neighbor against neighbor in Medford and would impose severe hardship on one community to solve what is plainly a a regional problem.

Split sessions or even Staggered Overlap are not more desirable than a full day session. Nevertheless, they need not be automatically discarded if they serve the best interests of the District students as a whole, under prevailing circumstance. The Board

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argues that petitioners suggest only a "different" plan. It is not the role of the administrative law judge or the Commissioner of Education to decide what plan is appropriate. Adjudication is limited to deciding whether the Board's plan is "reasonable." It is the burden of petitioners to demonstrate that the Standard Overlap Plan is in violation of that standard.

ANALYSIS

The Law:

The Board, in briefs submitted, correctly states the applicable law:*

The management discretion which inheres in the board is not subject to second-guessing, where it is not abused:

> The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. [Stratton v. Berkeley Heights Bd. of Ed. 1966 S.L.D. 73, 76, quoting Kenney v. Montclair Bd. of Ed., 1938 S.L.D. 647, aff'd, State Bd. of Ed., 1938 S.L.D. 649, 653]

There is a further bar to intrusion on the Board's functioning. It is the well-settled legal doctrine that the Commissioner of Education (and consequently an administrative law judge as well) is without original jurisdiction to exercise a local board's vested discretion. The Commissioner is guided by principles governing judicial review of municipal action. Being so constrained, he may not substitute his discretion for that of a board. Boult v. Bd. of Ed. of Passaic, 136 N.J.L. 521, 523 (E.&A. 1947).

The Board's administrative decision-making power is additionally insulated. It is entitled to a presumption of correctness. The Board's actions cannot be upset unless there is an affirmative showing that they were arbitrary, capricious or unreasonable. The Board's factual determinations must be accepted if they are supported by substantial credible evidence. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera, supra, at 20[illegible]

* The Board's arguments as to laches is not treated in this Initial Decision. That issue was raised at the first motion hearing. It was rejected in the resultant Order of April 9, 1984. That Order is attached and incorporated at Appendix B.

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More to the point, the inchoate responsibility of a local board of education to assign pupils within and without the schools of its district is part of its lawful authority. That responsibility falls well within the discretion which, when reasonably exercised, is protected from interference. Edwards v. Atlantic City Bd. of Ed., 1938 S.L.D. 683, aff'd, State Bd. of Ed., 1938 S.L.D. 685. "The test must always be that of reasonableness; that is, whether the board's own action was taken after fair consideration and in good faith." Gunsberg v. Teaneck Bd. of Ed., 1962 S.L.D. 163.

Petitioners suggest that two cases directly support their position: Bradley Beach Bd. of Ed. v. Asbury Park Bd. of Ed., 1959-60 S.L.D. 159, 162-163 and Wassmer v. Wharton Bd. of Ed., 1967 S.L.D. 125, 128. Both cases are consistent with the above legal tenets. As petitioners emphasize, the Commissioner, in each case, did deplore split sessions. Nevertheless, the decisions are inapposite. Their factual circumstances do not offer a parallel. Bradley dealt with the appropriate placement of 20 students from a sending district where two receiving districts could be used. One district was overcrowded; one was not. The Commissioner ruled it was unreasonable not to use the latter. Wassmer strongly supported the power of a board to end split sessions in the fourth grade despite opposition from its staff and district residents. The board's discretion was the key issue. The Commissioner ruled that board discretion could not be restrained, absent irrational use. Neither ruling stemmed from incidents which are comparable to those in dispute here.

The Record:

The factual tapestry woven by petitioners' own witness, the superintendent, displays a panorama of the Board's exhaustive efforts to understand and to ameliorate the Shawnee overcrowding problem. From at least 1975 it was kept informed continually by the superintendent of the pressures which had been building since 1973. Two public meetings stimulated citizen discussion of the increasing student population near the beginning of 1976. Petitions at that time signalled many residents' opposition to redistricting. Thereafter, the Board deliberated over at least 18 separate proposed courses of action (Exhibit R-2).

In December 1982, at an open meeting well-publicized in advance, the Board sifted the merits of Staggered Overlap as compared to redistricting. It voted to begin implementing the former, starting in the 1984-85 school year. One year later, in answer

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to petitions from some citizens asking for a reconsideration, the Board once more reviewed its decision. Again at a well-advertised public meeting, it voted to continue with Staggered Overlap. The recitation of this history and the underlying facts of record dispel any claim that the Board itself was arbitrary, capricious or unreasonable. Neither is there evidence of bad faith in its approach to resolution of the perplexing Shawnee dilemma.

The remaining question then is whether the Staggered Overlap Plan per se is so unreasonable as to warrant intrusion by the Commissioner under color of the appellate review standard outlined above. The answer must be that the plan is not so unreasonable.

Petitioners, through able counsel, have probed with considerable energy the shortcomings of Staggered Overlap. They have demonstrated that it is less desirable than an all-day session. They have proven it is marred by inconvenience, not only to freshmen who must observe its schedule, but to school officials who must administer it. In the end, however, they have not shown the plan to be arbitrary, capricious and unreasonable. The main concern here is thorough and efficient education. The superintendent, echoing the Board of which he is a non-voting member, denies that the learning process will be impaired by Staggered Overlap. He asserts that core, substantive education for incoming, freshmen will in no way be diminished, either in quantity or quality. Even a seventh course will be available for those who qualify. Nothing in the record prompts a contrary conclusion.

Much of petitioners' remaining case gives prominence to the inconvenience which will inhibit extracurricular activities, athletics, and bus transportation. To a degree, petitioners are correct. Nonetheless, the degree of inconvenience cannot accurately be characterized as intolerable. Evaluated against the plan's overall effect, neither are these disadvantages unreasonable. Extracurricular activities are available to all freshmen and busing will be provided for that purpose. Freshman teams are open in all sports but girls' tennis (which is lacking on every other District high school team roster). Buses are provided for athletic activities as well. There are admittedly real hardships for the few freshmen who achieve varsity standing with those varsity teams which may practice in the afternoon. Yet, viewed within the context of Shawnee's overall problems, this one-year shortcoming for an indeterminate few cannot realistically be thought of as a controlling factor in a decision involving the many. As to problems under the plan which will plague busing generally, this is clearly a logistical swamp. Yet, the superintendent

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was credible in his testimony that travel time inequities would surface under any plan devised. Finally, the assertion that children who are home alone in the morning are placed at risk more than those alone in the afternoon is far too speculative a proposition. The opinion that afternoons are less conducive to learning is equally unsupported.

Petitioners have presented no facts or even alternatives which, when placed side by side with Staggered Overlap, demonstrate that the current Board solution is fatally arbitrary. Inarguably, the parents who have joined in this complaint evince an urgent concern for the welfare of their children. They vigorously pursue an optimum approximation of the educational ideal. The members of the Board, on the other hand, in their quest to effect thorough and efficient education for all District children, must be faithful to a broader vision. They must strain to balance competing needs throughout the district which it is their duty to administer. In doing so, they are compelled by law to act reasonably. Under the circumstances of the instant case, they have satisfied their obligation.

CONCLUSION

I **CONCLUDE,** based on the undisputed and disputed facts found above, an assessment of credibility, a review of the entire record, and for the reasons set forth in the ANALYSIS portion of this opinion, that:

1. The Lenape Regional High School District Board of Education did not act unreasonably, arbitrarily, capriciously or in bad faith when it adopted a Modified Schedule Plan (Staggered Overlap) for use in Shawnee High School.

2. The Staggered Overlap Plan should not be enjoined, permanently or temporarily, from its scheduled implementation in September of the 1984-85 school year.

ORDER

I **ORDER,** therefore, that petitioners' application for permanent or temporary injunction of the Staggered Overlap Plan, as well as other related relief, be and hereby is, **DENIED.**

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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.

June 26, 1984
DATE

Joseph Lavery (A.R.)
JOSEPH LAVERY, ALJ

June 26, 1984
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 28 1984
DATE

Mailed To Parties:

Ronald L. Parker /phc
OFFICE OF ADMINISTRATIVE LAW

ml

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WITNESSES

For Petitioner:

K. Kiki Konstantinos, Superintendent of Schools, Lenape Regional High School District

For Respondent:

Respondent called no witnesses but relied upon a cross-examination of its superintendent, Mr. Konstantinos, together with its exhibits admitted to the record.

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EXHIBITS

For Petitioner:

P-1 Map of Lenape Regional High School District

P-2 The "Plan A" policy of January 1, 1973

P-3 Bus Route LOD702

P-4 Bus Route SH-500

P-5 Orientation Literature for Shawnee High School September 1983

P-6 Proposed bell schedule Shawnee High School

P-7 Policy 802 "Volurtary School Transfer Shawnee High School Attendance Area"

P-8 Minutes of the December 21, 1982 Board meeting

P-9 Minutes of the December 20, 1984 Board meeting

P-10 Letter from the Superintendent to parents in the District (printed)

P-11 Base data chart for Shawnee Area

P-12 Attendance policy intact chart September 30, 1982 for Shawnee High School

For the Board:

R-1 Minutes of the regular Board meeting of December 21, 1982

R-2 Sixteen separate reports of one or more pages submitted to the Board from 1975 onward with respect to the crowding conditions at Shawnee High School

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R-3 Large cardboard chart entitled "Shawnee High School proposed bell schedule."

R-4 Memo from Superintendent of Schools to Board of Education dated November 30 on Shawnee crowding ad hoc committee meeting on November 29, 1983.

R-5 Large cardboard chart entitled "Shawnee enrollments as of 2-29-84"

R-6 Large cardboard chart entitled "Lenape enrollments as of 2-29-84"

R-7 Supplemental affidavit of K. Kiki Konstantinos dated March 28, 1984.

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C.D., a minor child, by her parents, M.D. AND S.D. ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon careful review and consideration of the record, the Commissioner sets aside the recommendation of the Office of Administrative Law affirming the Board's action. The Commissioner in reaching such determination takes note that all school districts must provide adequate facilities for the housing of its student body in order to be certified under the revised process for certification of local school districts. The Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 sets forth ten essential elements consisting of some 51 separate indicators by which school districts are evaluated through the monitoring process and either certified or not certified. Element 5: Facilities requires that a school district be satisfactorily rated in Indicator 5.4 in order to be certified. Such indicator reads as follows:

> "5.4 The district's long-range facilities plan has been reviewed/revised within the last five years." (Manual, at p. 15)

A subsequent publication developed for purposes of providing guidance to county superintendents and local school district administrators entitled, Guidebook for the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975, states that:

> "***Schools on split sessions are considered to have not implemented the long range plan and, therefore, cannot be recommended for certification.***"
> (Emphasis in text.) (Indicator 5.4, at p. 9)

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The Commissioner cannot in good conscience affirm an action of the Board which would knowingly result in the district's non-certification due to inadequate facilities. According to the current evaluation criteria for local school districts pursuant to the Public School Education Act of 1975, the Lenape Regional School District would not be approved if it underwent monitoring. The Board through redistricting has the capability of operating the district such that all students have access to adequate facilities. While redistricting may not be the preferred resolution to the overcrowding problem at Shawnee High School, it is impossible for the Commissioner to sanction a plan which results in disparate treatment of similarly-situated pupils in the district.

Therefore, the Commissioner directs that the district immediately develop a plan to redistrict so as to provide a more adequate balance vis-a-vis the three schools' enrollments and capacity. Insofar as the Commissioner recognizes that redistricting prior to the commencement of the 1984-85 school year would undoubtedly give rise to enormous scheduling and bussing upheaval in the district, he directs that the "Staggered Overlap Plan" be eliminated no later than the commencement of the 1985-86 school year.

AUGUST 24, 1984

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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INITIAL DECISION
CONSOLIDATION
OAL DKT. NO. EDU 2729-84
AGENCY DKT. NO. #105-4/84
OAL DKT. NO. EDU 2730-84
AGENCY DKT. NO. #103-4/84

IN THE MATTER OF THE
ANNUAL SCHOOL BOARD ELECTION,
TOWNSHIP OF LAKEWOOD.

APPEARANCES:

Howard M. Newman, Esq., for petitioner, Martin M. Friedman (Kalac, Newman & Griffin, attorneys)

Richard K. Sacks, Esq., for respondent (Sharky & Sacks, attorneys)

J. Michael Rush, pro se

Record Closed: May 30, 1984 Decided: July 16, 1984

BEFORE **JOSEPH LAVERY,** ALJ:

This is a petition by two unsuccessful candidates in the annual school board election, held for seats on the Board of Education, Lakewood Township. The two petitioners, Martin E. Friedman and J. Michael Rush, appeal for an "inquiry" into alleged violations of statutorily prescribed procedures for school elections. They charge that violations did occur which affected the outcome of the election. The Board of Education, Township of Lakewood (Board) responds that the charges are without foundation, and, in any event the outcome of the election was not in any way affected.

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PROCEDURAL HISTORY

Petitioners filed their letters of appeal on April 6, 1984 with the Department of Education. Thereafter, the matter was scheduled for an "inquiry" under N.J.S.A. 18A:14-63.12, and filed with Office of Administrative Law for that purpose on April 17, 1984. The case was then scheduled for public hearing in the Ocean County Administration Building, to be held on May 11, 1984. On that day, the hearing convened. Counsel requested an opportunity to submit briefs, and did so on May 16 and May 30, 1984 respectively. On this last date the record closed.

MOTION TO CONSOLIDATE

In view of the common questions of fact and law involving identical parties, the separate petitions were consolidated at the hearing on May 11. The requisite order, issued verbally on that date, was based on N.J.A.C. 1:1-14.1 et seq. of the Uniform Administrative Procedure Rules of 1980, as amended.

ISSUES

The sole issues for resolution as a result of this inquiry are circumscribed by the legislative intent evident in N.J.S.A. 18A:14-63.12:

Issue No. 1 - Whether violations of statutorily prescribed procedures for school elections occurred, and, if so,

Issue No. 2 - Whether those violations affected the outcome of the election, to the point where the will of the electorate was thwarted.

Burden of Proof

Petitioners must demonstrate that there is a connection between the irregularity charged and the results of the election. They must show that the irregularities contravened a full and free expression of the popular will, before the election may be overturned. A presumption of correctness reposes in the incumbents, In Re Wene, 26 N.J. Super. 377 (Law Div. 1953).

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Undisputed Facts

Many of the basic, material facts in this case are not in contention:

On Tuesday April 3, 1984, the respondent Board of Education had an election to permit competition for four of the positions in a nine person board. Three positions at stake included full three-year terms. Another Board position was available with an unexpired two year term (the incumbent having resigned). The successful candidates for the three-year term positions were: Toby Ashen, Gail Gobar, and Michael Berman. As to the unexpired two-year term, Phillip Contract was elected (Exhibit PF-3). A bond referendum, a capital outlay question, and a current expense question were also resolved.

Nevertheless, after the election, two candidates brought this appeal to overturn the results. Petitioner J. Michael Rush had sought a full three-year term. Petitioner Martin E. Friedman had campaigned for the two-year remainder of the vacated Board position. Both candidates complained that the location of their names on the ballot was at variance with the location promised after the requisite "drawing" for position on the ballot, conducted by Board Secretary Moorcroft pursuant to N.J.S.A. 18A:14-13. The latter had told both Mr. Friedman and Mr. Rush that the candidates' names would be placed in two columns. One column would be for those candidates aspiring to the unexpired two-year term. The other column would be for those seeking three-year terms. Mr. Friedman was told that he would be number one in the two-year term column. Mr. Rush was informed that he would be number four in the three-year term column. In contrast, when the ballot was ultimately printed, there were not two columns. Instead, the names were printed across the top, in one row. The three-year candidates were numbered 1A through 8A, and separated from the two-year candidates with a short vertical line. The two year candidates then continued along the row as 9A through 11A. All the candidates were misnumbered as a result. The candidates' campaign literature, prepared on the information presented at the "drawing", was uniformly inaccurate. For example, Mr. Rush had advertised that he would be one of the four in column B. He was listed instead as number 4A under that part of the row which was headed: "full three-year term." Mr. Friedman, in turn, was listed as number 9A, under that part of the row headed: "two-year unexpired term." Mr. Friedman had written his campaign material with references to position number 1 under that heading.

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On learning of this discrepancy, Secretary Moorcroft stated that he had been unable to review the cardboard print-up of the ballot before its full promulgation. The budget had been completed only six days prior to election. Time was short. His expectation was that the printer would prepare the names in two columns, under the respective terms of office sought. The printer, David Johnson of Sun Printing Company, had followed the instructions of the Ocean County Board of Elections. That Board, different from the Board of Education, had instructed Mr. Johnson to print one row, rather than two columns. The Board had done so in order to accommodate the needs of their voting machine custodians. Mr. Moorcroft had not directed Mr. Johnson otherwise. Mr. Johnson, who had been printing ballots for 30 years, complied with the one-row instructions. Ten other Board of Election ballots were printed in identical fashion.

Other aspects of the election were also the subject of petitioners' criticism. Secretary Moorcroft, the chief administrative officer for all election proceedings, recalled a number of problems. Most were phoned into him either the day of , or the day after the election. Secretary Moorcroft did not personally witness any of the difficulties reported. In short they were:

1. Clifton Avenue site: A young lady was reported to be passing out white slips at polling places. She was reported to have urged election of three candidates.

2. Clifton Avenue site: On one voting machine, markings in pencil in the form of an "X" had been placed next to names of certain candidates. These names were erased upon discovery by an election worker, Gladys P. Seisel.

3. Dorchester Hall site: A letter of unspecified content was distributed at the polling place.

4. At Clifton Avenue, Leisure Village, and various other polling places the sites were crowded, and it was difficult closing them at the end of the election hours.

5. A car with advertisements in favor of candidate J. Michael Rush was reported driving near a polling place.

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6. Buses disembarked passengers at polling places bearing white slips of paper, the contents of which were not witnessed.

7. Prior to the election, a letter favoring three candidates (Berman, Ashen and Gobar) was widely distributed. It bore the signature of "Dr. Roseff."

   Some recipients believed the letter to have emanated from a respected cardiologist (who actually paid for its promulgation). In fact, it had been prepared by the cardiologist's cousin, a present Board member.

Secretary Moorcroft recorded those incidents, but took no steps to investigate. At all these sites, judges of elections were on duty. Though they reported to Secretary Moorcroft, they were responsible for on-site supervision. Materials were provided to each election judge prior to their assuming responsibilities (R-1, A-F).

ADVERSARY ARGUMENTS:

Petitioners' Arguments:

Mr. Rush, unrepresented by counsel, testified that he had been assured a place in column B as number 4. The misplacing of his name caused much confusion and was detrimental to his candidacy.

Mr. Friedman adverted to the undisputed facts above as being totally debilitating in so close an election. He stressed that he knew personally of the Dr. Roseff letter, the disembarking busload incident, and the Rush followers driving within 200 yards of polling places. With respect to the legal argument, through counsel's summation and brief, Mr. Friedman further contended that the ballot printing and related events was violative of N.J.S.A. 18A:14-13 and N.J.S.A. 18A:14-36. The voting patterns (PF-3) confirmed that confusion among voters was rampant. The legislative intent imbuing the foregoing statutes was consequently ignored. The Legislature must have anticipated that a departure from the ballot format described therein (column rather than row) would cause just such a dilemma as had arisen here. The electorate in this election was effectively disenfranchised. A new election, with appropriate instructions, should be called.

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Respondent's Argument:

Respondent offers in rejoinder the argument that none of the circumstances described of record are so gross as to require a setting aside of this election. There has been no demonstration that the will of the electorate has been thwarted. In the Matter of the Annual School Election in the School District of the Borough of Tinton Falls, 1978 S.L.D. 344. It is equally significant that all of the candidates' campaign preparations and printings suffered the same infirmity arising from the format of the printed ballot. Successful candidate Toby Ashen so testified.

FINDINGS OF FACT

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

As undisputed facts, I **FIND** those designated on pages 3 through 5 of this opinion.

As to matters which are disputed or **CONTESTED**, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. No person at hearing testified from first hand personal observation that a young woman or man, verbally or through a written instrument, sought to give voters specific candidate names at a polling place.

2. No person at hearing testified from first hand personal observation that the disembarking bus passengers had in their possession papers whose content was unlawful, pursuant to election statutes.

ANALYSIS

There is ample law pertaining to the test for overturning elections. For example, it has been held that mere irregularities involving compliance with provisions of election laws, although sufficient to challenge the right of voters at polls, are not

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sufficient to set aside an election and defeat the will of the electorate. In Re Petition of Hartnett, 163 N.J. super. 257, 265-266 (App. Div. 1978). Further, election laws must be liberally construed, but not so as to deprive voters of their franchise, or so as to render the election void for technical reasons. Kilmurray v. Gilfert, 10 N.J. 435, 440 (1952). Finally, laws for the regulation of elections in respect to the form and contents of ballots, or as to balloting procedure, are directory only, and not mandatory. Mere irregularities therein will not vitiate an election which is fair in other respects In Re Wene, supra 25 N.J. Super. at 377. It is with these guidelines in mind that the facts of record were examined at the hearing and which prompted a ruling that none of the irregularities urged, even if true, required that the election be overturned.

The factual allegations of petitioner Friedman's complaint suffered in part from a residual lack of competent evidence, which must be present to redeem hearsay testimony. This is implicit in those findings above concerning material facts surrounding the polling place complaints. Nevertheless, the testimony and exhibits presented concerning those incidents, even if all were true, do not portray circumstances to which the above cited judicial guidelines would apply. Whether, and even to what extent, the votes would have been altered by the history of this election, in sum is no more than conjecture. There has been no proof of impact on the voting public. Consequently, the ruling at hearing was appropriate: the accumulated incidents do not reveal a contravention of the full and fair expression of the popular will.

Turning to petitioner Friedman's legal argument: though certainly not frivolous, it lacks unequivocal precedent which would overcome the sturdy presumption of correctness in any election. With respect to N.J.S.A. 18A:14-13, the facts of record and the ballot as printed can be reasonably construed as satisfying sub-sections a, b and c. On the other hand, the sample ballot set forth at N.J.S.A. 18A:14-36 places the candidates in a column, and not a row. However, the crucial remaining aspects of the sample ballot, which bear on voter instructions, are present in the ballot used here. Additionally, despite the strenuously urged objections of petitioners, it is not clear that PF-6, the ballot heading, would create confusion. Apart from the row format, all names fall under the headings of the appropriate term. Moreover each heading is accompanied by accurate instruction as to the number of candidates to be voted on. To that extent, the instant ballot comports precisely with the sample ballot in N.J.S.A. 18A:14-36. The shortcomings of a row format, if there be any, have not been shown to be fatal in the legal sense or insurmountable as an impediment to general understanding.

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CONCLUSION

I **CONCLUDE**, therefore, based on the complete record of this inquiry and after a review of the legal arguments of both sides, that:

1. The reports of incidents complained of by petitioners, and of which Secretary Moorcroft was for the most part made aware, were deserving of immediate investigation by the secretary. This is particularly true in the specific individual assertions that a man and a woman were electioneering at the polls. The defacing of a voting machine would also require the secretary's attention.

2. This latter violation, concerning machine markings, was clearly proved by competent evidence.

3. It has not been demonstrated by competent evidence that the accumulated violations alleged, even if all were shown to be true, affected the outcome of the election, to the point where the will of the electorate was thwarted.

4. Absent such a showing, the presumed correctness of the election must be sustained.

5. The printed ballot here in dispute comports with the essential prerequisites set forth at N.J.S.A. 18A:14-13 and N.J.S.A. 18A:14-36.

ORDER

I **ORDER**, therefore, that the charges of petitioners that the School Board Election in the Township of Lakewood does not reflect a full and free expression of the popular will be **DISMISSED**, and that their request to overturn the election be **DENIED**.

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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.

July 16, 1984
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

July 16, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 18 1984
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

Petitioner Firedman's Exhibits

P-1	Letter dated April 5, 1985 initiating appeal
PP-2	Copy of vote tally annual school election Tuesday, April 3, 1984
PF-3	Copy of combined statement of result of school election.
PF-4	Civilian absentee ballot
PF-5	Cardboard print out resolution for capital outlay.
PF-6	Cardboard copy of the candidate order on the ballot for Board of Education election
PF-7	Vote tally penciled on yellow sheet of paper
PF-8	Letter from "Dr. Roseff" to Lakewood taxpayers
PF-9	Copy of newspaper article by Sam Christopher.
PF-10	Copy of newspaper article by Sam Christopher dated April 11, 1984
PF-11	Copy of newspaper article (unsigned entited "Campaign 84")
PF-12	Copy of campaign advertisement by petitioner Friedman

Petitioner Rush's Exhibits

PR-1	Letter of appeal dated April 5, 1984

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Respondent's Exhibits

R-1 (a-f) package of documents supplied to each election board member by board secretary

LIST OF WITNESSES

For Petitioner Friedman:

Gerald J. Moorcroft, Secretary, Lakewood Board of Education

Alice J. Chadwick

Gladys P. Siesel

David Johnson

Marjorie C. Grant

Irene Miccio

Martin E. Friedman, petitioner

For Petitioner Rush:

J. Michael Rush, petitioner

Michael Berman

For Respondent Board of Education:

Toby Ashen

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
LAKEWOOD, OCEAN COUNTY.	:	
	:	

The Commissioner has reviewed the record of these consolidated matters including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions by the parties were taken to the findings and recommendations contained in the initial decision, pursuant to N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly, the complaints set forth by petitioners in these consolidated proceedings can be and are hereby dismissed.

AUGUST 30, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1893-84
AGENCY DKT. NO. 37-2/84

LEONOR OUTOR,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent

APPEARANCES:

Barry A. Aisenstock, Esq., for petitioner

Grissele Camacho-Pagan, Esq., for the Board

Record Closed: June 18, 1984 Decided: July 16, 1984

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

Leonor Outor, a teaching staff member employed by the Board of Education of the City of Newark, Essex County, alleged she is a tenured principal and her reassignment by the Board to the position of vice-principal was in violation of her right to hold the position of principal. The Board denied she is a tenured principal and said her reassignment was proper.

The matter was transmitted to the Office of Administrative Law on March 19, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on April 27, 1984, at which the parties agreed to submit the dispute for summary decision. The parties briefed the matter and the record closed with filing of responsive briefs on June 18, 1984.

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The following were stipulated by the parties and are adopted herein as FINDINGS OF FACTS:

1. Petitioner started work as a regular teacher on September 1, 1967. From September 1, 1971 through June 1974, she served as a project coordinator. From September 1, 1974 through January 3, 1982, she served as a vice principal.

2. Petitioner holds valid certificates issued by the State Department of Education for the positions of teacher, principal, and school administrator.

3. Petitioner acquired tenure as teacher and vice principal.

4. Petitioner was assigned to the position of principal as of January 4, 1982. The assignment was ratified by the Board on January 26, 1982 as acting principal.

5. The Board acted on March 23, 1982 to appoint petitioner as principal, retroactive to January 4, 1982.

6. Petitioner replaced Daniel La Torracca as principal because he had been transferred to another school. During the time she served in an acting capacity, pending retroactive Board action, she was the only candidate considered for the principalship.

7. On December 23, 1983, a letter was delivered to petitioner from the Executive Superintendent of Schools advising her that tenure for the position of principal would not be granted to her and he was administratively removing her from the position of principal and returning her to the position of vice principal. The letter further directed her to report to Dr. Anthony D'Agostino on January 3, 1984 for reassignment as a vice principal.

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8. In his letter of December 23, 1983, the Executive Superintendent offered petitioner the opportunity to have an informal conference with him. She did not request to meet with him or his designee.

9. Petitioner did not meet with Dr. D'Agostino on January 3, 1984 but instead reported to Franklin School on January 4, 1984 inasmuch as the Executive Superintendent had advised her of that reassignment.

10. On February 21, 1984, the Board ratified action of the Executive Superintendent in transferring petitioner from provisional principal to provisional vice principal, effective January 3, 1984.

ARGUMENTS OF COUNSEL

Petitioner argued that N.J.S.A. 18A:25-1 and N.J.S.A. 18A:27-1 required the Board to act on transfers and appointments, and that the Board did not act in a timely fashion. Petitioner therefore acquired tenure as a principal under N.J.S.A. 18A:28-6. She cited McGlynn v. Bd. of Ed. of Lumberton, 1972 S.L.D. 28, wherein the Commissioner made such a determination.

She argued that appointment and reassignments must be made by the Board and not an administrator and cited Mosselle v. Bd. of Ed. of Newark, 1973 S.L.D. 197, aff'd State Bd. of Ed., 1974 S.L.D. 1414, and Humen v. Bd. of Ed. of Bayonne, 1977 S.L.D. 795, aff'd State Bd. of Ed., 1977 S.L.D. 807.

She argued her period of service as acting principal must be counted for tenure acquisition as principal as she did not temporarily replace another and cited Flood v. Jersey City Bd.of Ed., 1984 S.L.D ____ (decided January 14, 1984).

She argued that her failure to report to the vice principal's position on January 4, 1984 as directed by the Executive Superintendent would have subjected her to a charge of

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insubordination, which she feared, and the time served in that position while she held the title of principal should be counted for her acquisition of tenure as principal.

Wilma Colella v. Bd. of Ed. of Elmwood Park, 1983 S.L.D. __ (decided March 10, 1983) and Kenneth Miscia v. Bd. of Ed. of East Hanover, 1983 S.L.D. _ (decided March 31, 1984) were cited by petitioner in support of her position that tenure accrues in a position and not to all positions within an area of certification. She also cited Schifano v. Bd. of Ed. of Jersey City, 1983 S.L.D. ___ (decided October 6, 1983) for the proposition that transfer of a staff member in a tenured position requires consent.

The Board argued the precise service in the position of principal required for tenure pursuant to N.J.S.A. 18A:28-6 was not met. It noted petitioner only served as principal to December 23, 1983; schools were closed for Christmas recess and reopened on the effective date of her transfer to the vice principal position. The Board cited Zimmerman v. Newark Bd. of Ed., 1938 N.J. 65 183A, 2d 25 (1962); Ahrensfield v. State Bd. of Ed., 126 N.J.L. 543 (E.& A. 1941); and Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) for the standards of tenure acquisition.

The Board argued the action of the Executive Superintendent, subsequently ratified by the Board, was valid and served to bar accrual of tenure. It cited Canfield v. Bd. of Ed. of Pine Hill, 97 N.J. Super. 483 (App. Div. 1967), rev'd 51 N.J. 400 (1968). It also cited Zielenski v. Bd. of Ed. of Guttenberg, 1970 S.L.D. 202, rev'd State Bod. of Ed. 1971 S.L.D. 664, aff'd N.J. Super. (App. Div.), 1972 S.L.D. 692.

The Board conceded in its brief in response to McGlynn that had petitioner continued to serve in the position of principal for two calendar years she would have acquired tenure in the position.

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DISCUSSION AND THE LAW

Canfield is distinguished from the instant matter. In that case the New Jersey Court reversed the judgment of the Superior Court, Appellate Division, which had granted tenure by contract which ran beyond the time required for the acquisition of tenure, "for the reasons expressed in the dissenting opinion of Judge Gaulkin . . ." Judge Gaulkin made the clear distinction between the statutory requirements for tenure and damages resulting from a breach of contract. In Canfield, however, the Board acted to exercise a contractual provision for notice of termination prior to the service of time by Canfield to meet the precise statutory requirements for tenure acquisition. In the instant matter, the reassignment of petitioner from her position as principal was an administrative action.

In Zielenski, five months of employment were at issue for the acquisition of tenure. The Commissioner noted the Board had not acted on her employment as her engagement as a teacher was by the Superintendent, who was authorized by the Board to employ substitute teachers. He determined such employment "cannot constitute employment within the meaning of the Tenure Law . . .," and held petitioner had not acquired tenure. The State Board reversed, and its holding was affirmed by Superior Court, Appellate Division.

The State Board referred to N.J.S.A. 18A:28-4 and N.J.S.A. 18A:27-1 in addressing the Commissioner's holding that petitioner's employment did not come about by a recorded roll call majority vote of the full membership of the board and a legislatively recognized distinction between employment in a district and employment by a Board, and said "These statutes lead us to conclude that it was not intended to deny tenure to a teacher . . . " (at 668).

In Zielenski, the Commissioner dealt with the denial of tenure, whereas the State Board dealt with the acquisition of same. In the instant matter the Board's vote occurred after the period of time for tenure acquisition had passed.

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Although Mosselle and Humen deemed the administrative transfers ultra vires and the Board's ratification in Humen was determined to be within the scope if its authority, the dispute did not involve the acquisition of tenure.

The Commissioner stated in Moselle:

> It is equally clear that petitioner's initial transfer from his position at Vailsburg High School on January 26, 1973, was not a transfer which followed the requisite "roll call majority vote" of the Board. It was an administrative action and thus illegal because the authority which ordered it was not the authority which the statutes prescribe; (N.J.S.A. 18A:25-1). (at 210)

In Humen, the Commissioner said:

As was stated in Norma Whitecraft and Cherry Hill Education Association v. Board of Education of the Township of Cherry Hill, Camden County, 1974 S.L.D. 901:

> * * *[T]he Commissioner has already interpreted the statute of reference (N.J.S.A. 18A:25-1) to mean that an action of the local board of education, not a decision by a school administrator, is required prior to the time when the transfer is to be effective. James Mosselle . . . (at 806)

It is recognized here that an Executive Superintendent has been clothed with duties and powers by the Legislature pursuant to N.J.S.A. 18A:17A-1 et seq. N.J.S.A. 18A:17A-5(a) provides that:

> The executive superintendent may appoint, transfer, pursuant to the provisions of Title 11 of the Revised Statutes, and, pursuant to Article I of Chapter 17 of Title 18A of the New Jersey Statutes,' remove clerks in the immediate office, but the number and salaries of the clerks shall be determined by the Board.

N.J.S.A. 18A:17A-5(c) states:

> The executive superintendent shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal.

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The Commissioner determined the legislative provisions of N.J.S.A. 18A:17A-1 et seq. to be clear and unambiguous and not open to further construction in Daniel Gibson v. Board of Education of the City of Newark, 1984 S.L.D. ____ (decided March 30, 1984), and relied upon Watt v. Mayor and Council of the Borough of Franklin, 21 N.J.. 274 (1956) at slip opinion 36, wherein the New Jersey Supreme Court said:

> "* * * In every case involving the application of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, Carley v. Liberty Hat Mfg. Co., 81 N.J.L. 502, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. * * *" (at 277)

The record is void of any evidence that peititoner's appointment as principal was intended to be temporary. The contrary was stipulated as the vacancy filled by petitioner was created by transfer of the principal to another school.

I **FIND** that:

1) The transfer of petitioner by written notice from the Executive Superintendent was ultra vires and therefore null and void.

2) The Executive Superintendent's transfer was proposed to the Board at its February 7, 1984 Conference/Work Session. See Exhibit D.

3) The ratification of petitioner's transfer by the Board, although within the scope of its authority, was after the date of January 3, 1984 when petitioner would have acquired tenure as a principal pursuant to N.J.S.A. 18A:28-6 and was therefore too late to prevent such acquisition.

4) Petitioner is tenured in the position of principal.

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I **CONCLUDE**, therefore, that Summary Decision is **GRANTED** to petitioner and **DENIED** to the Board. The Board is hereby **ORDERED** to reinstate petitioner to her tenured position of principal, forthwith, and compensate her for any loss resulting from the illegal transfer.

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.

16 July 1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

July 18, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 20 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

Joint Evidentiary Documents

Exhibit A - January 26, 1982 Board minutes
Exhibit B - March 23, 1982 Board minutes
Exhibit C - December 23, 1983 letter, executive Superintendent to petitioner
Exhibit D - Excerpts of Board minutes of February 7, 1984, Conference/Work Session and February 21, 1984 meeting

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LEONOR OUTOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that the transfer of petitioner, although within the authority of the Board, must be done properly and in a timely fashion to affect petitioner's tenure status. N.J.S.A. 18A:25-1; 18A:28-6 Further, the recommendation of administration for such transfer shall not, of itself, be terminally definitive without the requisite action by the Board. Whitcraft et al. v. Board of Education of the Township of Cherry Hill, supra

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

Accordingly, petitioner as a tenured principal shall be reinstated to her position with remuneration.

IT IS SO DETERMINED.

AUGUST 30, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION
and
INITIAL DECISION
OAL DKT. NO. EDU 1995-84
AGENCY DKT. NO. 39-2/84

JOSEPH VOLPE,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent

APPEARANCES:

Ida L. Castro, Esq., for petitioner
(Giblin & Giblin, attorneys)

Andrew D. Manns, Jr., Esq., for the Board

Record Closed: July 11, 1984 Decided: July 16, 1984

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

Joseph Volpe, a tenured teacher, alleged the Board of Education abused its discretionary authority when it acted to require him to undergo a psychiatric examination, pursuant to N.J.S.A. 18A:16-2. The Board denied it acted improperly.

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 April 16, 1984. A prehearing conference was held on April 24, 1984. The matter was set down for hearing on June 4 and 5,

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1984. At the conference a discovery request by the Board for medical reports of petitioner from his treating cardiologist, one Dr. Freda, was orally denied.

Prior to the hearing dates, the Board filed motions for reconsideration of its discovery request, and for an order directing petitioner to undergo a psychiatric examination, construed herein to be a motion for summary decision. Petitioner filed responses in opposition to both motions, and filed a cross-motion for summary decision. The hearing was adjourned, and in the absence of disputed material facts, the matter is deemed ripe for summary decision. The matters were briefed, and the record closed with the July 11, 1984 filing of the Board's reply to petitioner's brief in opposition to the Board's motion for summary decision.

The Board's motion for reconsideration of its discovery request will be addressed first.

The Board argued that its requested medical reports are discoverable and cites N.J.A.C. 1:1-11.1 and R. 4:10-2(a) in suport thereof. Petitioner argued that the Board failed to state any reasons for the requested psychiatric examination, and since the request is now being contested, sought to bolster its action after it was taken.

The standards governing discovery must be examined. It is undisputed that "Discovery methods are means designed to assist parties in preparing to meet their responsibilities and protect their rights during hearings . . ." N.J.A.C. 1:1-11.1.

N.J.A.C. 1:1-11.2(b) states that: "In considering a discovery motion the judge shall weigh the specific need for the information; its relevance and materiality; the extent to which the information is within the control of a party; undue hardship; and matters of expense, privilege and oppressiveness." [emphasis added]

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The liberal rules of discovery were never intended to be without limitation. If that were not so, the emphasis supplied above in N.J.A.C. 1:1-11.2(b) would be superfluous. To permit a party to seek justification for its disputed action after the action is taken would appear to be an abuse of the rules of discovery.

In the instant matter, the Board acted to require petitioner to undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2. The petition followed. The Board cites a memorandum from petitioner's principal which memorialized a conference held between himself and petitioner, and a note from Dr. Freda, petitioner's treating cardiologist, as sufficient credible evidence to request the psychiatric examination. Both are incorporated herein as Exhibits C-2 and C-3. It is undisputed that petitioner was absent for approximately four months due to high blood pressure, which allegedly was an anxiety reaction resulting from job related stress.

N.J.S.A. 18A:16-2 states:

> Every board of education shall require all of its employees, . . ., to undergo a physical examination, . . . and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee show evidence of deviation from normal, physical or mental health . . . .

The court in Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203 (1973) held N.J.S.A. 18A:16-2 to be constitutional and said:

> However, when a board of education intends to resort to it and requires a psychiatric examination, it must give to the teacher a statement of its reasons . . . . (at 213).

It is undisputed that the burden of proof rests with petitioner. The specific need for the medical reports requested through discovery (and its relevance and materiality in applying N.J.A.C. 1:1-11.2(b) standards) would appear to be information that would have

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been of value to the Board in its consideration before it acted to require petitioner to undergo a psychiatric examination. Whether the reports now would provide "evidence of deviation from normal, . . . mental health . . ." to support the Board's action is unknown and irrelevant. But to now grant the discovery request to permit the Board to buttress a contention that it had acted properly would be an abuse of the intent of the rules of discovery. **I SO FIND.**

The Board's motion for reconsideration of its discovery request is hereby **DENIED.**

The substantive issue will be addressed by first examining the alleged reasons given by the Board for its action in requiring petitioner to undergo a psychiatric examination. They are Exhibits C-2 and C-3 in evidence.

C-2 is a memo under date of November 23, 1983 from principal T. S. David to the Assistant Executive Superintendent of Secondary Schools, Dr. James Wright, and is reproduced here in full:

> Mr. Volpe has been absent since September 11, 1983.
>
> Beyond the only and initial conference when Mr. Volpe told me of this impending absence, I have heard nothing.
>
> Mr. Volpe's illness is unfortunate for him, but I must also consider the students' education. I need, must have, a certificated, competent teacher of Social Studies.
>
> Please use the authority of your office to have Mr. Volpe examined by the Board's medical personnel. Mr. Volpe told me his blood pressure is up and teaching at Vailsburg High is a stressful situation.
>
> I hope his pressure becomes stable but I can't promise to undo the stress of five classes in the good school we have at Vailsburg.

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> I know there is a section of the A.P.P. which refers to investigations by that department of a teacher's illness and reports of the evaluation and return or nonreturn. Vailsburg must have this information immediately.

C-3 is a note from Robert M. Freda, M.D., P.A. - Internal Medicine - Cardiology, under date of October 12, 1983, which states:

> Patient with severe anxiety reaction resulting from job related stress. No work until further notice.

Upon receipt of C-2, Dr. Wright transmitted a memorandum to the Executive Director, Department of Personnel Services, wherein he requested "a formal request to Dr. Chase's office for a physical examination of Mr. Volpe." See C-1. [emphasis supplied]

The Acting Executive Director, Department of Human Resource Services, sent a letter to petitioner under date of January 9, 1984, wherein petitioner was advised "that the Newark Board of Education will consider the Executive Superintendent's request that you undergo a psychiatric examination in accordance with N.J.S.A. 18A:16.2. The reason for this request is based on the following:

> Deviation from Normal Physical and Mental Behavior." See C-4.

An Employee's Medical Certification was completed by Dr. Freda on December 23, 1983 which indicated "At this point in time, he (petitioner) should be able to function under normal stress conditions as of 1/23/84." See C-7. Approval by the Bureau of Health Education and Service was indicated on January 3, 1984.

The minutes of the Board's executive session on February 7, 1984 memorialized discussion of the matter. It indicated that petitioner and his union representative appeared at the meeting. The latter asked why the Board was requesting a psychiatric

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examination instead of a physical examination. The record does not reflect a response in their presence. After their departure, general counsel to the Board "informed the Board that this individual had been absent an inordinate number of days. He stated a medical slip had been submitted by Mr. Volpe's physician. The request for a psychiatric exam was merely an attempt to determine whether this individual had any psychological problems." In response to a Board member's inquiry "on what basis was it determined that Mr. Volpe should have a psychiatric examination instead of a physical examination," the Executive Superintendent "indicated that the Board of Education cannot run the risk when children are involved. He felt there was enough information presented for this individual to submit to a psychiatric examination." See C-9.

C-10 represents teacher observation reports of petitioner on February 11, 1982, March 25, 1982, May 7, 1982, September 29, 1982, October 25, 1982, November 23, 1982, December 16, 1982, January 4, 1983, January 27, 1984, February 23, 1984 and March 28, 1984. C-9 revealed that petitioner has taught in Newark for 24 years. Although the number and sequence of observations appears to be quite unusual for a teacher with his experience, petitioner made no allegations concerning them. The court notes observations immediately preceding and following the 1982-83 Christmas holiday break. Nevertheless, careful scrutiny of all observation reports fails to reveal any "evidence of deviation from normal, physical or mental health." If utilized as a basis for evaluation of petitioner's classroom behavior, pupil relations, and teaching effectiveness, the reports would easily support a rating of excellence.

It appears the only rational basis for any medical examination at all is petitioner's period of absence. A physical examination would certainly be warranted.

I **FIND** that:

1. The record reveals no evidence of deviant mental health to support a request for a psychiatric examination pursuant to N.J.S.A. 18A:16-2 and Kochman; and

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2. The Executive Superintendent's recommendation that petitioner undergo a psychiatric examination, as well as the Board's subsequent adoption of a resolution in support of same, was arbitrary and unreasonable.

I **CONCLUDE**, therefore, that summary decision is **GRANTED** to petitioner and **DENIED** the Board. The Board's resolution requiring petitioner to undergo a psychiatric examination shall be and is hereby **SET ASIDE.**

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.

16 July 1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

July 18, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 20 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

Evidentiary Documents

C-1 November 28, 1983 memo, Wright to Gallimore

C-2 November 23, 1983 memo, David to Wright

C-3 October 12, 1983 note from Dr. Freda

C-4: January 9, 1984 letter, DeSota to Volpe

C-5: January 12, 1984 letter, Volpe to Franotic

C-6: January 18, 1984 letter, Washington to Volpe

C-7: Employee's Medical Certification

C-8: January 18, 1984, Request for Information

C-9: February 7, 1984, Executive Session Minutes

C-10: Teacher Observation Reports

C-11: Board's February 7, 1984 resolution

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JOSEPH VOLPE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Board takes exception to the judge's denial of its request for discovery material, namely, petitioner's medical reports from the treating cardiologist. It also takes exception to the determination that its action requiring petitioner to submit to a psychiatric evaluation was arbitrary and unreasonable.

The Commissioner concurs with the judge's finding that, although the record reveals that a physical examination was warranted in this matter, there is no evidence of any deviant mental health exhibited by petitioner that would provide support for the Board's request that he undergo psychiatric examination pursuant to N.J.S.A. 18A:16-2 and Kochman, supra. The recommendation of the Office of Administrative Law granting summary judgment to petitioner is therefore adopted as the Commissioner's final decision in this matter for the reasons expressed in the initial decision.

SEPTEMBER 4, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION

OAL DKT. NOS. EDU 7995-82
AND EDU 9840-83
AGENCY DKT. NOS. 302-7/82A
AND 420-11/83A

SOUTH RIVER EDUCATION ASSOCIATION, ON BEHALF OF BARBARA EPPINGER, R. ARLENE HAYDEN, MARYANNE PAWLOWSKI, MARY ANN RAPS, ARLENE STRUGALA, AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

Respondent

AND

THE SOUTH RIVER EDUCATION ASSOCIATION ON BEHALF OF BARBARA EPPINGER, R. ARLENE HAYDEN, ARLENE STRUGALA, AND MARY ANN RAPS,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

Respondent.

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OAL DKT. NOS. EDU 7995-82 & 9840-83

APPEARANCES:

Arnold S. Cohen, Esq., for petitioners (Rothbard, Harris & Oxfeld, attorneys)

Steven J. Tripp, Esq., for respondent Board (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 8, 1984 Decided: July 23, 1984

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

The South River Education Association (Association) on behalf of the individually named petitioners, each of whom had been employed by the South River Board of Education (Board) as teachers assigned to the compensatory education program and/or the Title I program but who have since been laid off for reasons of economy, alleges the Board violated their asserted tenure protection by refusing to recognize their accrued seniority. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. After a prehearing conference was conducted, the Association on behalf of petitioners Eppinger, Hayden, Strugala and Raps, filed a similar complaint against the Board. The matters were consolidated by Order dated January 23, 1984. The parties agreed that the matter should be decided by cross-motions for summary decision. The record closed June 8, 1984 upon receipt of the Board's reply memorandum. The record consists of the pleadings, stipulations of fact, and letter memoranda of the parties.

BACKGROUND FACTS

The jointly executed Stipulation of Fact, and as subsequently supplemented, shows the following employment histories for each of the individually named petitioners.

Barbara Eppinger - Instructional Certificate, elementary endorsement and reading endorsement; educational services certificate as reading specialist.

January 12, 1977 through June 30, 1977: employed as a compensatory education teacher assigned to the Board's junior high school. From January 12, 1977 through April 6, 1977, Eppinger was employed three hours, 15 minutes per day. From April 6, 1977 through June 30, 1977, Eppinger was employed six hours per day.

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September 12, 1977 through June 30, 1978: compensatory education teacher assigned to the Board's middle school. 5 1/2 hours per day.

1978-79, 1979-80, 1980-81: Eppinger was employed as a full-time compensatory education teacher and her assignment presumably continued at the middle school.[1] During the course of Eppinger's employment with the Board, she was expected to attend, and did in fact attend, faculty meetings and compensatory education meetings. Additionally, Eppinger attended back-to-school nights each and every year.

R. Arlene Hayden - Instructional Certificate, with elementary endorsement.

September 12, 1977 through June 30, 1978: employed as a compensatory education teacher assigned to the Board's high school. For 3/4 hours per day.

1978-79, 1979-80, 1980-81, 1981-82: employed as compensatory education teacher on a full-time basis and assigned to the Board's high school.

December 17, 1982 through June 30, 1983: employed as a full-time compensatory education teacher assigned to the Board's Willet School.

During the course of Hayden's employment, she was required to attend one compensatory education meeting per month, but was not required to attend regular faculty meetings, back-to-school nights, nor parent-teacher association meetings.

Mary Ann Raps - Instructional Certificate with elementary endorsement.

September 12, 1977 through June 20, 1978: employed as a compensatory education teacher in the Board's elementary schools for 5 1/2 hours per day.

---

[1]The parties originally stipulated that Eppinger was employed full-time through the 1981-82 school year as a compensatory education teacher. However, in the supplemental Stipulation of Fact, the parties stipulate that Eppinger was employed full-time for the school years 1978-79, 1979-80 and 1980-81

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1978-79: employed on a full-time basis and assigned equally to the Board's compensatory education program and a Kindergarten class.

1979-80, 1980-81, 1981-82, 1982-83: employed as a full-time elementary teacher.

During the course of her employment, petitioner Raps was required to attend one parent-teacher association meeting per month, one back-to-school night meeting per year, and six to eight compensatory education meetings. Petitioner Raps was not required to attend any regular faculty meetings.

Arlene Strugala - Instructional Certificate with elementary endorsement. Educational services certificate as reading teacher.

September 16, 1974 through June 30, 1975: employed by the Board as a teacher and assigned to its Title I, elementary secondary education act program. Four and one-half hours per day.

May 3, 1976 through June 30, 1976: assigned to the Board's Title I program, five hours per day.

December 9, 1976 through June 30, 1977: assigned to the Board's Title I program, three hours per day.

September 1, 1977 through June 30, 1978: assigned to the Board's Title I program, six hours per day.

1978-79, 1979-80: employed full-time by the Board and assigned to its Title I program.

1980-81: employed as a 1/2 Title I teacher.

1981-82: full-time employment as a regular elementary teacher.

Maryanne Pawlowski - Instructional Certificate with an endorsement as a teacher of English.

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March 1, 1975 through June 30, 1975: employed as a reading teacher assigned to the Board's junior high school. Full-time.

1975-76, 1976-77: assigned full-time as reading teacher to the Board's junior high school.

1977-78, 1978-79, 1979-80, 1980-81: assigned full-time as a teacher of reading to the Board's middle school.

The Board stipulates that with the exception of hours worked, periods and extra duties assigned, persons employed as compensatory education teachers or teachers in the Title I program have the same classroom teaching duties as do regular teachers.

The parties further stipulate that the Board's regularly employed teachers at its high school, junior high school, and middle school are on duty from 8:00 a.m. until 3:28 p.m. daily. In addition to their regularly scheduled classes, teachers at the high school have a 15-minute unassigned period at the end of the day. The high school teachers are expected to attend faculty and staff meetings on a monthly basis. The schedule of teachers at the middle school and at the junior high school are substantially the same as the schedule of teachers at the high school. At the elementary level, teachers are expected to report to duty at 8:20 a.m. and they are released for the day at 3:15 p.m. Elementary teachers are also expected to attend regular faculty meetings on a monthly basis.

THE DISPUTE

The present dispute initially arose at the conclusion of the 1981-82 year when each of the individually named petitioners were subjected to a legitimate reduction in force for reasons of economy by the Board. Petitioners complained that the Board failed to recognize or honor the legal fact that as a result of their individual employment with the Board, they each acquired a tenure status under the provisions of N.J.S.A. 18A:28-5. A consequence of the Board's failure to recognize the tenure status of each petitioner is that the Board also failed to recognize that they individually were entitled to a determination of their seniority status prior to the Board subjecting them to a reduction in force. The following year, on August 23, 1983, the Board employed a person, from outside the district, to teach mathematics at the eighth grade for 1983-84. That person

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possesses an Instructional Certificate with an elementary endorsement. Petitioners' claim that at least one of them had a superior claim to that position by virtue of their tenure and seniority rights from prior employment with the Board.

ISSUES

The issues to be decided are whether petitioners acquired a tenure status of employment with the Board and, if so, what seniority claims they may have. If petitioners have a legitimate claim for seniority, which of them, if any, had a superior claim to the position of eighth grade mathematics teacher for 1983-84 as against the outside person who was employed. It is noted that with respect to Maryanne Pawlowski, the Board agrees she has acquired a tenure status of employment and, by virtue of her employment with it, has a legitimate claim of seniority in both the English and Reading categories.

TENURE

The New Jersey Supreme Court ruled in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) that

> By the express terms of these statutes [N.J.S.A. 18A:28-5, et seq.], an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. 90 N.J. 74.

Furthermore, the Court went on to hold that:

> We find no evidence of legislative intent to exclude remedial and supplemental teachers from the express language of N.J.S.A. 18A:28-5 and therefore conclude that they are eligible for tenure. 90 N.J. 75.
>
> * * *
>
> The intent of school boards to hire Title I teachers on a temporary basis cannot deprive those teachers of tenure. Id., at 81.

In this case, petitioners Eppinger, Hayden, Raps, Strugala and Pawlowski were each employed by the Board in positions which required them to be in possession of appropriate certificates. Each named petitioner possessed the appropriate certificate for

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their assignment. Each named petitioner has served the requisite period of time at N.J.S.A. 18A:28-5(a) to have acquired a tenure status. The Board does not dispute the time element; rather, it contends that petitioners are not entitled to tenure. The Board's position in this regard is directly at odds with the Spiewak holding. Accordingly, because each named petitioner satisfies the elements for the acquisition of tenure as announced by the Supreme Court in Spiewak, I **CONCLUDE** that each named petitioner has, in law, acquired a tenure status of employment with the Board.

SENIORITY

Having found that each named petitioner has acquired a tenure status, the next matter is to determine the seniority each person may claim. Petitioners contend that they have acquired seniority at both the elementary and at the secondary level by virtue of their assignments in the Board's employ. The Board contends that seniority, if any, which attaches to petitioners must be calculated according to their actual hourly employment and, furthermore, that such seniority must be determined according to seniority regulations which became effective on September 1, 1983. See, 15 N.J.R. 464.

First, with the exception of Pawlowski, no other petitioner has an Instructional Certificate with a secondary endorsement. Petitioners Eppinger, Hayden, Raps and Strugala each have elementary endorsements on their instructional certificate. In order to properly lay a claim for seniority at the secondary level, a basic requirement is to be properly certified at that level. Prior to September 1, 1983, one could have a seniority claim within the scope of their certificate necessary for their job assignment. Subsequent to September 1, 1983, seniority accrues only to those who actually serve in the subject matter category for which seniority is claimed. Moreover, the seniority regulations as amended and effective September 1, 1983, may not be applied in this case because all operative events occurred prior to September 1, 1983. That is, petitioners were first subjected to a reduction in force at the conclusion of the 1981-82 year. Next, the employment of the outside person to teach mathematics at the eighth grade level for 1983-84 occurred during August 1983. Consequently, the operative events giving rise to the dispute all occurred prior to the effective date of the regulations. It would be unfair to have new regulations applied to this case.

It must be noted that the eighth grade mathematics position is in a departmentalized junior high school level. It appears that there are five departmentalized

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mathematics classes and one departmentalized algebra class. Curiously, the Board contends that no one of the petitioners is eligible to teach mathematics at the eighth grade junior high school level for lack of appropriate certification. However, the person so employed is in possession solely of an elementary endorsement on an instructional certificate. If the Board's position is correct that no one of the petitioners have a legitimate claim to that position by virtue of a lack of certification, it would be equally true that the Board erred in assigning a person with but an elementary endorsement on an instructional certificate to that position for 1983-84.

N.J.A.C. 6:11-6.2(b) provides that

> Teachers with elementary endorsements are not permitted to devote more than one-half time to teaching art, music, health, home economics, industrial arts, or physical education in the elementary grades. Teachers with elementary endorsements are authorized to teach the common branch subjects, such as, reading, writing, arithmetic, and spelling in the secondary school, grades seven through 12.

In this case, because petitioners, with the exception of Pawlowski, taught the common branch subjects of reading, writing, arithmetic, and spelling at the secondary level does not give rise to a seniority claim for other kinds of academic subjects at the secondary level. The eighth grade mathematics class in dispute here is, according to the description contained within the Board's letter memorandum, begins the sequential nature of the mathematics in respect of algebra, geometry, trigonometry, analytic geometry, calculus, and so on. Clearly there is a need for a person who is trained in the field of mathematics to teach that subject at the level of eighth grade. No one of these petitioners show evidence of having such training. Consequently, even without regard to a seniority ranking, no one of petitioners have submitted evidence to show their qualification to teach eighth grade mathematics at the Board's junior high school and, accordingly, their demand for relief must fall. However, this does not excuse the Board for assigning an outside person who appears not to be properly certified to be a teacher of eighth grade mathematics. The Board is directed to take necessary steps to insure that all of their teachers are properly certificated for the assignments they have.

In respect of seniority calculations, the Board seeks to compare hours worked per day by petitioners with hours worked per day by so-called regularly employed teachers at the high school, junior high school, middle school and elementary levels.

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I have reviewed prior decisions of the Commissioner as cited by the Board including Tietjen v. Bd. of Ed. of Bethlehem, 1983 S.L.D. - (April 20, 1983), Diglio v. Bd. of Ed. of Riverdell, 1980 S.L.D. 547, and Edison Tp. Education Association v. Edison Board of Education, 1983 S.L.D. - (Dec. 29, 1983). A fair reading of those cases discloses that where persons are employed as compensatory education teachers or Title I teachers, their employment, regardless of whether it is three hours per day, five hours per day, or less or more, is evidence of an employment relationship between that person and the board. Lawnside Education Association v. Lawnside Borough Board of Education, OAL Dkt. EDU 2535-83 (Mar. 8, 1984), aff'd Comm'r of Education (Apr. 23, 1984). That is, because a person is employed, as an example Eppinger, from January 12, 1977 through June 30, 1977 for three hours and 15 minutes per day, does not mean that Eppinger's seniority must be prorated against the time spent by a regularly employed teacher. Neither the Commissioner's cases hold that to be the rule nor does the Supreme Court in Lichtman v. Ridgewood Board of Education, 93 N.J. 362 (1983) require that narrow view of seniority calculations. Rather, Eppinger's seniority as between January 12, 1977 through June 30, 1977 should be counted as five months and 19 days, without regard to the fact that during that time she first worked three hours, 15 minutes per day and then six hours per day. Eppinger did work a complete full day with respect to the assignment she was given in compensatory education. In respect of the period September 12, 1977 through June 30, 1978, Eppinger should be credited with nine months, 18 days seniority, which when added to her full time employment between 1978-79 through 1980-81, would yield four years, five months, seven days of seniority. The seniority claim, of course, is limited to those areas petitioner Eppinger is qualified to be assigned by virtue of her elementary endorsement on the instructional certificate.

Using the same method of calculation for petitioner Hayden as was applied for petitioner Eppinger, petitioner Hayden has accumulated five years, six months, one day seniority as a teacher with an elementary endorsement on her instructional certificate. Petitioner Raps has accumulated five years, nine months, eight days seniority at the elementary level. Petitioner Strugala has accumulated six years, three months, two day seniority at the elementary level. It was noted earlier that petitioner Pawlowski, it is agreed, has acquired tenure and seniority as a teacher of English and as a teacher of Reading and her seniority is six years, four months.

Insofar as petitioners are determined to have acquired a tenure status of employment and seniority, petitioners' prayer for relief is **GRANTED.** Petitioners'

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contention that one of them is eligible for the position of eighth grade mathematics teacher is found to be without merit. Even though the Board appears to have assigned an improperly certified person to that position, that error is not justification for any one of the named petitioners herein to receive relief.

It is noted that while the Board raised the affirmative defenses of the 90-day rule, laches and waiver, it failed to produce either evidence or argument in support of those defenses. Consequently, no consideration was given here to those allegations.

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.

July 23, 1984
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

July 23, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 26 1984
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ml

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

The record and initial decision 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.

Petitioners disagree with the judge's conclusion that none of them have entitlement to the eighth grade mathematics position, asserting that such a conclusion is contrary to governing regulations and established law and that no factual basis exists in the record to reach a conclusion that they are not qualified to teach the courses assigned to the position. They contend that the nature of the math courses has no bearing on the question of seniority; thus, one of them must be given the position because of certification to teach eighth grade mathematics and because seniority has accrued in a category which includes eighth grade math.

The Board rejects the legal argument put forth by petitioners regarding entitlement to the math position. Although the Board agrees with the correctness of the judge's conclusion, it asserts that petitioners are not entitled to the position pursuant to the amended seniority regulations operative September 1, 1983, regulations which it believes should be applied to the instant matter rather than the prior regulations applied by the judge in the initial decision. It cites West Orange Supplemental Instructors Association v. Board of Education of the Town of West Orange, Essex County, decided February 23, 1984, in support of the applicability of the amended regulations to decisions affecting 1983-84 school year positions. The Board argues that, if the amended regulations were applied herein, petitioners would not have entitlement to the position because it falls under the secondary category and each has accrued only elementary seniority.

The Board also argues that the judge erred in calculating the amount of elementary seniority accrued by petitioners, asserting that seniority should be prorated on the basis of total assigned duties of the particular position with the total assigned duties of full-time positions in the same school. It again cites Tietjen, supra, and Diglio, supra, in support of this assertion.

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In addition, the Board contends that the judge incorrectly calculated the seniority credit of Arlene Strugala by including her service during the 1974-75 and 1975-76 school years because in the first four-year period during which she worked, 1974-75 through 1977-78, she failed to accumulate more than three academic years of service pursuant to N.J.S.A. 18A:28-5. The Board argues that Ms. Strugala's seniority began to accrue on December 9, 1976 and that she acquired tenure on December 10, 1979.

The reduction in force to which petitioners were subjected occurred in June 1982 and all service rendered by them was prior to that date. N.J.A.C. 6:3-1.10(m) of the current seniority regulations specifically states that they shall apply prospectively to all future seniority determinations as of the operative date of September 1, 1983. It is, consequently, quite clear that the appropriate regulations to determine the seniority of each petitioner in this matter are those which were in operation prior to September 1, 1983. The Commissioner, therefore, concurs with the judge's finding that the prior regulations apply to this matter because all actions leading to the Petition of Appeal, including the Board's hiring of a nontenured individual to fill the vacant mathematics position, occurred prior to the implementation of the current regulations. This determination serves to correct any misinterpretation that may have resulted from the language contained in the West Orange Supplemental Instructors Association, supra, initial decision upon which the Board relies. The Commissioner is constrained to point out that the initial decision in that matter was remanded to the Office of Administrative Law for further determination and that the Commissioner did not make a determination as to the specific accrual of seniority with respect to those petitioners but merely determined that they were entitled to the same seniority rights as other tenured teaching staff members.

Based upon the employment history contained in the initial decision, ante, the following seniority categories are determined for each petitioner pursuant to N.J.A.C. 6:3-1.10 in effect prior to September 1, 1983:

(a) Barbara Eppinger's entire term of service falls under the elementary category, having taught in the junior high school and middle schools pursuant to her elementary-endorsed certificate.

(b) R. Arlene Hayden's period of service September 12, 1977 through June 30, 1982 as a compensatory education teacher assigned to the Board's high school as authorized by her elementary-endorsed certificate attaches to the secondary category limited to the common branch subjects she taught. The period of service, December 17, 1982 through June 30,

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1983 at the Willet Elementary School, attaches to the elementary category. Pursuant to N.J.A.C. 6:3-1.10(g) she also accrues seniority in the secondary category for the service rendered during the 1982-83 school year. This regulation states:

> "Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment."

(c) Mary Ann Raps' entire period of service as a compensatory education teacher assigned to elementary schools attaches to the elementary category.

(d) Arlene Struqala's entire period of service as a compensatory education teacher assigned to elementary schools attaches to the elementary category. However, the service rendered from September 1974 through June 30, 1976 does not receive seniority credit because she did not obtain tenure during the first four academic years of her service pursuant to N.J.S.A. 18A:28-5. During the first four academic years of service she accumulated only 28.5 months of service as shown below rather than the 30+ months required by regulation.

	Academic Year	Period of Service	Total
(1)	1974-75	9/16/74 - 6/30/75	9.5 months
(2)	1975-76	5/3/76 - 6/30/76	2.0 months
(3)	1976-77	12/9/76 - 6/30/77	7.0 months
(4)	1977-78	9/1/77 - 6/30/78	10.0 months
			28.5 months

Consequently, the period of service commencing on December 9, 1976 marks the first academic year of service toward which tenure is calculated. Tenure was obtained in December 1979, thus the period of service from December 9, 1976 on is credited toward seniority.

(e) Maryanne Pawlowski's service at the junior high school as a reading teacher pursuant to her teacher of English certificate for the

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> period March 1, 1975 through June 30, 1977 attaches to the secondary category. It would appear that the service from the 1977-78 school year through the 1980-81 year at the middle school attaches to the secondary category as well. If, however, the actual assignment fell under the elementary category, she would accrue secondary credit as well pursuant to N.J.A.C. 6:3-1.10(g) cited above.

In regard to the amount of seniority accrued, Lichtman, supra, has clearly established that the amount of seniority acquired by teaching staff members who are not full time is subject to prorating. The decision states:

> "***We agree with the Commissioner that the language and import of N.J.A.C. 6:3-1.10(b) are to be understood as allowing a pro rata calculation of seniority based upon the total accumulated service in a specific category. In this way, actual service can be duly recognized and relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared.***" (93 N.J. at 368)

Lichtman is distinguishable from Lawnside, supra, cited in the initial decision, in that petitioners therein were essentially employed full time, working seven hours per day as opposed to seven and one-half hours per day for other teaching staff members. This fact which led the Administrative Law Judge to conclude that there was no evidence to suggest that they were employed on a part-time basis. In the instant matter a portion of the service is part-time, therefore, a proration of seniority accrued is dictated by Lichtman.

The Commissioner is constrained to emphasize that, for purposes of determining tenure, the service rendered is not distinguished part-time versus full-time, that is, if a teacher works one year part-time, that service is credited as one year of service toward acquisition of tenure. However, for quantification of seniority credit, there is a distinction in that credit is given only for actual service rendered which consequently requires a proration of part-time service.

The method for calculation of proration of seniority advocated by the Board appears reasonable and fair, that is, proration of seniority based upon a comparison of the total assigned duty time to that of full-time teachers. In this manner, a teacher who had 240 minutes of assigned duty time as compared to 315 minutes of assigned duty time of full-time teachers would receive prorated seniority credit equivalent to .76. There are, of course, other

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methods of calculation that could be used to prorate seniority credit. Whatever method is used must assure that part-time teachers receive seniority credit in an equitable manner for all time they are committed to a board of education, from the time the individual's work day commences until his or her work day ends.

As regards the question of entitlement to the eighth grade mathematics position, the Commissioner notes that item 6 of the "Supplemental Stipulation of Facts" states that the contested math position consisted of five math classes and one algebra class. The Commissioner does not agree with the conclusion of the Administrative Law Judge that none of the petitioners in this matter is entitled to or qualified for the position. There is agreement that an individual with an elementary endorsement is not qualified to teach an algebra course which is a secondary school course offering and for which secondary credit hours are awarded; however, a teacher with an elementary endorsement is clearly qualified and entitled to teach 5/6 of the position at a minimum. Therefore, it is the determination of the Commissioner that the petitioner who has accrued the greatest seniority under the elementary category was entitled to the mathematics position during the 1983-84 school year. The Board could clearly have arranged, without disruption to scheduling and planning, to accommodate and protect the seniority rights of its tenured staff in filling the vacancy. The hiring of a nontenured, elementary-endorsed teacher for the position was clearly violative of the tenure and seniority rights of the most senior petitioner herein.

The Board is, therefore, ordered to determine the quantity of each petitioner's seniority, prorating any period of service that was part-time. The petitioner with an elementary endorsement who obtains the greatest total seniority is to be immediately reinstated to fill the eighth grade mathematics position. All salary, benefits, and emoluments for 1983-84 are to be paid by the Board, less mitigation of any monies earned or obtained through unemployment benefits for that period of time. Each of the other petitioners is to be placed on a preferred eligibility list.

SEPTEMBER 6, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6901-83
AGENCY DKT. NO. 306-8/83A

DOROTHY McGREEVY,
Petitioner,
v.
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,
Respondent.

APPEARANCES:

Andrew M. Marchese, Esq., for petitioner (Bosworth and Marchese, attorneys)

William A. Massa, Esq., Legal Department, Board of Education of Jersey City for respondent

Record Closed: June 27, 1984 Decided: July 25, 1984

BEFORE **ELINOR REINER**, ALJ:

On August 8, 1983, petitioner, Dorothy McGreevy, filed a Petition of Appeal with the Commissioner of Education, claiming that she had attained tenure as Supervisor of Curriculum Planning pursuant to N.J.S.A. 18A:28-6 and requesting that she be reinstated to that position. Respondent filed its answer on August 22, 1983, and thereafter on September 7, 1983 this 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.

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A prehearing conference was held on September 29, 1983 and the following issues were isolated:

1. Did respondent transfer petitioner to a non-staff supervisory position in violation of her tenure rights pursuant to N.J.S.A. 18A:28-6?

2. If so, to what relief is she entitled?

3. To what extent does confirmation of the Arbitration Award (See, Jersey City Ed. Ass'n v. Bd. of Ed. of the City of Jersey City (N.J. Ch. Div., Feb. 10, 1983, C-1377-82) (unreported)), prescribe the relief sought?

Pursuant to the prehearing order and on the date of the hearing in this matter, January 12, 1984, the parties provided the court with a partial stipulation of facts. The facts which were stipulated to, and which provide some understanding of the background of this matter, may be summarized as follows:

1. Petitioner commenced employment with the Jersey City School District in September 1968.

2. Petitioner received certification as a Principal/Supervisor in June 1977 (P-1).

3. Petitioner attained tenure as a teacher at the commencement of her employment in the 1971-72 school year.

4 On March 19, 1980 by resolution of the board, petitioner was assigned to the Office of Superintendent Curriculum and Planning, position of Coordinator Curriculum Planning, effective February 16, 1980 (P-2).

5. Petitioner functioned in that title until June 23, 1982.

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6. On July 22, 1982, petitioner was appointed Acting Supervisor Curriculum Planning, effective June 23, 1982 (P-3).

7. On July 20, 1983 by resolution of the board, the position of Acting Supervisor was abolished (P-4).

8. Petitioner was informed of that fact on or about July 28, 1983 (P-5).

9. On August 24, 1983, the board resolved to transfer petitioner from Acting Supervisor Curriculum Planning to Reading Specialist School No. 42 (P-6).

10. On August 29, 1983, petitioner was transferred from Reading Specialist Public School No. 42 to Reading Specialist Public School No. 5.

11. Since September 1, 1983 petitioner has functioned in the capacity of Reading Specialist Public School No. 5.

In addition to the above undisputed facts it became apparent at the hearing that the following facts were essentially undisputed. They may be summarized as follows:

1. The position of Acting Supervisor was abolished as a result of confirmation of the Arbitration Award by Judge Robert Tarlton (See, Jersey City Ed. Ass'n. (R-1)) which required publication of certain promotional positions.

2. On or about February 1983 a promotional examination for the position of Supervisor of Curriculum Planning was announced and the job description for the position (P-8) was prepared by the board and posted. The written portion of the promotional examination was given in March 1983.

3. Petitioner was not notified, nor did she personally or individually take part in the arbitration proceeding which resulted in the arbitration award. She did not know that her position would be affected by it.

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In addition to the above facts, Dorothy McGreevy testified that as Coordinator she was required to coordinate the entire program. She had to make certain that there was a working relationship in the curriculum groups, return to the original goal and evaluate ideas. It was her responsibility to determine what was to be taught in an area in the school rather than how it was to be taught (the latter being the responsibility of an area supervisor). She contended that she was responsible for seeing that the process of curriculum development took place. Thus, she supervised the teacher's work developed at the committee level and evaluated the performance and contributions of the teachers (i.e. the content of their ideas). She noted that this responsibility appears as the first item of the job description for Coordinator (No. 1 of P-7). She admitted that she did not evaluate the performance of teachers (this too was the responsibility of an area supervisor) nor did she file any formal written evaluations. Although she alleged evaluations were ongoing and resulted in certain people not being asked to work on the committees, she acknowledged, however, on cross-examination that it was not really her job to do so.

McGreevy opined that the term "coordinator" as used in the job description for Coordinator-Curriculum Planning is synonymous with the term "supervisor" as used in the job description for Supervisor of Curriculum Planning (P-7 and P-8 respectively). More specifically, McGreevy stated that there was no change in her duties nor was she advised that there would be a change when she became Acting Supervisor; there were simply more groups and more committees. In both positions she reported and submitted progress reports to the deputy superintendent and was responsible for a budget. McGreevy contended that although the title of Supervisor was an upgraded one and "looked better," the job was in actuality one and the same. Moreover, despite the fact that no supervisory certificate was required for the Coordinator position, she could not think of a coordinator who did not possess one. In fact, she alleged that she had performed supervisory functions in both capacities for, when she functioned as Coordinator, there was no Supervisor and when she functioned as Supervisor, there was no Coordinator.

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Upon questioning by this judge, McGreevy recalled that initially the members of the various committees had volunteered their services. The volunteers were reviewed by her and the area supervisor and recommendations were made to the deputy superintendent. Budgets were prepared by her and the area supervisor and sent to the deputy superintendent. In addition to evaluating teachers, teachers' ideas and their committee performance, McGreevy noted that she submitted informal reports, which included a general statement of the committee work, to the deputy superintendent. The report did not mention individuals, the evaluation of those individuals only being utilized for future service. Moreover, McGreevy acknowledged that the title was changed to Supervisor because evaluation was necessary; since the work kept growing, the role was broadened to Supervisor.

In an effort to refute petitioner's allegation that the two jobs were essentially the same, James J. Jencarelli, employed by respondent as First Assistant Superintendent for Personnel, was called to testify. Jencarelli noted that the Coordinator was to report to the assistant superintendent (which position was abolished July 21, 1981 and absorbed by the superintendent or deputy superintendent), while the Supervisor position contemplated reporting to the deputy superintendent. In addition, the Supervisor received salary based on the supervisory guide; while the Coordinator received the entitled and appropriate step on the teacher's guide plus a $1500 stipend for the year. More to the point, and in terms of function, Jencarelli stated that the Coordinator was not authorized to supervise and evaluate personnel while the Supervisor was authorized to perform supervision and evaluation of personnel. Thus, the Supervisor position required a supervisory certificate as one of its qualifications. Referring to the job of Coordinator, Jencarelli pointed out that a Coordinator's job was to gather material related to curriculum. Thus, reports from the various committees would not contain an indication of who the Coordinator worked with. Rather, the teachers who worked with the Coordinator would report to the area supervisor or principal. On the other hand, Jencarelli stated that the Supervisor of Curriculum Planning would be responsible for evaluating personnel in a teaching capacity. Thus, the Supervisor would conduct the same type of evaluation as an area chairman although he/she had no background in a particular subject area. It is noteworthy, however, that on cross-examination it became apparent that Jencarelli did not know

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whether the Supervisor would evaluate curriculum or teaching. Moreover, other than differences in supervision, Jencarelli, admitting that appellant did not report to him, stated that he did not know of any other difference between the two positions nor did he know precisely what petitioner did as Acting Supervisor. Moreover, on questioning by this judge, Jencarelli indicated that he believed that both job descriptions were prepared by the individual in the particular positions, namely petitioner. In addition, he acknowledged that although there was no official board action, the position of Coordinator was effectively abolished when the position of Acting Supervisor Curriculum Planning was established.

In an effort to clarify the manner in which the two job descriptions were prepared, McGreevy resumed the stand. She testified that she had prepared job descriptions for both jobs. In fact, the job description for the position of Coordinator (P-7) was written by her and approved by the board prior to her assuming the position. However, although she acknowledged that she had prepared a job description for the Supervisor's position prior to the job being posted, and presumably subsequent to her assignment to it, she claimed it was not P-8 (which she first saw when the promotional exams were posted). Rather, noting that changes in her prepared description were made by the board, of import is the fact that petitioner recalled that in her prepared description the word "coordinate" was not changed to "supervise."

Upon further questioning petitioner contended that there was essentially no difference in the two positions in terms of function. She contended that the real difference in the two jobs was in terms of status; the added status of supervisor being helpful to her in dealing with other supervisors. Further, she admitted that the difference in status occurred because in one job she functioned as a supervisor and in the other she did not. She admitted that she had known that no supervisory certificate was required for the Coordinator's position (she stated that it had been her view that she could not get tenure as a Coordinator and acknowledged that a promotional test was not required for the position), but that prior to taking the job of Supervisor she had known it to be a supervisory position.

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At issue is whether petitioner, a tenured instructional-staff member, has proven by a preponderance of the credible evidence that the time served in the position of Coordinator i.e. from February 16, 1980 until June 23, 1982, when she was appointed Acting Supervisor, Curriculum Planning, may count towards tenure as a supervisor pursuant to N.J.S.A. 18A:28-6.[1] Tenure is a status created by statute and not contract; one is not entitled to tenure until all the statutory requirements are met. Ahrensfeld v. State Bd. of Ed., 126 N.J.L. 543 (1941); Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962). More to the point, an employee of a board of education is entitled to tenure if he or she (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate and; (3) has served the requisite period of time. Spiewack v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). It would seem, therefore, that by an extention of reasoning, petitioner has established her right to promotional tenure under N.J.S.A. 18A:28-6 if she has proven that she worked in a position for which a certificate as supervisor was required (albeit implicitly), if she held such a certificate and if she worked in the position for the requisite number of years. See, Howard v. Bd. of Ed. of Jersey City, OAL DKT. EDU 7814-81, affirmed Comm'r. of Ed., March 8, 1983. Clearly, the evidential record clarifies the fact that petitioner was certified as a supervisor during all relevant time periods. The questions which remain are whether petitioner has established that her service as Coordinator was in a position that required supervisory certification and whether service in that position may be tacked on to service in the position of Acting Supervisor Curriculum Planning in order to provide petitioner with service in the "position" for the requisite number of years.

The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. Quinlan v. North Bergen Bd. of Ed., 1959-60 S.L.D. 113, 114 rev'd State Bd. of Ed., 1960-61 S.L.D. 243, aff'd 243 N.J. Super. 40 (App. Div. 1962). In so doing, the duties performed rather than the title of the

[1] N.J.S.A. 18A:28-6 provides that any teaching staff member under tenure or eligible to obtain tenure, who was transferred or promoted with his consent to another position shall not obtain tenure in the new position until after (a) expiration of a period of employment of two consecutive calendar years in the new position; (b) employment for two academic years in the new position together with employment in the new position at the next succeeding academic year; or (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years . .

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position must be controlling in determining whether a position is protected by tenure. Id. at 114. In this regard, N.J.A.C. 6:3-1.10 (g) provides that:

> 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, whether petitioner should be credited with time served as Coordinator, Curriculum Planning, in determining whether she is entitled to tenure as a supervisor requires focusing on the duties performed as Coordinator, particularly in comparison to those performed as Supervisor. A consideration of the case law in this area, in light of the facts established at the hearing, indicates that petitioner was essentially functioning in the same manner in both positions—as a supervisor—and, thus, should be granted tenure.

As a backdrop and preliminarily it must be observed that N.J.A.C. 6:11-10.4 (c) defines supervisor as ". . . any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." More helpful, is the Commissioner's definition of supervision:

> * * * Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things, the observing, advising and directing of teachers in their instructional and guidance activities inside and outside the classroom. Through advice, either upon request or otherwise, through programs of in-service training and through curriculum improvement activities, the supervisory staff acquaints the classroom teacher with the aims, materials and methods of education and encourages and assists them to achieve the objective of the schools. * * * Grasso v. Hackensack Bd. of Ed., 1960-61 S.L.D. 137, 138.

In evaluating the nature of the duties performed, it has been held that where the teaching staff member had performed the duties of assistant superintendent of schools with the knowledge and at the direction of the school board and possessed the certificate required to serve in that position, she was entitled to tenure in that position even though she was not given the appropriate title. Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805. Of greater significance and akin to the facts herein is Vieland v. Princeton Regional Bd. of Ed., 1976 S.L.D. 892. In that case, the petitioner held the position of Coordinator

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of Staff Development from 1970-73; she served as Director of Staff Services from 1973 to February 1975. A supervisor's certificate was required for both positions. The Commissioner found that the duties performed by petitioner in these positions were supervisory as defined in Grasso at 137, and they were performed with full knowledge of the school board which had approved them as part of a job description. Thus, the Commissioner held that petitioner was entitled to tenure as a supervisor even though the job description for the coordinator position included a clause stating that the position required explicit omission of the supervisory or evaluative role. Vieland at 898-899.[2]

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2 But see, Howard v. Jersey City Board of Education, OAL DKT. EDU 7814-81, March 8, 1983 (unreported) which at first blush appears to be apposite to the instant case. In Howard, petitioner was assigned to the temporary position of Assistant Director of the Title I-ESEQ 1965 Program in October 1977. In December 1980, he was appointed Acting Director of the program. In September 1981, he was returned to the position of classroom teacher, which he claimed was violative of his tenure and seniority rights.

Following the criteria set forth in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), the administrative law judge found that the petitioner did not work in a position for which a supervisor's certificate was in fact and in law required. Howard at 7. The administrative law judge observed that while the petitioner felt he was charged with observation and evaluation of instructional personnel employed in the Title I Program, the superintendent's testimony made clear that such essential supervisory functions and duties were never intended to be encompassed within the assistant director's position, but rather, were the responsibility of the school principal. Id.

Although the facts of Howard are similar in some respects to those in the instant case, there are important distinctions between the two cases. Respondent's intentions as to the distinction between the positions of Coordinator and Supervisor are not clear here; that the Supervisor position did not exist while petitioner worked as Coordinator and vice versa, suggests little or no difference in the two positions. Moreover, the duties of the positions were expressly recognized by the school board in Howard at 8; there is no similar recognition in the instant case.

In addition, it is noteworthy that to the extent that the administrative law judge in Howard relied on the Commissioner of Education's decision in Epps v. Jersey City Board of Education 1980 S.L.D. April 8, 1980, rev'd. (N.J. App. Div., January 3, 1983, A-3171-79-T3) (unreported), (wherein Epps was initially denied tenure because of the nature of the program he worked in and the employees he supervised), it no longer can be said to provide support for same in light of the Appellate Division's decision. In fact, Epps suggests that one should look beyond the school board's official action. In Epps, the court found that appellant, who served in a supervisory capacity (under several titles) in the Title I Program, had met the criteria for tenure set forth in Spiewak. Epps was certified as a supervisor, acted in the capacity of a supervisor and for most of the time in question, his job specifications set forth supervisory and evaluative junctions. Id. at 6. In reaching its conclusion, the court noted that the administrative finding that Epps was not appointed by the school board as supervisor was not controlling. Id.

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In the instant case although the job description for the Coordinator position did not contain the word "supervise" as it did in the Supervisor of Curriculum Planning job description, this court must, as was done in Vieland, consider whether the duties described were actually supervisory.

In reaching a determination on this issue, this court has evaluated the testimony and evidence adduced at the hearing. It appears clear that there were at least two differences in the two positions. Clearly, the Coordinator position, as specified in the job description (P-7 in evidence) required the "coordination" of all efforts of the professional staff in projects of curriculum development while the position of Supervisor of Curriculum Planning specified "supervision." In addition, the former position required a teaching certificate while the latter necessitated a supervisor's and/or principal's certificate. Other than those distinctions, readily admitted by petitioner, petitioner contended in essence that there were essentially no differences in the two positions. Although she acknowledged that she did not evaluate the manner in which the teachers performed their teaching functions, she contended that she was, however, responsible for seeing that curriculum development took place, which of necessity required the evaluation of teacher's contributions and performance on the committee level. Apparent from her testimony was the fact that the thrust of her responsibility was to determine what was to be taught in a specific area. Moreover, petitioner alleged that there was no change in her duties when she became Acting Supervisor, but simply a continuation and furtherance of the same functions. It was her belief that the latter title was simply a "better" title (with increased and more appropriate status) for the same, if not broader, job functions (which required evaluation). (Although petitioner seemed to indicate at one point that the change in title reflected some change in her supervisory functioning, the substance of her testimony was to the effect that the real difference in the two jobs was simply in terms of the status attributed to the title and not in terms of function.) In an effort to substantiate this contention petitioner pointed out that when she functioned as Coordinator there was no Supervisor, and when she functioned as Supervisor there was no

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Coordinator. In fact, petitioner recalled that in the job description she prepared for the position of Supervisor of Curriculum Planning she did not use the word supervise but continued to use the word coordinate.

Although James Jencarelli attempted to dispute petitioner's contention as to the similarity of the two jobs, his testimony failed to do so. Jencarelli sought to distinguish between the two jobs in terms of "authorization" to supervise and evaluate. That characterization, however, failed to demonstrate actual differences in function. Equally unpersuasive to this court was Jencarelli's statement that the Supervisor of Curriculum Planning was responsible for evaluating personnel in a teaching capacity. Not only did this allegation not comport with petitioner's statements to the contrary and not appear as part of the job description, but on cross-examination it became apparent that Jencarelli simply did not know whether the Supervisor was to evaluate curriculum or teaching. Moreover, Jencarelli admitted that petitioner did not report to him, that he did not know of any other differences in the two positions and, in actuality, did not know precisely what petitioner did as Acting Supervisor. Based on this testimony and evidence, this court cannot attribute significance to Jencarelli's view that the Supervisor was an "evaluator" while the Coordinator was not. Rather, it appears clear to this court that the preponderance of the believable evidence is to the effect that there was little if any difference in the functions of the two positions. Petitioner did essentially the same job, in the "supervisory" position, albeit perhaps on a grander scale, as she did as Coordinator. In fact, when petitioner was Coordinator there was no Supervisor and when petitioner was Supervisor there was no Coordinator. More particularly, this court accepts petitioner's statement that her functioning involved substantially the same tasks and responsibilities with a more apt and prestigious title.

In view of this court's determination that the two positions are essentially the same in terms of function, the issue that presents itself is whether the function of the "position" may be deemed to be supervisory in nature. For if the "position" was essentially supervisory then petitioner must be deemed to have served the requisite period of time as a supervisor. In resolving this question, it is observed that it is undisputed by

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respondent that the position of Supervisor of Curriculum Planning is supervisory in nature. That being so, it clearly follows that if the two positions are similar in nature, the Coordinator position can be considered nothing less. More to the point, however, it is apparent that the "position" as outlined above clearly deals with the development and maintenance of high standards of curriculum as set forth and articulated in Grasso. Clearly, in order for supervision to be ongoing, it is not essential that teachers be evaluated in their instructional performance. Supervision may be accomplished through "curriculum improvement activities" such as those performed by petitioner (P-7 and P-8 respectively).

In addition to the question of duty, it behooves this court to consider the ramifications of the lack of supervisory certification required for the Coordinator position. At issue is whether the fact that supervisory certification was not required for the position of Coordinator prohibits service in the Coordinator position to be tacked on to petitioner's employment as Acting Supervisor Curriculum Planning. It is this court's view that the lack of that requirement cannot serve to control the result here. Rather, since petitioner held the proper certification for the position (which certification was implicitly required, or ought to have been required, for the position), the requirements of certification pursuant to N.J.S.A. 18A:28-6 have been met. A board cannot control a person's category of tenure by virtue of the title assigned or the certification required. Rather, the duties performed and the certification which should be, or is, implicitly required dictate the appropriate result. Support for this conclusion may be gleaned from Euell v. Princeton Reg'l. School Dist., Mercer County, 1978 S.L.D. 666, aff'd State Bd. of Ed., 1979 S.L.D. 825. In that case, petitioner was appointed to the position of assistant principal. However, since she did not hold the appropriate certificate (school principal; school administrator), her title was changed to administrative assistant; in fact, her duties were those of an assistant principal except that she did not evaluate teachers. Six weeks before she was appointed principal, she attained the requisite certificate for principal. The Commissioner determined that petitioner had acquired tenure as an assistant principal. In so doing, he concluded that since petitioner became eligible for tenure as an assistant principal when she received the certificate, the one-year and eleven-months

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petitioner served as principal should be added to her six-week service as administrative assistant with proper certification. Id. at 676. It would appear that, here as in Euell the petitioner held one title (Coordinator) while actually performing the duties of another (Supervisor). In addition, petitioner held the appropriate certification for both positions. Thus, in the manner of Euell, the time served as Coordinator should be counted as time served as Supervisor.

Based on the foregoing, I **CONCLUDE** that petitioner has proven by a preponderance of the credible evidence, that she has attained tenure as Supervisor of Curriculum Planning pursuant to N.J.S.A. 18A:28-6. Accordingly, therefore, her petition of appeal is granted and it is **ORDERED** that she be reinstated to the position of Supervisor of Curriculum Planning.[3]

[3] It is to be noted that in so ordering this court is cognizant of the Judgment and Arbitration Award (See, Jersey City Ed. Ass'n., (P-9 and R-1)) in which the arbitrator set aside the board's appointment to certain positions due to its failure to comply with clearly enunciated promotional requirements. While this court makes no finding as to the applicability of the award to the position herein, inasmuch as the position was not the subject matter of the arbitration award and in view of this court's determination that petitioner has a statutory right to tenure as a supervisor, the award cannot serve to bar the relief sought.

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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.

July 25, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

7/27/84
DATE

Receipt Acknowledged:
Seymour Lewis
DEPARTMENT OF EDUCATION

JUL 31 1984
DATE

Mailed To Parties:
Ronald L. Parker/sht
FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

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APPENDIX

WITNESSES

Dorothy McGreevy
James J. Jencarelli.

EXHIBITS

P-1	Certificate of Principal/Supervisor, dated June 1977, for Dorothy McGreevy
P-2	Resolution of the Board of Education, dated March 19, 1980
P-3	Resolution of the Board of Education, dated July 22, 1982
P-4	Resolution of the Board of Education, dated July 20, 1983
P-5	Letter to Mrs. McGreevy from James J. Jencarelli, dated July 28, 1983
P-6	Resolution of the Board of Education of August 24, 1983
P-7	Job Description for Coordinator–Curriculum Planning
P-8	Job Description for Supervisor of Curriculum Planning
P-9	Arbitration Award of August 27, 1982
P-10	Memorandum to Dr. Michael M. Ross from Mr. Franklin L. Williams regarding staff reductions in critical areas, dated August 16, 1983 (2 pages)
R-1	Confirmation Award and Order of Judge Tarlton

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DOROTHY MC GREEVY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c by extension.

A close reading of the initial decision, the arguments of law and an examination of the exhibits attached convinces the Commissioner that the judge erred in reaching her conclusion that petitioner attained tenure as a supervisor. The Commissioner notes petitioner's contention that the term "Coordinator" is synonymous with the term "Supervisor" as used in the job description (P-7 and P-8 respectively). The Commissioner acknowledges the marked similarity between the two job descriptions but observes that the only certification requirement for the position of "Coordinator" was that of a New Jersey Teacher Certificate which petitioner held as a tenured teacher at the commencement of her 1971-72 school year. The Commissioner notes that petitioner served one year as coordinator and then was appointed as acting supervisor, a position in which she served one year until its abolishment.

In the opinion of the Commissioner there is no legal basis for petitioner to reach backward in time from her position as acting supervisor to her service as coordinator to try to tack together the two years of service for the purpose of tenure pursuant to N.J.S.A. 18A:28-6. Petitioner fails the test of entitlement to tenure set down in Spiewak, supra; nothing in the record by document or testimony indicates that the position of coordinator required anything beyond teacher certification.

For all the above-stated reasons the Commissioner finds and determines that petitioner did not attain tenure as a supervisor pursuant to N.J.S.A. 18A:28-6. Accordingly, the conclusion of the judge is herewith set aside, the Petition of Appeal is dismissed with prejudice.

SEPTEMBER 10, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 3916-84
AGENCY DKT. NO. 188-5/84

D.D. BY E.D., HIS PARENT AND GUARDIAN, AD LITEM,
Petitioner,
v.
LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

APPEARANCES:

William S. Ruggierio, Esq., for petitioner (Sacharow, Ruggierio & LeBon, attorneys)

Arthur F. Risden, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: June 6, 1984 Decided: July 20, 1984

BEFORE **JOSEPH LAVERY,** ALJ:

This is an appeal by D.D. through his legal guardian and father, E.D. They protest the expulsion of D.D. (hereinafter petitioner) from Cherokee High School, a school within the Lenape Regional High School District (hereinafter District). The action was taken by the Board of Education (hereinafter Board) based on accumulated disciplinary actions.

PROCEDURAL HISTORY

This matter was initiated by a motion which preceded the Board of Education expulsion hearing filed with the Department of Education on May 15, 1984. Subsequent to

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that hearing, an additional motion was filed with the Department of Education on May 23, 1984. A cross-motion was filed by the Board on May 30, 1984, and the matter was filed with the Office of Administrative Law (OAL) on May 30, 1984. The case was then scheduled for oral argument on the motion and cross-motion, to be held June 1, 1984. That hearing was converted to a conference and was continued and expanded to a full plenary hearing on June 5, 1984, in the Evesham Township Municipal Court. The hearing continued to the following day, June 6, with the intention of attempting to provide an oral decision through telephone conference. A decision was announced on that date and the record closed.

MOTIONS

Petitioner's motions of May 16, 1984 and May 23, 1984, in sum sought to stay the expulsion of petitioner, to restore him to classes pending appeal, and to elicit a ruling that the expulsion was not warranted on the facts. A cross-motion by the Board sought dismissal or in the alternative summary judgment. After a conference hearing on the date of motion, June 1, it was concluded that the remedy sought would more efficiently be pursued through rapid plenary hearing. With that understanding the motions were held in abeyance, to be absorbed within the plenary hearing proceedings scheduled for June 5, 1984.

ISSUES

The sole issue in this case is whether the Board, in expelling petitioner from school, acted within its proper statutory discretion, or whether its decision was arbitrary, capricious, unreasonable or taken in bad faith.

Burden of Proof

The burden of proof falls on petitioner. He must show by a preponderance of the credible evidence that the Board acted arbitrarily, capriciously, unreasonably or in bad faith. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

Undisputed Facts

Many of the basic facts are not in contention:

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Petitioner began the 1983-84 school year as a junior at Cherokee High School, one of the three high schools in the District. In the course of every school year during his stay at Cherokee, he accumulated a history of discipline. Specifically, this has included a total of 22 "discipline records," 7 suspensions, and, as a further consequence, 21 days of absence. The separate disciplines were prescribed by 14 separate teachers. The process under which such discipline is imposed is governed by Board "Policy 505." This Board regulation includes a series of appeal steps, each of which is accompanied by progressive disciplinary penalties. Generally described, the official appeal system begins with an informal hearing at the level of the high school principal or his/her designee. For lengthy suspensions, an administrative review board is available. Thereafter, appeal hearings are convened before the superintendent of schools. The final plateau for local administrative appeal ends with the Board of Education itself. Petitions beyond the Board must be pursued with the State Commissioner of Education.

Petitioner, during his high school career, has advanced through every step of discipline and appeal. However, the Board's decision to expel was prompted only by petitioner's recent actions, from which he has made timely appeal. The alleged offenses, four in number, all occurred after January 1, 1984. They followed a superintendent's hearing before K. Kiki Constantinos, held November 17, 1983. At that time, the superintendent informed petitioner and his parents of the consequences of further suspension. The superintendent cautioned them that any future suspension would trigger petitioner's referral to the Board for an expulsion hearing. Notwithstanding this warning, petitioner was again suspended. The particular incidents involved were:

1. January 18, 1984: petitioner was charged with having removed a fire extinguisher and having used it to squirt a fellow student in the school hallway. A three-day suspension followed (R-5).

2. March 21, 1984: petitioner was suspended beginning April 9, 1984 through the date for Board hearing, April 17, 1984, after a report of hazardous driving in the school parking lot (R-3). On April 17, the Board expelled petitioner, effective April 18, 1984. (Spring vacation intervened between April 20 and April 30. In that time, petitioner brought an appeal to the Superior Court. Judge Haines ordered his reinstatement, to be followed by a new hearing. On May 2, 1984, petitioner was reinstated.)

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3. May 2, 1984: petitioner was charged with disrupting a physics class by playing "dollar poker" while a teacher was instructing (R-2).

4. May 10, 1984: petitioner was reported to have engaged in horseplay with a fellow student during a power shop class. He was charged with blowing his nose in a paper towel and rubbing it on another boy (R-1).

Eventually, the Board reconvened the expulsion hearing as directed by Judge Haines. That hearing was held on May 16, 1984. The Board redetermined that expulsion was appropriate. Petitioner, who earlier had sought without success to stay the Board hearing through a motion to the Commissioner of Education, then moved again to have the Commissioner of Education reinstate. The Commissioner, in response, forwarded the case to the Office of Administrative Law. These proceedings ensued.

Adversary Arguments

The Board's Position:

The Board at hearing, although not bearing the burden of proof, nevertheless presented its case first, in the interest of a coherent record.

In sum, the Board argued that petitioner's collective history of discipline, taken together with the four individual incidents from which timely appeal was made, warranted the expulsion. Moreover, it stated that neither the authority of the Commissioner nor the role of this administrative law judge embraced a discretion to substitute a judgment on the merits made by the Board. Rather, the Commissioner and an administrative law judge are limited to determining whether the Board's action was arbitrary, capricious, unreasonable or motivated by bad faith. In support of its decision, the Board then presented witnesses to the four incidents underlying the expulsion of petitioner:

January 18, 1984: **David Sandowich,** a physical education and health teacher, recalled that date. While he was instructing his class, he heard a commotion nearby in the school hallway. Reacting to the noise, he went into the hallway and found two students, both wet. One of the students was petitioner. A fire extinguisher lay nearby. Water was not only on the students, but also on the hallway floor. The students were chasing each

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other. Mr. Sandowich knew that students were not permitted to be in the hallway at the time. As a result, he prepared a "discipline record" for each (R-5). Assistant Principal **Kathleen R. Buckley** discussed the incident with petitioner. Despite the warning of the superintendent during the November 17, 1983 hearing, she determined not to refer petitioner for a Board expulsion hearing. Her reasoning was that petitioner had denied using the extinguisher. He conceded only that he and his fellow student were squirting one another at a water fountain. Thus, she levied only a three-day suspension.

March 21, 1984: **Kathleen Costello**, a health and physical education teacher, recalled this event. On that day she observed petitioner driving in the parking lot of Cherokee High School. Ms. Costello had seen a girl whom she knew leave his car. She then watched petitioner drive off at a high rate of speed, intentionally spinning the car 360 degrees with screeching wheels. He next proceeded to the exit of the parking lot where he "wheeled out," that is, "burned rubber" at a high rate of speed and left the school vicinity. Ms. Costello was extremely concerned. She feared that persons nearby might be injured. Her husband was still in the lot. Petitioner also barely missed collision with numerous cars parked nearby. **Andrew M. Medrick,** a science teacher, also observed petitioner's car spin and "wheel out." He discussed it with Ms. Costello and her husband. He thought petitioner's driving was dangerous and felt in jeopardy himself. The two teachers decided that Ms. Costello should fill out a "discipline record" (R-3). The incident prompted Assistant Principal Buckley to suspend, pending a Board expulsion hearing. She investigated the matter first with petitioner, who eventually admitted to the act. He stated he was too ill to attend school, but nevertheless brought his girlfriend to school in a yellow car that he did not own.

May 2, 1984: **Diane I. Hillman**, a science teacher, recalled petitioner's first class after the Superior Court's order of reinstatement. Petitioner became involved in a "dollar poker" game, played by using serial numbers on currency. He did so during her class instruction. Ms. Hillman remembered asking petitioner to stop but he continued nonetheless. Only when she went directly to his desk did he cease. She directed him to put the dollar bill away. Petitioner then reacted as though he did not understand the cause of her irritation. Ms. Hillman filled out a "discipline record" (R-2) and forwarded it to the administration. Petitioner was then suspended.

May 10, 1984: Describing petitioner's final infraction, **Robert A. Cassamo,** an industrial arts teacher, stated that he observed petitioner blow his nose in a paper towel and wipe

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the contents on another student's back during a power shop class. The student, T.G., pushed petitioner away. Petitioner answered by punching T.G. in the stomach with a quick, closed fist. The movement was sharp, but not hard. Although petitioner's attitude was playful, the other student appeared angry and excited when he struck at petitioner in retaliation. In later discussions, petitioner said that he was pretending, but T.G. had no knowledge of this. Although Mr. Cassamo felt that this was not a true "fight," he felt also that it was sufficiently serious to qualify as hazardous behavior. Mr. Cassamo believed his treatment of the incident was no more harsh with petitioner than it would have been with any other student.

All teachers who testified denied that Ms. Buckley had given special direction to discipline petitioner at the slightest provocation following his reinstatement by the Superior Court. Rather, they were told simply to monitor his behavior. This instruction was not atypical procedure for students returning from suspension. The Board also urged the theory that petitioner's entire disciplinary record must be assessed when evaluating the Board's decision to expel (R-6, A through E). Existing legal precedent, the Board suggests, is clearly on the side of presuming the correctness of its decision. Overturning that action could be justified only after clear findings of an abuse of its discretionary power. Petitioner's continued willful disobedience, his disruptiveness, and the danger he posed to the faculty and student body were more than adequate validation of the expulsion.

Petitioner's Argument:

Petitioner presented his case through personal testimony and, with respect to the power shop incident, through appearance of T.G., the other student involved. As a whole, petitioner's argument was that the punishment for his offense went far beyond an appropriate response. In addition, he urged that a penalty be fashioned now which would permit his participation in the final examinations. Hopefully, their successful completion would allow him to leave school with his class.

Petitioner discussed each of the incidents spoken of above in chronological order.

January 18, 1984: Petitioner stated that he had never made use of the fire extinguisher as charged by Mr. Sandowich. He had left the nearby gymnasium only for a drink of water in

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the hallway. Once at the water fountain, he was pushed by another student. He responded in kind. The other student removed the fire extinguisher from the wall, and petitioner then turned the nozzle away. In the scuffle both he and the fellow student were sprayed. Petitioner admitted he had also squirted his schoolmate with water from his mouth.

March 21, 1984: Petitioner recalled being absent from school because of mononucleosis. He acquiesced to the pleading of his girl friend to drive her to school. Once at school, he inadvertently pushed the accelerator too hard. He never lost control, but the car may have slid a small distance. It did not turn 360 degrees. Petitioner conceded speeding from the lot; nevertheless, he stressed that the only one endangered was himself.

May 2, 1984: Petitioner denied he had engaged in "dollar poker." In his first period class he was asked by another student for a dollar bill. He merely complied. There was no disruption in class and no gambling.

May 10, 1984: Petitioner described this as mere joking interplay. He had pretended to wipe his nose on a towel and rub T.G.'s back. T.G., in turn, punched him. Petitioner recalled that although he may have pushed back, there was no fight since both were friends. This was customary behavior between them. No power tools were near. The bench tops had been cleaned at the end of class. T.G. testified in a similar vein, but agreed that this activity was dangerous in that setting.

Overall, petitioner argued that the four incidents complained of would not warrant expulsion in the context of generally experienced school behavior. Emphasis by Mrs. Buckley on monitoring the activities of petitioner may have implanted in the teachers' minds a belief that a special, inordinate focus on discipline was called for. Because of this, the teachers viewed petitioner's offenses with an outsized perspective.

Additionally, petitioner's accumulated disciplinary record reveals that most of the serious offenses were in petitioner's first two years of attendance. Expulsion is thus an overreaction to the latest behavior. It is a penalty reached without crediting family counseling recently begun and currently ongoing.

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FINDINGS OF FACT

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

As **UNDISPUTED** facts, I **FIND** those designated on pages 2 through 4 of this opinion.

As to matters which are disputed or **CONTESTED,** pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. As to the January 18, 1984 incident, petitioner did take part in horseplay that included removal of a fire extinguisher from its assigned place. The water on the floor and on each student was sprayed, at least in part, by petitioner, who spit water at his fellow student.

2. As to the March 21, 1984 incident, petitioner, while absent with legitimate sickness, took his girl friend to school. He drove his car at a high speed and in a hazardous fashion while in the school parking lot. He did spin the car in a circle and "wheeled out" from the exit. Both of these maneuvers were fraught with the potential for serious injury to himself and others in the lot, and risked considerable damage to parked cars.

3. As to the May 2, 1984 incident, petitioner disrupted the physics class. He did so by discussing a dollar bill with a fellow student, for whatever reason. This took place while Ms. Hillman was attempting to teach physics. He stopped only after Ms. Hillman approached him directly, after repeated attempts to make him desist.

4. As to the May 10 incident, petitioner did pretend to wipe his nose on a paper towel and did rub the paper towel on the back of a fellow student. T.G., the fellow student, was unaware that petitioner had merely pretended. T.G. responded with alarm and agitation. The ensuing scuffle was not at the level of a real fight. It was sufficiently

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roughhouse and serious as to be disruptive. It was dangerous in the setting of a power shop.

5. Assistant Principal Buckley did counsel teachers to monitor the behavior of petitioner in class after the court's reinstatement from expulsion. This direction was neither more nor less than would have been applied to any child who had been suspended. None of the teachers felt compelled to impose discipline on petitioner that was unusual or undeserved as a result of Ms. Buckley's directives.

ANALYSIS

Nothing in this record proves that the Board was arbitrary, capricious or unreasonable in expelling petitioner from Cherokee High School. This child's record is one which is replete with disciplinary infractions of serious proportion (R-6, A through E). It does not disclose any discernable focus by the school administration or individual teachers on petitioner which would suggest personal bias or compulsion to discipline. Assistant Principal Buckley's attention to the behavior pattern of petitioner was professional and completely justified. To the extent she advised her teachers to keep a close watch on petitioner, her instructions were warranted. They were appropriate against the backdrop of her responsibility to administer discipline properly in a large high school. Her actions also reflect a dutiful concern for the welfare of all other students in her charge.

The four incidents, at issue, even as described by petitioner himself, would together with his past record, support expulsion. This is especially true when considered against the warning by Superintendent Konstantinos during the November 17, 1983 hearing. Assistant Principal Buckley even afforded petitioner the benefit of a not very large doubt in the fire extinguisher incident. Yet, ignoring this largesse, petitioner persisted in like activity during the three later incidents. Even minimal judgment should prompt the thought that such conduct was not in his best interest. Testimony by the teachers who observed each of these incidents first-hand was completely credible, both in content and in demeanor.

The history of this child's educational maladjustment confirms that the current counseling is a praiseworthy move to resolve petitioner's real and continuing behavior problems. Nevertheless, although positive and laudable, it cannot override a decision by

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the Board taken to preserve the overall well-being of the other students at Cherokee High School. Petitioner is unwilling, and perhaps unable, to restrain his acting out. The Board, its administrators, and its teachers have a responsibility to provide a thorough and efficient education not just to petitioner, but to all the children in Cherokee High School. This duty, of course, cannot serve as a cloak to hide improper actions. Public officials can never evade scrutiny of their performance. In this case, however, no facts have emerged to prove that the Board treated petitioner in a fashion which was arbitrary, capricious, unreasonable or in bad faith. This is especially borne out by the inarguable adherence to "Policy 505." That regulation was followed scrupulously. It afforded petitioner more than one stop along the path to weigh the consequences of his behavior. R.R. v. Board of Education of the Shore Regional High School, 109 N.J. Super. 337, 343 (Ch. Div. 1970); N.J.S.A. 18A:37-1 and N.J.S.A. 18A:37-2.

CONCLUSION

I **CONCLUDE,** therefore, after a review of the entire record, including an evaluation of the credibility of witnesses, and for the reasons expressed in the ANALYSIS portion of this opinion, that the Board of Education, Lenape Regional High School District, did not act arbitrarily, capriciously, unreasonably or in bad faith when it expelled D.D. from Cherokee High School.

ORDER

I **ORDER,** therefore, that the expulsion of D.D. from Cherokee High School by the Board of Education, Lenape Regional High School District, be, and hereby 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.

July 19, 1984
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

July 20, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 24 1984
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 3916-84

LIST OF WITNESSES

For petitioner:

D.D. testified on his own behalf

T.J., student, Cherokee High School

For the respondent:

Robert A. Caccamo, Industrial Arts Teacher, Cherokee High School

Diane I. Hillman, Science Teacher, Cherokee High School

Kathleen Costello, Health and Physical Education Teacher, Cherokee High School

Andrew M. Medrick, Science Teacher, Cherokee High School

David Sandowich, Physical Education and Health Teacher, Cherokee High School

Kathleen R. Buckley, Assistant Principal, Cherokee High School

K. Kiki Constantinos, Superintendent of Schools, Lenape Regional High School District

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LIST OF EXHIBITS

For petitioner:

P-1	Copy of note from Kathleen R. Buckley to all teachers of D.D., dated May 1, 1984
P-2	Letter from William H. Foltz, Principal, Cherokee High School, to parents of D.D., dated April 6, 1984

For respondent:

R-1	Discipline record, dated May 11, 1984
R-2	Discipline record, dated 5-2-84
R-3	Discipline record, dated March 21
R-4 (I.D. only)	Letter from Betty S. Adler to William Ruggierio, Esq., dated May 10, 1984
R-5	Discipline record, dated January 18, 1984
R-6	A through E school files of D.D.
R-7	Letter, dated May 11, 1984, William H. Foltz, Principal, to Mr. & Mrs. E.D.

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D.D. by E.D., his parent and guardian, ad litem,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision 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 that in making a determination with respect to whether the Board acted arbitrarily, capriciously or unreasonably in expelling him, focus should be upon the four incidents in 1984 which lead to his ultimate expulsion. Petitioner strongly objects to the judge's conclusion that the assistant principal's directive to staff to "monitor his behavior" was not unusual or unjustified. He avows that such a "monitoring" instruction would lead to the reporting of events which would otherwise escape notice or not result in substantial discipline and contends that the events of alleged misconduct following his court-ordered return to school on May 1, 1984 are not sufficient to warrant expulsion. As regards the two incidents occurring earlier in 1984, petitioner asserts that, at most, the record indicates he squirted a schoolmate with water from his mouth in the vicinity of a water fountain and, although admitting that the March incident with his car was unfortunate, he believes it is wrong to consider this incident as an act of intentional wrongdoing sufficient to warrant expulsion. He, thus, asks that the Commissioner find that the Board's action in expelling him was arbitrary, capricious and unreasonable.

The Board rejects the arguments put forth by petitioner and contends that the conclusion and determination by the judge should be affirmed and adopted as the final decision in this matter.

The Commissioner upon careful and thorough review of the factual circumstances of this matter, cannot support petitioner's exception that focus should be limited to the four incidents in 1984 which ultimately led to his expulsions when determining whether the Board's action was arbitrary, capricious or unreasonable. The record is abundantly clear that petitioner has an extensive history of disruptive behavior since his entry to high school. It is readily apparent from a review of the record that he consistently

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broke school rules and exhibited disruptive or inappropriate behavior despite ample time and opportunity provided him to respond to the rules and to behave in an acceptable manner. The record demonstrates that petitioner was given ample warning as to the consequence of his continued failure to abide by reasonable school rules and to meet reasonable standards/expectations for appropriate behavior.

Given the factual circumstances, the Commissioner cannot in good conscience agree that his review of the Board's action be limited to or have a primary focus upon those immediate actions by petitioner which precipitated expulsion proceedings. Nor can he support the contention that the judge erred when concluding that the assistant principal's directive to staff to "monitor his behavior" was not unusual or unjustified. The monitoring appeared both prudent and appropriate given petitioner's long history of disciplinary infractions.

The Commissioner, therefore, concurs with the judge's conclusion that the Board's action in expelling petitioner was neither arbitrary, capricious nor unreasonable. In the judgment of the Commissioner the Board's action to expel was justified given the persistent, disruptive behavior of petitioner and his refusal to behave in a manner appropriate to the school's rightful expectations. The Commissioner is constrained to emphasize that, just as a local district has a responsibility to provide a thorough and efficient education to its student, so, too, the student has a responsibility to avail him or herself of and benefit from that education. Parents likewise have a responsibility to assure that their children abide by reasonable school rules. It is not unreasonable for the school to expect its students to demonstrate respect for peers and teachers.

Notwithstanding the above, the Commissioner does observe from the record that there did not appear to be any alternative or modified educational program available in the district that might have assisted petitioner to overcome his disruptive behavioral pattern. Although the Board was not necessarily required to provide any alternative programming, particularly since petitioner was not a special education student, he is constrained to point out that such alternative strategies may have been of assistance.

The Commissioner encourages the Board to permit the parents and petitioner the opportunity to meet with the child study team to review any options available to D.D. for the continuation of his education, given his expulsion from the Lenape Regional High School District. Such options shall be ones which petitioner and his parents may pursue on their own initiative.

If the parents and D.D. agree to this offer and do in fact avail themselves of any such educational option, the Commissioner strongly recommends that the Lenape Board of Education, after a

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reasonable period of time, permit D.D. to request that it reconsider his expulsion upon evidence of his ability to be a contributing member of the school community.

Accordingly, the recommendation of the Office of Administrative Law affirming petitioner's expulsion is adopted by the Commissioner as the final decision in this matter.

SEPTEMBER 18, 1984

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8613-83
AGENCY DKT. NO. 352-9/83A

PLAINFIELD EDUCATION ASSOCIATION ON BEHALF OF LIZZIE BUTLER, MEL ROSE CANADY, DIANE MOCHARSKI, HELEN TAPPER AND IN ITS OWN CAPACITY,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,
Respondent.

APPEARANCES:

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

Victor E. D. King, Esq., for respondent
(King, King & Goldsack, attorneys)

Record Closed June 25, 1984 Decided: August 6, 1984

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OAL DKT. NO. EDU 8613-83

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

Statement of the Case

This appeal involves the validity under the Open Public Meetings Act ("Act"), N.J.S.A. 10:4-6 et seq., of an action taken by the Plainfield Board of Education ("Board"). Petitioners are the majority bargaining representative of all teachers in the district and four supplemental teachers whose positions have been abolished by the Board. Two issues are raised by the pleadings. First, petitioners contend that the Board's failure to include the item in the agenda distributed to the public constitutes a violation of the "adequate notice" provision of the Act, N.J.S.A. 10:4-8(d). Second, petitioners allege that the Board's refusal to hold a public discussion of the employment status of supplemental teachers constitutes a violation of N.J.S.A. 10:4-12(b)(8). They seek reinstatement to their former positions and an award of lost salary and other benefits. For its part, the Board denies that its procedures violated any requirements of the Act. In the event that a violation is found to have occurred, the Board denies that petitioners are entitled to the requested remedy.

Procedural History

By resolution adopted on August 16, 1983, the Board decided to "eliminate the position of supplemental teachers effective immediately." The effect of this resolution was to terminate the employment of all twelve supplemental teachers in the district, including the four individual petitioners.[1] On September 29, 1983, petitioners filed a petition with the Commissioner of Education attacking the Board's action. The Board filed

---

[1]Supplemental teachers who either had acquired tenure or possessed certification as teacher of the handicapped were offered reemployment by the Board in a different capacity. Eight of the twelve teachers affected by the resolution were rehired for the 1983-84 school year. Individual petitioners in this proceeding are the four who were not reemployed. Since the filing of the petition, Diane Mocharski was rehired by the Board as a full-time teacher for the rest of the 1983-84 school year. She has been notified by the Board that her contract will not be renewed for 1984-85.

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its answer on October 10, 1983. Subsequently, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Hearings before the Office of Administrative Law were held on April 9 and 11, 1984. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of briefs filed by the parties, the record closed on June 25, 1984.

Undisputed Facts

Most of the material facts are undisputed.

During the 1982-83 school year, the Board employed twelve supplemental teachers on a part-time basis.[2] Employment of supplemental teachers commenced about two weeks after the start of the regular school year in September and ended about two weeks before the finish of the regular school year in June. Each individual petitioner possessed appropriate certification for the subjects she was teaching. Lizzie Butler began working for the Board as a substitute teacher in 1979. From October 1980 until her termination, she was employed as a supplemental teacher. Mel Rose Canady began employment as a supplemental teacher in January 1977. Diane Mocharski started working as a supplemental instructor in April 1982. Helen Tapper commenced employment in December 1980. Except for Mel Rose Canady, none of the individual petitioners had been employed long enough to be eligible for tenure in the position.

In April 1983, the Board notified the four individuals in writing that they would be reemployed as supplemental instructors for the 1983-84 school year. Sometime in June 1983, the Board sent petitioners a second letter confirming its intention to reemploy them

[2]The individual petitioners worked five hours per day, five days per week.

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for the 1983-84 school year. Meanwhile, the majority bargaining representative was engaged in ongoing negotiations with the Board concerning the salaries of supplemental teachers. Until then, supplemental teachers had been paid less than regular teachers with equivalent qualifications and experience. The Board frankly admits that its decision to eliminate the positions was influenced, at least in part, by the supplemental teachers' demand to be placed on the same negotiated salary guide as regular teachers.

As early as August 9, 1983, the Board gave its attention to the proposed abolition of the position of supplemental teacher. Minutes of the Work and Study Meeting held on that date show that the Board privately discussed the possible "elimination of the supplemental teachers."[3] Such discussion occurred in connection with the Board's review of "the status of the stalled negotiations." At the conclusion of this private meeting, the Board directed its staff to develop a specific recommendation on the question for presentation in executive session at its next regular business meeting.

On August 12, 1984, the Board sent identical letters to all twelve supplemental teachers. The text of this letter is so important that it is reproduced in full:

> You are hereby notified, in accordance with the Open Public Meetings Act, that the Board of Education at its meeting on August 16, 1983 will discuss in private, or executive session, matters which will affect your continued employment in your current position.
>
> This letter is being sent to twelve individuals currently in the employ of the Board. In the event all of these persons request in writing that the discussion be held in public, the board will do so, otherwise, the discussion will occur in private.
>
> Requests should be made to the Business Office no later than noon on August 16, 1983.

---

[3]Work and Study Meetings are held on the second Tuesday of each month to acquaint Board members with possible items for further discussion. Any items tentatively approved by the Board are moved forward for consideration by the Board at the Business Meeting held on the third Tuesday of each month. Official action of the Board is only taken at its Business Meetings.

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The individual petitioners were understandably confused by this letter. Mocharski wondered if the letter meant that she might be offered a full-time contract for 1983-84. Canady thought the letter might mean that she would be reassigned to another position. All four requested in writing prior to the Board's self-imposed deadline that the discussion of their employment situation be conducted in public. Of the twelve teachers to whom the Board sent the letter, eleven responded by asking for a public discussion. Only one teacher did not reply.[4] Nobody specifically requested that the discussion be closed to the public. Despite the request by eleven supplemental teachers to hold a public discussion, the Board ruled that it was not required to conduct its deliberations in public unless all twelve supplemental teachers joined in the request. Without formally acknowledging receipt of petitioners' request, the Board proceeded with its plan to exclude the public from its discussion about elimination of the supplemental teachers.[5]

Also on August 12, 1983, Henry Lee, board secretary, prepared an agenda for the upcoming meeting. Copies of this agenda were released in advance to the press and distributed to the public at the beginning of the meeting on August 16, 1983. Although the Board had earlier decided to consider the elimination of supplemental teachers, the agenda made available to the public contained no reference to that topic. Instead, the proposal to eliminate supplemental teachers was mentioned in a three-page attachment labeled "Executive Session" supplied to Board members alone. This attachment, seen only by the Board, detailed the following administrative recommendation:

---

[4]Due to the short notice given by the Board, the twelve teachers hardly had any time to make a request for a public discussion. For example, Mocharski discovered the Board's letter in her mailbox upon her return from vacation on Monday, August 15. She personally delivered her written request for public discussion to the Board's business office on August 16. There is no proof on the record that the twelfth teacher actually received the Board's letter in time to answer.

[5]The meeting on August 16, 1983 was a regular Business Meeting of the Board. Date, time and location of all regular meetings had been included in the annual schedule of meetings adopted by the Board at its yearly reorganization meeting and publicized in accordance with N.J.S.A. 10:4-18.

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> ...the Board [should] eliminate the use of supplemental teachers which duplicate the services of resource room teachers. Resource rooms provide basic instruction in academic areas to a greater number of children than can be serviced by supplemental teachers. Additionally, resource rooms use personnel who are certified to teach children with learning disabilities.

In addition, the attachment set forth a proposed resolution in the form ultimately approved by the Board. Lee explained that the attachment was not distributed to the public because the Board had "asked us to have the [school] administration work further on the situation."

Butler, Canady and Mocharski, along with Eve Donahue, president of the Plainfield Education Association, attended the Board meeting on August 16, 1983. Tapper did not attend because she assumed that the meeting would be closed to the public. Soon after the opening of the meeting at 7:10 p.m., the Board adopted a resolution authorizing it to reconvene in executive session for the purpose of privately discussing various confidential items including "personnel" matters. Initially, the executive session lasted approximately 50 minutes until 8:00 p.m. Next, the Board conducted a short public session lasting almost ten minutes. Then, the Board returned for another executive session which lasted for 50 minutes until 9:00 p.m. After the second executive session was over, the Board arranged for distribution to the audience of a document entitled "Agenda Addendum." Included in the addendum was the language of the resolution abolishing the position of supplemental teacher, but not the administrative recommendation. The public portion of the meeting continued until nearly 10:30 p.m.

No special time was set aside for petitioners to address the employment status of supplemental teachers. There were, however, two opportunities during the meeting for anyone from the general public to speak before the Board. These opportunities were known as "privileges of the floor." The first, occurring at the beginning of the public

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meeting, was restricted to comments about items on the agenda. As previously noted, the agenda handed out to the public at the outset of the meeting did not contain any reference to the elimination of the supplemental teachers. The second, which occurred only after the Board had already adopted the resolution to abolish the supplemental positions, was for public comments on any item of interest, regardless of whether or not it appeared on the agenda.

None of the individual petitioners took advantage of the opportunity to utilize the privilege of the floor. Mocharski felt "intimidated" by the procedure. It did not seem to her that there was any genuine opportunity for public discussion. Similarly, Butler complained that the meeting was rushed and that "we didn't really have a chance to say anything." At one point, Eve Donahue, who in her capacity as president of the Plainfield Education Association had experience in dealing with the Board, rose to object on the ground that notice to the interested teachers was inadequate. Her objection was ignored by the Board. Before any vote of the resolution was taken, Donahue again rose to bring to the Board's attention various alleged violations of the collective agreement. Aside from Donahue's objections, there was no discussion in public of the merits of the resolution. A vote of the Board members was taken in public. By vote of five to nothing, the Board passed the resolution.

The next day, August 17, 1983, the Board notified the individual petitioners of its action to eliminate the position of supplemental teacher in the district. In its letter, the Board declared that the contract of employment for 1983-84 was "no longer in effect." Later, on March 20, 1984, the Board adopted a second resolution purporting "to eliminate the position of supplemental teachers effective August 16, 1983" by a vote of six to one. Petitioners did not receive prior notice that their rights might be affected by an action taken at this meeting. Consequently, petitioners did not have any opportunity to request a public discussion.

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Summary of Disputed Evidence

Some disagreement between the parties exists on whether the Board actually held discussions about the elimination of supplemental teachers at its executive session on August 16, 1983. As previously indicated, the minutes of the Work and Study Meeting held on August 9, 1983 reveal that the Board decided to include the subject "in the next meeting in Executive Session." On August 12, 1983, the Board informed petitioners that it "will discuss in private, or executive session, matters which will affect your continued employment." Furthermore, on August 16, 1983, the Board adopted a resolution authorizing it to reconvene in executive session to discuss "personnel" items.

Nonetheless, Henry Lee, who was present during the executive session, testified that elimination of the supplemental teachers was never discussed outside of the public portion of the meeting on August 16, 1983. Lee's testimony on this particular issue was hedged and vague. At one point, he stated that he "didn't know" if the topic came up. At another, he merely said that he could not "recall any specific comment on it." According to Barbara Anderson, supervisor of personnel, there were "several discussions" during the executive session on August 16, 1983. Of course, petitioners have no personal knowledge of what occurred when the Board met in private.

Findings of Fact

I **FIND** that the Board must have discussed elimination of the supplemental teachers during its executive session on August 16, 1983. Otherwise, it would have been totally unnecessary for the Board to notify the supplemental teachers of its intention to discuss their employment status in executive session. Nor would it make sense for the Board to deny petitioners' request to hold a public discussion if it was going to discuss the subject in public anyway. There is no doubt that the question appears on the agenda for

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discussion at the executive session. Shortly after emerging from executive session, the Board voted unanimously to abolish the supplemental teacher positions. Other than listening to Donahue's objections, the Board did not conduct any discussion of the resolution in public view. It is unlikely that the Board would vote to approve a resolution it had never discussed, especially when the Board had expressly called for more information on the proposal at its Work and Study meeting.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board violated the Open Public Meetings Act by failing to honor petitioners' request for a public discussion and that, therefore, the individual petitioners are entitled to reinstatement to their positions.

Under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., public bodies, including school boards, must comply with procedural requirements designed to protect the public's right to participate in the governmental process. Its basic purpose is two-fold: to ensure that the public receives adequate notice of all public meetings, N.J.S.A. 10:4-9; and, to guarantee that, with few limited exceptions, meetings of public bodies shall be open to the public at all times, N.J.S.A. 10:4-12(a). Generally, strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred. Polillo v. Deane, 74 N.J. 562 (1977). The Commissioner of Education has incidental jurisdiction to determine issues arising under the Act as they relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, 187 (App. Div. 1979).

Petitioners first contend that the Board violated the Act by omitting their employment status from the published agenda. This contention is without merit. In support of their argument, petitioners rely on N.J.S.A. 10:4-8(d) which defines "adequate notice" to mean,

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> ...written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken.

Because the Board knew it would discuss abolition of supplemental teachers at its meeting on August 16, 1983 and yet failed to include that subject in the agenda made available to the public, petitioners claim that the Board failed in its duty to give notice of the agenda "to the extent known." But the so-called 48-hour notice applies only to special meetings and not to regular meetings. N.J.S.A. 10:4-8(d) goes on to state where annual notice is given in compliance with N.J.S.A. 10:4-18, "no further notice shall be required for such meeting." Regular meetings are governed by N.J.S.A. 10:4-18, which provides only that the notice must contain "the location of the meeting to the extent it is known, and the time and date of each meeting." Taken together, these statutes make clear that publication of an agenda is unnecessary for regular meetings covered by the annual notice. Witt v. Gloucester Cty. Bd. of Chosen Freeholders, 94 N.J. 422, 433 (1983). La Fronz v. Weehawken Bd. of Ed., 164 N.J. Super. 5, 7 (App. Div. 1978). Therefore, the Board was not obligated to publish an agenda for its regular Business Meeting scheduled for August 16, 1983.

Even so, petitioners claim that the Board violated the Act by voluntarily publishing an agenda which left out an important item. While an agenda may not be necessary, so the argument goes, once the Board decides to publish an agenda it must include every known topic for discussion. Recently, in Crifasi v. Governing Body of Oakland, 156 N.J. Super. 182 (App. Div. 1978), the Appellate Division rejected the very same argument. Crifasi involved a challenge to the appointment of an individual to fill a vacancy in the borough council. As framed by the court, the issue was "whether a public body may consider a matter at a regularly scheduled meeting, for which annual notice has been given, where a separate agenda for the meeting has been provided which does not reflect that matter." 156 N.J. Super. at 186. Upholding the validity of the appointment, the Appellate Division held that "an agenda issued prior to a regular meeting does not restrict the scope of that meeting" unless the omission was intentionally calculated to mislead the public. Ibid. To adopt the contrary result, the court reasoned, would simply

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"encourage public bodies not to issue any agendas for regular meetings." (at 187). In our own case, there is inadequate proof to establish that the Board's motive was to deceive the public. If the Board had been seeking to evade the Act, it would not have served written notice on petitioners that the action taken at its next regular meeting might affect their continued employment. Thus, the present circumstances fall squarely within the holding of Crifasi.

More compelling is petitioners' second contention that the Board acted in derogation of their right to a public discussion. Since there is apparently some confusion on the extent of the Act, it is helpful to set out its scope. Known popularly as the "Sunshine Law," the Act was designed to encourage public involvement in government. Polillo, supra. It does not, however, confer any right on untenured teachers to demand a formal trial-type proceeding on the decision not to renew their contracts. See, Donaldson v. No. Wildwood Bd. of Ed., 65 N.J. 236 (1974). It does not even guarantee the right of a teacher to speak at a board meeting, although ordinarily one would expect such opportunity to be granted. Rather, the Act protects "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation and decision making." N.J.S.A. 10:4-7. Any exception to this mandate for full public disclosure is to be strictly construed. Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64, 70 (App. Div. 1977), cert. den. 76 N.J. 238 (1978).

One limited exception to the general disclosure requirement is created by N.J.S.A. 10:4-12(b)(8). That section provides:

> A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> ....Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting. (Emphasis added.)

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This "personnel exception" is intended to protect the privacy of the employee. The right belongs to the individual, not to the public body. Indeed, courts have interpreted the statute to create an implied obligation to notify potentially affected employees so that they can make a decision on whether they desire a public discussion. Oliveri v. Carlstadt-E. Rutherford Bd. of Ed., 160 N.J. 131 (App. Div. 1978); Rice, supra. Waiver of the right of privacy is a personal privilege which cannot be transferred to a third party. Rice, at 75.

Here the Board served advance notice on the supplemental teachers that action to be taken at its regular meeting might affect their continued employment. The only issue is whether the underscored language in N.J.S.A. 10:4-12(b)(8) requires that all twelve individuals make a request before the discussion must be held in public. In a footnote to page 135 of the Oliveri decision, the Appellate Division addressed just that problem:

> N.J.S.A. 10:4-12(b)(8) requires a nonpublic meeting unless all of the individual employees whose rights could be adversely affected request a public discussion in writing. Where the contract of several employees may not be renewed we construe the above language as not foreclosing each employee from the right to a public discussion of his individual matter, irrespective of whether any of the others request a public discussion of their individual matters.

What happened in Plainfield illustrates the unfairness of any other approach. While twelve teachers received notice of possible adverse action, only four were not reemployed. All four requested a public discussion. By arbitrarily defining the class of "affected employees" as twelve rather than four, the Board could defeat the rights of the four individuals most directly affected. Denial of the request for public discussion made by those at greatest risk runs counter to the generous spirit of the legislation.

Passage of the second resolution on March 20, 1984 does not cure the original deficiency under the Act. N.J.S.A. 10:4-15(a) permits a public body to "take corrective or remedial action by acting de novo at a public meeting held in conformity with this act ... regarding any action which may otherwise be voidable." It might thus have been possible for the Board to have corrected its earlier error by holding a subsequent meeting at which public discussion was allowed. Since petitioners received no notice of the March 20, 1984

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meeting and lacked any opportunity to attend a public discussion, the second resolution can be no more valid than the first. Cf., Polillo, 74 N.J. at 578.

The Board's remaining defenses may be quickly dismissed. Pointing to the exception for negotiation of a collective bargaining agreement, N.J.S.A. 10:4-12(b)(4), the Board maintains that it was justified in not holding a public discussion. Negotiation of the terms and conditions of employment did not occur in this case. Instead of negotiating, the Board decided simply to eliminate the positions of the supplemental teachers. Similarly, the Board's insistence that petitioners did not suffer any harm is unsupported by the facts. Discussion of elimination of the supplemental teachers in fact took place in executive session on August 16, 1983. Surely it did not seem so harmless to the individual petitioners when immediately thereafter they lost their jobs.

Lastly, we turn to the issue of remedy. In adition to the availability of fines, N.J.S.A. 10:4-17, and injunctive relief, N.J.S.A. 10:4-16, the Act provides that any action taken by a public body at a meeting which does not conform to its provisions "shall be voidable." N.J.S.A. 10:4-15(a). Significantly, the statute makes improper action by the public body "voidable" rather than "void." As distinguished from an act which is "void" from its inception, a "voidable" act remains in force and effect until the defect has been authoritatively ascertained and declared. Houman v. Mayor & Council of Pompton Lakes, 155 N.J. Super. 129, 158-9 (Law Div. 1977); Minder v. Minder, 83 N.J. Super. 159 (Ch. Div. 1964); Inskeep v. Lecony, 1 N.J.L. 131 (Sup. Ct. 1971). See also, 92 C.J.S. "Void and Voidable," pp. 1020-1027 (1955). Applying this recognized meaning of the words, petitioners are entitled to reinstatement to their positions, but not to an award of back pay during the intervening period. Booth v. Willingsboro Bd. of Ed., 1983 S.L.D. ___ (Comm'r of Ed. 1983), cited by petitioners in support of their demand for back pay, is not controlling. Unlike the present case, in Booth the Commissioner of Education had no occasion to consider the "void-voidable" distinction because none of the parties raised it. In light of the denial of any back pay award, it is unnecessary to reach the dispute between the parties regarding mitigation of damages. The remedy granted in this case is

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fully in keeping with the admonition of the New Jersey Supreme Court that the remedial sections of the Act "contemplate maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business." Polillo, at 579.

Order

It is **ORDERED** that the resolution adopted by the Board on August 16, 1983 is hereby declared null, void, and of no effect to the extent that it eliminated the positions of the four individual petitioners.

It is further **ORDERED** that the four individual petitioners are hereby reinstated to the position of supplemental teacher in the district.

And it is further **ORDERED** that petitioners' demand for back pay is **DENIED**.

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

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

August 6, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

August 8, 1984
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

AUG 10 1984
DATE

Mailed To Parties:
Donald A. Rakowski
FOR OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Witnesses

1. Diane Mocharski
2. Mel Rose Canady
3. Eve Donahue
4. Lizzie Butler
5. Henry Lee
6. Helen Tapper
7. Barbara Anderson
8. Mary S. Gladden
9. Annette Kearney

List of Exhibits

No.	Description
J-1	Minutes of Annual Organization Meeting, May 17, 1983
J-2	Agenda for Aug. 9, 1983
J-3	Minutes for Aug. 9, 1983

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J-4	Agenda for Aug. 16, 1983
J-5	Agenda Addendum, Aug. 16, 1983
J-6	Portion of Agenda for Aug. 16, 1983
J-7	Minutes of Aug. 16, 1983 meeting
J-8	Ltr to Lizzie Butler, dated Aug. 15, 1983
J-9	Ltr from Lizzie Butler, dated Aug. 15, 1983
J-10	Ltr to Dianne Mocharski, dated Aug. 12, 1983
J-11	Ltr from Dianne Mocharski, undated
J-12	Ltr to Helen Tapper, dated Aug. 12, 1983
J-13	Ltr from Helen Tapper, undated
J-14	Ltr to Mel Rose Canady, dated Aug. 12, 1983
J-15	Ltr from Mel Rose Canady, dated Aug. 15, 1983
J-16	Job description Supplemental Instructor
J-17	Student population figures
J-18	List entitled "Supplemental Teachers"
J-19	Resource Room Schedule March 1984

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R-20for id. Total number of students serviced 1982-83

R-21for id. Resource Room Job Description

R-22 Supplemental/RR Profiles

R-23for id. Memo to Resource Rm Teachers, Sept. 2, 1983

R-24for id. Memo to Dr. E. Lattimore, March 27, 1984

R-25 Certified copy of portion of Mimutes of March 20, 1984

J-26 Contract Helen Tapper 1982-83

J-27 Contract helen Tapper 1981-82

J-28 Contract Helen Tapper 1980-81

J-29 Contract Mel Rose Canady 1980-81

J-30 Contract Mel Rose Canady 1982-83

J-31 Contract Lizzie Butler 1982-83

J-32 Contract Lizzie Butler 1981-82

J-33 Contract Lizzie Butler 1980-81

J-34 Contract Dianne Mocharski 1982-83

J-35 Contract Dianne Mocharski 1982-83

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R-36 id. Ltr to Elementary Supplemental Teachers dated March 30, 1983, with attachments (6)

R-37 id. Draft of Plan to Replace Supplemental Instruction with attachment (1)

R-38 id. Supplemental Assignments 1982-83

R-39 id. Record of Supplemental/RR Inst. Deborah Cupid 1983

R-40 id. Record of Supplemental/RR Inst. Joan Bandomer 1982-83

R-41 Record of Supplemental/RR Inst. P. Hines 1983

R-42 Record of Supplemental/RR Inst. Y. Cowen 1983-84

R-43 Record of Supplemental/RR inst. Doris Williams 1982-83

R-44 Record of Supplemental/RR Inst. A.S. Breckens 1982-83

R-45 Record of Supplemental/RR Inst. Ruth Harris 1982-83

R-46 Record of Supplemental/RR Inst. Dianne Mocharski 1982-83

R-47 Record of Supplemental/RR Inst. Dianne Mocharski 1982-83

R-48 Record of Supplemental/RR Inst. L. Butler 1982-83

R-49 Record of Supplemental/RR Inst. M. Freiday 1982-83

R-50 Record of Supplemental/RR Inst. Mel Rose Canady 1982-83

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OAL DKT. NO. EDU 8613-83

R-51	Record of Supplemental/RR Inst. Mel Rose Canady 1982-83
R-52	Record of Supplemental/RR Inst. Dianne Mocharski 1982-83
R-53	Record of Supplemental/RR Inst. S. Lothan 1982-83
R-54	Record of Supplemental/RR Inst. Donna Russell 1982-83
R-55	Record of Supplemental/RR Inst. H. Tapper 1982-83
R-56	Record of Supplemental/RR Inst. McAfee 1982-83
R-57	Record of Supplemental/RR Inst. J.B. Macaluso 1982-83
R-58	Record of Supplemental/RR Inst. A. Press 1982-83
R-59	Record of Supplemental/RR Inst. Judy Friedenreich 1982-83
R-60	Record of Supplemental/RR Inst. Judy Friedenreich 1982-83
R-61	Ltr to Carol Greenberg, Aug. 17, 1983
R-62	Ltr to Ruth Harris, Aug. 17, 1983
R-63	Ltr to W. Laster, Aug. 17, 1983
R-64	Ltr to Y. Cowan, Aug. 17, 1983
R-65	Ltr to F. Knox, Aug. 17, 1983
R-66	Ltr to C. Klausner, Aug. 17, 1983

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R-67	Ltr to S. Lathan, Aug. 17, 1983
R-68	Ltr to R. Schwartz, Aug. 17, 1983
R-69	Ltr to M. Freiday, Aug. 17, 1983
R-70	Ltr to M. Freiday, Aug. 12, 1983
R-71	Ltr to C. Greenberg, Aug. 12, 1983
R-72	Ltr to R. Harris, Aug. 12, 1983
R-73	Ltr to C. Klausner, Aug. 12, 1983
R-74	Ltr to F. Knox, Aug. 12, 1983
R-75	Ltr to S. Lathan, Aug. 12, 1983
R-76	Ltr to R. Schwartz, Aug. 12, 1983
R-77	Ltr to Y. Cowen, Aug. 12, 1983
R-78	Ltr to Helen Tapper, dated Oct. 31, 1983
R-79	Candidate interview form, Oct. 3, 1983
P-1	Form letter from Barbara Anderson, dated Aug. 17, 1983
P-2	Negotiated agreement between the Plainfield Board of Education and the Plainfield Education Association for the 1983-84 school year
P-3	Agenda for Aug. 16, 1983

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P-4	Agenda addendum for Aug. 16, 1983
P-5	Job search list of Mel Rose Canady
P-6	Job search list of Lizzie Butler
P-7 id.	Minutes of meeting of May 18, 1982
P-8	Portions of by-laws of the Board, amended Sept. 15, 1981

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PLAINFIELD EDUCATION ASSOCIATION, on behalf of LIZZIE BUTLER ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c, each party submitting primary and reply exceptions as provided for in law.

An examination of the copius record herein, including over eighty documents in evidence and the testimony of nine witnesses, convinces the Commissioner that the judge properly concluded that the Board failed to conform to the request of four of the petitioners to exercise their right to a public discussion of their continued employment with the Board under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., specifically 10:4-12(b)(8).

In Plainfield twelve teachers received notice of possible adverse action to their employment; subsequently only four were not reemployed. However, the Board defined the class of affected employees as twelve rather than four, denying public discussion at both Board meetings in violation of the right of the four whose continued employment was affected. The Commissioner concurs in the judgment by the court that petitioners should accordingly be reinstated.

However, in the opinion of the Commissioner the judge erred in concluding that petitioners should not be awarded back pay. The act of the Board denying petitioners their right to a public hearing was voidable and, having been determined to be void, the consequent return of petitioners to employment must be with remuneration. Polillo, supra; Booth, supra

Accordingly, the Plainfield Board of Education shall reinstate petitioners with mitigated back pay as may be determined proper and necessary.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1564-84
AGENCY DKT. NO. 20-1/84

WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
LARRY F. LISKOVEC,
Respondent.

APPEARANCES:

Carl J. Palmisano, Esq., for petitioner (Palmisano & Goodman, attorneys)

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

Record Closed: June 26, 1984 Decided: August 8, 1984

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

On or about January 19, 1984, the Woodbridge Township Board of Education (Board) certified charges of unbecoming conduct, pursuant to N.J.S.A. 18A:6-10 et seq., to the Commissioner of Education for determination against Larry F. Liskovec (respondent), a teacher with a tenure status in its employ. After the matter was transferred to the Office of Administrative Law by the Commissioner as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted March 30, 1984, during which the issues were defined and discovery parameters were established. Thereafter, a plenary hearing was conducted on June 4 and 5, 1984, at the Sayreville Municipal Court, Sayreville. The record closed June 26, 1984, when the parties filed simultaneous briefs in support of their respective positions.

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PROCEDURAL HISTORY

On or about December 30, 1983, the assistant superintendent filed with the Board a statement of charges against respondent. Respondent was served with the charges on or about January 3, 1984. Subsequent to the period of time within which respondent was granted the opportunity to respond before the Board,[1] the Board, at a closed meeting conducted January 19, 1984, found probable cause to credit the evidence in support of the charges and it determined to file the charges with the Commissioner of Education. The Board also determined that "* * * the suspension of Larry F. Liskovec be continued without pay" (Verified Petition of Appeal, Para. 5).[2] The gavamen of the charges is that respondent allowed, encouraged, induced, or enticed L.K., a minor female pupil in his charge, to engage him, or to enter with him, in an improper physical relationship which was beyond the scope of his duties as a public school teacher.

Respondent denies the material allegation of the charges and contends, as a third separate defense, that the Board failed to comply with unspecified provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10. Respondent also contends that the charges must be dismissed because they are vague, unclear, and provide him inadequate notice upon which to defend; that the charges fail to state a claim upon which relief may be granted; and, that the Board has violated his rights under the Fourteenth Amendment of the United States Constitution. Prior to hearing, respondent's motion to depose L.K., the female pupil who is the subject matter of the charges against respondent, and her boyfriend, was denied by written order on May 3, 1984. Thereafter, respondent's motions for more specific answers to interrogatories, to have L.K. examined by a psychiatrist of his choosing, and for a dismissal of the charges against him because the charges were allegedly based on hearsay were also denied.

This concludes a recitation of the procedural history of the matter.

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[1] N.J.S.A. 18A:6-11.

[2] It will be shown later that the alleged conduct complained of against respondent surfaced on December 20, 1983. On December 20, 1983, "school administrators" advised respondent of the complaint (2T117). It appears respondent was suspended with pay pending an investigation. (See, N.J.S.A. 18A:25-6.) When the Board found probable cause and certified the charges to the Commissioner, it continued respondent's suspension but without pay. Respondent does not challenge the procedure of either action.

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CHARGES

The charges as filed by the assistant superintendent with the Board against respondent and as certified by the Board to the Commissioner of Education are as follows:

> The said Larry F. Liskovec, while employed as a tenured teaching staff member of the Woodbridge Township School District and during the months of November and December, 1983, did engage in conduct unbecoming a teacher in that he:
>
> (a) Made improper suggestive comments from time to time during the aforesaid period to L.K., a female minor and student at Woodbridge High School;
>
> (b) Made improper advances during the aforesaid period to L.K., a female minor and student at Woodbridge High School.
>
> (c) Took improper liberties with L.K., a female minor and student at Woodbridge High School, for the purpose of engaging in improper physical contact with said minor student;
>
> (d) Made improper physical contact from time to time during the aforesaid period with L.K., a female minor and student at Woodbridge High School, on and off the school premises;
>
> (e) Did exert undue influence on L.K., a female minor and student at Woodbridge High School, for the purpose of creating an improper non-educational relationship to the detriment of said minor student in her physical, emotional, psychological and educational well-being;
>
> (f) Did, in fact, encourage, promote and create an improper, non-educational relationship with L.K., a minor female student at Woodbridge High School, to the detriment of said minor student and her physical, emotional, psychological and educational well-being;
>
> (g) By deliberate acts and comments, did harass, annoy and cause emotional distress and embarassment to L.K., a minor female student at Woodbridge High School.

The Board produced the testimony of four witnesses in support of the charges: L.K., the female pupil; Muriel Marash, a guidance counselor in the Board's employ; S.B., L.K.'s boyfriend; and B.C., a friend of S.B. Respondent testified in his defense, as did respondent's wife. All nonparty witnesses, except respondent's wife, were sequestered during the hearing.

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UNCONTROVERTED FACTS

After a review of all the testimony heard in the matter and appropriate weight given thereto, I **FIND** the following facts to be uncontroverted except as otherwise noted.

L.K. was observed by this court to be a bright, generally articulate, physically mature 16 year old female. She is presently enrolled in the business course, at the eleventh grade level, at Woodbridge High School. L.K. describes herself as a "B" student who achieves the honor roll each semester. She participates on the interscholastic cross-country team, winter and spring track teams, and she is a participant in a concert singing group at the high school. During the 1983 Christmas season, from November 28, 1983 forward, L.K. worked after school at Caldor's, a local store in Woodbridge, located about 1/2 mile from the high school.

Respondent, who is appropriately certified, has been employed by the Board as a teacher for 12 years. He has acquired a Masters Degree in supervision and administration. During his 1983-84 assignment at the high school, respondent taught four classes, one of which was accounting, while the remaining three classes were in data processing. In addition, respondent was in charge of after school detention and of the school's loss of credit disciplinary program.[3] He is an assistant director of the school yearbook and he assists in crowd control during interscholastic football and basketball games. Respondent has had no prior disciplinary action taken against him during his employment with the Board. In fact, the Board does not suggest that respondent has anything other than a "fine teaching record" (Board's Brief, pp. 13-14).

L.K. was a student in one of respondent's data processing classes during the fall semester of 1983-84. L.K. also took an accounting course but with a teacher other than respondent. L.K. describes respondent as a popular teacher, accessible to all his pupils, and who is easy to talk with.

During the 1983-84 fall semester, L.K.'s father was hospitalized for thyroid treatment. L.K. is the only child living at home, although she has an older brother and

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[3]The loss of credit program appears to be a pupil disciplinary measure by which a pupil "loses" credit if the pupil fails to fulfill certain requirements or commits disciplinary infractions. Data for the program were maintained in a computer, located in a typing room identified as D-3.

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sister. L.K. described the 1983 fall semester as a very difficult time because she was concerned about her father and, because L.K.'s mother spent much time at the hospital with her father, she had no one to talk with. L.K. had had a "steady" boyfriend, S.B., but that relationship terminated sometime near the beginning of the fall semester. L.K. eventually turned to respondent in school and discussed the fact of her father's hospitalization with him, as well as her relationship with another boy, R.L., with whom she was then keeping company.[4] Respondent explained that he perceived L.K. as a pupil who had "typical problems" including the illness of her father, her inability to talk with her mother, her fear of going home to an empty house, her relationship with her former boyfriend S.B.,[5] and L.K.'s difficulty in school work. L.K. admitted having difficulty in accounting and in data processing. The difficulty in the latter course, data processing, for which L.K. had respondent as a teacher, was her inability to write programs and her lack of success on periodic tests. Furthermore, respondent, it is agreed, advised students in his data processing classes of their grades, around mid-November, for the soon to be completed marking period. L.K. learned she achieved a C grade for the period which would prohibit her from honor roll membership.

After L.K. sought assistance from respondent in respect of her problems, L.K. telephoned respondent at home one evening around 11:30 p.m. to discuss her problems. Respondent's wife, who had not known L.K., answered the telephone and talked with L.K. while her husband, respondent, finished showering. L.K. admits telephoning respondent at home, but denies talking with respondent's wife other than to ask for him when his wife answered the telephone. Respondent subsequently had a telephone conversation with L.K. of approximately 20 minutes. Respondent's wife does not recall what, if anything, she heard her husband say during the course of that conversation. Respondent's recollection of the substance of that telephone conversation differs substantially from the recollection of L.K., in that respondent asserts L.K. telephoned to talk of her pregnancy by S.B. while L.K. contends she talked only of her concern for her father.

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[4]Respondent contends that in addition to L.K.'s concern with her father's health, she was also distressed over the asserted fact that she was pregnant by S.B. According to respondent, S.B., when advised by L.K. that she was pregnant, severed the relationship with L.K.

[5]Though L.K. began dating R.L. during the 1983 fall semester, she also dated S.B. during October and November 1983, though not on a steady basis (1T110).

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Respondent has been married to his wife for 12 years. During the 1983 fall semester, respondent's wife was pregnant. Respondent's wife is also a public school teacher of 12 years but with another board of education. She has been on maternity leave from that employment since December 1983. Respondent's wife explained that while both she and respondent wanted children, she had had two miscarriages in the past seven years. Between February and May 1983, to correct what was diagnosed as an infertility problem, respondent had to administer medication to his wife every other day. During the same time, respondent transported his wife to New York City on occasion for blood tests. Eventually, respondent's wife did become pregnant at or near June 1983. Respondent's wife testified that when L.K. telephoned respondent at home at 11:30 p.m., she, respondent's wife, talked with L.K. for five or ten minutes of personal matters relating to her infertility problem and her then existing pregnancy.

During the 1983 fall semester, L.K.'s seventh period was her assigned lunch period while respondent had an unassigned seventh period. When L.K. learned she was to receive a C grade from respondent, she would not eat lunch; rather, at least three times a week, she would proceed to respondent's classroom where he would assist her with data processing and accounting studies, the latter though only to the point where his assistance would not interfere with the direction of L.K.'s regular accounting teacher. During about the same time, middle November, L.K. had a term paper due for another course which had to be typed sometime in November. L.K. requested and received permission from respondent to avail herself, after school, of a particular typewriter in the typing room, D-3, under respondent's control. L.K., it is noted, was also typing a term paper for a friend. L.K. would arrive at the typing room around 4:00 p.m., after finishing cross-county practice or winter track practice, to type. Respondent, who would generally be on detention duty in a nearby classroom, would unlock the room for L.K. and he, in turn, would return to the classroom where he was conducting detention. When the pupils assigned detention were dismissed for the day, respondent would return to the classroom where L.K. was typing her term paper. Respondent would proceed to work upon the loss of credit disciplinary program.

It is noted that the door to the typing room, located on the extreme left of the room as one looks in, had a translucent glass panel but, because of file cabinets on the immediate inside of the classroom, approximately one-third of the right side of the classroom could not be observed by one looking into the classroom while passing in the

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outside corridor. A question of fact remains as to the time respondent generally would complete his detention duties to return to the typing room.

This concludes a recitation of uncontroverted facts.

BOARD'S PROOFS IN SUPPORT OF THE CHARGES

Muriel Marash has been employed by the Board as a guidance counselor for 10 years and, for the past four years, has been assigned to the high school. Ms. Marash, who was not L.K.'s assigned guidance counselor, testified that on or about December 20, 1983, L.K. was referred to her by an administrator. L.K. was visibly upset and distressed. Ms. Marash explained that after getting L.K. calm, L.K. asked to be removed from respondent's classroom. Ms. Marash testified that such a request for transfer is unusual to be submitted so late in the semester. Ms. Marash testified that L.K. explained she was uncomfortable with respondent because she and respondent had "somewhat of a relationship," and that L.K. did not want to face respondent again.

Ms. Marash arranged for L.K. to return to her office later in the day, in the presence of another counselor, and had L.K. repeat in detail the alleged relationship which was to have existed with respondent. Subsequent to the second meeting with L.K., Ms. Marash then talked with the school principal and L.K.'s mother. L.K. was eventually removed from respondent's class.

Ms. Marash also testified in regard to a school flowergram program which appears to have been a school sponsored money raising activity for student purposes. Apparently, students may send flowers at special times during the school year to whom ever they choose by placing an order one week prior to the distribution date of the flowers. December 22, 1983, was a flower distribution date. L.K. had, one week earlier, placed a flower order to be sent respondent. L.K. prepared a card (R-1), placed it in a sealed envelope (R-1a), and in the manner of all such cards, L.K.'s was kept by Ms. Marash to be distributed with the flowers to the designated person. During the course of Ms. Marash's conversation with L.K. when L.K. requested a transfer from respondent's class, L.K. requested that the card she prepared for delivery to respondent be removed and that neither the card nor the ordered flower be delivered. Ms. Marash removed the card as L.K. requested and gave it to the school principal. Later, the school principal, after

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having opened the sealed envelope, returned the card to Ms. Marash. The card, as prepared by L.K. and intended for delivery to respondent, reads as follows:

> Mr. L.
>
> Just a little way to say I love you very much with all my heart.
>
> Love, L.[K.] (R-1)

This is the last in a series of alleged incidents by which respondent is implicated in having a relationship with L.K. beyond that relationship acceptable as between a teacher and a 16 year old female pupil.

In respect of the prior incidents, and the "details" of the relationship with respondent, L.K. testified at hearing that she did ask respondent to assist her in data processing and accounting and that he did, in fact, assist her during the seventh period when she was scheduled for lunch and he was unassigned. During the course of that extra assistance, L.K. testified that she began discussing with respondent her father's health and a boy whom she was then seeing, R.L.. L.K. testified that she felt comfortable with respondent and wanted to be friends with him because she wanted him to explain things to her. Contrary to respondent's contention, L.K. testified she did not discuss in any way with respondent her former or then existing relationship with S.B.

L.K. explains that respondent's assistance did help her grades improve. L.K. then asked respondent for permission to use a typewriter in the typing room, after school, in order to prepare the term papers. At a time either before or after L.K. began using the typewriter in D-3 after school, she testified that she noticed respondent becoming too friendly.[6] As an example, respondent would touch L.K.'s shoulders during the regular data processing class while other pupils were present.

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[6]L.K.'s recollection of the time of prior events, by way of months or dates, is, by her own admission, weak or non-existant. (1T64) For examples, see 1T20, an inability to recall when she asked respondent for academic assistance and an inability to recall when her father was in the hospital; 1T23, an inability to recall when respondent allegedly called her on the telephone at home; 1T45, an inability to recall when she saw respondent in the typing room; 1T66, 96, an inability to recall when the flowergram program was held, 1T72, an inability to recall when her term paper was due or the days she went to the typing room; 1T79, a then present recollection on cross-examination that her father was in the hospital in November, but an inability to be precise or to approximate when in November "unusual" events occurred between she and respondent; 1T85, certain knowledge that she went to the typing room after school for a two week period, but not on a daily basis.

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L.K. testified that when she began using the typing room after school, respondent would open the typing room for her at approximately 4:00 p.m. Respondent would then return to his detention duties, located in a nearby classroom, and when detention was finished, respondent would return to the typing room at approximately 4:30 p.m. Janitors, by that time, would have been into the typing room to empty the waste baskets. When respondent did return to the typing room, L.K. testified that the two of them would then be alone until approximately 5:30 p.m. when she would leave to go to work at Caldor's. L.K. testified that when respondent did return to the typing room, he would work on the computerized loss of credit program in the typing room. However, after the relationship progressed from mere friends to something more, and after respondent began touching her shoulders during the regular data processing class in front of other pupils, L.K. testified that respondent, while in the typing room with her after school, would gently touch her face, shoulders, lips, and ears with his finger. This conduct occurred, L.K. says, as she was seated at the typewriter which was located in the first row directly in front of the translucent glass of the classroom door.

L.K. testified that when she would get up from the typewriter to dispose of papers in the waste basket, located in the portion of the classroom not observable from the outside, respondent would put his arms around her and kiss her. When this conduct first occurred, L.K. testified she was frightened because she did not know what respondent wanted. She wondered why respondent was kissing her, although she did not kiss respondent back. L.K. explained that while she did not want to engage in such conduct, she could not back away from respondent because his arms were around her. As L.K. recalls, when respondent was kissing her or embracing her, there was total silence. L.K. did not tell anyone that respondent had kissed her because, as she explains, she had no one to tell. Furthermore, L.K. explains that she is the kind of person who keeps such matters to herself.

Inexplicably, L.K. returned to the typing room after school the next day. Respondent unlocked the typing room door whereupon she entered the room and respondent proceeded to his detention duties. When respondent's detention duties were completed, L.K. says that respondent returned to the typing room. L.K. testified that respondent, who was not hostile, then told her that R.L. was not good enough for her, that he wants what is best for her, and he proceeded to rub her shoulders and her neck. As respondent held L.K. in an embrace, she explains that he kissed her ear lightly and was blowing in her ear. L.K. explains that again she could not back away from respondent

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because his arms were around her. Respondent continued to tell L.K. that he only wanted what was best for her while he was kissing and embracing her. L.K. testified that respondent had his hands on her head so that she could not move. L.K. explains she did not scream, nor call for help, nor tell anyone, including her mother, because she was fearful of being physically harmed by respondent if respondent found out she had told anyone. Curiously, L.K. did testify that she said to respondent she saw no reason for him to be in the typing room while she was there, notwithstanding the fact the typing room was where the computer for the loss of credit program was and L.K. knew respondent was in charge of the loss of credit program. L.K. explains that in response to her question to respondent why are you kissing me, respondent was to have said he wanted what was best for her and that he was best for her. Once again, after the foregoing activity occurred between respondent and L.K. for the second occasion, L.K. testified that she continued to return to the typing room after school thereafter to complete the term papers.

L.K. testified that during the course of the asserted relationship with respondent, respondent called her at home on two occasions. L.K. cannot recall when respondent called her, but she does know that the calls were made at approximately 11:30 p.m.[7] L.K. explains that during the course of the telephone calls, respondent discussed with her in detail his wife's infertility problem, the corrective measures he and his wife had taken, their mutual joy over the fact of her, respondent's wife, then existing pregnancy, and the fact that respondent and his wife were attending, or intending to attend, Lamaze classes.[8] L.K. also testified that during the course of the beyond more than just friends relationship, respondent was to have told her that he had planned to seek a divorce from his wife prior to the time of her pregnancy. However, L.K. says that respondent explained his wife's pregnancy changed his mind in that regard.

L.K. testified that respondent had sent her flowers as part of the school's flowergram program, along with a card, which she has since destroyed but which she now says, read:

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[7]It cannot be determined from L.K.'s testimony when, in relation to the time she called respondent, respondent was to have called her. It will be seen shortly that respondent denies telephoning L.K. at home as she asserts.

[8]It appears from the record that Lamaze is a method of natural childbirth during which the husband assists the wife in her delivery of the child which requires both husband and wife to attend classes prior to delivery so that proper breathing and muscle relaxation may be learned.

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> Saying I love you does not mean what you really think it means, as [sic] just as a friendship. (1T90)

Finally, L.K. testified that notwithstanding the fact she was told by respondent she had earned a C grade in data processing for the marking period, she received a grade of B on her report card. When she questioned respondent whether he made an error, L.K. testified respondent explained he had not made an error and that he, respondent, had already told her mother at a parent-teacher conference that she, the mother, would be very surprised at L.K.'s grade (1T89a).

On another occasion, L.K. testified that as she was preparing to leave for work at Caldor's at about 5:30 p.m., she asked respondent whether she could keep her books in "the room"[9] (1T35). Respondent, according to L.K., took her to the department chairperson's office, unlocked the door with a key in his possession, and with L.K. went into the office. L.K. explains that respondent closed the door, took her books from her hand, set them down, and proceeded to kiss her. It is noted that the office has a door which can be locked from either side, and although there are two windows exposed to the outside, both windows are covered with shades, the kind which when drawn, prevent persons from the outside seeing in regardless of whether an incandescent or fluorescent light is on in the inside. In L.K.'s words, the following occurred once she and respondent were inside the office with the door closed:

> As we got in the room he [respondent] started kissing me and then he started to blow in my ear and touched my ear very lightly. [After unbuttoning her blouse] he touched my breasts and then he moved his hand down to my genital area and started touching down there and then he just moved back up and started kissing me and just touching my face real lightly and putting his hand through my hair. (1T36, 42.)

L.K. testified that she then asked respondent why he was not home with his wife; that he was not getting home until 6:00 p.m. at night, that she could not understand why he was not at home with his wife particularly in the circumstances where they, respondent and his wife, were about to bring a baby into the world, and that they should be close to each other right now (1T42-43). L.K. explains that she had requested

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[9]It is unclear whether "the room" referred to by L.K. is the typing room D-3, or respondent's classroom, or some other room. It could reasonably be inferred, based on the evidence of record, that "the room" to which L.K. refers in her testimony was the department chairperson's office.

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respondent's permission to leave her books in the classroom because the gates to the second floor where her locker was located and where she would normally keep her books, were closed for the night (1T39), or, as on cross-examination, that the doors were not closed but that the lights were out on the second floor (1T88a). L.K. testified she and respondent were in the department chairperson's office for about 30 minutes, after which she left and walked to work. It was after this experience with respondent that L.K. says she finally told S.B., her former boyfriend, of the "relationship" she was having with respondent. It is not clear in this record when L.K. told S.B. of the asserted relationship, other than she had to tell S.B. after the occurrence in the department chairperson's office. Curiously, however, L.K. went on to testify that even after that occurrence, she continued to return to the typing room the following day after school whereupon respondent, according to L.K., was to have kissed her again (1T45).

S.B., who was graduated from Woodbridge High School in 1983, was L.K.'s boyfriend during the 1982-83 year. S.B. testified he severed the relationship sometime before the commencement of the 1983-84 year. Thereafter, however, S.B. testified he began to date L.K. again during the 1983 fall semester, though not on an exclusive basis. S.B. testified that sometime in December 1983, L.K. told him of her relationship with respondent. Though S.B. took no immediate action then, another incident occurred during December 1983 which led to a confrontation between S.B. and respondent.

S.B. testified that he had had an automobile accident during October 1983 and that some of his teeth were knocked out. During December, on a Friday evening at about 5:30 p.m., he had to pick up his dental x-rays at his dentist's office located close to the high school. S.B. testified that as he was driving past the high school, he noticed respondent's vehicle still in the faculty parking lot. S.B. explains he became curious because of what L.K. had told him regarding her relationship with respondent. S.B., having been told that respondent gave L.K. a ride to work after school, went to Caldor's and discovered that L.K. had not yet reported for work. S.B. testified he knew that L.K. was not at home because he had already telephoned her there. S.B. proceeded to get his x-rays, and he assured himself that respondent's vehicle was still in the faculty parking lot. Having been told by L.K. that she and respondent were having a "relationship" S.B. wanted to see if respondent gave L.K. a ride to Caldor's and, if so, what would occur. He immediately returned home and called his friend, B.C., and asked to borrow his car. S.B. explained he did not want to use his car to follow respondent and L.K. because L.K. could identify his, S.B.'s car. B.C. told S.B. he would drive. B.C. picked up S.B. at home and

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both proceeded to the public library parking lot which adjoins the school faculty parking lot. They discovered respondent's vehicle still in the faculty parking lot. S.B. testified that at approximately 5:45 he observed respondent and L.K. come out of the school building. Wanting to know whether respondent was, in fact, driving L.K. to work as L.K. reported, S.B. and B.C. immediately drove to Caldor's parking lot and waited. After exiting their vehicle, and concealing themselves behind other parked cars, S.B. observed respondent's vehicle pull into the driveway of Caldor's with respondent and L.K. in the front seat. S.B. testified that he then observed respondent pull L.K. towards him, kiss her, after which L.K. exited respondent's vehicle and proceeded to enter Caldor's. S.B. described the kiss as "a French kiss" which lasted 30 seconds or more (1T115).

L.K. testified at hearing that the foregoing incident did occur in Caldor's parking lot, on a rainy night, although she asserts she did not kiss respondent back. Furthermore, at the time of the incident L.K. had no knowledge that either S.B. or B.C. were observing her and respondent. On cross-examination, L.K. declared her uncertainty whether it was raining during the evening the incident at Caldor's was to have occurred.

S.B. testified that he was shocked and that he did not know what to do. His friend, B.C., finally returned S.B. home. S.B. explained his shock in the following way:

> I never thought anything like that would happen, you know, I thought, you know, to tell you the truth I thought L.[K.] fabricated it in her mind until I saw that day, you know, I knew she hadn't been, you know, fabricating or making up a story or whatever or just fantasizing. (1T116.)

S.B. explained that after showering and getting dressed at home, he returned to Caldor's and confronted L.K. He told L.K. what he had observed and that L.K. did not know what to say. S.B. then left Caldor's.

S.B. testified that the next day, Saturday, L.K. called him and said respondent had called and asked her to tell him respondent wanted to see him. S.B. explained he had to go to school the following Monday to see another teacher in regard to a forensic tournament. Monday, when S.B. was in the school to see the other teacher, respondent saw him and called him to his classroom. S.B. testified he was angry and that he said some things to respondent that he presently regrets. S.B. describes the meeting with respondent in the following way:

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> I walked in and he said you know sit down. He [respondent] went to shake my hand. I wouldn't shake his hand and he started saying things like I don't know what kind of relationship you had with L.[K.] before. I don't know what kind you have now but you obviously did something to lose her trust and you seemed to resolve that now. I'm sure you can have her back now forever he said to me and that got me more mad then anything else because to me he was saying, you know hey I'm done with her you can have her back. That got me very angry. I just started flying off the handle and told him exactly what I thought. I told him I knew what was going on. Other people knew what was going on. (1T118.)

When pressed on cross-examination as to what he told respondent during the meeting, S.B. testified that "I told him I was going to nail his balls to the wall" (1T130).

S.B. is positive that his testimony accurately reflects his observations that Friday evening. In fact, he testified that he and B.C. had a pair of "rinky-dink binoculars, little opera glasses" to assist them in identifying respondent and L.K. (1T135). Furthermore, he was able to recognize L.K. immediately. S.B. testified that he had seen respondent's car on prior occasions and that he had seen respondent operating the vehicle when he, S.B., had himself driven L.K. to Caldor's sometime around Thanksgiving.

B.C. testified in substantial corroboration of S.B.'s testimony in regard to the incident at Caldor's parking lot between respondent and L.K. B.C. testified he believes the incident occurred on Friday evening, December 9, 1983. He explains that S.B. called him at approximately 5:30 p.m. in order to borrow his vehicle. B.C. told S.B. that he would drive S.B. where he wanted to go. B.C. picked S.B. up at his home and they proceeded to the high school faculty parking lot. They waited until respondent and L.K. exited the building. B.C. and S.B. then proceeded to Caldor's parking lot where they waited. When they observed respondent's vehicle enter the parking lot, S.B. got out of B.C.'s vehicle and positioned himself near respondent's vehicle. B.C. did likewise. B.C. testified that he observed respondent and L.K. talking with each other, after which L.K. collected her things to go to work. B.C. testified that he then observed respondent and L.K. engaged in a "French kiss" together with a "couple of little kisses." Both B.C. and S.B. described respondent's vehicle as the vehicle they saw pull into Caldor's parking lot and in which the above described incident occurred, without contradiction from respondent.

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It is upon these proofs that the Board alleges respondent engaged in conduct unbecoming a teacher by making to L.K. improper suggestive comments and advances, by taking improper liberties with L.K., by making improper physical contact with L.K., by exerting undue influence on L.K. for the purpose of creating an improper relationship, and that respondent encouraged, promoted, and created such an improper relationship which caused L.K. emotional distress, embarassment and harassment.

RESPONDENT'S PROOFS IN OPPOSITION TO THE CHARGES

Respondent's wife testified that her 12 year marriage to respondent has been very satisfying. She described respondent as a devoted husband and that their relationship, particularly during the past seven years when she had two miscarriages, has become very close. Respondent's wife testified that respondent is always available when she needs him. As an example, between February through May 1983, respondent had to give her shots every other day in order to assist her becoming pregnant. Furthermore, respondent had to take her to New York City for blood work on various occasions. During the 1983 summer, respondent's wife explained that she had to have two surgical procedures performed, the recovery from which required bed rest. During that period of time, respondent's wife testified that respondent did all the household cooking and housework for a period of two to three months. Respondent's wife testified that she never once contemplated a divorce from respondent.

Respondent's wife testified that she did answer the telephone when L.K. called her husband sometime during the fall semester of 1983, although she fixes the time of the telephone call as between 10:30 p.m. to 11:00 p.m. The wife testified that when she answered the phone, and L.K. asked for her husband, she explained to L.K. that her husband was taking a shower. The wife testified that she then proceeded to talk with L.K., waiting for her husband to complete his shower, of matters concerning her pregnancy, her miscarriages, and the difficulty she had experienced in their mutual efforts to become pregnant. When her husband finally finished showering and began the telephone conversation with L.K., respondent's wife testified that though she was present in the room while respondent was talking with L.K., she cannot specifically recall what she had heard. Respondent's wife did testify that it is not unusual for pupils to telephone her husband, nor in fact is it unusual for her own pupils to call her at home. She explains that their telephone number is in the book. In fact, on one occasion, respondent's wife

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testified that a female pupil, other than L.K., telephoned her husband at home because she had been raped and she, the pupil, needed someone to talk with.

Focusing on the alleged incidents between L.K. and her husband in the D-3 typing room, the department chairperson's office, and the incident which was to have occurred on a Friday evening, perhaps December 9, 1983 according to B.C., in Caldor's parking lot, respondent's wife's testimony seeks to establish that it would have been impossible for respondent to have been present with L.K. at the times of the alleged incidents.

First, respondent's wife testified that every Monday during December 1983, she and respondent attended Lamaze classes, which began at 6:30 p.m., at St. Barnabus Hospital in Livingston. She testified that consequently, respondent had to be home in Iselin, almost five miles from the high school, every Monday by 5:00 p.m. in order to drive from their home in Woodbridge to Livingston in order to be on time for the 6:30 p.m. class. Next, the testimony of respondent's wife seeks to demonstrate that respondent was home no later than 4:30 p.m. on Friday, December 2, 1983, and Friday, December 9, 1983. In regard to December 2, 1983, respondent's wife testified that respondent had to be home at 4:15 p.m. because she has a present recollection that that evening she and respondent went to dinner with their best friends. In regard to December 9, 1983, respondent's wife testified that she has a present recollection that respondent was home at 4:30 p.m. because respondent had to return to school to chaperone a dance that evening.

The testimony of respondent's wife also seeks to show that respondent was home early, 4:15 - 4:30 p.m., on December 7 when he erroneously thought she had an appointment with her obstetrician that day. Her appointment was scheduled for the following day, Thursday, December 8, 1983 and, consequently, respondent's wife testified that she knows he had to be home by 4:00 or 4:15 to drive her to the obstetrician's.

On cross-examination, respondent's wife acknowledged that the times recorded in the school's sign in-sign out sheet for respondent's departure from school on Monday, December 5 and Thursday, December 8, dates she testified her husband was home at 4:15, shows that he signed out from school at 5:30 and 4:15, respectively (2T30, 32) causes her not to be too certain when respondent did, in fact, return home those days.

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The following colloquy occurred between Board counsel and respondent's wife during cross-examination.

Q. Were you ever concerned or did you ever develop any feeling that maybe this relationship with L.K. was becoming more serious or different than that of a student-teacher relationship?

A. No.

Q. You had no indication of that?

A. I didn't feel that at all, no.

Q. How about on the nights when your husband came home late from school?

A. He's — that's been the way for years. I mean that's just what he does. He always stays and does a lot of work. Sometimes I would — even a couple of times I go to school and he would be working in the office or working on the computer or whatever. I didn't find it strange at all. (Emphasis supplied)

Q. You didn't?

A. No.

Respondent's wife testified that respondent had advised her that he and L.K. had talked in respect of her father's illness, that she, L.K., had no one to talk with, that L.K. had told him, respondent, that she was afraid she was pregnant, and that respondent was concerned about her not eating. Respondent's wife testified that she sees nothing improper that her husband, respondent, would talk with L.K. of these concerns.

Respondent testified in his own defense. Immediately upon taking the stand, respondent was asked by counsel in a forthright manner the following questions and provided the answers, as indicated:

Q. Mr. Liskovec, do you know why you are here?

A. Yes.

Q. Why?

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A. To answer allegations or defend of myself against allegations that have been made against me.

Q. And have you read the allegations?

A. Yes.

Q. And do you understand the allegations?

A. Yes.

Q. And have you had the opportunity to sit and talk to me over the course of the months?

A. Yes.

Q. And have we discussed this?

A. Yes.

Q. Have we discussed what will happen to you if the charges are sustained?

A. Yes.

Q. Do you understand the ramifications?

A. Yes. (2T38)

Respondent testified in respect of his marriage to his wife that he is "very satisfied and pleased" (2T46). He explained that it is not unusual for students to call him, or his wife, at home regarding homework assignments, personal problems, or simply as a matter of having someone to talk with. Respondent testified that he did have, on one occasion, a female pupil call him at home who had been raped. However, respondent, upon learning of that pupil's problem, contacted the school nurse and the guidance office regarding what those persons could do for her in terms of guidance and assistance.

In respect of the asserted relationship between him and L.K., respondent's testimony seeks to establish that any relationship which existed was not beyond that which should exist between a teacher and a female pupil. Specifically, respondent denies ever kissing L.K., he denies ever fondling L.K., he denies ever sexually abusing L.K., he denies sending flowers to L.K. (although he admits he sent flowers as part of the school's flowergram program to his wife), he denies ever sending L.K. a "love letter," and he denies ever touching the breasts of L.K. (2T57).

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Respondent, in support of his position that any relationship between him and L.K. was no more than a normal relationship between teacher and pupil, testified that he did, in fact, help L.K. in data processing and accounting but only during the regular seventh period of the day. Respondent afforded this assistance to her, he says, because in his class of data processing, L.K. performance was erratic. That is, respondent testified that on periodic tests he administered, L.K. received four F's, three A's, and one B. When L.K. asked him for assistance, he explained that he knew she needed additional help. Finally, because respondent knew that L.K. needed additional assistance in his class, he believed that when L.K. asked him for assistance in accounting that she, in fact, needed extra assistance. It is noted, however, that there is no indication in this record respondent, when asked by L.K. to give her assistance in accounting, a course he did not teach her, ever talked with L.K.'s regular accounting teacher to determine where L.K. was weak in accounting or to coordinate his assistance with what was occurring in the regular accounting class.

Respondent testified he did change L.K.'s data processing grade from a C to a B but for the following reason. He says he also changed the grade of six other pupils after they questioned him in regard to their announced grade. Respondent explained that the average of L.K.'s test grade was a C. However, he assigned a grade of B to her class participation. Respondent combined L.K.'s test grade average of C with her class participation grade of B and arrived at a judgment that she should receive a final grade of B for that marking period. It appears that respondent rated L.K. as performing above average in his data processing class because he explained if L.K.'s class participation had been only average, he would have assigned a class participation grade of C (2T62). Notwithstanding respondent's explanation of the grade change from a C to a B, based essentially on L.K.'s purported classroom participation, respondent had earlier testified on direct examination that L.K.'s classroom participation was "adequate" (2T42).

Respondent testified that he did, in fact, allow L.K. to use the typing room, D-3, after school. Respondent explained that he merely provided the facility for L.K. to type her term paper after school while he was engaged with his detention duties (2T50). In fact, respondent testified that while L.K. was in D-3 after school, he was in that room only on five occasions in order to work on the loss of credit program (2T110). In regard to the time respondent completed his detention duties, he submitted a statement, with the agreement of the Board but for two exceptions, which he says describes his detention duties (J-1). That statement shows respondent's detention duties, and it is presumed he has detention duty every day after school, are as follows:

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1. When he completes his regular school day, respondent proceeds to the principal's office to secure detention materials and slips which designate those pupils throughout the high school who are assigned detention.

2. Respondent proceeds to the detention classroom and he updates detention books by recording the names of the students scheduled for detention that day.

3. Records the names of the students who report to to detention. He proceeds to supervise the students assigned detention until they have completed their detention time. It is noted that detention time generally concludes at 3:30 p.m., but that that time can be extended by respondent for misbehavior in the detention room. Respondent claims that additional detention time is assigned him by students every day. Consequently, respondent asserts that generally the last student to leave detention is approximately 4:00 p.m. This last assertion is one which the Board cannot accept, nor can it reject.

4. Respondent contends that when the detention period is over, he "updates the balance of the detention book with the names of students assigned detention on other days" (J-1, Para. 4).

5. Respondent asserts he then reviews the detention book for names of students who have not yet served detention assigned them from previous days.

6. Respondent then determines the status of all students who had not reported to detention, perhaps because of early dismissal or absences.

7. Respondent then completes slips for those who have been assigned detention but failed to report. He places those slips in the students' homeroom teacher's mailbox when he completes his detention duty.

8. Respondent determines how many students have absented themselves from detention on at least two occasions. He reports the names of such

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students to the homeroom teacher by placing a slip in the homeroom teacher's mailbox.

9. Respondent asserts he then proceeds to the office and places both slips, those who fail to appear and those who fail to appear on two occasions, in the homeroom teacher's mailbox.

10. Respondent contends that he finishes his detention duty at 5:00 p.m. However, the Board does not agree, nor disagree, with this assertion. It states that respondent is not required to work until 5:00 p.m.

It was noted earlier that respondent, while admitting he allowed L.K. to use the typing room after school while he was at detention, testified he was in the typing room alone with L.K. on only five occasions. On each of those occasions, respondent testified he worked on the loss of credit program on the computer. In regard to his whereabouts after school at least between November 29 through December 16, when he admits helping L.K. (2T105), respondent testified, as did his wife, that every Monday in December he took his wife to St. Barnabas Hospital in Livingston to participate in the Lamaze classes. In response to the question what time he arrived home on December 5, the first Monday in December 1983, respondent replied "* * * I got home as soon as the detention functions were over which was five o'clock" (2T51). Respondent testified he was home at approximately the same time on the two following Mondays in December, the 12th and the 19th, in order to go to Livingston. In regard to Wednesday and Thursday, December 7 and 8, respondent testified he was home at approximately 4:10 p.m. in order to take his wife to her obstetrician. The appointment with the obstetrician was actually on Thursday, December 8; he erroneously believed that the appointment was on Wednesday, December 7, which he says explains why he was home early that day (2T53). In respect of the Fridays in December, December 2, 9, and 16, respondent explains that on December 2, he was home between 4:15 and 4:30 because he and his wife went out to dinner with friends. On December 9, respondent testified that he was home at 4:30 p.m., a time he describes as "earlier than normal" (2T54), because he had to return to school that evening to chaperone a student dance. On December 16, 1983, respondent explained that he had to report to the school at 5:30 as an assigned security person for the high school basketball games which were to follow that evening (2T55, 56). It appears that respondent completed his detention duties on December 16 and proceeded directly to the gymnasium.

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The times respondent recorded his departure from the school on the school's sign out sheet are, in large measure, inconsistent with his testimony. As examples, respondent testified that he was home on Monday, December 5, soon after 5:00. However, the time he recorded on the sign out sheet for Monday, December 5 is 5:30. On Wednesday, December 7, the date respondent testified that he was home at approximately 4:15 because he erroneously believed his wife had an appointment with the obstetrician that evening, the sign out sheet shows that he recorded his departure time from school on December 7 as 5:45 p.m. On December 9, the date respondent testified that he was home earlier than normal because he had to return to school for a student dance, the sign out sheet shows that respondent signed out from school on December 9 at 5:15 p.m.

Respondent explains the inconsistency between his testimony regarding times he arrived home on certain days in December, compared with times he recorded as leaving the school on the sign out sheet, in the following manner. Respondent explains he is aware that the school policy is for teachers to sign in when they report for duty in the morning and to sign out when the depart school premises in the afternoon. However, respondent testified he generally ignores signing out for several reasons. One, respondent considers the requirement that he sign out to be demeaning and irrelevant to his professional life. Two, though he has been reminded in the past by school administrators of the requirement to sign out, no administrator reminded him of such requirement during the 1983 fall semester. Third, respondent testified that by the time he completed his detention duties for the day at 5:00 p.m., the office, where the sign in-sign out sheet was located, was locked. He explained that the administrative offices generally close for the day at 4:30 p.m. In respect of this latter assertion, it must be noted that respondent is in possession of a key to the administrative offices where the sign in-sign out sheet is located; that for respondent to carry out his detention duties as he states them (J-1, supra), he by his own admission proceeds, following detention duties, to "* * * go to the office and place both types of [detention] slips in the teachers' mailboxes" (J-1, para. 9). Respondent explains that because he is opposed to signing out on a daily basis he does, at a randomly selected future date, record the times of his departure for prior days he failed to sign out. The times used on such prior dates, to record the times he departed on prior dates, are selected by him purely at random. Thus, though respondent admits his sign out sheet records a time of 5:30 as his departure time from the school on December 5, 1983, he insists he was home at 4:30 that day. The following colloquy between respondent and Board counsel on cross-examination illuminates respondent's philosophy in respect of the sign out times recorded on respondent's sign out sheet:

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Q. Did you sign them [sign out sheets] randomly?

A. On occasion, yes.

Q. Not all the time?

A. As I said my entire signing in and signing out procedures were random.

Q. Were they ever accurate?

A. I would image on occasions, yes.

Q. How would you distinguish between what is accurate and what is not accurate?

A. In regard to what?

Q. If you're leaving today would you sign the accurate time or would you at random put something down?

A. It depends on whether or not I was in a rush or whether or not I had any concerns about anything else. I absolutely never did sign a totally accurate time.

Q. You didn't?

A. No, I would approximate the time. If it was between five and 5:15. If it was between or close to ten minutes after, like eight after, I'd write ten after. That was the degree of my accuracy.

Q. But you wouldn't for example say it is 5:45 if it is 3:50; would you?

A. I might on occasion if I signed the time at a time other than when I was signing out.

* * *

Q. You did it [signed out] even though you didn't like to do it?

A. On a random basis, yes.

Q. Random as to time but not as to the day you signed in? There were three or four or five days you didn't sign in?

A. No. What I said was that my entire procedure for signing in and out is random. I will sign a time that is close to the time. If I have neglected to sign in two or three days I will then go back and sign in times. A normal thing for me to sign when I don't know the time is sign in at 8:30 and sign out at 5:30.

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Q. Do you use your best recollection if it is two or three days later as to when you left?

A. No.

Q. You just pluck a figure out of the air?

A. It is irrelevant in that point.

Q. Why is it irrelevant?

A. I perform all my duties to the best of my ability and there is no question about it.

* * *

Q. Why would you sign 5:30?

A. It was more close to the accurate time.

Q. So it was a reasonably accurate reflection of when you were there and when you went in there?

A. Generally, yes. Specifically, no. (2T82-85)

On direct examination, respondent did not specifically address the alleged incident which had occurred in the department chairperson's office with L.K. other than to deny that he ever kissed her, fondled her, or touched her breasts. On cross-examination, respondent was asked "[Do] you recall the testimony of L.K. regarding the office of [the department chairperson]?" (2T110) and, it is noted that respondent testified he frequently uses the department chairperson's office after regular school hours. After responding in the affirmative, respondent and board counsel had the following colloquy:

Q. Did you [respondent] walk in there [the department chairperson's office] with L.?

A. No.

Q. Did you let L. in?

* * *

Q. During the period you were with her, during that two and a half week?

A. On once (sic) occasion L. entered the room.

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Q. She did?

A. Yes.

Q. Why did she enter the room?

[A. To drop off her books.]

Q. What time of day was this?

A. After the normal school day.

* * *

Q. Why would she drop her books off at [the department chairperson's] office?

A. She told me she did not want to go up to her locker and asked if it would be permissible. (2T110-112)

Respondent admits that he drove L.K. to work at Caldor's on at least three occasions for her to report to work at 6:00 p.m. Respondent explains that on one of those occasions, L.K. was going to be late for work because she had been working on her term paper in the typing room; on another occasion, respondent testified it was raining; and, on another occasion he drove L.K. to work in his vehicle in the company of another pupil. Other than his earlier denial of ever having kissed or fondled L.K., together with his denial of having touched the breasts of L.K., respondent did not address the testimony of S.B. or B.C. as to what they observed in Caldor's parking lot nor did he address L.K.'s testimony of what she says occurred there. It is recognized, however, that respondent contends he was elsewhere on Friday evenings in December.

Respondent denies ever discussing the possibility of a planned divorce from his wife with L.K. although he does admit discussing with L.K. his mutual efforts with his wife to have children, the fact of his wife's two miscarriages, and the fertility injections he administered to his wife (2T45, 96). Respondent testified that when S.B. appeared at school on the day he talked with S.B., S.B. not only physically threatened him but also threatened that he, S.B., would "get his [respondent's] job." Respondent reported S.B.'s conduct to school administrators but not until the day he was advised of the charges against him.

Finally, respondent testified that he has many former pupils, since graduated, return to talk with him to show, I presume, that he is a well-liked teacher.

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This concludes a recitation of the respective proofs of the parties in regard to the charges certified by the Woodbridge Township Board of Education against Larry F. Liskovec.

DISCUSSION

It is apparent that a finding as to the truth or falsity of the charges depends in large measure upon a finding of credibility which should attach to either L.K. or to respondent. With the exception of the incident which was to have occurred at Caldor's parking lot, all other incidents were to have occurred privately between L.K. and respondent. L.K. is insistent upon her version of what occurred during those asserted private encounters, notwithstanding her inability to recall times or dates, while respondent, in his general denial of the substantive allegations, is equally insistent, notwithstanding his, at times, conflicting testimony.

In assessing credibility, particularly credibility of students who testify against teachers, I am mindful of the Commissioner's long-held view in that regard as he expressed in In the Matter of the Tenure Hearing of Edward J. Quinn, School District of South Orange-Maplewood, 1975 S.L.D. 397, wherein, relying on the prior case of Palmer v. Bd. of Ed. of Autobon, 1939-49 S.L.D. 183, 188, he said:

> It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessity of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children * * * Palmer, supra, at 188.

In this case, L.K. is 16 years of age. Respondent was in a position through which he could exert some form of discipline upon her. On the other hand, credibility to be attached to respondent's testimony, taken as a whole, must be determined upon the basis whether or not the testimony is plausible and natural, extraordinarily surprising, suspicious or incomplete, or whether the testimony appears fabricated. Each of the factors mentioned, in respect of credibility which should attach to L.K. and to respondent, must be delicately balanced so as not to assign one factor overriding significance to the detriment of other factors.

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There are inconsistencies in the testimony of both L.K. and respondent. Furthermore, the strength of the testimony of respondent's wife is considerably lessened in respect of the times that respondent was to have arrived home on Mondays during December, on Wednesday, December 7 and Thursday, December 8, in addition to Fridays, December 2, 9 and 16. The strength of this testimony was weakened when respondent's wife, when confronted with respondent's sign out sheet, could not then be certain the time that respondent did, in fact, arrive home on those occasions.

L.K.'s testimony, as noted above, is not without contradiction. While on the one hand L.K. testified that when respondent first kissed her, her reaction was one of fright and repulsion and, withdrawal from such a relationship, and in consideration that the first incident had to occur sometime around Thanksgiving, it is curious that sometime on or about December 15 or 16 she would prepare a card, to accompany a flower for respondent, in which she tells him that she loves him. Equally as curious is the fact that after L.K. had the first encounter with respondent, she continued to return to the typing room after school knowing full well she would be in that room alone with respondent when he entered. Moreover, even after the occurrence at Caldor's parking lot, L.K. proceeded to return once again to the typing room, after school, and subject herself to, according to her, respondent's kisses. Furthermore, it is curious that neither S.B. nor B.C. observed in Caldor's parking lot any attempt by L.K. to remove herself from the situation in which she was.

Respondent's testimony has its own intrinsic inconsistencies. First, respondent's partial justification for his assertedly not signing out on a daily basis is that the office where the sign out sheets were located was locked at 4:30. However, his detention duty statement, if accurate, discloses that he had to enter the office at or about 5:00 p.m. every day in order to place detention slips in homeroom teachers' mailboxes. Arguably, the sign out sheet was removed from the office counter. However, respondent testified that he knew where the sign out sheet was kept, which was easily accessible to him, at the time that he was in the office inserting detention slips into homeroom teachers' mailboxes. Next, respondent's reasoning for changing L.K.'s grade from C to B is simply not persuasive. His argument that L.K.'s class performance was such that he had to rate it a B, in light of his earlier description of L.K.'s class performance as "adequate," belies L.K.'s class performance as anything more than average. By respondent's own admission, if a pupil's classroom performance is average, the highest grade he would assign that performance is C. Furthermore, I am not at all

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persuaded by respondent's disclaimer as to the accuracy of the times reported on his sign out sheet do not accurately reflect the times that he departed from the school on specific days. Discrepancies which exist on his sign out sheet do not occur until sometime in November and extend through the middle of December 1983, the very time that the incidents complained of by L.K. were to have occurred. Between September through the middle of November, respondent's sign out sheets, according to his own testimony, appear to be accurate.

Finally, the question of the nature of the findings which must be entered in this matter should be addressed. It is respondent who is charged with conduct unbecoming a teacher; L.K. is not the subject matter of the charges. It is immaterial whether L.K. was, or was not, pregnant at the time she first solicited respondent's assistance to console her in regard to her father's health, or to assist her with data processing or accounting, or to assist her in any personal problems she may have had. Factual questions which must be decided include whether respondent committed the conduct complained of by L.K. in the circumstances as described by L.K., without regard to L.K.'s motivation. Respondent, as a public school teacher, stands in a fiduciary relationship with L.K. as he does with all his pupils. As such, respondent owes each and every one of his pupils a duty of trust and loyalty which means that he must, at all times, act in the best interests of the pupil and that he may not engage in any activity which would serve his own unique self-interests.

Having considered the foregoing, I **FIND** L.K.'s testimony with respect to the complained of incidents to more reliably depict that which occurred as opposed to respondent's version of the same incidents. This is so for I **FIND** L.K.'s testimony to be more natural and plausible than I **FIND** respondent's attempts to explain away or justify, or to ignore the detailed testimony presented against him. L.K. testified, in my view, in complete candor without regard to any humiliation or embarassment she suffered. When her memory failed her, she said so without resort to fabrication. In contrast, respondent's testimony is found to be fabricated in respect of the accuracy of times recorded on his sign-out sheet, contrived in respect of the incident in the department chairperson's office, and manufactured in his general denial of the offensive conduct alleged. L.K.'s failure to recollect all details, or dates of the acts alleged, pales into insignificance when measured against her recollection of events she did present. Accordingly, I **FIND** that a

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preponderance of credible evidence exists in this record to show the following to be the facts of the matter:

1. Prior to the incidents found to have occurred herein, respondent's teaching record in the employ of the Woodbridge Township Board of Education has been unblemished.

2. Respondent's testimony shows he understands the nature of the allegations against him and that he has assistance of counsel.

3. L.K. is a 16 year old female pupil who was in a direct student-teacher relationship with respondent. There came a time during the 1983 fall semester when personal and academic problems were overwhelming her and, in her mind, she had no one to talk with. L.K. turned to respondent, her teacher, and he afforded her the opportunity for her to speak and for someone to listen. In fact, respondent went out of his way to assist L.K. with her academic difficulties during his own unassigned seventh period of the day. To the extent that respondent assisted L.K. in her academic work and in her concern for her father, to the extent of his ability by assisting her in his course, data processing, and providing an ear for her to discuss that concern, respondent maintained an appropriate teacher-pupil relationship.

4. The teacher-pupil relationship began to deteriorate when respondent, perceiving his role as something more than a teacher to one of his pupils, began to place his hands on L.K.'s shoulder during the regular data processing class in a manner analogous, I infer from the testimony of L.K., to a father-daughter relationship. It is at this point respondent began to cross the line from a teacher-pupil relationship to, as L.K. explains, a "something more" relationship.

5. I am persuaded by a preponderance of credible evidence that the incidents described by L.K. as having occurred in the typing room, at an approximate time of between 4:30 p.m. through 5:45 p.m., did in fact, occur. That is, I find a preponderance of credible evidence in this record to establish that respondent, having completed his detention duties

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sometime between 4:30 p.m. and 5:00 p.m., would return to the typing room, whereupon he would engage L.K. in the course of conversation she described and he would commit the acts upon her person as she explained. A preponderance of credible evidence demonstrates that respondent would advise L.K. that boys she dated were not good enough for her, that he wanted only what was the best for her, and on one or more occasions, he explained to L.K. that he was best for her. Contemporaneous with that kind of conversation, a preponderance of credible evidence establishes respondent would rub L.K.'s shoulder, gently touch her face, her lips, and run his fingers over her body, and at the propitious moment when she was in that section of the room not observable from the outside, he would proceed to embrace and kiss her.

6. Though I find respondent's assertion of not completing detention duties until 5:00 p.m. on a daily basis to be not wholly accurate and insufficient to establish a credible defense, even if his assertion is accurate in regard to the time that the "last pupil left detention" was 5:00 p.m., there is sufficient evidence in the record to demonstrate that he still had time enough to proceed to the typing room to carry out the kinds of activities complained of by L.K. Respondent's wife testified that respondent generally gets home late; respondent himself testified that his arrival at home of between 4:15 and 4:30 p.m. is " 'earlier than normal' "; and, there is apparent agreement between respondent and L.K. that L.K. remained in the typing room for at least a two week period between November 29 and December 16, 1983, during which time she had to report to work at Caldor's at 6:00 p.m.

7. I am persuaded by L.K.'s testimony that the occurrence in the department chairperson's office is as she described it. That is, I find that respondent and L.K. were in the department chairperson's office, regardless of how or why they were there, and that respondent proceeded to kiss L.K. and fondle her breasts and her genital area. I also find as fact that respondent kissed and fondled L.K. either before, during, or after having unbuttoned L.K.'s blouse. Whether the gate to the second floor lockers was locked or, alternatively, whether merely the lights were off, is not a finding which need be made here.

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8. There is a preponderance of credible evidence to establish that the events as described by S.B. and B.C. at Caldor's parking lot, on some unidentified Friday, did, in fact, occur. That is, I find that respondent drove L.K. to work from school and, prior to L.K.'s exit from respondent's vehicle, respondent and L.K. engaged in an embrace and a kiss. Whether the kiss was a "French kiss" as described by S.B. and B.C. is immaterial. The fact is that respondent, as a public school teacher, drove L.K., in his personal vehicle, to her place of employment from school and had physical contact with L.K. by way of his, respondent's, efforts to cause a kiss to occur between teacher and pupil.

9. Having already determined that L.K.'s testimony is more credible than that of respondent's, I find that respondent did, in fact, telephone L.K. at home, at approximately 11:30 p.m., on two occasions. I further find that on one occasion, respondent caused to be delivered to L.K. a flower, together with a card as described by L.K., as part of the school's flowergram program.

This concludes a recitation of the findings of fact relevant to a disposition of the matter.

CONCLUSIONS OF LAW

First, the charges against respondent are not, as he asserts, vague or unclear so as to afford him inadequate notice upon which to defend. Respondent testified as to his knowledge and understanding of the charges, together with the fact that he has had assistance of counsel during this entire proceeding. Second, there is no evidence to support respondent's assertions that the Board violated his Fourteenth Amendment rights in regard to due process and/or his liberty or property interests. Finally, no evidence, nor legal argument, was adduced nor presented in regard to any procedural errors the Board is alleged to have committed.

There is no dispute that a board of education which certifies tenure charges pursuant to N.J.S.A. 18A:6-10 et seq., against an employee who has acquired a tenure status in its employ bears the burden of proving the truth of the charges by a preponderance of credible evidence. In the Matter of the Tenure Hearing of Dominic

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Parisi, School District of the City of Elizabeth, Union County, 1974 S.L.D. 631. There is also no dispute that should the board, which prefers the charges against the teacher with the tenure protection, fail to meet its burden, the charges must be dismissed and the affected employee must be reinstated. In the Matter of the Tenure Hearing of Marie Concetta Versocki, School District of the Borough of South Plainfield, Middlesex County, 1978 S.L.D. 677.

Notwithstanding respondent's unblemished record while in the employ of the Woodbridge Township Board of Education it is clear that "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct.) aff'd, o.b. 131 N.J.L. 326 (E. & A. 1944). In this case, the charges are more than a single incident. The conduct complained of in the charges expands a period of time ranging from the middle of November, according to respondent himself, or from approximately November 29, 1983 through December 16, 1983. Consequently, it can be said that the "single incident" rule of Redcay does not apply. But if the "single incident" rule of Redcay does not apply, than these charges, found to be true herein, are more egregious than such a single incident.

It has already been noted that respondent, as L.K.'s teacher, was in a fiduciary relationship with L.K. which required him to manifest, and to encourage, a relationship with L.K. built on trust and loyalty in respect of his obligations as a public school teacher solely for her benefit to achieve a thorough and efficient program of education. In this case, respondent has gone far beyond his obligations and has violated the fiduciary trust between himself and L.K. by virtue of his offensive conduct with L.K. in the typing room, the department chairperson's office and in Caldor's parking lot. It cannot be over-emphasized that it is immaterial whether, at the time respondent's offensive conduct was occurring, L.K. found it offensive. It is further immaterial what L.K.'s motivation was for any role she may have had in respect of encouraging respondent to engage in such conduct. Respondent is a public school teacher and as such, he assumes all duties and obligations of the fiduciary relationship which exists between teacher and pupil and he assumed the liability for breach thereof.

The fact that respondent engaged in such conduct as proven to be true herein is sufficient to demonstrate that he should not continue to be a teacher in the public schools of the State of New Jersey. Respondent, at the very least, encouraged L.K. to present herself to him after school for him to engage in such conduct by his failure to

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control and limit the relationship with L.K. to that of teacher-pupil. More likely than not, respondent induced L.K. to continue to present herself after school by his gratuitous grant to her of a grade of B. On an earlier occasion, the Commissioner noted in In the Matter of the Tenure Hearing of Frederick L. Ostergen, School District of Franklin Township, 1966 S.L.D. 185, and the Commissioner has not changed his view since then, that:

> It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. 1966 S.L.D. at 187.

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

> . . . 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. [at 321]

Finally, the Commissioner said In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, that:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. [at 98-99]

Respondent's conduct in this case is outrageous and the fact that L.K. is a 16 year old female pupil aggravates the matter. Respondent's prior unblemished record of service is insufficient to overcome the gravity of harm he has committed. L.K., based on the facts in this case, suffered physical indignities at the hands of respondent by being

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kissed, fondled and otherwise offensively touched by respondent without just cause, excuse or justification.

Accordingly, I **FIND** and **CONCLUDE** that the only appropriate discipline to be imposed in this case is that Larry F. Liskovec be, and is hereby, **DISMISSED** from his tenured employment as a public school teacher in the employ of the Woodbridge Township Board of Education.

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

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

August 8, 1984
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

August 9, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 13 1984
DATE

Ronald L Parker/pht
OFFICE OF ADMINISTRATIVE LAW

ml

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EVIDENCE

J-1 Respondent's description of detention duties

R-1 Flowergram card from L.K. intended for respondent

R-1a Envelope in which flower card intended for respondent was placed by L.K.

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IN THE MATTER OF THE TENURE	:	
HEARING OF LARRY F. LISKOVEC,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WOODBRIDGE, MIDDLESEX COUNTY,	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that respondent in primary exceptions claims that further answers to interrogatories should have been allowed by the judge. The Commissioner concurs with the decision on motion of the court herein denying such request. In the opinion of the Commissioner, respondent was supplied with sufficient answers to interrogatories to permit him to properly prepare his defense.

The Commissioner further notes respondent's exception to the finding of fact and conclusions of law reached by the judge in this matter wherein he held respondent's wife's testimony to have been weakened by her uncertainty as to the time her husband returned from work after having been confronted with respondent's sign out sheets. Respondent contends that the Board never supplied him or his attorney with specific dates or times at which the alleged acts of sexual abuse occurred and further denied a motion to compel such specificity. Respondent contends that the provision of such specificity would have enabled him to provide documentation as to the date, time and duration of the Lamaze classes which he attended at the St. Barnabas Medical Center each Monday in December in the company of his pregnant wife. Respondent further takes exception to the judge's finding relative to the rejection of the testimony of respondent and his wife as to his activities on December 2, 9, and 16. Respondent contends that, had the sign out time sheets been made available to him through discovery, he could have provided corroborating testimony as to his actual whereabouts on the evenings and times in question.

Respondent likewise rejects the judge's conclusions of law as they relate to his acceptance of L.K.'s testimony as to the attention paid to her by respondent in class and as to what transpired in the department chairperson's office. Respondent

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further rejects the testimony of S.B. and B.C. who claim to have seen him kiss L.K. in Caldor's parking lot after dropping her at work. Respondent's rejection of said testimony being based upon incredulity that classmates would not have noticed extra attention lavished by respondent upon L.K. on the one hand and alleged bias toward respondent by S.B. and his friend B.C. on the other. (Respondent's Exceptions, at p. 21)

A close reading of the initial decision and an examination of the record, including the testimony of witnesses and the documents submitted in evidence, convinces the Commissioner that the findings of fact and conclusions of law are properly supported by the record. The Commissioner so holds.

The Commissioner finds and determines that the judge herein drew his conclusions from credible evidence. The Commissioner notes the conflict in testimony between respondent and L.K. and two other witnesses, S.B. and B.C. (Tr. I, 26, 114; Tr. II-4, 57)

The Commissioner affirms the credibility determinations herein by the judge considering "***'the proofs as a whole' with due regard to the opportunity of the one who heard the witnesses to judge their credibility***." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); and State v. Johnson, 42 N.J. 146, 162 (1964).

The Commissioner likewise finds respondent's contention that he could have or would have presented witnesses to prove that he could not have been with L.K. at the times contended had he known of the time sheets, which seem to indicate otherwise, to be lacking in credibility. Respondent knew full well the time span within which the events which are the basis of the charges herein were alleged to have occurred and he had ample opportunity to present witnesses who might cast doubt upon the testimony and evidence presented by the Board. His failure to have done so must be viewed to his detriment.

The Commissioner notes the following litany of citations from respondent's exceptions (at pp. 25-27) in support of his argument that the decision by the judge herein be rejected: Tenure Hearing of Stanley Ziobro, School District of the Town of Westfield, Union County, decided September 28, 1983; Tenure Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D. 239; Tenure Hearing of Anthony Polito, School District of the Township of Livingston, 1974 S.L.D. 666; Tenure Hearing of Victor J. Puzio, School District of the Borough of Wallington, 1975 S.L.D. 683.

The Commissioner is constrained to note that the present case and those cited above are similar only in that they all involve a claim of physical sexual contact between a tenured teacher and a minor student. (Board's Exceptions, at p. 27)

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The Commissioner notes as does the Board in its reply exceptions that, in each of the above-cited cases, the credibility of the corroborating witnesses was determined by the Commissioner to have been suspect. In the instant matter, a careful review of the transcript and the testimony leads the Commissioner to conclude that the testimony of the Board's witnesses stands the test of both consistency and credibility. The Commissioner further notes that in Ziobro, supra, the most recent of the cases cited by respondent, the Commissioner found Ziobro guilty of conduct unbecoming a teacher based upon a single incident of exercise of unprofessional judgment. In that matter, the Commissioner mitigated the penalty because he was not convinced of the total credibility of the single witness called to testify to Ziobro's past behavior. In the circumstances herein, respondent stands accused of numerous incidents of sexual advances to a female student at least one of which was corroborated by two eyewitnesses whose testimony was not shaken in cross examination. Further, the Board presented the detailed testimony of a guidance counselor whose assessment of the concern, confusion and state of mind of L.K. over the sexual advances made by respondent supports L.K.'s own description of her feelings. In the Commissioner's view, Ms. Marash's assessment of L.K.'s credibility, the assessment of a trained, sensitive guidance counselor used to dealing with dissembling students, weighs heavily in his determination.

In response to the above testimony, respondent offered only the testimony of his wife whose own certainty of the exact times at which respondent returned from work was somewhat cast into doubt by the disparities indicated on the sign out time sheets.

Consequently, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. The charges of unbecoming conduct certified by the Board against respondent having been proven true in fact, the Commissioner determines that Larry F. Liskovec shall be removed from the employ of the Board of Education of Woodbridge Township as of the date of this decision.

IT IS SO DETERMINED.

SEPTEMBER 24, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8675-83
AGENCY DKT. NO. 347-9/83A

GUSSIE GOEBEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,
Respondent.

APPEARANCES:

Anthony N. Gallina, Esq., for petitioner (Aronsohn & Springstead, attorneys)

James R. Freeswick, Esq., for respondent (Gladstone, Hart & Rathe, attorneys)

Record Closed: August 2, 1984 Decided: August 9, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, a secretary to the Superintendent of Schools, contends that her termination from employment was in violation of her tenure rights under N.J.S.A. 18A:17-2. She asserts that she worked for the Board of Education for more than three consecutive years and one day and had tenure at the time of her termination. Petitioner claims that her employment commenced on June 18, 1980 and was terminated June 30, 1983. Respondent argues that the nine days that petitioner worked in June 1980 were voluntary and did not count toward the acquisition of tenure. Respondent argues that petitioner's employment commenced July 1, 1980 and was terminated June 30, 1983, before she acquired tenure under the statute.

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On September 27, 1983, petitioner filed an appeal with the Commissioner of Education. Respondent filed an Answer with the Commissioner of Education on October 24, 1983. On October 28, 1983, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on February 15, 1984, the following issues were identified:

1. Was petitioner terminated from her employment with respondent as a secretary in violation of her tenure rights under N.J.S.A. 18A:17-2?

2. If petitioner should prevail, what relief is she entitled to?

Prior to the commencement of trial, a joint Stipulation of Facts was submitted to the court which will be set forth hereinafter and which I adopt as part of my **FINDINGS OF FACT.** I am also attaching the Stipulation of Facts and annexed exhibits to this Initial Decision.

STIPULATION OF FACTS

1. On June 9, 1980, the respondent adopted the following motion: That the President and Secretary of the Maywood Board of Education be authorized and directed to prepare and execute a proper contract with Gussie Goebel as a 12-month Secretary to the Superintendent of Schools for the 1980-81 school year, with a salary of $9,500.

2. The 1980-81 school year began on July 1, 1980 and ended on June 30, 1981 for 12-month employees of respondent.

3. A copy of one page from the minutes of a meeting of respondent on June 9, 1980 is attached hereto as Exhibit A.

4. Attached hereto as Exhibit B is a document entitled "Employment

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Contract" signed by Louis Roer, President of respondent, Inez Bisconti, Secretary of respondent, and Gussie Goebel, the petitioner.

5. Petitioner was present on the premises of respondent on nine days in June 1980 as follows: June 18, 19, 20, 23, 24, 25, 26, 27 and 30.

6. The petitioner did not report to work on ten work days during the month of July 1980 as follows: July 7, 8, 9, 10, 11, 14, 15, 16, 17 and 18.

7. Under the contract between the respondent and the Maywood Education Association covering the period July 1, 1979 through June 30, 1981, the petitioner was not entitled to any vacation days during the month of July 1980, except for July 4, 1980, which was a paid holiday for all employees.

8. Petitioner reported to work on the following work days during the month of July 1980: July 1, 2, 3, 21, 22, 23, 24, 25, 28, 29, 30 and 31.

Petitioner did not report to work on July 4, 1980, which was a paid holiday for all employees.

9. A. Patrick Ferro served as Acting Superintendent of Schools during the entire month of June 1980 and from July 1, 1980 through July 16, 1980.

10. On July 17, 1980, Dr. Francis E. Moran started work as Superintendent of Schools of the Maywood Public School System.

11. The first time that petitioner began working for Dr. Francis Moran was on July 21, 1980.

12. Petitioner's first paycheck was dated July 15, 1980. A copy is attached hereto as Exhibit C.

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13. Petitioner's second paycheck was dated July 31, 1980. A copy is attached hereto as Exhibit D.

14. Petitioner was rehired by respondent as a 12-month Secretary to the Superintendent of Schools for the 1981-82 school year.

15. The 1981-82 school year commenced on July 1, 1981 and ended on June 30, 1982 for 12-month employees of respondent.

16. Attached hereto as Exhibit E is a document entitled "Employment Contract" signed by Patrick Andrews, President of respondent, Ralph Hanson, Secretary of the respondent, and Gussie Goebel, petitioner.

17. Petitioner was rehired by respondent as a 12-month Secretary to the Superintendent of Schools for the 1982-83 school year.

18. The 1982-83 school year commenced on July 1, 1982 and ended on June 30, 1983 for 12-month employees of respondent.

19. Attached hereto as Exhibit F is a document entitled "Employment Contract" signed by the President of respondent, the Secretary of respondent and by petitioner.

20. Respondent determined not to rehire petitioner for the 1983-84 school year which was to commence on July 1, 1983 and end on June 30, 1984.

21. Dr. Francis Moran, Superintendent of Schools, notified petitioner that she had not been rehired by respondent for the 1983-84 school year, by letter dated April 27, 1983, a copy of which is attached hereto as Exhibit G.

22. Petitioner's last regular payroll check was dated June 24, 1983 for the period ending June 30, 1983. A copy of the paycheck stub is attached hereto as Exhibit H.

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23. Petitioner's last day of employment with respondent was June 30, 1983.

On May 17, 1984, the matter was set down for trial. The trial was conducted on May 17, June 27 and June 28, 1984 at the Office of Administrative Law, Newark, New Jersey. Post-hearing briefs were due on July 27, 1984, but because of the illness of the father of one of the attorneys, the time when such post-hearing documents were due was extended until August 2, 1984 on which date the record was closed.

The witnesses who testified, the exhibits marked into evidence and the Stipulation and Appendix are set forth in the attached Appendix.

DISCUSSION OF FACTS

In May 1980, as a result of seeing an ad in the local paper, Gussie Goebel applied for the position of Secretary to the Superintendent of Schools (R-1). She was interviewed for the position in May 1980 by the Acting Superintendent of Schools, A. Patrick Ferro. The secretary whom petitioner eventually replaced, Corolyn Wood, was present at the time of petitioner's interview. Petitioner was told that Corolyn Wood would be leaving her employment on June 30, 1980 and it would be beneficial if the new person could be trained during the last two weeks of June by Ms. Wood. At the time of the interview, petitioner told Mr. Ferro that she would not be available for two weeks in July because of previous vacation plans.

Petitioner was notified sometime around June 10 or 11, 1984 that she would get the job as Secretary to the Superintendent of Schools. As a result of receiving that information, Gussie Goebel resigned from her position with Titan Group, Inc., effective Friday, June 13, 1980 (R-2).

Petitioner commenced employment with the Board on June 18, 1980. During her first week on the job, she executed an employment contract for the 1980-81 school year. See Stipulation of Facts, Exhibit B. As can be seen by viewing the contract, it runs from the — day of June 1980 to the 30th day of June 1981. Also, although signed at the bottom

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of the agreement by Ms. Bisconti, Louis Roer, and Gussie Goebel, there appears no date above their signatures. As can be seen from the previously mentioned Stipulation, petitioner was present at the Board offices on nine days in June 1980 and was not present on ten days in July. Ms. Goebel testified that she would come into work each day at 8:00 a.m. and leave at 4:00 p.m. commencing June 18, 1980. She worked with Corolyn Wood and was trained at the various systems in the office. Petitioner was involved with filing, typing and preparing agendas for the Board of Education. Both A. Patrick Ferro and Louis Roer testified that they observed petitioner at her job in June 1980. As a matter of fact, Mr. Ferro asked petitioner to make telephone calls for him and to type a letter during this period of time.

Petitioner's first contract which was signed first by her and later by Louis Roer, who testified that he did not read it before he signed it, and Inez Bisconti was prepared by Corolyn Wood. Ms. Wood had prepared most of the contracts of employment during her years as Secretary to the Superintendent of Schools.

Inez Bisconti, Acting Secretary to the Board of Education, indicated to Mr. Ferro that the month June 1980 was incorrect in the employment contract. Although some conversations took place between her and Mr. Ferro, no corrective action was taken ever with regard to the June 1980 date.

Petitioner received her first paycheck dated July 15, 1980 (Exhibit C attached to Stipulation of Facts). Bisconti testified that the July 15 paycheck covered the period of time from July 1 to July 15. She emphasized that the school year started July 1, 1980 and ran until June 30, 1981. The July 15 paycheck did not cover the nine-day period of time that petitioner worked in June. It should be noted again that Goebel did not report to work on July 7, 8, 9, 10, 11, 14 and 15. (A legitimate question can be raised that if the July 15, 1980 paycheck did not cover the nine working days in June, what did it cover since petitioner did not work very many days during the first pay period in July.)

Respondent introduced into evidence several documents from which it argued petitioner commenced her employment on July 1, 1980. A membership enrollment card in

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the New Jersey Dental Service Plan, Inc. (R-8) has a notation, "date hired 7/1/80" and an Employee's Withholding Allowance Certificate (Form W-4) had a date on the face side of June 18, 1980. Attached to this document was a typed memo showing payroll number 1122 and the name and address of Gussie Goebel and it has Superintendent's Secretary, 7/1/80 and the following notation: "Worked with Mrs. Wood last one or two weeks in 6/80 with compensatory time off in July" (R-10). On a Public Employees Retirement System Enrollment Application there appears a notation that petitioner's date of employment began on July 1, 1980, although signed by Inez Bisconti, Acting Secretary, on June 18, 1980 (R-3). A Department of the Treasury Certification of Payroll Deductions form indicates that her date of enrollment is July 1, 1980 (R-4). The Blue Cross/Blue Shield card indicates that her effective date of membership is 9/1/80 (R-9). According to a Washington National Insurance Company Certificate of Identification (R-7a), the effective date of the insurance coverage was July 2, 1980 which policy was cancelled subsequent thereto (R-7b). Another Notice of Premium Due form from Washington National indicated that petitioner's insurance became effective July 2, 1980 (R-6).

After petitioner was terminated from her employment in June 1983 she applied for and collected 40 weeks of unemployment at $152.00 per week or a total of $6,080. Although not presently employed, she also worked temporarily after being terminated by respondent and received approximately $300 in addition to the money received from unemployment. Petitioner did actively seek employment on a regular basis, but was unable to find any jobs.

The new Secretary to the Superintendent, who replaced petitioner, received a raise in the amount of 7 and 1/2 percent retroactive to July 1, 1983.

FINDINGS OF FACT

In addition to the Stipulation of Facts previously set forth, I make the following **FINDINGS OF FACT:**

1. Petitioner commenced her employment with the Board on June 18, 1980 and

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worked for the Board at the Office of the Superintendent of Schools on June 18, 19, 20, 23, 24, 25, 26, 27 and 30, 1980.

2. I do not find by a preponderance of the credible evidence that there was any kind of "swapping arrangement" whereby petitioner was allowed to take ten vacation days in July in exchange for working during the nine days in June 1980.

3. The membership enrollment card in the New Jersey Dental Service Plan, Inc. indicates that petitioner signed the card and dated it June 18, 1980 and on the top of the card there is an indication that she was hired on July 1, 1980.

4. The Employee's Withholding Allowance Certificate (Form W-4) indicates a date of June 18, 1980 for Gussie Goebel with a notation typed on the other side "Superintendent's Secretary, 7/1/80-worked with Mrs. Wood last one or two weeks in 6/80 with compensatory time off in July."

5. The enrollment application for the Public Employee's Retirement System—New Jersey Division of Pensions indicates a date of June 18, 1980 alongside of Inez Bisconti's signature with a notation "date employment began July 1, 1980."

6. The Department of Treasury, Division of Pensions, Certificate of Payroll Deductions indicates a date of enrollment of July 1, 1980 with deductions to begin November 1, 1980.

7. A Blue Cross/Blue Shield card indicates effective date of coverage 9/1/80.

8. Insurance identification information from Washington National Insurance Company indicates an effective date of July 2, 1980.

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9. Petitioner's last day of employment with the Board was June 30, 1983.

10. Petitioner's employment with the Board was from June 18, 1980 until June 30, 1983, a period of three consecutive calendar years plus 12 days.

CONCLUSIONS OF LAW

In order for a secretary to obtain tenure, she must satisfy the requirements of N.J.S.A. 18A:17-2 which states:

> b. Any person holding any secretarial or clerical position or employment under a board of education of any school district under any officer thereof, after
>
> > 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the Board or officer employing him, or . . .
>
> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or reduced in compensation, 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.

In order for me to determine whether or not Gussie Goebel had tenure as of June 30, 1983, the last day of her employment with the Board, I must merely, and in a mechanical way, look at whether or not she has met the statutory criteria for tenure.

It is clear and uncontroverted that Gussie Goebel commenced her employment with the Board on June 18, 1980 and was terminated on June 30, 1983. Thus, she held her secretarial position after the expiration of a period of employment of three consecutive calendar years in the district, the third calendar year coming to an end on June 18, 1983. Gussie Goebel worked 12 days beyond the third consecutive calendar year.

It is irrelevant, as respondent contends, that the Board did not intend to employ her until July 1, 1980. It is also not germane that a number of documents such as the

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membership enrollment card in the New Jersey Dental Service Plan, the Employee's Withholding Allowance Certificate (Form W-4), the enrollment application for the Public Employees Retirement System, the Certification of Payroll Deductions, the Blue Cross/Blue Shield information card and Washington National Insurance Company Certificate identification cards contain reference to Gussie Goebel's commencement of employment being July 1 or July 2, 1980. These documents conflict with the unquestionable fact that petitioner commenced her employment and started working on June 18, 1980. If respondent did not intend for petitioner's employment to commence until July 1, 1980, it should not have had her work starting June 18, 1980. Additionally, it should not have executed petitioner's first employment contract with a June 1980 date in it rather than a July 1, 1980 date. Respondent seems to be asking me to disregard what it actually did in terms of petitioner's commencement of employment and is rather asking me to listen to what it intended to do.

Respondent argues, rather unconvincingly, that petitioner worked for nine days in June as a volunteer. Additionally, petitioner's first paycheck which she received on July 15, 1980 did not cover the nine days in June, but rather covered the period of time from July 1 until July 15, 1980. This is an absurd argument. I cannot believe that the respondent would pay petitioner for the period of time from July 1, 1980 until July 15, 1980 when she did not work July 4, 7, 8, 9, 10, 11, 14 and 15. I **CONCLUDE** that the first check issued on July 15, 1980 covered her nine working days in June 1980. I am sure a public entity, such as a board of education, would not pay an employee with public monies for work not performed.

Louis Roer's testimony that he never read petitioner's original contract in June 1980 and therefore the Board should not be bound by it is a frivolous argument. The Board shall not now be allowed to repudiate or reform a contract entered into over four years ago nor shall it be allowed to now claim that the action of the Board president in executing the contract was either a mistake or that his action was ultra vires.

The law is quite clear and well established that in order for one to obtain tenure, precise statutory conditions must be met. See Ahrensfield v. State Board of Education,

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126 N.J.L. 543 (E. & A. 1941). A teacher's employment for tenure purposes commences only once his or her teaching duties begin and not on an earlier date when the teaching contract was entered into. Zimmerman v. Newark Board of Education, 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963); Carroll v. State Board of Education, 8 N.J. Misc. 859 (Sup. Ct. 1930). In Zimmerman the court held that the teacher's employment began on the date in September when he began teaching and not on the previous June 30 when he entered into the teaching contract.

Although it does not concern the length of employment requirement, the New Jersey Supreme Court's decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), indicates that the guideline for determining whether a teacher is entitled to tenure is whether the statutory conditions have been met and not what the school board intended. The court held that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates and who have worked the requisite number of years, are eligible for tenure unless they come within explicit statutory exceptions. Spiewak at 81. The court found that the intent of school boards to hire Title I teachers on a temporary basis cannot deprive those teachers of tenure. The school board's position in the instant case is it did not intend that petitioner's employment should commence prior to July 1, 1980. The Board's intent is irrelevant in light of what actually took place, which was that petitioner's employment commenced on June 18, 1980. Thus, although it vigorously argues that it never intended that petitioner commence her employment other than on July 1, 1980, its intent cannot deprive petitioner of tenure if she in fact meets all of the statutory conditions.

I **FIND** and **CONCLUDE** that petitioner has met all of the statutory requirements under N.J.S.A. 18A:17-2.

As an aside and although unnecessary for a resolution of the issues before me, I want to comment on the unreported Appellate Division case in Stachelski v. Oakland Board of Education (N.J. App. Div. April 30, 1984 A1144-79) (unreported). Respondent, in the instant matter, in a post-hearing motion, sought to reopen the trial to present testimony that over a three-year period of time, petitioner was absent from school for

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approximately 90 days, i.e., 18 days in 1980-81, 42 days in 1981-82 and 29 days in 1982-83. Respondent relies on Stachelski to support its view that petitioner did not work three consecutive years and thus does not meet the statutory requirements of N.J.S.A. 18A:17-2. As I indicated in a letter decision, I denied respondent's application to reopen the case since this issue was never raised prior to the trial. However, although unnecessary for the decision before me, it should be noted that the leave granted to Susan Stachelski was as a result of her applying for an unpaid maternity leave for the entire school year 1976-77. This was an applied-for and granted board of education leave. The court in its decision in Stachelski in viewing her employment from 1973 through 1978 concluded that under the statute she never worked more than three academic years out of any four consecutive years. Even though I do not have the issue before me, certainly Stachelski is distinguished from the matter before me. If the issue were before me, it is questionable if I would be bound to apply Stachelski to deny petitioner tenure status.

Since petitioner has met the statutory requirements of N.J.S.A. 18A:17-2, she obtained tenure prior to her termination on June 30, 1983. Accordingly, the Board's termination of her effective June 30, 1983 was null and void since it failed to comply with the statutory procedure for terminating a tenured employee, i.e., filing tenure charges.

I **ORDER** and **CONCLUDE** that petitioner be reinstated to her position as Secretary to the Superintendent of Schools retroactive to July 1, 1983. I further **ORDER** that respondent pay petitioner that salary which she would have earned for the year 1983-84, together with a 7 and 1/2 percent raise (the same raise earned by her replacement) reduced by her unemployment in the amount of $6,080 and $300 earned at temporary employment, or a total reduction from back pay of $6,380.

All other issues raised are deemed to be without merit or are deemed to have been decided by this decision.

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OAL DKT. NO. EDU 8675-83

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who is empowered by law 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 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.

7-9-84
DATE

ROBERT P. GLICKMAN, ALJ

August 13, 1984
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 16 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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APPENDIX

List of Witnesses

Corolyn K. Wood
Gussie Goebel
Inez Bisconti
Louis Roer
Albert Patrick Ferro
Dr. Francis Moran

List of Exhibits

Exhibit No.	Description
R-1	Letter to Board of Education from Petitioner
R-2	Letter to employer re: resignation
R-3	Enrollment application, PERS
R-4	State of New Jersey, Division of Pension, payroll deductions
R-5	NJEA Group Disability Insurance Plans
R-6	Notice of Premiums Due
R-7a	Insurance Company ID card
R-7b	Insurance Company ID card
R-8	Membership Enrollment New Jersey Dental Plan
R-9	Blue Cross/Blue Shield card
R-10	Employee's Withholding Allowance Certificate

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R-11	Memo from Bisconti to Moran
R-12 (Id.)	Handwritten memo by Bisconti
R-13	Contractual agreement between Board of Education and Maywood Education Association
R-14	Stipulation
R-15	Page from Board minutes 1981
R-16	Page from Minutes 1982-83
R-17a	Annual Performance Report
R-17b	Memorandum April 22, 1983
P-1	Memo to Moran from Ferro
P-2	Memo dated January 19, 1981

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GUSSIE GOEBEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision 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 Board strongly objects to the judge's conclusions that petitioner commenced employment on June 18, 1980 and that she has met the statutory requirements for tenure acquisition, asserting that the preponderance of credible evidence in the record supports its contention that she did not begin her employment until July 1, 1980. The Board contends that it was not made aware of the arrangement between petitioner and the Acting Superintendent with respect to reporting to the Office of the Superintendent for two weeks in June and the taking of time in July for a previously planned vacation; it never requested nor authorized her to report to work in any manner during June 1980. The Board continues to argue that petitioner reported in June as a voluntary assistant and that she knew she would and could not receive pay for that time but that she would receive compensatory time in July 1980 with pay and that the collective bargaining agreement in effect at that time did not entitle her to any vacation days during July 1980.

The Board requests that it be allowed oral argument before the Commissioner and that the record be reopened for evidence to be considered that was erroneously excluded from the hearing. It objects to the judge's ruling from the bench that the proffered evidence would not be allowed because it was not raised in the pleadings or at prehearing conference, claiming that the evidence is within the scope of its second separate defense set forth in its answer and issue (a) of the pre-hearing order. Specifically at issue relative to the evidence is whether petitioner met the requirements of N.J.S.A. 18A:17-2 in view of an 18-day leave of absence without pay from her position during the 1980-81 school year, a 42-day leave without pay for the 1981-82 school year and a 29-day leave with pay during 1982-83.

The Board requests that the matter be reopened for the limited purpose of receiving evidence with respect to the above, urging that it is relevant and material, citing Stachelski v.

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Oaklyn, 1979 S.L.D. 331, aff'd State Board 338, rev'd N.J. Superior Court, Appellate Division, April 10, 1981, cert. den. 88 N.J. 493 as support for the relevance of such evidence.

In addition, the Board takes exception to the award of damages granted by the judge, avowing that she is not entitled to back pay because she did not make a reasonable diligent effort to find employment, either permanent or temporary, after her discharge. The Board alleges that she should have been able to obtain a position by January 1, 1984 and, thus, should be entitled to only 1/2 year of back pay. It contends that, since petitioner would probably not have received a raise for 1983-84, her resultant salary would have been one half of $11,401.50 ($5,700.75) and, since she received unemployment of $6,080 and $450 in earnings, her earnings exceeded what she would have obtained in the Board's employ from July 1, 1983 to January 1, 1984.

Petitioner rejects the arguments put forth by the Board and affirms the initial decision with respect to the determination that she has met the statutory requirements for acquisition of tenure. She does, however, except to the judge's determination that she is entitled only to a seven and one-half percent raise relative to back pay, contending that she should receive a raise equivalent to that of the Board Secretary because, had she not been improperly terminated, her raise would have been negotiated along with this individual's.

The Commissioner has reviewed the legal arguments put forth by the parties in this matter. He concurs with the findings and conclusion reached by the judge that petitioner has met the statutory requirements for tenure acquisition pursuant to N.J.S.A. 18A:17-2.

The record clearly reflects that petitioner commenced her employment on June 18, 1980. Despite any arguments to the contrary, the contract signed by petitioner and the Board President (R-6) clearly documents the fact that employment was to commence in June, albeit an unspecified date in June. It is unrefuted that petitioner began her employment on June 18, 1980. Whether or not there was an arrangement for compensatory time for vacation plans in July is irrelevant. The Commissioner is constrained to comment that had there been careful scrutiny and examination of the contract prior to signing by the Board President, it is possible that this matter could have resulted in a different determination with respect to tenure acquisition.

With respect to the back-pay issue, the Board's argument is deemed without merit. The Commissioner determines that the amount of mitigation was appropriately determined by the judge. Since there is an exception filed by petitioner with respect to the specific percentage increase, it is the determination of the Commissioner that, absent any documentation in the record that a with-

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holding of increment was to be recommended to the Board relative to petitioner's increment, the Board determined the amount of backpay based on petitioner's entitlement under the negotiated agreement for the 1983-84 school year had she not been improperly terminated.

With respect to the issues of oral argument and reopening of the matter, both requests are denied. The Commissioner, upon careful review of Stachelski, supra, agrees with the judge's conclusion contained in the initial decision, ante, that this matter is distinguishable. In Stachelski and Mountain v. Bd. of Ed. of the Township of Fairview, 1972 S.L.D. 526, aff'd State Board 1973 S.L.D. 777, which is cited in Stachelski, the leaves of absence were for a full year of not being "employed." In this matter, there is no question that petitioner was employed for each of the years in question, albeit that a portion of each of those employment years was devoted to a leave of absence. Thus, the requirement of N.J.S.A. 18A:17-2 has been met. This requirement reads in part:

> "***b. Any person holding any secretarial or clerical position or employment under a board of education of any school district under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him ***
>
> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title [18A:6-9 et seq.]. (Emphasis supplied.)

The recommendation of the Office of Administrative Law is adopted as the final decision by the Commissioner, except as modified with respect to the determination relative to the percentage increase as noted herein. The Board is to immediately reinstate petitioner with all back pay, benefits, and emoluments to which she is entitled, consistent with this decision, less the amount specified by the judge for mitigation of income received during her improper termination.

SEPTEMBER 27, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT ET AL., MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	

This matter has been remanded to the Commissioner of Education by virtue of a June 19, 1984 order of the Supreme Court of New Jersey for reconsideration in light of the entire transcript of the proceedings conducted before the Administrative Law Judge.

The record and transcripts have been thoroughly reviewed. The Commissioner finds no evidence or testimony to support the allegation that the Board's action in transferring petitioners was retaliatory in nature or intended as a punishment. Nor does he find that the record in any manner supports the existence of a conspiracy between the superintendent and principal to transfer petitioners as a retaliatory or punitive measure. The planning and decision-making in regard to the restructuring of the district's physical education program/department involved an administrative council, not merely the high school principal and superintendent. Testimony clearly indicates that the planning and recommendation for reorganization of the physical education program and concomitant transfer of personnel was the result of a group decision-making process and was not something falling exclusively under the domain of either the superintendent or the principal, individually or together. (Tr. II-204-206; Tr. III-33-35, 38-41, 108-109, 111) There is no indication whatsoever in the record that either the principal or superintendent exerted any undue influence in the decision-making process. There was unrefuted testimony that the superintendent was not involved with the grievance nor the grade change incident. Nor was he informed of these issues until after the grievance was settled (Tr. III-30-32), a grievance which was settled at the principal's level. (Tr. I-195; Tr. III-48)

The planning and decision-making process in regard to the transfer of personnel and the restructuring of the physical education department commenced prior to the filing of the grievance (Tr. III-32) and various administrative staff participated in the reorganization and transfer recommendations but were not involved in the grievance or grade change. (Tr. III-32) Restructuring of the physical education department district-wide was consistent with a documented Board objective to review the district's physical education program, an objective developed well in advance of and totally unrelated to the grade change and grievance incidents. (Tr. II-209; Tr. V-5, 14, 21)

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The Commissioner has thoroughly and carefully examined whether or not the Board's action was fatally flawed because it was "infected" with underlying bad faith of the superintendent and principal. The Commissioner does not believe that it was. As previously stated, the recommendation resulted from a group process. There is no evidence to indicate that either the superintendent or the principal, individually or jointly, controlled or unduly influenced the decision-making process, nor is there any question whatsoever that the Board merely rubber-stamped the recommended transfers. On the contrary, the Board engaged in lengthy and extensive consideration of the issues related to the transfers and it was fully knowledgeable of the allegations prior to the action it took. The record clearly demonstrates that the Board exercised its discretionary authority to deploy staff as it saw fit through independent judgment and in good faith.

The Commissioner is constrained to point out that both Petitioners Ivan and Murray testified that the issue of the grievance was not supported by the physical education department staff at the high school as a matter it wished to pursue as a departmental grievance. (Tr. I-181-82; Tr. II-71-72) Mr. Manser, the Princeton Regional Education Association faculty representative who was requested to attend the April 16, 1981 meeting with Petitioner Murray at which the transfers were discussed with the principal, characterized the grievance, which he learned of indirectly as a matter he had no specific knowledge of nor any specific interest in. (Tr. II-164) Petitioner Ivan described his support of Murray's pursuit of the grievance as follows:

"Q. And you put that, the issue of filing a grievance about procedure, to a vote among your department members; is that right?

A. We wanted to have a vote so that we would all be together so that this may not happen to someone else down the road.

Q. Did such a vote take place?

A. Yes.

Q. And the result of that was not to file a department grievance or a class grievance?

A. The department result was split. Some were in favor and some were not and we couldn't get a unanimous consensus on it and, generally, if you are asking for the entire department, if you do not get the entire department to agree to it, then we do not pursue it as an entire department.

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Q. But your concern, aside from Mr. Murray's, was on a procedural issue as to how such a grade change, or grade modification should be handled procedurally, if I understand?

A. We were concerned how it was brought about that someone with an F could be changed to a medical excuse.

Q. Now, it's fair to say, then, that no grievance developed, emanated from your department on that issue then?

A. As a total department?

Q. Yes.

A. All of us together, no.

Q. Did you file a grievance over the issue of the grade change?

A. No. The procedure is it is up to the individual teacher to do so.

Q. Okay. Did you attend any subsequent meeting at which the issue of the grievance was discussed with either members of your department or members of the PREA?

A. I was not invited.

Q. Okay. You were not a member of the PREA; is that correct?

A. No, I was not a member of the PREA.

Q. You were not then, nor are you now?

A. Nor am I now, no.

Q. So, you did not attend any of the meetings at which the grievance which was ultimately filed was discussed; is that correct?

A. I was not invited. No. (Tr. I-181-183)

***

Q. Okay. Did you attend any meeting at any level regarding this grievance?

A. Only in the sense that we had our departmental meeting.

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Q. That first meeting where the vote was taken and you could not get --

A. And ongoing discussions with Mr. Murray.

Q. So, you discussed the grievance with Mr. Murray, that's what you are telling us?

A. Yes.

Q. But you had no participation in the actual grievance that was filed by the PREA; isn't that right?

A. That's correct.

Q. Okay. Nor did you have any discussions with any members of the PREA about the grievance; isn't that correct?

A. They never called me.

Q. You didn't have any discussions with Dr. Houston [superintendent] about the grievance, did you?

A. Dr. Houston would not at this time have anything to do with the grievance.
(Tr. I-184-85)

***

Q. What do you mean by 'supporting Mr. Murray'? What do you mean by that? You didn't participate in any meetings with the PREA where the grievance was formulated, you had no discussions with Mr. Sakala [principal] about it, you had no discussions with the PREA about it. You tell me what you mean by 'support'.

A. Well, if Mr. Sakala, during the process, would have called me in, I certainly would have gone in and indicated that the procedure in the grade change was wrong.
(Tr. I-186)

***

Q. Okay. Back to my question, what do you mean when you say you supported Mr. Murray?

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A. Mr. Murray, in our ongoing discussions, he asked me -- told me, I plan to file a grievance. I saw all the evidence, and I said, Tom, you have every right to pursue this since the grade was changed to a medical excuse.

Q. That was your support?

A. No.

Q. Okay. What else?

A. And also, for some unknown reason, it was, in various areas of the school, and people would again ask, Why are you supporting Mr. Murray, and my response would be, He is correct.

Q. Okay. So, people would come up to you and say, Why are you supporting Mr. Murray with respect to his grievance? So that assumes two things, number one, you were supporting him, and number two, they knew you were supporting him; right?

A. Yes.

Q. Okay. Who were these people that would ask you this?

A. Members of the staff.

Q. What staff?

A. My staff.

Q. Physical education staff?

A. Are you still continuing to support Mr. Murray, and I said, Certainly.

Q. All right. So, in other words, this would be initiated by people coming to you and asking you if you supported the grievance?

A. That's correct.***" (Tr. I-188-89)
(Emphasis supplied.)

When questioned as to whether he discussed the grievance with anybody at the high school from the time the grievance was filed and the April 16, 1981 meeting, Petitioner Murray responded, "Like I say, my department or probably Mr. Bracaloni, the guidance

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counselor." (Tr. II-64) When asked whether he made any statements to anyone regarding his disagreement with the principal's decision on the grievance, his response reads:

> "Yes. I would say I did and again, I can't recall who. I was satisfied, as I said before, for the reasons that he gave me and was content with that, but I still felt he made the wrong decision." (Tr. II-65)

It seems reasonable to conclude from the above that the grievance was not a particularly controversial, divisive or publicized issue in the district, or that Petitioner Ivan's "support" of the grievance was highly active or controversial.

While there does appear to be some credible evidence to support that the high school principal's motivation might have been influenced to a certain degree by ill feelings toward Petitioner Murray as a result of the grievance and grade change incidents, there is, however, no credible evidence that the ill feeling extended to Petitioner Ivan because he was supportive of Murray's pursuit of a grievance. Moreover, there is sufficient credible evidence that the principal had adequate basis and motivation to effectuate the transfer controverted herein had the grade change and grievance never occurred. The record supports that the principal had concerns about and dissatisfaction with the high school physical education program well in advance of and independent from the grievance and grade change incidents. (Tr. II-43, 82)

The Commissioner believes that portions of the testimony of the superintendent with respect to several of the reasons cited for petitioners' transfers were unconvincing, specifically Petitioner Murray's "unhappiness" and the need for "balance" of assignments racially and by sex. Notwithstanding noted weaknesses in the superintendent's testimony, the record is abundantly clear that the transfers were made in order to bring about desired change in the district's physical education program K-12, this unto itself is sufficient to constitute a reasonable basis for the transfers without reaching to other reasons cited. The record clearly demonstrates that the transfers as approved by the Board were first and foremost in the best interest of the district.

The Commissioner is of the firm belief that petitioners have failed to sustain the burden of proof articulated in Bradley v. Bd. of Ed. of Borough of Freehold, 1976 S.L.D. 590 which states:

> "***A board of education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer. For a

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> teaching staff member who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper, and to the exclusion of all other bona fide reasons. In the instant matter, petitioner failed to sustain this burden of proof.***" (Emphasis supplied.) (at 600)

The Commissioner believes that petitioners failed in their burden of proof not only with respect to their allegations regarding the Board's action, but also with respect to the punitive, retaliatory motivation of the principal and superintendent.

As previously stated, the record supports the fact that the Board was fully knowledgeable of the alleged motivation behind the transfers, just as they were knowledgeable of the educational benefits to be derived from the transfers. Clearly, the Board in this matter, after exercising its own independent judgment in an open process which included lengthy public discussion and comment, deemed the transfers to be proper and to have educational benefit. The use of transfers to bring about change and new perspectives is certainly a management practice not unknown in education and was certainly not unknown to the Princeton Regional Board, having made substantial administrative staff transfers the year prior to this matter and changes in staff assignment in other departments. (Tr. III-36, 40).

Kopera, supra, dictates that it is not the role of the Commissioner to substitute his judgment for that of the board. It has been held by the courts that a board of education is entitled to a presumption of correctness and its actions will not be upset unless such action is determined to be arbitrary, capricious or unreasonable. Boult and Harris v. Passaic Bd. of Ed., 1938 S.L.D. 7 summarizes well the proper exercise of the Commissioner's judicial function with respect to his review of a board's actions:

> "[I]t 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. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions." (at 13)

The Commissioner is constrained to emphasize that petitioners had no entitlement to a specific position of employment; they were transferred within the scope of the endorsement on their

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instructional certificates; they suffered no demotion or reduction in compensation, tenure or seniority rights; and the record demonstrates that the Board clearly did not act in an arbitrary, capricious, improper or unreasonable manner when exercising its management prerogative with respect to the transfers.

Accordingly, since petitioners have not sustained the burden of proof in this matter that the Board's action was improper or that it was so infected by administrative bad faith as to warrant the setting aside of the transfer action, the Petition of Appeal is dismissed with prejudice.

SEPTEMBER 28, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 68-84
AGENCY DKT. NO. 437-12/83A

MARILYN SUSSMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

APPEARANCES:

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

Louis J. Greco, Esq., for the respondent (Donio, Greco & Donio, attorneys)

Record Closed: July 9, 1984 Decided: August 23, 1984

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

This matter concerns the petition filed by Marilyn Sussman with the Commissioner of Education on December 1, 1983. In this petition it is alleged that the Board of Education of the Greater Egg Harbor Regional High School District (hereinafter referred to as "Board") improperly denied the petitioner the benefits provided by N.J.S.A. 18A:30-2.1. The Board denied the allegation, and the matter was referred to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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Specifically, Ms. Sussman alleges that she is entitled to sick leave benefits, pursuant to N.J.S.A. 18A:30-2.1, for the period from March 16, 1983 through April 4, 1983, that she was out of work because of injuries caused by an alleged accident occurring at the Absegami High School on March 16, 1983, and that the time she was out should not be credited against her accumulated sick days.

N.J.S.A. 18A:30-2.1 provides:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absences during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statute. 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.

At the prehearing conference held on February 24, 1984, the parties agreed that the issues in this matter are:

(a) whether the injuries were sustained by the petitioner in the course of her employment with the Board;

(b) whether the petitioner has complied with the 90-day provision as set forth in N.J.A.C. 6:24-1.2; and

(c) whether the petitioner must file a workers' compensation claim in order to qualify for benefits pursuant to N.J.S.A. 18A:30-2.1.

During the prehearing conference, I was informed that at the end of the 1982-83 school year, Ms. Sussman and a number of other teachers were transferred to the Egg Harbor Township School District as part of a stipulation of settlement (P-1). I requested Ms. Riefberg to contact the Egg Harbor Township Board of Education and to inform them about the petition filed by Ms. Sussman and that a determination in this

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matter might affect Ms. Sussman's accumulated number of sick days. Ms. Riefberg was to inform the Egg Harbor Township Board of Education that it had the option either to participate in the matter or to agree in writing that it would be bound by the determination. By letter dated May 16, 1984, A. Ralph Perone, Esq., informed Ms. Riefberg that the Egg Harbor Township Board of Education had decided not to enter an appearance and that it had agreed to be bound by any determination made in this matter (C-1).

Based on the testimony and exhibits admitted into evidence at the hearing on May 30, 1984, I **FIND** that the facts in this matter are not in dispute.

During the 1982-83 school year, Ms. Sussman was a teaching staff member employed by the Board. In her position, Ms. Sussman was entitled to a daily preparation period during which time she was not regularly assigned to any specific duties (P-7). According to Ms. Sussman, the preparation period is primarily intended to be used by the teacher for school preparation work, for conferences with other teachers, administrators and students, and that during this period, teachers could be required to take over another class or other responsibilities and the teacher had to stay in the school. Although Ms. Sussman recognized that there was no limitation on how she used the preparation period, it was her practice to do school work during that period.

Mr. Harry Knoblauch, who was employed by the Board as a teacher and was the president of the Oakcrest-Absegami Teachers' Association during the 1982-83 school year, stated that during the preparation period, teachers were required to be available for conferences with parents, administrators, other teachers and pupils. Also, he stated that the teacher could be assigned to temporary teaching duties during the preparation period, and the teacher was not allowed to leave the school. Mr. Knoblauch stated that it was the common practice of the teachers employed by the Board to remain in their classrooms or to be in the faculty dining room during their preparation period.

As of March 16, 1983, the first period of the school day was designated as the petitioner's preparation period. Because another teacher used her classroom during the first period, it was Ms. Sussman's practice to spend her preparation period in the faculty dining room.

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While the petitioner was in the faculty dining room during her preparation period on March 16, 1983, she purchased a cup of hot tea and then she started to discuss a student with the school social worker, Margaret Lane. During her discussion, the cup that held the petitioner's tea collapsed, and the petitioner sustained a second degree burn on her left forearm and additional burns on her stomach and thigh.

It should be noted that in his brief, Mr. Greco alleged that the March 21, 1983 report regarding Ms. Sussman's accident, prepared by Linda F. Spendiff, Secretary-Bookkeeper employed by the Board, indicated that the petitioner's cup of tea dropped from her hand. This report was not introduced into evidence, nor did Ms. Spendiff testify at the hearing, and, therefore, Ms. Sussman's testimony as to how the accident occurred remains undisputed for the purpose of this determination, Ferdinand v. Agricultural Ins. Co. of Waterford, N.Y., 22 N.J. 482 (1956).

The petitioner reported the accident to the school nurse and received medical treatment at the Atlantic City Medical Center (P-2). Following the advice of her physician, Dr. Ricardo Urdinaran, Ms. Sussman did not return to work until April 4, 1983. Ms. Sussman presented the Board with a note from Doctor Urdinaran explaining the reason for her absence (P-3).

According to Ms. Sussman, she was in shock for several days after the accident. While she was out of work, the petitioner had a great deal of pain, and she had to limit her activities in order to avoid exposure to the burn areas. Ms. Sussman stated that when she returned to work on April 4, 1983, she was weak, and she was uncomfortable because of the burn on her arm.

Upon her return to work, Ms. Sussman discussed her absence with Ralph Martin, the Board's business manager, and she was not informed that her accumulated sick days would be used to cover her absence as a result of the accident. At the end of the school year, in accordance with its practice, the Board sent Ms. Sussman a note stating the number of her accumulated sick days which would be carried over into the next school year. This note reflected the fact that her accumulated sick days had not been used for the period of time she was out because of the accident.

In mid-August 1983, Ms. Sussman received a letter from Christine Smith, Claims Specialist for C&F Underwriters Group, the workers' compensation insurance carrier for the Board, informing her that she was not entitled to workers' compensation

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benefits for her injuries because her accident on March 16, 1983, did not occur within the course of her employment (P-5). At the hearing, Ms. Sussman stated that she thought this letter affected only her workers' compensation benefits.

Upon receipt of the letter from Ms. Smith, the petitioner spoke to Gene Sharp, a representative of the New Jersey Education Association, about her right to workers' compensation benefits; however, Mr. Sharp did not tell her that this letter would have any effect on her accumulated sick days.

After the 1982-83 school year, Ms. Sussman was transferred to the Egg Harbor Township School District and pursuant to the stipulation of settlement, this school district had to give her credit for her accumulated sick days (P-1).

By letter dated August 17, 1983, Ms. Sussman was informed by the Egg Harbor Township School Board that she had 10 1/2 accumulated sick days as of September 1, 1983, and that this number included the carry-over sick days as well as the 10 days for the 1983-84 school year (P-6). Ms. Sussman did not receive this letter until the first week of school in September. This fact was confirmed by Mr. Knoblauch, who indicated that he received a similar letter in his school mailbox in the beginning of September 1983.

Upon receipt of this letter, Ms. Sussman contacted Thomas Smith, the Superintendent of Education for the Egg Harbor Township Board of Education, and he confirmed that the records of the Board reflected that she was entitled to a carry-over of a 1/2 sick day. Ms. Sussman filed her petition with the Commissioner of Education on December 1, 1983.

Ms. Sussman stated that she has retained counsel and will be filing a case for workers' compensation benefits. By law, Ms. Sussman has two years from the date of injury to file such a case.

At the hearing, Ms. Riefberg indicated that she had served a subpoena on Margaret Lane, the school social worker, and was informed that Ms. Lane would not appear because she had an appointment at the Wills Eye Hospital in Philadelphia. Although initially Ms. Riefberg indicated that she wanted Ms. Lane to testify, she rested

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the petitioner's case after Ms. Sussman and Mr. Knoblauch testified. The Board presented no witnesses and offered no exhibits.

The threshold issue in this matter is whether the petition should be dismissed for non-compliance with N.J.A.C. 6:24-1.2 or barred by laches.

N.J.A.C. 6:24-1.2, in part, provides:

> 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.

In his brief, Mr. Greco argued that the petition should be dismissed since it was not filed within 90 days of Ms. Sussman's receipt of the letter from C&F Underwriters Group indicating that the petitioner was not qualified for workers' compensation benefits (P-5). Mr. Greco argued that upon receipt of this letter, the petitioner should have recognized that if her injuries were not work-related she would likewise not be eligible for benefits pursuant to N.J.S.A. 18A:30-2.1. In addition, Mr. Greco argued that the petitioner had not presented any compelling reason for the delay in filing the petition and that the matter should be barred by laches and that there should not be a relaxation of the 90-day rule, pursuant to N.J.A.C. 6:24-1.19.

Ms. Riefberg argued that the petition was filed within the 90-day period provided by N.J.A.C. 6:24-1.2 because Ms. Sussman was first notified that she was denied benefits pursuant to N.J.S.A. 18A:30-2.1 when she received the letter from the Egg Harbor Township Board of Education regarding her accumulated sick days in the beginning of September 1983 (P-6). Ms. Riefberg noted that the letter from the representative of the C&F Underwriters Group did not address the question of the petitioner's accumulated sick days and, therefore, it did not put her on notice that the Board had adjusted its records as to her accumulated sick days. Ms. Riefberg argued that to assume that Ms. Sussman had deduced that the letter from the workers' compensation carrier would affect her accumulated sick days was inequitable and unrealistic because the petitioner does not have any substantial knowledge of the intricacies of workers' compensation and school law. Lastly, Ms. Riefberg argued that the matter should not be barred by laches since there was no delay in filing the petition and since the Board had not shown that it was prejudiced, See, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982).

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Having reviewed the facts and the arguments of the attornies, I **CONCLUDE** that the petition was filed within the 90-day period provided by N.J.A.C. 6:24-1.2. The Board informed the petitioner of the number of her accumulated sick days at the end of the 1982-83 school year and she was not notified that the Board had adjusted this number until she received the letter from her new employer during the first school week in September 1983. The letter that Ms. Sussman received from the workers' compensation carrier representative did not mention her accumulated sick days, nor was it written by an employee of the Board. It is unreasonable to assume that a person receiving this letter would think that it affected anything other than workers' compensation benefits. On the other hand, it is reasonable to assume that Ms. Sussman would have thought that if the Board had adjusted the number of her accumulated sick days that she would receive a notification from the Board. Since I have concluded that the petition was filed within the 90-day period, there is no need to consider the question of laches.

The next issue is whether this matter should be dismissed or stayed pending a determination in the workers' compensation case.

Mr. Greco argued that the matter either should be dismissed or stayed pending a determination by the Division of Workers' Compensation regarding the petitioner's eligibility for benefits. In support of his argument, Mr. Greco noted that the Appellate Division in Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982), held that the "accident arising out of or in the course of employment" standard used in N.J.S.A. 18A:30-2.1 was intended to have the same exact meaning as that standard has within the context of the Workers' Compensation Act. Mr. Greco argued that this suggests that there should be identical results and that the only way this can be achieved is if one entity makes a determination as to whether the petitioner's accident occurred within the course of her employment. Since the Division of Workers' Compensation has the greater experience handling such matters, Mr. Greco argued that it should make the decision. Mr. Greco recognized that his position is inconsistent with the State Board of Education's decision in Masino v. West Deptford Bd. of Ed., State Bd. of Ed. (July 8, 1981), appeal dismissed, (N.J. App. Div., June 15, 1983, A-5469-80T1) (unreported) and argued that this decision was impliedly overruled by the Theodore case.

Ms. Riefberg argued that the petitioner is entitled to a determination by the Commissioner of Education and that the matter should not be dismissed or stayed until

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there is a determination by the Division of Workers' Compensation. In support of this position, Ms. Riefberg cited the State Board of Education's decision in the Masino matter, and Bergmann v. Vineland Bd. of Ed., OAL DKT. EDU 8457-82 (August 1, 1983), adopted, Comm'r of Ed. (Sept. 15, 1983).

In the Masino matter, the administrative law judge determined that the Commissioner of Education did not have original jurisdiction regarding benefits pursuant to N.J.S.A. 18A:30-2.1, and that a determination had to be made initially by the Division of Workers' Compensation, OAL DKT. EDU 4347-79 (October 3, 1980). This initial decision was adopted by the Commissioner of Education (November 20, 1980). In reversing the Commissioner's decision, the State Board of Education stated:

> 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 [Decision, July 8, 1981, p. 2]

Ms. Riefberg argued that the State Board of Education's decision in the Masino matter is consistent with the decision in the Theodore case. I agree. Although the Appellate Division in Theodore ruled that the standard of proof for deciding the issue of whether or not an accident arose out of or in the course of employment should be the same in school law as it is in workers' compensation law, the court did not either imply or hold that the Commissioner of Education cannot make an independent determination regarding a person's rights pursuant to N.J.S.A. 18A:30-2.1 and, in fact, the Appellate Division recognized the jurisdiction of the Commissioner of Education in such matters.

Since the State Board of Education has determined that the Commissioner of Education should decide cases involving benefits pursuant to N.J.S.A. 18A:30-2.1, notwithstanding the fact that a determination has not yet been made by the Division of Workers' Compensation, I **CONCLUDE** that this matter should not be either dismissed or stayed. It has been established that an administrative interpretation should not be set aside unless there is a showing that such an interpretation is inconsistent with the

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enabling statute. See, N.J. Association of Health Care Facilities v. Finley, 83 N.J. 67 (1980); State v. Council of State College Locals, 153 N.J. Super. 9 (App. Div. 1977), certif. den., 78 N.J. 326 (1978); Boyle v. Riti, 175 N.J. Super. 158 (App. Div. 1980); East Windsor Regional Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547 (App. Div. 1980); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544 (1978).

Therefore, although I recognize that there is merit to Mr. Greco's argument that the Division of Workers' Compensation should make the initial determination in this type of a case, based on the decision of the State Board of Education in the Masino matter, I **CONCLUDE** that the petitioner is entitled to a determination, at this time, by the Commissioner of Education regarding her rights under N.J.S.A. 18A:30-2.1.

In addition, Mr. Greco argued that the petitioner should be required to file a case with the Division of Workers' Compensation in order to mitigate the liability of the Board pursuant to N.J.S.A. 18A:30-2.1. I **CONCLUDE** there is nothing in the law to support this position, and that the argument is moot since Ms. Sussman testified that she will file a case with the Division of Workers' Compensation.

The last issue is whether or not Ms. Sussman's accident on March 16, 1983, occurred in the course of her employment.

Ms. Riefberg argued that Ms. Sussman's accident occurred during her preparation period which is a part of her workday and that the petitioner had not deviated from her normal routine on the day of the accident. Ms. Riefberg argued that the act of drinking tea was incidental to her duties and that she is entitled to sick leave benefits pursuant to N.J.S.A. 18A:30-2.1.

Ms. Riefberg recognized that the "accident arising out of or in the course of employment" standard in N.J.S.A. 18A:30-2.1 should be given the same meaning as it has in the context of the workers' compensation law, Theodore, supra. She noted that in Cavalcante v. Lockheed Electronics Company, 85 N.J. Super. 320, 324 (Union Cty. 1964), aff'd, 90 N.J. Super. 243 (App. Div. 1966), the court held that pursuant to the workers' compensation law, an accident arises in the course of employment "when it occurs (a) within the period of employment, (b) at the place where the employee may reasonably be, and (c) while he is fulfilling the duties of his employment, or doing something incidental to it." Ms. Riefberg argued that there were a number of workers' compensation

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cases holding that brief interruptions from work for lunch or snacks are within the course of employment, citing the decisions in Jones v. Continental Electric Co., Inc., 75 N.J. Super. 76 (App. Div. 1962), certif. den., 38 N.J. 312 (1962); Crotty v. Driver Harris Co., 49 N.J. Super. 60 (App. Div. 1958), certif. den., 27 N.J. 75 (1958); Wyatt v. Metropolitan Co., 74 N.J. 167 (1977).

Mr. Greco argued that the petitioner should be denied benefits pursuant to N.J.S.A. 18A:30-2.1 because the workers' compensation cases have held that there must be a causal connection between the injury and the working conditions, citing the decision in Deniello v. Machine Express Company, 119 N.J. Super. 20 (Law Div. 1972), and that such a causal connection did not exist in this matter in that the petitioner was acting beyond the scope of her employment at the time of the accident. Mr. Greco argued that the preparation period is a duty-free period and that there is no restriction on the teacher's activities.

In her rebuttal brief, Ms. Riefberg noted that in the Daniello case the court recognized that the workers' compensation law should be given a liberal construction in order to avoid harsh results to the employee and his/her family and that the court found that a causal relationship existed where the worker's clothes caught fire at home after he had spilled fuel on himself at work.

In his brief, Mr. Greco also relied on the decision in Robertson v. Express Container Corp., 13 N.J. 342 (1953). In that matter, Ms. Robertson's employer was not aware that she ate her lunch on the roof of its building and the accident occurred when Ms. Robertson was climbing to a higher point on the roof in order to see a nearby fire. The Supreme Court in the Robertson case held that the employee's action was not incidental to her employment, and that the accident did not arise in the course of her employment. In reaching its decision, the Supreme Court stated that while a lunch or rest period taken on the employee's premises does not necessarily interrupt the employment relationship, an accident occurring during such a time is not per se sufficient to entitle an employee to compensation under the Workers' Compensation Act unless there is a causal connection between the employment and the accident.

I agree with Ms. Riefberg's argument that the Robertson case is distinguishable from this matter based on the facts.

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In this matter, the petitioner was entitled to a preparation period and it was her normal practice to use this time to prepare for her classes. At the time of the accident, Ms. Sussman was engaging in a conversation about a student with the school social worker and the fact that she was drinking tea at the time was incidental. I **CONCLUDE** that the petitioner's accident occurred within the scope of her employment and that she is entitled to benefits, pursuant to N.J.S.A. 18A:30-2.1, for the period between March 16, 1983 and April 4, 1983. I **ORDER** that the Board amend its records to reflect this determination and that the Board transmit this information to the petitioner's current employer, the Egg Harbor Township Board of Education.

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

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

August 23, 1984
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

5/23/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 27 1984
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

ml/E

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APPENDIX

EXHIBITS ADMITTED INTO EVIDENCE:

FOR THE PETITIONER:

P-1 Stipulation of Settlement and Consent Order of Dismissal Greater Egg Harbor Regional High School District Board of Education v. Board of Education of the Township of Egg Harbor, Oakcrest-Absegami Teachers' Association et al.

P-2 Medical Report of the Atlantic City Medical Center - Emergency Department, dated March 16, 1983

P-3 Note from Dr. Urdinaran regarding Marilyn Sussman's medical condition, dated March 25, 1983

P-4 Marked for identification only

P-5 Letter to Marilyn Sussman from Christine Smith, dated July 25, 1983

P-6 Letter from Thomas Smith, Jr. to Marilyn Sussman, dated August 17, 1983

P-7 Part of the Union Contract for the period July 1, 1981 through June 30, 1983

JUDGE'S EXHIBIT:

C-1 Letter from A. Ralph Perone to Barbara E. Riefberg, Esq., dated May 16, 1984

WITNESSES

FOR THE PETITIONER:

Marilyn R. Sussman
Harry Knoblauch

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MARILYN SUSSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

For the reasons stated by the judge in reaching her conclusions the Commissioner affirms the determinations made herein. The Board accordingly is directed to amend its records to show that petitioner's accident occurred within the scope of her employment entitling her to benefits pursuant to N.J.S.A. 18A:30-2.1. This information shall be transmitted to petitioner's present employer, the Egg Harbor Township Board of Education.

IT IS SO DETERMINED.

OCTOBER 2, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7434-84
AGENCY DKT. NO. 415-10/84

MR. & MRS. WILLIE BURNSIDE, JR., ON THEIR OWN AND ON BEHALF OF THEIR MINOR SON, RICHARD BURNSIDE; MR. & MRS. HOWARD COLEMAN, ON THEIR OWN AND ON BEHALF OF THEIR MINOR SON, HOWARD HURCULES COLEMAN; LINDA STAJDEL AND GREGORY T. MCGANN, ON THEIR OWN AND ON BEHALF OF GREG MCGANN, RESPECTIVELY LEGAL WARD AND MINOR SON THEREOF; MR. & MRS. KEITH JONES, ON THEIR OWN, AND ON BEHALF OF THEIR MINOR SON, MICHAEL A. JONES; MR. & MRS. DENNIS KOVACH, ON THEIR OWN AND ON BEHALF OF THEIR MINOR SON, MARK KOVACH; KATHLEEN LAIRD, ON HER OWN AND ON BEHALF OF HER MINOR DAUGHTER, MELISSA LAIRD; MR. & MRS. MICHAEL DRAYMAN, ON THEIR OWN AND ON BEHALF OF THEIR MINOR SON, DANA DRAYMAN; PEGGY HALLION, ON HER OWN AND ON BEHALF OF HER MINOR SON, DAVID HALLOIN AND FRANK J. BALKUM, ON HIS OWN

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AND ON BEHALF OF HIS MINOR SON,
WILLIAM G. BALKUM,

Petitioners,

v.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION; ROBERT F. KANABY, EXECUTIVE DIRECTOR, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY; THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION'S ELIGIBILITY COMMITTEE AND ELIGIBILITY APPEALS COMMITTEE, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT: THE NORTHERN BURLINGTON COUNTY REGIONAL BOARD OF EDUCATION AND THE MEMBERS THEREOF, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONNALY; EILEEN T. SHEEDY, SUPERINTENDENT, BOTH IN HER OFFICIAL CAPACITY AND PERSONALLY; AND, G. RICHARD LANGE, PRINCIPAL, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY,

Respondents,

and

MR. & MRS. DONALD MORGAN, ON THEIR OWN BEHALF AND ON BEHALF OF THEIR MINOR SON, DONALD MORGAN, JR.,

Petitioners,

v.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, ROBERT F. KANABY, EXECUTIVE DIRECTOR, BOTH IN HIS OFFICIAL CAPACITY AND

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PERSONALLY; THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION'S ELIGIBILITY COMMITTEE AND ELIGIBILITY APPEALS COMMITTEE, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONNALLY; THE RANCOCAS VALLEY REGIONAL SCHOOL DISTRICT; THE RANCOCAS VALLEY REGIONAL BOARD OF EDUCATION AND THE MEMBERS THEREOF, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; WILLIAM CLARK, SUPERINTENDENT, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY; AND HENRY W. HUSS, PRINCIPAL, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY,

Respondents

and

MR. & MRS. GEORGE C. QUEEN ON THEIR OWN BEHALF AND ON BEHALF OF THEIR MINOR SON, GEORGE QUEEN; AND, CAROL SAULER, ON HER OWN BEHALF AND ON BEHALF OF HER MINOR SON, RONALD SAULER,

Petitioners,

v.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, ROBERT F. KANABY, EXECUTIVE DIRECTOR, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY: THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; THE MEMBERS OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION'S ELIGIBILITY COMMITTEE AND ELIGIBILITY APPEALS COMMITTEE, BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY; THE WEST DEPTFORD SCHOOL DISTRICT; THE WEST DEPTFORD BOARD OF EDUCATION AND THE MEMBERS THEREOF,

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OAL DKT. NO. EDU 7434-84

BOTH IN THEIR OFFICIAL CAPACITY AND PERSONALLY, CHARLES B. MCNALLY, SUPERINTENDENT, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY; AND WILLIAM G. STUBBS, PRINCIPAL, BOTH IN HIS OFFICIAL CAPACITY AND PERSONALLY,

John T. Barbour, Esq., for the petitioners (Barbour & Costa, attorneys)

Michael J. Herbert, Esq., for the respondent, New Jersey Interscholastic Athletic Association et als. (Sterns, Herbert & Weinroth, attorneys)

Steven Mushinski, Esq., for the respondent, Rancocas Valley Regional H.S. Board of Education and the Northern Burlington Regional H.S. Board of Education (Parker, McKay & Criscuolo, attorneys)

Arthur J. McDonald, Jr., Esq., for the respondent, West Deptford Board of Education (Holston & McDonald, attorneys)

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

This petition of appeal was filed in the Office of the Commissioner of Education on October 2, 1984 and transferred to the Office of Administrative Law on October 4, 1984. Petitioners' appeal requested an Order for Interim Restraints and included an Order To Show Cause why the interim relief sought by the petitioner should not be granted, returnable October 5, 1984 at the Office of Administrative Law Trenton. Oral argument was conducted on same date. Counsel for petitioner filed a brief with his appeal and counsel for the New Jersey State Interscholastic Athletic Association (NJSIAA) filed a brief in opposition to add interim relief. Affidavits were filed by each of the litigants.

The matter here in controversy concerns a change in the athletic eligibility rules for high school pupils promulgated by the NJSIAA. The rule change effected a higher academic standard for all pupils who wished to participate in athletics beginning in the September 1984 school year. The rule is summarized by its statement that all pupils intending to participate in athletic activities in the September 1984 school year must earn 23 credits in the second semester of the 1983-84 school year. All of the petitioners in this matter have failed to earn 23 credits and the record shows that some of them missed by one-half a point.

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Petitioners argue that the pupils have met all of the rules which were distributed to parents and that they were never notified of the change in rules in a timely fashion so that the students might take whatever action was needed to be eligible for the fall sports programs.

Petitioners argue further that all of the pupils in this action have met and exceeded the level of performance expected of them as set forth in the handbook distributed to them by their high school admistration; now after the summer is completed and they are unable to take any make-up courses, they find that it is impossible to become eligible because of the change in the NJSIAA rules.

The record shows that the NJSIAA in cooperation with the Office of the Commissioner of Education worked many hours over the course of the past year revising its rules and setting a more rigorous academic standard for athletic eligibility. The NJSIAA argues that it adopted these new rules on December 5, 1983 concerning the issue of academic eligibility standards and issued those rules to all member schools in December 1983. The Commissioner of Education was also served with these rules and pursuant to N.J.S.A. 18A:11-5, the NJSIAA asserts that these rules were adopted by the Commissioner because he has not acted to disapprove them in the 20 days permitted by this statute. Further, the State Board of Education adopted a resolution on May 2, 1984 which requires each local board having grades seven or higher to establish a local policy regarding academic standards and athletic eligibility for athletic and cocurricular activities. The State Board supported fully the standards for academic performance as set forth by the NJSIAA. However, it resolved in its penultimate paragraph,

> that these local policies shall be adopted January, 1985 and implemented by September, 1985. . . .

The NJSIAA has presented the affidavit of its executive director with Exhibits A through U attached. That affidavit and its exhibits attest to the NJSIAA's efforts to notify all member school in accordance with its own constitution, by-laws, and rules and regulations that there was a change in the academic standards for athletic eligibility commencing in the September 1984 school year. Additionally, NJSIAA counsel represented that most of the school districts in this State abided by that notice and that the pupils in those schools made whatever efforts were needed to ensure their eligibility for the 1984-85 school year. The NJSIAA asserts that it would not be fair to all of those

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who made that effort to find that it really was not required because some pupils did not abide by the new regulations.

In spite of the NJSIAA's efforts to notify all member schools at least one principal was unaware of the change in eligibility standards as set forth in the affidavit of the principal of the Rancocas Valley Regional High School. In his affidavit, he stated that he only became aware of the change in eligibility requirements at the beginning of the 1984-85 school year.

The time constraints on counsel and on the school districts involved do not permit an exhaustive treatment of this subject at this time. Suffice it to say, however, that it is clear that some if not all of the parents and pupils involved in this action were not aware of or did not understand the new regulations as they affected them for the current school year. The result of this change has had the affect of causing pupils who would have been eligible under the old rule of the NJSIAA to be ineligible under its new rule which it implemented beginning September 1984. Under the old rule a pupil was required to pass three courses in the prior semester to be eligible to participate in school athletics. Petitioner argues that his clients did what they were told to do as shown in the Northern Burlington Handbook which is issued to all pupils and that it was only after the Northern Burlington adopted a resolution in August 1984 when it was too late for the students to do anything about earning more credits that they became aware of the new regulations which caused them to be ineligible to participate in athletics.

Based on my review of all of the moving papers in this matter, the affidavits submitted by many persons and the arguments of counsel, the relief requested by petitioners is **GRANTED** for the following reasons:

1. I am convinced by my review of these affidavits, the date of adoption of the Northern Burlington Regional High School resolution (August 1984) that all member schools did not properly notify their student bodies of the effective date of the change in academic standards and properly counsel those pupils so they could avoid the kind of proceeding we held today.

2. The resolution of the New Jersey State Board of Education which is attached to the petition of appeal is very supportive of the efforts and

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the standards developed by the NJSIAA and it directs all member schools as follows:

> no district shall adopt standards less than the NJSIAA standards adopted at its December 5, 1983 meeting and required of all member districts. . . .

However, it also -

> RESOLVED that these local policies shall be adopted January 1985 and implemented by September 1985. . . .

This resolution was transmitted to an Assistant Commissioner of Education on May 9, 1984, and a carbon copy was mailed to a county superintendent of schools. There is nothing in the record which would indicate whether or not the Assistant Commissioner of Education or any or all of the county superintendents thereafter notified any of their local boards in accordance with this State Board resolution.

The effect of the rule change by the NJSIAA will cause some of these petitioners to miss their last opportunity to participate in fall sports since some of them are seniors. Unfortunately they will never be made whole even if they should later appeal on the merits because by that time, the fall sports season will have ended. This decision is in no way critical of the hard work and long hours spent by the NJSIAA in creating and developing these athletic academic standards. However, there is a problem with proper notice and perhaps the kind of official notice which is required would be a resolution such as the State Board issued and perhaps even a formal letter from the Commissioner of Education to the county superintendents and to all superintendents in this State advising them of the effective date of change of the new athletic eligibility standards. Clearly, the State Board has directed all districts to implement these new standards by September 1985. And even though the NJSIAA was able to show documents among its exhibits which put member schools on notice of the change in rules effective this September, it is also clear that some member schools did not properly notify their pupils of this change.

In other decisions by the Commissioner, it has been stated that the NJSIAA has achieved what can be reasonably considered a semi-governmental status, since it is official policy-making body for interscholastic athletics and such policies affect thousands of public school children in the State. See: Bd. of Ed. of the Sterling Reg. H.S. Dist. &

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Michael J. McKinney v. New Jersey State Interscholastic Athletic Association, OAL DKT. EDU 1029-83 decided March 24, 1983; Gordan F. VanNote v. NNew Jersey State Interscholastic Athletic Association, OAL DKT. EDU 10260-82 decided March 8, 1983. It is also clear from these and other decisions that athletics are an integral part of a pupils school life. Mainland Reg. Teachers' Assoc. v. Bd. of Ed. of Mainland Reg. Sch. Dist., 176 N.J. Super. 476, 482-484 (App. Div. 1980); Bd. of Ed. of Greater Egg Harbor Reg. H.S. Dist. v. NJSIAA, 1983 S.L.D. (decided August 12, 1983).

In accordance with these decisions and for the reasons expressed above, it is **ORDERED** that the pupils previously declared ineligible for failing to earn 23 credits in the second semester of the 1983-84 school year be re-evaluated under the old rule which existed prior to the NJSIAA changed regulation. Participation in the fall sports by these pupils will be determined based on an analysis of their academic credentials for the second semester of the 1983-84 school year.

Pupils eligible to participate under this Order shall not participate in any interscholastic athletic contests before October 12, 1984; however, these pupils may practice with their teams if in good medical and physical condition.

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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OAL DKT. NO. EDU 7434-84

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

5 October 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

10/5/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

ij

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MR. AND MRS. WILLIE BURNSIDE, JR., on their own and on behalf of their minor son, R.B. ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION ET AL.,	:	
RESPONDENTS.	:	

The Commissioner has reviewed the entire record in this matter as well as the initial decision rendered by the ALJ. The Commissioner notes that exceptions to the above-cited decision were presented in oral argument before his representative on October 9, 1984, all parties having agreed to same in order to provide a speedy determination.

Respondent NJSIAA excepts to the ALJ's failure to find that all but three of the petitioners in this matter had failed to follow what it perceives to be the statutorily prescribed process for seeking initial relief, namely through "***the internal procedures of the association.***" N.J.S.A. 18A:11-3 Respondent NJSIAA contends that appeals to the Commissioner must be an aftermath of exhaustion of the internal processes of the Association.

Respondent NJSIAA further asserts that the ALJ in reaching his determination to set aside the application of its academic eligibility standards completely misconstrued the meaning and intent of the State Board's Resolution of May 2, 1984 which required "***each local board of education having grade seven or higher to establish a local policy regarding academic standards and student eligibility for athletic and co-curricular activities***" and required that such policies be adopted by January 1985 and implemented by September 1985. Respondent NJSIAA contends that the aforementioned resolution was designed to encourage local standards which might be more rigorous than those adopted by NJSIAA but which could not be less demanding. Further, argues NJSIAA, the January and September 1985 dates were meant to apply solely to those local standards and in no manner can be construed as placing a restriction upon the September 1, 1984 application of NJSIAA's newly adopted standards.

Additionally, NJSIAA contends that the ALJ in this matter accepted without question petitioners' allegations that they were not properly notified of the changes in the academic eligibility standards adopted by NJSIAA in December 1983. Further, contends NJSIAA, the ALJ completely misconstrued the import of the affidavit

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of the principal of Rancocas Valley Regional High School. Such affidavit does not support the proposition that the principal was unaware of the changed standards but NJSIAA contends instead that he misinterpreted the meaning of the standards. (See Affidavit of Henry Huss, Principal, Rancocas Valley Regional High School.)

Respondent NJSIAA points to its Exhibit K to provide proof that not only was a representative of Rancocas Valley Regional High School District (Rancocas Valley) present at the December 1983 meeting at which the new academic standards were approved but that this representative voted in favor of such adoption.

Respondent Rancocas Valley substantially supports the exceptions of Respondent NJSIAA and further reiterates NJSIAA's position regarding the meaning of the affidavit of Principal Huss. Rancocas Valley further contends that the student involved in the controverted matter from that school not only was provided with sufficient notice of the new academic standards but in fact did attend summer school.

Respondent Northern Burlington Regional High School District (Northern Burlington) likewise generally supports the exceptions of Respondent NJSIAA. Additionally, Northern Burlington contends that the ALJ misconstrued its resolution of August 20, 1984. Such resolution was a routine readoption of the rules and regulations of NJSIAA for the school year 1984-85 and an agreement to abide by same as required by N.J.S.A. 18A:11-3. Northern Burlington contends that the August 20 resolution was misconstrued by the ALJ as having been the only notice to the students and parents of the school district as to the change in academic eligibility standards. Northern Burlington refers to the affidavit of its superintendent, Eileen T. Sheedy, as rebuttal to such finding wherein Ms. Sheedy states:

> "4. Coaches of the football and soccer team held spring meetings, to which former and prospective members of the teams were invited. At these meetings the changes in standards for participation, as promulgated by the New Jersey State Interscholastic Association were fully explained."

Petitioners essentially concur in the decision rendered by the ALJ. Petitioners' basic argument lies in what is purported to be either a lack of notice or a lack of sufficient notice to permit students to effectively prepare for meeting the newly adopted standards. Petitioners then propound an argument which raises the issue of whether or not NJSIAA is a public body. If it is a public body, argue petitioners, then any rules and regulations which it develops must be subject to the notice and publication procedures of the Administrative Procedure Act. If it is not a public body, the promulgation of rules and regulations impacting upon public school districts and their staffs and pupils is an unconstitutional usurpa-

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tion of authority. In support of such argument petitioners cite Group Health Insurance of New Jersey v. Howell et al., 40 N.J. 436 (1963); Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978); Costanzo v. New Jersey Racing Commission, 126 N.J. Super. 187 (App. Div. 1974); N.J. Department of Transportation v. Brzoska, 139 N.J. Super. 510 (App. Div. 1976); Amelia Arabia v. Simon Zisman et al., 143 N.J. Super. 168 (Chan. Div. 1976); and State of New Jersey, Plaintiff-Respondent, and Ocean Grove Camp Meeting Association of the United Methodist Church, Intervenor-Respondent v. Louis J. Celmer, Jr., Defendant-Appellant, 80 N.J. 405 (1979).

Petitioners further contend that announcements over loudspeakers do not satisfy the requirements of notice since such notices, even if effective to inform students, do not ensure that parents of such students have been made aware of the changed standards applied to athletic eligibility.

In addition to the alleged failure to provide adequate notice, petitioners argue against the appropriateness of the standards themselves in that the requirement for eligibility is based exclusively upon the passage each semester of a fixed percentage of the minimum number of credits required for graduation.

Petitioners argue that such requirement for passage of a fixed percentage of points makes no distinction between students who carry a full load of difficult courses against those who carry less demanding courses or whether the eligible student receives all D's as opposed to the ineligible student who may receive high grades except in those courses which he or she has failed. Nor, argue petitioners, do the standards distinguish between schools which are easy and those which are more difficult in which to receive passing grades.

Petitioners argue that the right to participate in athletics is protected by the New Jersey constitutional guarantee of a thorough and efficient education and the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1 et seq.) In support of such contention petitioners cite Mainland Regional Teachers Association v. Board of Education of the Mainland Regional School District, 176 N.J. Super. 476, 482-484 (App. Div. 1980) and also the Commissioner's decision in Board of Education of Greater Egg Harbor Regional High School District v. NJSIAA, decided August 12, 1983.

Petitioners further urge the Commissioner to find that the State Board Resolution of May 2, 1984 requiring that local school districts adopt policies setting academic eligibility requirements for participation in athletics and cocurricular activities by January 1985 was in violation of the Administrative Procedure Act. Had the notice period required by such act been followed, there would not exist the present problem wherein new standards have been

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set into place without providing a substantial period of notice to those persons to whom such standards would apply and that they would be responsible for meeting such standards.

Petitioners likewise reject the argument raised by Respondent NJSIAA relative to their failure to have exhausted the internal appeals procedures of NJSIAA. Petitioners cite in support of such argument Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549 (1979) which, petitioners allege, stands for the proposition that failure to exhaust administrative remedies is not absolute where irreparable harm might occur, where agency jurisdiction is doubtful or where the public interest requires prompt decision. Petitioners further contend that the NJSIAA Handbook on page 95 limits the right of appeal to the principal of the school involved.

In reply exceptions, Respondent NJSIAA disputes petitioners' contention that the Handbook permits only a principal to appeal. Respondent points out that page 53 of said handbook likewise provides that a student or parent of a student may also appeal as an individual and that any principal may appeal on behalf of a school. Respondent NJSIAA also specifically rejects petitioners' argument that changes in NJSIAA's rules, regulations or bylaws require approval pursuant to the Administrative Procedure Act since the right of NJSIAA to develop such rules, regulations, bylaws and constitution subject to the approval of the Commissioner is specifically provided for in statute. N.J.S.A. 18A:11-3

Respondent NJSIAA, in further rebuttal, contends that the Commissioner in accepting the changed standards without comment had, pursuant to the statutory requirement, given approval to same and that through its various publications and newsletter the Association had fulfilled its obligation to notify all school districts as to both the nature of the changed athletic eligibility standards and the date of their applicability. In Respondent NJSIAA's view, no obligation for further notice was required and certainly the Association was not required to individually notify each student athlete or potential athlete and/or their parents.

Upon review of the record and the arguments of the parties, the Commissioner finds and determines that the ALJ's reliance upon the State Board's Resolution of May 2, 1984 as a basis for setting aside the September 1, 1984 application date of NJSIAA's standards for academic eligibility is entirely misplaced. The January 1985 date for adoption of local policies dealing with academic eligibility and the September 1985 implementation date deal solely and exclusively with local policies of academic eligibility which may be more stringent than those of NJSIAA and which may likewise apply to cocurricular, as well as athletic, activities. Such resolution, the full text of which is reproduced below, in no way supersedes or sets aside either the substance of the NJSIAA rules for eligibility or the date of their applicability. Proof of the State Board's intent

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to place its requirement to local boards in addition to those already adopted by NJSIAA is provided, as underlined, in the resolution below:

"WHEREAS, the State Board of Education has expressed concern regarding the academic performance of students who participate in athletics and other co-curricular activities, and

WHEREAS, the Commissioner of Education and the State Board of Education have received the report of a task force appointed to study this issue, and

WHEREAS, a State Board Committee, charged with the responsibility of reviewing the Task Force's recommendations, and providing guidance for the State Board in addressing the issue of academic eligibility standards, has completed its deliberations, and

WHEREAS, the State Board of Education wishes to reaffirm its position that the primary mission of the schools is to provide an effective and appropriate education for all of its pupils, and to establish acceptable standards of pupil performance, and

WHEREAS, it is the responsibility of the local school districts to ensure that students participating in athletics and other co-curricular activities maintain a standard of academic performance that is consistent with the primary mission of the schools, now therefore be it

RESOLVED, that the State Board of Education directs each local board of education having grade seven or higher to establish a local policy regarding academic standards and student eligibility for athletic and co-curricular activities, and be it further

RESOLVED that the local policy shall:

a. provide a definition of the activities and grade levels to which the standards apply, and

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b. consider, among other possible standards, grade point average, attendance requirements and course failure rate. For inter-scholastic athletic eligibility, no district shall adopt standards less than the NJSIAA standards adopted at its December 5, 1983 meeting and required of all member districts, and be it further

RESOLVED, that these local policies shall be adopted January, 1985 and implemented by September, 1985, and be it finally

RESOLVED, that the State Board of Education requests the Commissioner to study the impact of existing and proposed standards of eligibility in order to guide future action of the Commissioner and the Board to ensure that students participating in athletics and co-curricular activities have met appropriate standards of academic performance. The results of the study should be presented to the State Board of Education by January, 1986."

Had the State Board intended to set aside the implementation of NJSIAA's rules and replace them with locally developed policies, it would have explicitly done so. Rather, it chose to endorse those NJSIAA rules as a minimum and directed local boards to review academic standards of eligibility and to develop their own policies of a more stringent nature and encompassing other cocurricular activities if they so chose.

Upon examination, the Commissioner likewise finds that the ALJ accepted the affidavits of petitioners that they were not afforded notice as to the applicability of the new standards while either disregarding or misunderstanding the affidavits of the representatives of the three respondent school districts that students were indeed afforded prior notice of the fact that new rules for academic eligibility would take effect on September 1, 1984. While the affidavit of Henry Huss, principal of Rancocas Valley Regional High School admits to a misinterpretation of the eligibility standards, he does not indicate that he was unaware of the standards or the date of their applicability nor does he substantiate what the ALJ contends was a lack of notice to the students. Consequently, the Commissioner finds that, while conflicting evidence may exist as to whether or when the respondent school districts may have provided notice of the change in the academic eligibility requirements, it is patently clear that NJSIAA through its minutes, publications and handbook over a period of time, beginning in April 1983 (see Respondent's Exhibit C) and continuing on through final adoption and beyond, kept its membership informed of both the progress of the

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amended regulations and their content. Of particular note in this regard is the "Flash News" bulletin of January 13, 1984 which specifically brought to the attention of all member schools the fact that the new academic requirements had been passed at the December meeting and which advised each member school of the content, date of applicability and scope of such regulations. The full text of the aforesaid bulletin is reproduced below:

> "The legislation relative to Academic Requirements passed at the Annual Meeting on Monday, December 5, 1983, becomes effective with the start of the 1984/85 school year. Member schools are reminded to review the course enrollment during the second semester of 1983/84 for all student/athletes to assure enrollment in courses that will enable each of them to meet this requirement for scholastic eligibility in September, 1984. Courses successfully made up during the Summer of 1984 can also be applied to satisfy this requirement.
>
> "To be eligible during the Fall and Winter seasons of 1984/85, a student must pass 25% of the State requirement for graduation. Presently this requirement is 92 credits; therefore, a student must pass 23 credits at the conclusion of the second semester of 1983/84. This applies to all students above the ninth grade.
>
> "To be eligible for the Spring Season of 1985, a student must be passing 12 1/2% of the State requirements or 11 1/2 credits at the conclusion of the first semester (January 31, 1985). This applies to all students including ninth graders.
>
> "If a student is eligible at the start of a Sports Season, he/she remains eligible for that entire Sports Season regardless of his/her grades at the end of a marking period."

Further, it should be noted that the aforesaid bulletin advised member schools to review the course enrollment during the second semester of 1983-84 for all student athletes to assure enrollment in sufficient courses to enable them to meet the new requirements and also so as to allow students to make up work during summer school. Such notice, the Commissioner holds, should have been more than sufficient to have put local school districts on notice as well as to have triggered any questions which may have arisen relative to the new standards.

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The Commissioner has likewise carefully considered the argument raised by petitioners' question as to whether NJSIAA is a public body or a private association. In that context, the Commissioner concludes that the NJSIAA is a voluntary association of public and private schools which has been statutorily authorized, subject to the review and supervision of the Commissioner of Education, to promulgate rules, regulations, constitution and/or bylaws for the conduct and regulation of a student activity. By virtue of such statutory authorization it is not subject to the requirement that its rules and regulations be promulgated pursuant to the Administrative Procedure Act. As to petitioners' argument pursuant to the cases cited, ante, that such exclusion exceeds the legislative authority, it is a question which must by its very nature be one that is decided in a forum other than the Commissioner of Education. In the Commissioner's view, since the Legislature has indicated its intent, he is bound by such legislative grant of authority. (See N.J.S.A. 18A:11-3 et seq.)

The Commissioner likewise categorically rejects petitioners' argument herein that the uniform standards promulgated by NJSIAA may not be imposed because they do not take into consideration the differences which may exist between easy and difficult courses and academically superior and academically inferior schools; nor do they consider whether a student retains eligibility by virtue of all D grades as against one who has all A's except for one or two grades which may serve to make him or her academically ineligible. To accept such logic would make it impossible for any school to establish any standards which might serve as a prerequisite for graduation, advancement from one level of a subject to another or the attainment of any academic award or honor. Further, the Commissioner rejects petitioners' contention that the constitutional requirements of a "thorough and efficient" education preclude the establishment of academic standards as a prerequisite for participation in cocurricular activities. Notwithstanding the fact that petitioners cite the holding in Mainland Regional supra, that cocurricular activities are "***a significant part of the duty to furnish a thorough and efficient education" (176 N.J. Super. at 482), the Commissioner cannot agree that such finding by the Court may be "bootstrapped" into rejecting any and all standards for participation in a particular curricular or cocurricular activity. (Petitioners' Brief, at pp. 7-8) To accept such logic would therefore permit a student to take English IV prior to successful completion of English I, II and III simply because such course was a "***significant part of the duty to furnish a thorough and efficient education." Further, it may not be argued that, because the Commissioner in Greater Egg Harbor, supra, affirmed an ALJ's finding that statutes dealing with athletics and the elements of a thorough and efficient education conferred a property interest, therefore no standards may be established which would regulate the participation of students in athletic activity. Indeed, if it may be argued that such an interest does exist, it exists only to the degree that participation in said activity may not be denied for arbitrary and

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capricious reasons, nor may such participant be discriminated against in exercising that interest. In the current matter, no argument has been made nor evidence presented that petitioners herein were provided any less opportunity to achieve academic eligibility than other students who did pass a sufficient number of credits to obtain or maintain academic eligibility for participation in athletics. Further, all of the petitioners in this matter had access to and continue to have access to a due process procedure in a forum other than the one in which this matter is presently being decided. Only three petitioners have availed themselves of that procedure.

Consequently, and for the reasons contained herein, the decision of the administrative law judge is hereby set aside and the Petition is dismissed. Whatever restraints against the imposition of the academic eligibility standards promulgated by NJSIAA were granted by the initial decision are set aside.

OCTOBER 15, 1984

COMMISSIONER OF EDUCATION

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MR. AND MRS. WILLIE BURNSIDE, JR., of their own and on behalf of their minor son, R.B., et al.,	:	
APPELLANTS,	:	
V.	:	SUPERIOR COURT
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, et al.,	:	APPELLATE DIVISION
RESPONDENTS,	:	
AND	:	
ROBERT CATHERMAN AND ANGELA CATHERMAN, et al.,	:	
APPELLANTS-INTERVENORS.	:	
	:	

Decided by the Commissioner of Education, October 15, 1984

Argued: October 24, 1984 - Decided: November 15, 1984

Before Judges Matthews, Furman and Cohen.

On appeal from the decision of the Commissioner of Education.

John T. Barbour argued the cause for appellants (Barbour & Costa, attorneys).

Michael J. Herbert argued the cause for respondents New Jersey State Interscholastic Athletic Association and its Executive Director (Sterns, Herbert & Weinroth, attorneys).

Arthur J. MacDonald, Jr., argued the cause for West Deptford Board of Education (Holston and MacDonald, attorneys).

Stephen J. Mushinski argued the cause for Rancocas Valley Regional High School Board of Education and Northern Burlington County School District (Parker, McCay & Criscuolo, attorneys).

Rudolph J. Wenzel, Jr. argued the cause for appellant-intervenor.

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Jaynee LaVecchia, Deputy Attorney General, argued the cause for State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM

Petitioners, high school students and their parents, filed a petition of appeal with the Commissioner of Education seeking temporary and permanent restraints which sought to prevent implementation in the 1984-85 school year of the "23 credits" rule adopted by the New Jersey State Interscholastic Athletic Association (NJSIAA). Petitioners' request for interim relief was transferred to the Office of Administrative Law. Oral argument was conducted on October 5, 1984 and on that day the Administrative Law Judge issued an initial decision granting the interim and permanent relief sought.

The Director of the Bureau of Controversies and Disputes within the Department of Education thereafter, on October 9, 1984, heard further oral argument on the relief being sought on an emergent basis, and on October 15, 1984, the Commissioner of Education issued a final decision rejecting the recommendations of the ALJ and ordering that the 23 credit rule not be stayed or waived for petitioners.

Petitioners then applied to a single judge of the Appellate Division for emergent relief on October 18, 1984. Emergent relief was denied and the request was referred to the full part. The full part denied emergent relief. The matter was calendared, however, for argument on October 24, 1984.

Following extensive review and discussion among its membership and the Department of Education, the NJSIAA voted, during December 1983, to adopt a new rule governing eligibility for participation in high school athletics. That rule, known as the 23 credits rule, requires students to pass 25% of the academic minimum needed for graduation in each year of secondary schooling in order to be eligible to compete in interscholastic athletic competition. Since 92 credits are required for graduation, a student would have to pass the 23 academic credits in the previous year to compete during the 1984-85 school year. The rule was made effective for the 1984-85 school year.

The NJSIAA advised its membership of passage of the new rule through its January 1984 "Flash News" and its February 1984 Bulletin. The membership was told to advise its student athletes of the changed rule. The record presented before the Commissioner demonstrated to the Commissioner's satisfaction that the three school districts named as respondents in this matter did engage in various efforts to inform their students during the 1983-84 school year of the change in the rule which would go into effect in the 1984-85 school year. These efforts included public address announcements, postings of notice of the changed rule in the schools, newspaper notices and the conducting of meetings in the

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spring of the 1983-84 school year for students interested in competing in various sports. The record did not indicate, nor did the Commissioner require, proof of actual notice to each of the students named as a petitioner here.

The Commissioner concluded that the record demonstrated ample advance notice of the change in the rule and he declined to stay or waive application of the new, more rigorous academic standard for eligibility to participate in high school interscholastic athletics. With respect to the facts pertinent to the intervening Westwood School District students who pursued a hearing before the NJSIAA, they did not appeal to the Commissioner, but instead appealed directly to this court.

Petitioners claim a constitutional right to participate on their high school's interscholastic athletic teams.

The "thorough and efficient education" clause of the New Jersey Constitution, implemented by the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., does require a breadth of program offerings in the public schools. See N.J.S.A. 18A:7A-5. It is not disputed that extracurricular activities, including interscholastic athletics, play an integral part in satisfying the breadth of programs requirement of "T&E." While they are important factors toward a sound and comprehensive academic education, each pupil does not have a right to participate in interscholastic athletics. More specifically, each pupil has a right to the opportunity to participate in interscholastic athletics and other extracurricular activities. That opportunity may not be hampered by discrimination in the participants' selection.

Participation is subject to eligibility requirements or other preconditions. Eligibility requirements are within the control of the NJSIAA subject to review and approval of the Commissioner of Education.

The NJSIAA determines and administers the policy regarding all aspects of interscholastic athletic competition in this State. It thereby performs a function that is not only public in nature but also has a broad-based impact on the public schools and public school children throughout this State.

The Association, unlike purely private associations, is subject to regulation by the Commissioner of Education. N.J.S.A. 18A:11-3 permits local boards of education to join voluntary associations such as the NJSIAA. However, that statute specifically states that "no such voluntary association shall be operative without approval of its charter, constitution, bylaws, and rules and regulations by the Commissioner of Education." The Commissioner has been vested with the further power "to direct the association to conduct an inquiry by hearing or otherwise on a particular matter or alternatively, direct that particular matter be heard directly by him...." N.J.S.A. 18A:11-3. All amendments to the charters, constitutions, bylaws, rules and regulations of such associations

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must be approved by and cannot take effect prior to approval by the Commissioner. N.J.S.A. 18A:11-5. Finally, N.J.S.A. 18A:11-4 provides:

> The minutes of every meeting of any association functioning under this act which shall oversee activities associated with statewide interscholastic sports programs in this State shall be transmitted by and under certification thereof to the commissioner or his designee who shall ... prepare a report detailing all programs and fiscal activities of the State-wide associations and such other associations functioning under this act as he feels may be necessary. This report shall be based upon annual reports submitted to him by the associations operating under this act and shall detail any developments contrary to the public interest and shall indicate whether or not the intent of the Legislature in its grant of statutory authority to boards of education to join such associations is faithfully being executed. [emphasis added]

It appears from the record before us that opportunity to be heard on the merits of the proposed eligibility rule was available to the NJSIAA membership several times during 1983 before it was adopted. Member school districts and, in turn, prospective student-athletes were provided with advance notice in various forms of the requirements of the new rule. In addition, we note that petitioners have been granted a forum to have their arguments heard as to why the new rule should be stayed or waived for them, and that under procedures established, individual cases will be reviewed where such relief is requested. There have been hearings before the Commissioner, and in the case of the intervenors, before the NJSIAA. Due process does not require more. Appellants' suggestion that there must exist proof of actual notice of the new rule to each individual appellant student-athlete and his parent or parents in order for it to be effective as to them is without merit. Such a requirement is not mandated by law.

The Commissioner argues that petitioners cannot demonstrate that a recognizable right has been violated here. We agree with his position. Nor can we conclude that the decision in this matter is so arbitrary or unreasonable as to require reversal.

Petitioners have raised a number of issues with respect to the status of the NJSIAA and the concomitant procedural requirements to be applied to it.

Specifically, appellants contend that the NJSIAA should be subject to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. in the promulgation of rules which involve "policy issues affecting the public at large." At the outset we note that none of

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the student petitioners have appealed an individual rejection of eligibility under the new rule. In the case of the Westwood intervenors no appeal was taken to the Commissioner. Consequently our opinion does not deal with the question of the applicability of the APA in individual cases.

Petitioners offer two reasons why we should hold that the Administrative Procedure Act applies to the rule-making function of the NJSIAA. First, citing Iuppo v. Burke, 162 N.J. Super. 538 (App. Div. 1978), they assert that the State Board of Education and the Commissioner are required to comply with the Administrative Procedure Act "whenever they are involved in the amendment of rules and regulations or the creation of new ones." We held in Iuppo that the State Board was not empowered to rescind or suspend a regulation which governed the action of the Commissioner, unless it complied with the rule amendment procedure set out in N.J.S.A. 52:14B-4. 162 N.J. Super. at 547-548.

The question before us is not, however, whether the Commissioner or the State Board of Education is required to comply with the Administrative Procedure Act. Here the issue is whether the NJSIAA is so bound.

Their second contention is based on their assertion that the NJSIAA, as an athletic association, is imbued with state action and for that reason must comply with the Administrative Procedure Act. This argument misses the point. In determining whether the Administrative Procedure Act applies, the Legislature has not focused upon the presence or absence of "state action." The question is whether the Legislature intended that rule-making body to be a "state agency" for purposes of the Administrative Procedure Act. Simply stated, the Administrative Procedure Act does not apply whenever there is state action; the Act applies only to "state agencies" vested by the Legislature with rule making authority.

The NJSIAA takes the position that the Administrative Procedure Act does not apply. The athletic association simply states that it is not a state agency but a voluntary association which is not exercising any governmental function and whose rule-making powers are subject to scrutiny and approval by the Commissioner of Education.

The brief filed on behalf of the Commissioner takes the position that if the Legislature intended the Administrative Procedure Act to govern voluntary associations it would have said so. The Attorney General, like the athletic association, finds adequate safeguards against arbitrary action by the athletic association in the Legislature's requirement of Commissioner approval of rules, regulations and bylaws.

A voluntary association regulating the conduct of student activities (N.J.S.A. 18A:11-3) is not a "board, division, commission, agency, department, council, authority, or office" within a principal department of the executive branch of the state

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government authorized by statute to promulgate rules. The canon of statutory construction, "expressio unius," states generally, that where the Legislature makes express mention of certain things in legislation, the exclusion of other things is implied. Gangemi v. Berry, 25 N.J. 1, 11 (1957); Shapiro v. Essex Cty. Freeholders Bd., 177 N.J. Super. 84, 94 (Law Div. 1980), aff'd 183 N.J. Super. 24 (App. Div. 1982), aff'd 91 N.J. 430 (1982). Since the Legislature so carefully detailed the entities which it wanted included within the definition of "state agency" for Administrative Procedure Act purposes, applying this doctrine of statutory construction results in the conclusion that the Legislature specifically decided to exclude entities such as voluntary associations, even though they too were given rule-making power. It is true that this rule of statutory construction is simply an aid in determining legislative intent and is not controlling. We regard it particularly appropriate here, where it appears that the Legislature has not only set up a separate rule-making procedure for voluntary associations but also has failed expressly to include voluntary associations in the list of entities deemed to constitute a state agency for Administrative Procedure Act purposes.

It is true that the Legislature is not specific about how rules and regulations of voluntary associations are to be adopted. This is in sharp contrast to the very detailed requirements for rule-making governing state agencies set out in N.J.S.A. 52:14B-4. All the Legislature provides in N.J.S.A. 18A:11-3 is that the voluntary association cannot operate without an approved charter, constitution, bylaws, and rules and regulations, which approval has to be sought from the Commissioner of Education.

We agree with the Attorney General that if the Legislature intended that voluntary associations be subject to the more stringent procedures of the Administrative Procedure Act, it would have said so.

Petitioner's reliance upon Group Health Ins. of N.J. v. Howell, 40 N.J. 436 (1963), characterized as a case "squarely on all fours" with the present one, is misplaced. There the Supreme Court declared unconstitutional a statute which directed that no corporation could obtain a certificate of authority to conduct business as a medical service corporation without first obtaining the State Medical Society's approval of its prospective trustees. The Court held that the statute constituted an improper delegation by the Legislature of its licensing power and a violation of due process under the Fourteenth Amendment. In the course of its opinion the Court ruled that the Legislature could not delegate to a private body the power to determine who should have the right to engage in an otherwise lawful business, where that private body was not subject to public accountability and where "the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action upon the part of such private body." Id. at 455.

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Appellants analogize the NJSIAA to the medical society arguing that the athletic association is also a private body not subject to accountability and able to arbitrarily set statewide standards. The plain language of N.J.S.A. 18A:11-3 refutes that argument. The association can make no rules or amend any of its existing rules without the approval of the Commissioner of Education. He, unlike the medical society, is a public official. Furthermore, N.J.S.A. 18A:11-3 expressly provides for judicial review of the Commissioner's ruling approving or disapproving an athletic association rule. Thus, none of the faults found by the Supreme Court in the statute in Group Health Ins. of N.J. v. Howell, supra, 40 N.J. 436, can be said to exist in the present factual context.

Petitioners also argue that "excessive entanglement with various religious groups" requires reversal of the Commissioner's decision. There is nothing in the record that even remotely demonstrates entanglement of religious groups with the State, a precondition for finding a First Amendment violation.

Finally we find no merit in any of the remaining arguments raised by petitioners.

The action of the Commissioner is affirmed.

Cert. denied 101 N.J. 236 (1985)

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2465-84
AGENCY DKT. NO. 79-4/84

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,
Petitioner,
v.
VINCENT T. McKENNA, TAX COLLECTOR AND TREASURER OF THE BOROUGH OF CLIFFSIDE PARK AND TREASURER OF SCHOOL MONIES OF THE CLIFFSIDE PARK BOARD OF EDUCATION,
Respondent.

Robert M. Jacobs, Esq., for petitioner
(Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Stanley L. Wyrzykowski, Esq., for respondent

Record Closed: August 3, 1984 Decided: September 17, 1984

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OAL DKT. NO. EDU 2465-84

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

Statement of the Case

This is an action by a local school board seeking to disqualify one of its own members also occupying the position of treasurer of school moneys. Several issues are presented about the legality of the same individual holding both positions. First, the question is raised whether the situation violates the common-law doctrine prohibiting dual holding of incompatible offices. Second, it is alleged that holding both positions at the same time is contrary to various New Jersey statutes, namely: N.J.S.A. 18A:12-2, which prohibits any school board member from being "interested directly or indirectly in any contract with or claim against the board;" N.J.S.A. 18A:12-1.1, which renders a board member ineligible "for appointment to any paid office or position required to be filled by the board unless he shall resign or cease to be a member at least six months prior to his appointment;" and, N.J.S.A. 18A:12-4, which prohibits a school board member from receiving any "compensation for his services."

Procedural History

On April 9, 1984, petitioner Board of Education of the Borough of Cliffside Park ("Board") filed a verified petition with the Commissioner of Education against respondent Vincent T. McKenna. Among other relief, the Board requested entry of judgment that McKenna must either resign from his position as treasurer of school moneys or be declared unqualified to serve as member of the school board. Meanwhile, the Board applied for issuance of a temporary restraining order to prevent McKenna from serving as treasurer of school moneys pending the outcome of the proceeding.

One day later, on April 10, 1984, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Petitioner's application for temporary restraints was treated as a motion for emergency relief under N.J.A.C. 1:1-

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9.6. Oral argument was heard on April 11, 1984. By order entered on April 24, 1984, the motion for emergency relief was denied for lack of irreparable injury. Prior to July 18, 1984, the parties filed cross-motions for summary decision along with supporting legal briefs. A hearing was held on July 30, 1984 to develop additional facts.

Findings of Fact

All of the relevant facts have been stipulated by the parties or are undisputed. I **FIND:**

McKenna has been treasurer of school money (formerly known as custodian of school money) for more than 28 years. He was first elected to the office of tax collector/treasurer for the Borough of Cliffside Park in 1955 and has been re-elected ever since. As a result of his incumbency in that elective municipal office, he automatically assumed the duties of treasurer of school money as well.[1]

Those duties are fixed by statute, and have been accurately described in a Statement of the Senate Education Committee attached to Senate No. 695 (1976), the bill which, as amended, ultimately became L. 1977, c. 464. That Statement provides:

> The custodian of school moneys is the treasurer of a school district and must be bonded. His salary is determined by the Board of Education. He receives and holds in trust all school moneys and, when directed by the board, deposits it in a bank designated as a depository of school moneys, keeping a record of the sums received and paid out and using the system of bookkeeping prescribed by the State board.

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[1] N.J.S.A. 18A:17-31 mandates that "the treasurer of school moneys of each school district" shall be "the custodian of moneys of the municipality" or, at the school board's option, "the tax collector," unless both these officeholders do not wish to serve in the additional capacity, in which case the school board "shall appoint any other suitable person except a member or employee of the board." Since McKenna served as both municipal tax collector and municipal treasurer, and never indicated an unwillingness to serve as treasurer of school moneys, he has continuously occupied all three offices.

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> He is required to present to the board, monthly and upon request, a detailed account of all receipts and warrants signed by him since the last accounting. At the close of the school year and not later than August 1, he is responsible for submitting to the board an annual report showing the amounts received and dispersed during the year, copies of which are filed with the county superintendent.

According to McKenna, his duties as treasurer of school moneys are "strictly administrative" and do not involve the exercise of "executive power." In his capacity as treasurer of school moneys, McKenna has no control over the amount of money appropriated for school purposes by the board of education and the governing body. Nor does McKenna, as treasurer of school moneys, have any control about how those funds are disbursed. Instead, his function is limited to receiving whatever amounts are designated by others as school moneys, depositing such sums in a bank selected by the Board, and following the Board's instructions for making payment. Accounts maintained by McKenna are audited by independent auditors. Although McKenna must sign all warrants for payment, such warrants (except for payments from the payroll account) must be countersigned by the Board president and secretary. Asked if there were any circumstances under which he might fail to comply with the Board's directions for payment, McKenna replied that the sole occasion would be if he knew there were insufficient funds on deposit to cover a particular check.

At the school election held on April 3, 1984, the voters of the district chose McKenna to serve on the Board. He took his oath of office as a school board member on April 12, 1984. During the same meeting, the Board appointed McKenna to act as treasurer of school money. As a member of the Board, McKenna voted in favor of his own appointment. No written contract of employment exists between McKenna and the Board. The Board establishes his annual salary.[2] Currently, his salary is set at $2,000.

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[2]Pursuant to N.J.S.A. 18A:17-33, the treasurer "shall receive from the board of education such compensation as the board shall determine."

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Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the positions are incompatible; and, alternatively, that the treasurer of school moneys has a "claim" for salary against the board within the meaning of N.J.S.A. 18A:12-2, and, accordingly, cannot legally occupy both positions.

At the outset, it must be emphasized that nobody has accused McKenna of any misconduct or wrongdoing. To the contrary, the record suggests that McKenna has always exhibited the highest degree of honesty and ethical behavior. The Board's complaint is merely that the positions must be kept separate and independent from each other "as a matter of law." Interpretation of the law in this particular instance is, at best, a close judgment call. Even if the Board's views are to prevail, McKenna can hardly be faulted for his willingness to serve on the school board.

N.J.S.A. 18A:17-31 provides:

> The treasurer of school moneys of each school district which does not contain more than one municipality shall be the custodian of the moneys of the municipality unless the board of education shall designate the tax collector of the municipality; provided, however, that if both the custodian of moneys of the municipality and the tax collector of the municipality submit written notifications to the board that they do not wish to serve as treasurer of school moneys, the board shall appoint any other suitable person except a member or employee of the board, with a term of office fixed by the board as such treasurer . . . Any municipal officer acting or designated as treasurer of school moneys who ceases to be such officer shall thereupon cease to be such treasurer.

Statutory duties prescribed for the office are totally ministerial or nondiscretionary in nature. For example, the treasurer of school moneys "shall receive and hold in trust all school moneys belonging to the district." N.J.S.A. 18A:17-34. He "shall keep a record of the sums received and paid out by him ... in accordance with the uniform system of bookkeeping" established by the State Board of Education. N.J.S.A. 18A:17-35. And, he

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"shall render" monthly and annual reports. N.J.S.A. 18A:17-36. Little opportunity exists for the treasurer to make any choices of his own, or perform any function which is not in response to the school board's direction.

Initially, the Board urges that the holding of both offices by the same person is prohibited by the common law doctrine of incompatible offices. Absent any specific constitutional or statutory prohibition, the doctrine applies to situations where "one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another." Shear v. City of Elizabeth, 41 N.J. 321, 325 (1964); Reilly v. Ozzard, 33 N.J. 529, 543 (1960); Ahto v. Weaver, 39 N.J. 418, 422 (1963); DeFeo v. Smith, 17 N.J. 183 (1955). Its purpose is to assure that an office holder discharges his public duties "with undivided loyalty." Jones v. MacDonald, 135 N.J. 132 (1960). Incompatibility is an "essential ingredient of the doctrine." DeFeo, at 187. The basic test is "whether incompatibility inheres in the rights, duties or obligations of the offices." Jones, at 136. When deciding to invoke the doctrine, courts have looked at whether one office is subordinate to the other "in any sense of direct supervision," or whether "the fiscal needs of one office are within the control of the other." Jones, at 137. They have also examined whether the independence of either office may be compromised by the merger of functions of both in one individual. DeFeo, at 189. Such inquiry, however, is "largely subject to legislative policy." Schear, at 325. If the lawmakers ordain that one person may or may not hold two public offices, then "the judiciary cannot interfere." Ibid. Thus, the focus becomes what relationship between the two offices the Legislature intended to create.

Here the duties of treasurer are entirely subordinate to the school board. Certainly there is the element of direct financial control by the school board since the board has the statutory power to increase or decrease the salary of the treasurer. N.J.S.A. 18A:17-33. More importantly, the language of N.J.S.A. 18A:17-31 evinces a legislative intent to protect the integrity of the record-keeping function by placing the responsibility in an independent office. In the event that the municipal treasurer or tax collector declines to serve as treasurer of school moneys, the school board shall appoint

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"any other suitable person except a member or employee of the board" itself. While this portion of the statute does not literally apply to the circumstances of our case, it implies that the Legislature intended the treasurer of school money to be someone other than a member of the board of education. That conclusion is further buttressed by the history of the amendment which added this particular language. The amendment was designed "to insure that the independent judgment of the custodian of school moneys is preserved." Statement attached to Senate No. 695 (1976). Clearly, the Legislature assumed that the independence of the office was already safeguarded in the first instance by entrusting the job to a municipal official outside the authority of the school board.

Additionally, the Board argues that McKenna's appointment as treasurer of school moneys is violative of N.J.S.A. 18A:12-2, which states:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board . . .

Because McKenna's entitlement under N.J.S.A. 18A:17-31 arises automatically by virtue of his election as municipal tax collector/treasurer, he has not entered into any "contract" with the Board. His right to the office of treasurer of school moneys is derived from the status conferred by statute, not from any contractural agreement. Cf., Shelko v. Mercer Cty. Special Services Sch. Dist., 90 N.J. 63, 76-81 (1982). Hence, McKenna is not interested "directly or indirectly in any contract with" the Board.

Nevertheless, the fact that the Board determines the amount of compensation paid to the treasurer of school moneys is sufficient to constitute a "claim" against the Board within the contemplation of N.J.S.A. 18A:12-2. Generally, the word "claim" has a well-defined meaning in the law, and includes "everything which may be demanded by suit." Ippolito v. Mayor of Hoboken, 60 N.J. Super. 477, 486 (App. Div. 1960). In its primary sense, "the word is a broad and comprehensive term," and has been "understood in a somewhat enlarged sense, embracing every species of legal demand." 14 C.J.S. 2d,

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Claim, p. 1182. Administrative decisions have interpreted the word as applicable to pecuniary as well as other interests. Illustratively, in Woodstown-Pilesgrove Reg. Bd. of Ed. v. Ketas, 1980 S.L.D. 1563 (St. Bd. 1980), aff'd 1980 S.L.D. 1507 (App. Div. 1980), a member seeking compensatory and punitive damages against his own board was held to be ineligible to serve so long as his claim was being litigated. As long as McKenna remains as treasurer of school moneys, he has a continuing claim against the Board for compensation owing for his services in that capacity. If permitted to serve on the Board, he would be a member of the very body which determines the amount of his salary and evaluates any complaints about his performance of duties in his role as treasurer of school moneys. Ongoing conflicts of this type are exactly the evil against which N.J.S.A. 18A:12-2 was intended to operate. The situation here is readily distinguishable from one involving a more limited and nonrepetitive conflict, such as a claim for indemnification of legal fees, Hogan v. Kearny Bd. of Ed., 1982 S.L.D. ___ (Comm'r of Ed. 1982), or for counsel fees in connection with public interest litigation, Newark Bd. of Ed. v. Brown, 1984 S.L.D. ___ (Comm'r of Ed. 1984).

Although the Board also relies on N.J.S.A. 18A:12-1.1 and N.J.S.A. 18A:12-4, those statutes add nothing to the strength of its argument. N.J.S.A. 18A:12-1.1 renders a board member ineligible

> . . . for appointment to any paid office or position required to be filled by the board unless he shall resign or cease to be a member at least 6 months prior to his appointment, except in cases where the office or position is by law required or permitted to be filled by a member of the board.

As previously mentioned, McKenna holds his office as treasurer of school money by operation of law and not as a result of his appointment by the board. Therefore, treasurer of school moneys is not an office "required to be filled by the board" to which N.J.S.A. 18A:12-1.1 has any application. Similarly, N.J.S.A. 18A:12-4 provides that, "A member of the board of education shall receive no compensation for his services." It is apparent from its context that the prohibition against "compensation for his services" relates back to services as a member of the board of education. There being no indication that

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McKenna receives any compensation for serving on the board of education, the statute is inapposite.

Lastly, the relief to be afforded the Board must be considered. Under the common law, the rule was that "upon the acceptance of another and incompatible office, the first became vacant." DeFeo, at 190. Strict application of the rule has been sometimes relaxed to avoid an unfair result. Visotcky v. Garfield City Council, 113 N.J. Super. 263, 267 (App. Div. 1971). In the present case, the Board is only seeking to force McKenna to choose between the two offices. Moreover, it would thwart the public will, as expressed at the recent school board election, if McKenna were involuntarily removed from his seat on the Board because of his subsequent acceptance of the office of treasurer of school moneys. Given the closeness of the issues in this case, a much better remedy is to allow McKenna a short period of time within which either to resign from the office of treasurer of school moneys or be declared ineligible to continue serving on the Board.

Order

It is **ORDERED** that within 30 days of the date of the final decision of the Commissioner of Education respondent McKenna may tender his resignation from the office of treasurer of school moneys.

And it is further **ORDERED** that upon the failure of McKenna to resign from the office of treasurer of school moneys by the above date, he shall be deemed ineligible to continue serving as a member of the Board and his seat on the Board shall be considered vacant, without the necessity of any further order.

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OAL DKT. NO. EDU 2465-84

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.

Sept. 17, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Sept. 18, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 20 1984
DATE

Ronald L. Parker/pro
FOR OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Witnesses

1. Vincent T. McKenna

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BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
VINCENT T. MC KENNA, TAX COLLECTOR AND TREASURER OF THE BOROUGH OF CLIFFSIDE PARK AND TREASURER OF SCHOOL MONEYS OF THE CLIFFSIDE PARK BOARD OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Respondent in primary exceptions speculates on several hypothetical situations in terms of the contrived impact of the definition herein of "claim" against the Board. Respondent objects to the broad definition of "claim" contending that its application to any member of the Board would prevent that member from going to court.

The Board, in reply exceptions, denies the applicability of such argument and affirms the judge's decision as consistent in all respects with the long-standing conflict of interest principles. So too does the Commissioner.

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

The Order set down by the court shall prevail; Respondent McKenna to continue as an active member of the Board must resign from the position of Treasurer of School Moneys.

IT IS SO DETERMINED.

OCTOBER 30, 1984

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6085-84

AGENCY DKT. NO. 357-8/84

DR. COLUMBUS SALLEY,

Petitioner

v.

THE BOARD OF EDUCATION OF THE CITY OF NEWARK, a municipal corporation; FRED STECHER; EDGAR BROWN; CHARLES BELL; REV. OLIVER BROWN; and ELEANOR GEORGE, individually and as members of the BOARD OF EDUCATION OF NEWARK,

Respondents.

Lawrence S. Schwartz, Esq., for petitioner (Schwartz, Pisano & Simon, attorneys)

Robert L. Podvey, Esq., for respondent (Podvey, Sachs & Catenacci, attorneys)

Record Closed: September 18, 1984 Decided: September 20, 1984

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Dr. Columbus Salley, the executive superintendent for the Board of Education of Newark (Board), contests the Board's action on June 30, 1984 and July 10, 1984 in suspending him with pay, as being violative of his contract rights, violative of the Open Public Meetings Act, and violative of his due process rights. Petitioner argues additionally that the appointment by the Board of a neutral third-party hearing examiner is legally unsupportable and seeks an order restraining, enjoining and prohibiting the Board from acting to hold any type of hearing before the third-party fact finder. The Board asserts that the Commissioner of Education lacks subject matter jurisdiction and, even if the Commissioner has jurisdiction, this matter is not yet ripe for the Commissioner's consideration. The Board also argues that it has the legal right to appoint a hearing examiner to conduct a hearing.

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On August 6, 1984, petitioner filed an appeal with the Commissioner of Education. On August 15, 1984, the matter was transmitted to the Office of Administrative Law for consideration of petitioner's motion for emergent relief, i.e., to restrain any action by the third-party neutral hearing examiner. On August 21, 1984, respondent moved for an order dismissing the action upon the ground that the Commissioner of Education lacked subject matter jurisdiction. On September 19, 1984, the court heard oral argument.

FINDINGS OF FACT

The following facts are uncontroverted and are hereby adopted by me as my **FINDINGS OF FACT:**

1. On June 30, 1984 and again on July 10, 1984, the Newark Board of Education suspended Dr. Columbus Salley with pay from his position as Executive Superintendent of Schools.

2. Prior to July 13, 1984, the Newark Board of Education submitted "charges" against Dr. Salley to the Commissioner of Education.

3. On July 17, 1984, the Commissioner of Education wrote the following letter to Vickie A. Donaldson, General Counsel, Newark Board of Education:

> Dear Ms. Donaldson:
>
> Your petition on behalf of the Newark Board of Education was received on July 13, 1984. Upon review I am returning same to you because it does not present a controversy over which I have jurisdiction under N.J.S.A. 18A:6-9.
>
> By filing this petition, the Newark Board of Education has requested that I consider "charges" which have been "certified" by the Board with the desire that I uphold "the suspension of Respondent by Petitioner, for just cause." This does not present a controversy over which I have jurisdiction. There is no statutory provision for my hearing a matter of this kind.

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The certification of charges procedure is one provided under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The Executive Superintendent is not tenured nor is he tenure eligible by law. N.J.S.A. 18A:17A-1. The procedure, therefore, does not apply.

Additionally, there is no true controversy or dispute in your petition. The Newark Board of Education has already taken a definitive action concerning the Executive Superintendent's employment status. As with other actions of a board of education, this action enjoys a presumption of correctness. If the party affected by such an action does nothing to challenge the action, it will stand. Under such circumstances there is an absence of a cognizable controversy or dispute. Unless the adversely affected party appeals the action of the Board to me in a timely fashion, there is no dispute over which I can exercise jurisdiction pursuant to N.J.S.A. 18A:6-9.

Very truly yours,

Saul Cooperman
Commissioner

4. On August 14, 1984, the Board appointed former U.S. District Court Judge H. Curtis Meanor as an impartial hearing examiner to conduct a hearing involving the suspension and charges against Dr. Salley.

5. Subsequent thereto, Dr. Salley informed the Board that he would not participate in any hearing conducted by H. Curtis Meanor.

CONCLUSIONS OF LAW

A threshold issue which must be addressed is whether or not the Commissioner of Education has jurisdiction to hear and decide the petition filed by Dr. Salley. Initially, the Commissioner did not accept the "charges" filed by the Board against Dr. Salley for those reasons stated in his July 17, 1984 letter.

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It is absolutely clear, after a careful reading of the petition filed by Dr. Salley, that his complaints against the Board involve alleged violations of his contract with the Board and alleged violations of the Open Public Meetings Act. N.J.S.A. 10:4-6 et seq. In order for the Commissioner to acquire subject matter jurisdiction, the controversy or dispute by Dr. Salley must arise under the school laws. N.J.S.A. 18A-6-9. Certainly, a contractual dispute does not arise under the school laws, and is more properly a matter to be decided in the Superior Court. Also, it is recognized that the Commissioner has incidental "jurisdiction to determine issues arising under the Open Public Meetings Act as it related to controversies under the school laws," but the Commissioner does not have primary jurisdiction to hear mainly an Open Public Meetings Act controversy. See, Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). Putting aside the contractual and Open Public Meetings Act disputes, I **CONCLUDE** that there is nothing set forth in the petition which would constitute a controversy or dispute arising under the school laws. Dr. Salley, the Executive Superintendent of the Newark School System, is specifically precluded from acquiring tenure. N.J.S.A. 18A:17A-1. Thus, he cannot be considered a tenured superintendent against whom tenure charges may be filed with the Commissioner under N.J.S.A. 18A:6-10 et seq.

Petitioner's argument that the contract between Dr. Salley and the Board vests the Commissioner with jurisdiction is without merit. The law is clear that "an administrative body may not acquire jurisdiction by estoppel or consent." 73A C.J.S. Public Administrative Law and Procedure, Section 117 (1983). The Commissioner's jurisdiction is based on controversies or disputes arising under the school laws (Title 18 of our statutes and Title 6 of the Administrative Code.

It must be remembered that the Executive Superintendent of the Newark School System is a unique, statutory position, not found in any other school district in New Jersey. Thus, the question of whether or not the Commissioner has subject matter jurisdiction to hear Dr. Salley's dispute which is set forth in his petition is one of first impression.

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I **FIND** and **CONCLUDE** that the Commissioner lacks subject matter jurisdiction to hear this dispute since it does not arise under the school laws, and deals with a controversy involving an interpretation of a contract and issues involving the Open Public Meetings Act, neither of which require the expertise of the Commissioner. Furthermore, I **FIND** and **CONCLUDE** that Dr. Salley is not a tenured superintendent, and, therefore, those procedures set forth in N.J.S.A. 18A:6-10 et seq. are inapplicable. Finally, I **FIND** and **CONCLUDE** that Dr. Salley and the Board by contract cannot vest the Commissioner of Education with subject matter jurisdiction. The Commissioner's jurisdiction arises strictly from law.

IS THIS MATTER RIPE FOR DETERMINATION?

Assuming, arguendo, that the Commissioner had jurisdiction to decide this matter, is the matter ripe for the Commissioner's review? I **FIND** and **CONCLUDE** that the matter is not ripe for review. In reaching this conclusion, I would "emphasize a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication. . . " is controlling. See, Tribe, American Constitutional Law, Section 3-13 at 61 (1978). Additionally, as stated in Southeastern Pennsylvania Transp. Auth. v. I.C.C., 644 F. 2d 253 (3rd Cir. 1981): ". . . SEPTA's request that we decide these issues now would require us to speculate as to events in the future which may never materialize." In the instant case, Dr. Salley was merely suspended with pay. I shall not speculate as to what the Board may do in the future. However, Dr. Salley has not yet been terminated. If, arguendo, the Board should go forward with the procedure in which it uses H. Curtis Meanor as a hearing examiner, the end result might very well be reinstatement of Dr. Salley. No court or tribunal should speculate as to what might happen in the future since it might never materialize.

Accordingly, I **CONCLUDE** that even if the Commissioner of Education has subject matter jurisdiction, this matter is not ripe for determination.

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DOES THE BOARD OF EDUCATION HAVE THE POWER TO APPOINT H. CURTIS MEANOR AS HEARING EXAMINER?

Since I have decided that the Commissioner lacks subject matter jurisdiction, it is both unnecessary and unwise for me to comment on the appropriateness of the Board's action in appointing H. Curtis Meanor as hearing examiner.

Based on what I have just enunciated, I am granting respondent's motion to dismiss the petition on the grounds that the Commissioner of Education lacks subject matter jurisdiction. I am denying without prejudice petitioner's application for emergent relief.

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.

9/20/84
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

Sept. 24, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

September 24, 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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DR. COLUMBUS SALLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK ET AL., ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter which includes 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 exceptions have been filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner upon review and careful consideration of the respective positions taken by the parties by way of their exceptions finds and determines that the arguments presented therein are unpersuasive to warrant a reversal of those findings and conclusions of law set forth in the initial decision which the Commissioner hereby affirms and adopts as his own.

This decision should not be regarded as a determination of the ultimate reviewability of the final determination of the Board of Education of the City of Newark concerning Executive Superintendent Salley's employment.

Accordingly, the instant Petition of Appeal is hereby dismissed.

NOVEMBER 8, 1984 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL. DKT. NO. EDU 10125-83
AGENCY DKT. NO. 392-11/83A

MATTHEW F. AMATO, JR.,
Petitioner,
v.
HUDSON COUNTY AREA VOCATIONAL AND TECHNICAL SCHOOLS BOARD OF EDUCATION,
Respondent.

APPEARANCES:

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

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

Record Closed: August 24, 1984 Decided: September 20, 1984

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

On November 1, 1983 petitioner, Matthew F. Amato, Jr., filed a petition of appeal with the Commissioner of Education alleging that he had tenure in the position of job placement coordinator. Respondent filed its answer to the petition on December 22, 1983 denying that petitioner had acquired tenure in that position.

On December 30, 1983 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.

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After notice to all parties, a prehearing conference was held on April 24, 1984 at which time the following issues were isolated:

1. Does petitioner have tenure in the position of job placement coordinator? If so, when was it acquired?
2. Was the petition untimely filed pursuant to N.J.A.C. 6:24-1.2 (the 90-day rule)?[1]

Thereafter, a hearing was held on June 20, 1984. Witnesses who testified and documents considered in deciding this case are listed in the appendix attached hereto.

The background of this dispute became clear at the hearing. Petitioner, Matthew F. Amato, Jr., received a Bachelor of Science degree in 1972 from St. Peter's College and a Master of Arts degree in 1979 from Jersey City State College. On October 1, 1980 petitioner, who had never worked for a board of education prior to this date, was hired by respondent as a job placement coordinator. No certification was required by respondent for the position nor did the job description list certification as one of the requirements (J-2). In addition, petitioner held no certification for the position. Petitioner worked continuously until November 17, 1982, at which time he was terminated; the reason advanced by respondent was petitioner's lack of certification. (Petitioner was advised by the county superintendent that he did not possess proper certification for the position (R-1).) Subsequently, respondent procured an emergency certificate for petitioner (J-9) and he was reemployed on February 17, 1983. On notice that certification was required, petitioner obtained permanent certification in March 1984 (J-10). That certification is the proper one for the position of job placement coordinator.

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[1] Issue No. 2 was the subject of a motion to dismiss made by respondent. Said motion was denied by this court, by letter dated March 13, 1984, it being determined that the motion could be resolved only after a determination as to the issues sought to be addressed in the instant matter was made. It is to be noted, however, that Issue No. 2 was not the subject of the hearing and was, in fact, not renewed at any point subsequent to this court's initial denial of the motion.

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Against this backdrop, and in support of his contention that he had acquired tenure, petitioner attempted to demonstrate by way of testimony that he had diligently pursued the question of proper certification and had reasonably relied upon the information and assurances given him by respondent that it was unnecessary.

Petitioner testified that at the time he was hired he was advised that he met the qualifications for the job. (He admitted, however, that he had not been informed as to the specific qualifications until he received a job description on or about June 18, 1981 (J-2)). More to the point, petitioner stated that he had asked John Powers, board secretary and board business manager, whether any certification was necessary (petitioner claimed that he was not interested in another open position with respondent because it was not tenurable), and had been advised that it was not and that the job placement position was tenurable. Once hired (J-3) and in order to "doublecheck," he had questioned Superintendent Earl Byrd as to whether any certification was required and had been advised by Byrd that he knew of none. Thereafter, and after he had begun working, petitioner received a request for information (J-4), which requested among other facts, the type of certification held. Petitioner indicated that he did not fill in this information because he had been advised that no certification was necessary. However, in an effort to determine why this information was requested, he spoke to Assistant Superintendent David Rowland, who informed him that no certification was necessary. Thus, he handed in the form to Rowland without the requested information.[2] Petitioner further indicated that approximately one month later, at a meeting of job placement coordinators in December 1980, First Assistant Superintendent of Schools/Personnel Frank Roberts, asked by one of the job placement coordinators if certification was required, responded that it was not necessary. In addition, petitioner recalled that after he was terminated on November 17, 1982, Roberts informed him that he had not known whether certification was needed or not. It is to be noted that on cross-examination petitioner admitted that he had not asked the county superintendent whether certification was necessary until after he was terminated; he contended, however, that "he did not know of the county superintendent" until that time.

[2] It is to be noted that David Rowland, subpoenaed by petitioner, failed to appear at the hearing.

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Next to testify was Frank Roberts, a member of the board of education from August 1977 to December 3, 1980, board president from September 1977 until December 3, 1980 and first assistant superintendent/personnel from December 1980 to July 1, 1983. He recalled that when respondent determined to hire additional job coordinators, Superintendent Earl Byrd was given the responsibility of seeking applicants, determining their qualifications and recommending them to the board for approval. Thus, petitioner's qualifications were left in the hands of Superintendent Earl Byrd, and the board followed his recommendation. With regard to the requirement for certification, Roberts testified that prior to December 1980 he did not know that certification was required for the position. (While on the board, he was apparently advised by Superintendent Morton Margulies that no certification was required for the position, as it was noninstructional, and he relied upon that statement.) He stated that it was not until November 1982 that he was informed by Byrd of the requirement and, thus, became aware of it (J-6). In fact, Roberts indicated that prior to this date no one in the district was aware of the requirement.

Of further note, and of specific import, was Roberts' testimony regarding the meeting in December 1980, testified to by petitioner. Recalling that it was called in order to straighten out vacation time, Roberts contended he was not aware then that a question regarding certification had been asked. In addition, he did not recall certification being questioned at any other time or having a conversation with petitioner regarding it. On cross-examination, Roberts admitted that he has a case on appeal against respondent.

John Powers, employed from 1975 until March 1982 as board secretary and business manager, recalled that in the summer of 1980 he spoke with petitioner about the position of job placement coordinator. Opining that the focus of the conversation was on petitioner's prior experience and the salary to be paid, Powers testified that he did not believe (albeit he was not totally sure) that petitioner had asked if certification was

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required or that it had been discussed. Noting that Dr. Margulies did not require certification for the position and that Byrd followed in this vein (he recalled no conversation with Byrd or Margulies on this subject), he admitted that he did not tell petitioner about the certification requirement. In fact, Powers, who indicated that the job description in effect prior to J-2 in evidence was identical to the current one, actually recalled no conversation with petitioner regarding certification until November 1982.

Robert Gallagher, presently functioning as a job placement coordinator, indicated that when he was hired in October 1976 he was not advised of a certification requirement. Rather, he stated that he first became aware of the requirement in November 1982. Prior to that time, he recalled no conversation regarding certification between board members or with the supervisor of the district; the issue simply did not arise. Moreover, Gallagher admitted that in November or December 1976 he had spoken with a county superintendent of education, at which time he questioned tenure in the position. He stated that he was advised that there was no tenure in the position since it was not "certifiable."

Earl Byrd, employed by respondent as superintendent for the last five years, recalled being involved in petitioner's hire. Noting that he was satisfied at that time that petitioner met the qualifications of the job according to the job description, he could not recall if there had been a specific discussion with petitioner regarding certification. Byrd stated, however, that he was not aware that certification was required in June 1980, the position having been deemed at its inception and in 1979 (and no change being made to it in 1980) to be noninstructional. Although at first he claimed that he became aware that certification was required when the Level II Evaluation Report was issued in 1982, he thereafter acknowledged that he had received a letter dated August 17, 1981 (with an attached program report dated May 26-28, 1981 (J-5)), which recommended that the job placement coordinators be properly certified. Byrd recalled that as a result of the issue then being raised, he directed First Assistant Superintendent Frank Roberts to check the certification of the job placement coordinators. He claimed, however, that the next time he heard about the issue of certification was in November 1982. On questioning by this judge, Byrd recounted that there had been some difficulty getting the information

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regarding certification because initially it was suggested that certification as a "coordinator" was required.

In reviewing the above testimony, this court opines that although petitioner indicated that he had been advised by John Powers, Earl Byrd, David Rowland and Frank Roberts that certification was not necessary (and contends that he relied upon those statements), the preponderance of the testimony adduced at the hearing did not support this allegation. In fact, none of the named individuals called by petitioner to testify recalled having a conversation with him regarding a certification requirement or being questioned about the certification at any other time. Similarly, Robert Gallagher, a job placement coordinator also could not recall such conversations having taken place and contended, as did the others involved, that the issue simply had not arisen. Based upon this testimony, accepted as credible and believable, this court does not find that petitioner had diligently pursued the question with respondent and had been advised by respondent, by way of conversation and statements on which he relied, that it was not necessary.

Despite this finding, it is clear, however, and apparently undisputed, that respondent never thought certification was required. In fact, petitioner's witnesses confirm in substantial measure that they did not know that certification was required, and actually believed that it was not required, since the position was noninstructional. It is noteworthy that the job description did not even list certification as a requirement for the position. Moreover, clearly respondent had known petitioner was not certified at the time of his hire and hired him anyway. In addition, when petitioner did not complete respondent's request on November 3, 1980 as to the type of certification held by him (which should have made it clear that there was a question as to his certification), then, too, no action was taken by respondent to indicate to petitioner that certification might be necessary. While it may be that respondent's nonaction was based upon its mistaken view that certification was not necessary, this court is struck by the fact that when

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Powers and Byrd were put on notice, on or about August 17, 1981, that certification was recommended, at which time Byrd apparently advised Roberts to check into the situation, nothing of substance was done by respondent at that juncture to clarify the issue and/or place petitioner on notice that a problem existed with his certification. In fact, respondent did not take any affirmative action in regard to petitioner until well over a year later. In view of this, respondent is hard pressed to deny that its actions, albeit unintentional, did not contribute to petitioner's belief that certification was not necessary.

It must be noted, however, that although petitioner alleged that although no certificate was necessary for the position, it was tenurable (he claimed to have been told that by Powers when he was hired), none of the other testimony adduced substantiated petitioner's contention that respondent had made any statements to the effect that tenure had been considered as part and parcel of the position. To the contrary, the substantial weight of the evidence is to the effect that the position was deemed by respondent not to require a certificate, because it was noninstructional in nature (and apparently non-tenurable). Moreover, this court cannot ignore that Gallagher admitted that he spoke with the county superintendent of education and was clearly advised that the position was not tenurable. Thus, although it may be accurate to state that petitioner was led to believe that the position did not require a certificate, it cannot be said with any degree of certainty that he was led down the garden path to believe that he would gain tenure in the position. I, therefore, find that the evidence fails to substantiate petitioner's allegation that he relied upon respondent's action in support of his belief that the position was tenurable.

In essence, petitioner's argument is based upon his view that he should not suffer for respondent's failure to require that he hold the proper certification. Claiming that he fulfilled all respondent's requirements and was eligible for an emergency certificate, petitioner alleges that the board is now equitably estopped from denying him tenure. To

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the contrary, respondent asserts that petitioner has not accrued tenure, inasmuch as he did not possess the requisite teaching certificate at the time questioned. More specifically, respondent contends that the requisite period of time for tenure to attach begins to run at the time the position is certified and the petitioner holds the required certification. Referring to petitioner's allegation that respondent is estopped from denying him tenure, respondent alleges that petitioner has no basis in fact to support his estoppel argument. In any event, respondent asserts that the statutes are quite clear that no teaching staff member may be employed in the public schools by any board of education unless he is the holder of a valid certificate.

This court has reviewed the testimony and evidence presented in this matter and must agree with the position espoused by respondent. In order to determine whether petitioner has met the requirements for tenure, this court has looked to N.J.S.A. 18A:28-5, which provides in pertinent part as follows:

> The services of all teaching staff members including all teachers, . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:
>
> a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> c) the equivalent of more than three academic years within a period of any four consecutive academic years.

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Clearly the tenure statutes, enacted to protect teachers from dismissal for unfounded, flimsy or political reasons, Spiewak v. Rutherford Bd. of Ed. 90 N.J. 63, 73 (1982), entitle an employee of a board of education to tenure if he or she: 1) works in a position for which a teaching certificate is required; 2) holds the appropriate certificate; and 3) has served the requisite period of time. Id. at 74.

With regard to the first requirement, there is no doubt that petitioner was not in a position for which a teaching certificate was required. In fact, petitioner has contended, and this court has accepted as fact, that respondent did not require petitioner to hold a teaching certificate for his position as job placement coordinator. Since qualification for tenure as a teaching staff member necessitates that the position require a teaching certificate issued by the board of examiners, the fact that same was not required by respondent serves as an obstacle to petitioner's acquisition of tenure. In addition, and in regard to the second requirement for tenure acquisition, it is clear that "no teaching staff member shall acquire tenure . . . who is not the holder of an appropriate certificate for such position issued by the state board of examiners in full force and effect. N.J.S.A. 18A:28-4. The necessity for appropriate certification was apparent in Sydnor v. Bd. of Ed. of Englewood, 1976 S.L.D. 113 in which a teacher, who claimed she was entitled to tenure merely on the basis of her years of service, was denied tenure because she lacked proper certification for the position. See also, Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50 in which the Commissioner reached a different result and afforded petitioner, who served as a guidance counselor, tenure as a teacher because he possessed a certificate which was cognizable by the Commissioner. In the instant case, the facts do not warrant such a result; petitioner lacked any certification until after he was terminated by respondent and, therefore, was not the holder of a proper certificate as required for tenure status.

In regard to the third component of tenure acquisition (i.e. service for the requisite period of time), this court opines that petitioner has failed to meet this requirement as well. The law clearly states that "no teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach." N.J.S.A. 18A:26-2. See also, N.J.A.C. 6:11-3.1. Furthermore, any contract or

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engagement between a board of education and a teacher must cease whenever the county or local superintendent notifies the board in writing that the teacher does not possess a proper teachers' certification. N.J.S.A. 18A:27-2, N.J.A.C. 6:11-3.2. Since N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4 define a "teaching staff member" as a member of the professional staff of any district or regional board of education (N.J.S.A. 18A:26-2), it appears that petitioner must be considered a teaching staff member as a result of his employment as a job placement coordinator. As such, it is observed that petitioner was rightfully discharged, pursuant to N.J.S.A. 18A:27-2, on November 23, 1982 when it was determined that he did not possess the proper teaching certificate. Since his termination must be labeled a "rightful discontinuance of service," it appears clear that petitioner has not served consecutively for the requisite number of years and has, therefore, failed to fulfill the time and service requirement for tenure.

In a further effort to gain tenure, petitioner asserts that this court should invoke the doctrine of equitable estoppel to avoid the injustice that would otherwise accrue to him. Clearly, and in general, the principle of equitable estoppel applies to all public bodies where the interest of justice and fairness dictates such a course. State v. East Shores, Inc., 154 N.J. Super. 57 (Ch. Div.1977). See also, Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-504 (1955); and White v. Bd. of Ed., Twp. of Boonton, Morris Cty., 1976 S.L.D. 876. However, in applying the doctrine of equitable estoppel, caution must be used when actions of government agencies are at issue. Thus, a court will refuse to relax the conditions laid down in a statutory grant of agency power when to do so would defeat the public policy intended to be served. In this vein, the court in Spiewak specifically held that the tenure provisions of N.J.S.A. 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away. Spiewak at 76. See also, In re IFPTE Local 195 v. State, 88 N.J. 393, 403 (1982). As a further aid in its determination, this court has reviewed the case of Sydnor v. Englewood Bd. of Ed., which is factually similar to the instant case. There, the Commissioner determined that petitioner could not have acquired tenure status because she did not possess a valid teaching certificate as statutorily required by N.J.S.A. 18A:28-4, nor could she legally

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continue to teach without a valid certificate, pursuant to N.J.S.A. 18A:27-2. Sydnor at 116. More to the point, the Commissioner determined that the procuring of certification is the primary responsibility of a teacher. Thus, even an inexcusable delay on the part of a superintendent (in insuring that a teaching staff member is certified or applying in timely fashion for an appropriate certificate) did not create a valid claim for tenure status.

Similarly, petitioner in the instant case has claimed that he relied upon respondent's conduct and was thereby induced to refrain from acquiring proper certification. While it may be, and this court has, in fact, found that to some extent petitioner was led to believe that certification was not essential (it is to be remembered that this court did not, however, find that the issue had been pursued and considered to the degree contended by petitioner), this conclusion does not help petitioner. Instead, such reliance must be deemed to have been unreasonable. N.J.S.A. 18A:28-5 clearly sets forth the requirements for the acquisition of tenure. Furthermore, results of the failure to comply with the requirements are expressed in unambiguous terms in N.J.S.A. 18A:26-2 and 27-2. Thus, the statutes must dictate the outcome of the case rather than the conduct of respondent. In addition, as indicated in Sydnor, the primary responsibility for procuring proper certification rests with the teacher. Here, petitioner did not adequately assume such responsibility. In actuality, although petitioner alleged that he was concerned about the need for certification, there was insufficient evidence to substantiate the fact that he diligently pursued the need for it for tenure purposes or attempted to apply for it. More to the point, since petitioner's failure to procure a certificate was in contravention of the law, he must, therefore, suffer the consequences mandated by N.J.S.A. 18A:26-2, N.J.S.A. 18A:28-4, N.J.S.A. 18A:28-5, N.J.S.A. 18A:27-2, along with corresponding administrative regulations. The doctrine of equitable estoppel cannot be used as a shield to protect petitioner from the legal requirements of tenure and his responsibility for fulfilling them. As in Sydnor, petitioner's claim to tenure is without merit by reason of his failure to meet the precise conditions set forth in the statutes. See, Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963).

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Based upon the foregoing, it is **CONCLUDED** that respondent has properly denied petitioner tenure as a job placement coordinator in respondent's school district. It is therefore **ORDERED** that petitioner's appeal is **DENIED**.

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

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

September 20, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Sept. 24, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

September 27, 1984
DATE

Ronald L. Pantle, Jr.
FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

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APPENDIX

WITNESSES

Matthew Amato, Jr.
Frank Roberts
John Powers
Robert Gallagher
Earl W. Byrd

EXHIBITS

J-2	Job description for position of Job Placement Coordinator, dated June 18, 1981
J-3	Letter to Mr. Amato from Earl W. Byrd, dated August 20, 1980
J-4	Memo to Mr. Amato from Mr. David C. Rowland, dated November 3, 1980
J-5	Letter to Mr. Byrd and Mr. Powers from Louis C. Acocella, dated August 17, 1981 (44 pages)
J-6	Letter to Mr. Byrd and Dr. Klein from Louis C. Acocella, dated November 18, 1982
J-7	Resolution of the board, dated November 23, 1982
J-8	Letter to Mr. Amato from Earl W. Byrd, dated February 18, 1983
J-9	Emergency Certificate for Matthew Amato, dated February 1983
J-10	Regular Certificate for Matthew Amato, dated March 1984

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MATTHEW F. AMATO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL AND TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law and the exceptions thereto filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

It is observed from petitioner's exceptions to the initial decision that strenuous objections are taken to those findings that absolve the Board from its responsibility to have determined through initial application to the Office of the County Superintendent as to whether or not the position for which he was employed required an appropriate teaching certificate pursuant to N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1.

The Commissioner observes that when petitioner was initially employed by the Board he was in possession of a B.S. Degree in Science as well as a Master of Arts Degree issued from accredited New Jersey colleges. While it is evident that he did not possess an appropriate teaching certificate to be employed as job placement coordinator, it is equally evident that such title established by the Board was not a recognized title pursuant to N.J.A.C. 6:11-3.6 which reads as follows:

> "(a) School districts shall assign position titles to teaching staff members which are recognized in these rules.
>
> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such

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> request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year."

Moreover, in the event that the Board was unable to secure a fully certificated person or persons for the job title of job placement coordinator, it was then required by regulation to do the following with respect to applying for persons who would qualify under an emergency certificate:

> "(a) An emergency certificate is a substandard one-year certificate issued only in fields of teacher shortage as certified annually by the Commissioner of Education.
>
> (b) It is issued only on application of a public school district, submitted after August 1, in which the local board of education declares its inability to locate a suitable certificated teacher.
>
> (c) A current list of fields designated for emergency certification is available from the Bureau of Teacher Education and Academic Credentials or the county superintendent of schools." (N.J.A.C. 6:11-4.4)

It is noted that this section was subsequently amended and adopted on September 5, 1984 and now appears as N.J.A.C. 6:11-4.3.

Clearly, the Commissioner finds and determines that the Board failed to take the essential above-cited procedural steps 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. The record establishes that petitioner would have been eligible to obtain an emergency certificate by virtue of the college degrees he then possessed to qualify at the outset of his employment for an emergency certificate. In any event petitioner did obtain an emergency certificate and thereafter was reemployed by the Board on the basis of such certification. Additionally, he received his permanent certificate to qualify him in the position of job placement coordinator in the Board's employ as of March 1984.

The Commissioner is further 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.

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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 the 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 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). The Commissioner so holds.

In arriving at the above determination the Commissioner relies in part upon the reasoning set forth in Joanne K'Burg v. Board of Education of Lower Alloways Creek, 1973 S.L.D. 636 wherein it was held in part that:

> "***The question of whether petitioner has or has not acquired tenure does not turn, as the Board asserts, on the date and subsequent effect of the administrative memo (P-2, ante) tendered her on March 14, 1973. The true test of whether a tenure status has accrued is, as articulated in Ahrensfield v. State Board of Education, 126 N.J.L. 543 (1941), whether the precise conditions laid down in the applicable statutes are met. In this case, the applicable statute is N.J.S.A. 18A:28-5. In this instance, these 'precise' conditions are met, because petitioner has clearly served the requisite period of time in the Board's employ and acquired possession of a standard teaching certificate during the course of the academic year while she was still employed.
>
> "In Zimmerman, supra, the Court held, inter alia:
>
> > '***Inherent in the tenure legislation is the policy that a board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period.***'
> >
> > (at pp. 72-73)

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> "Surely, the Board in this case, had sufficient time to determine whether petitioner met acceptable standards for continued employment in each of the five years it was required to seek renewal of her emergency certificate. For whatever reason, the Board chose to continue her employment on an emergency basis for five succeeding academic years. When the standard certificate was issued to her during her fifth year of employment, all conditions for permanent tenure were then met. From his own records, the Commissioner has determined that the standard teaching certificate was issued petitioner on April 26, 1973. Accordingly, the Commissioner finds that the administrative memo (P-2, ante) is of no effect, and the Board's action terminating her employment for the 1973-74 academic year is ultra vires and is hereby set aside.***"
>
> (Emphasis in text.) (at 640)

Accordingly, in view of the Commissioner's findings and conclusions set forth above, the initial decision in this matter is reversed and it is further found and determined that petitioner has, in fact, complied with the provisions of N.J.S.A. 18A:28-5(c) and has acquired a tenure status in the Board's employ as of March 1984 when he received his permanent teacher's certificate.

IT IS SO ORDERED.

NOVEMBER 8, 1984

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 8249-83
AGENCY DKT. NO. 342-9/83A

PETER J. ROMANOLI,
Petitioner,
v.
WILLINGBORO TOWNSHIP BOARD OF EDUCATION,
Respondent.

Carl John Kerbowski, Esq., on behalf of the petitioner

Robert P. Martinez, Esq., on behalf of the respondent (Richard and Martinez, attorneys)

Record Closed: August 13, 1984 Decided: September 27, 1984

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

Peter J. Romanoli (petitioner), the chief school administrator in the position of Superintendent of Schools in the Willingboro Public School District, challenges an action taken by the Willingboro Board of Education (Board) on June 27, 1983, by which it withheld his salary increment for 1983-84. Petitioner contends the Board's action in this regard is arbitrary and unreasonable, that it constitutes a reduction in his salary contrary to the provisions of N.J.S.A. 18A:6-10, and that the Board violated the provisions of N.J.S.A. 18A:29-14 by its asserted failure to afford him written reasons why such action was taken within ten days of June 27, 1983. Finally, petitioner contends the meeting of June 27, 1983, at which the Board took its controverted action was held in violation of

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N.J.S.A. 10:4-6 et seq., the Open Public Meetings Act.[1] The Board denies each and every factual allegation set forth and contends that its controverted determination to withhold petitioner's salary increment for 1983-84 is in all respects proper and lawful. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, under the provisions of N.J.S.A. 52:14F-1 et seq. A plenary hearing was scheduled and conducted, after which the parties filed briefs in support of their respective positions. The record closed on August 13, 1984, upon receipt of the parties' final briefs.

BACKGROUND FACT

Petitioner has been employed by the Board as its superintendent for the past 14 years and has acquired tenure in that position under the provisions of N.J.S.A. 18A:28-5. The Board, at a special meeting conducted October 20, 1982, fixed petitioner's salary for the then existing 1982-83 school year at $63,945.[2] The Board, at the same meeting, determined that petitioner's salary for the following school year, 1983-84, would be established at $68,741. The vote of the Board on petitioner's 1982-83 salary was five ayes (Board members Nunn, Richardson, Martello, Oliver, and Iiannone), two nayes (Board members Arties, Harper), and one abstention (Board member Wisniewski). Board member Whitehurst was not in attendance. The vote on petitioner's 1983-84 salary was five ayes from the same named Board members as on the 1982-83 salary, and three nayes, with Wisniewski changing from an abstention to a naye vote.

Following the annual school election held by the Board during April 1983, the annual reorganization meeting was conducted April 18, 1983. Board members Richardson, Oliver, and Arties were succeeded on the Board by Ms. Good, Leary and Stephenson. The Board replaced Richardson as its president with the election of Ms. Harper as president. The newly reorganized Board proceeded to establish its schedule of meetings, together with the time and place for the holding of such meetings, and it designated its two official newspapers. The Board determined that the second and fourth Monday of each month shall be public meetings while the first and third Monday of each month shall be

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[1]This allegation was originally filed by petitioner in New Jersey Superior Court, Law Division, Burlington County, by way of an action in lieu of prerogative writ (C-1). That court transferred the matter to this forum to be consolidated for hearing with all allegations arising from the controverted Board action on June 27, 1983.

[2]The Board also fixed at the same meeting 1982-83 and 1983-84 salaries for all administrative employees.

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conference meetings. In the same resolution, the Board determined the time and place of the meetings and it determined that the Burlington County Times and the Camden Courier Post would be its official newspapers (J-1). Following its reorganization business, the Board proceeded to vote on whether to grant its administrative personnel the 1983-84 salaries as fixed on October 20, 1982. Board member Whitehurst moved to withhold the increment of the petitioner for 1983-84 but such motion failed for lack of a second. Whitehurst amended the motion to provide that Board action on petitioner's salary be deferred until the Board, acting as a committee of a whole, evaluated the performance of petitioner to determine whether petitioner ". . . followed the guidelines and directions of this Board." (J-1, at p. 47).

It is noted that N.J.A.C. 6:3-1.22 provides detailed regulations in regard to the obligation of each board of education to adopt a policy for the performance evaluation of its chief school administrator. N.J.A.C. 6:3-1.22(b) states the purpose of the annual evaluation to be:

1. Promote professional excellence and improve the skills of the tenured chief school administrator;

2. Improve the quality of the education received by the pupils served by the public schools;

3. Provide a basis for the review of the performance of the tenured chief school administrator.

The regulations also require that: (1) the Board policy and procedure with respect to the evaluation of its chief school administrator be developed in consultation with the chief school administrator; (2) they allow a board at its discretion to employ a qualified consultant to assist in the evaulation process; (3) they require the chief school administrator to receive a copy of the adopted Board policy and that amendments to the policy be afforded the chief school administrator within ten working days after adoption; (4) they require an annual summary conference between the Board and the chief school administrator before the written performance report is filed and that the conference be held in private unless the chief school administrator requests otherwise; and, (5) they require the annual written performance report of the chief school administrator be prepared by April 30 by a majority of the total membership of the Board.

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It should also be noted that N.J.S.A. 18A:29-14 provides, in part, as follows:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules precribed by him. . . .

Prior to April 18, 1983, petitioner's performance was not formally evaluated by the Board in 1982-83. Subsequent to the Board's reorganization meeting on April 18, 1983, the Board, acting as a committee of a whole, conducted meetings for purposes of evaluating petitioner's performance. The record discloses that such meetings were held on May 6, May 17, June 1, June 8, June 20, and June 23, 1983. A 17 page evaluation (R-2) of petitioner's performance was prepared in narrative form, in addition to a one-page exhibit list. The evaluation was signed by seven of the nine[3] members of the Board (Ms. Good, Ms. Harper, Ms. Nunn, Leary, Stephenson, Wisniewski, Whitehurst).

On June 27, 1983, the Board conducted its second regularly scheduled meeting for June. At this meeting, the Board determined to withhold petitioner's salary increment for 1983-84 by a vote of six ayes (Ms. Good, Ms. Harper, Wisniewski, Leary, Stephenson, Whitehurst), two nayes (Ms. Martello, Iiannone), with one abstention (Ms. Nunn). On or about July 6, 1983, Board President Harper signed a letter addressed to petitioner which states:

> On June 27, 1983, the Board of Education voted to withhold your salary increment for the 1983-84 school year. That vote was predicated on the following reasons:
>
> 1. 1982-83 Board of Education evaluation of the Superintendent;
> 2. Failure to communicate accurately with the Board and the public;
> 3. Failure to adequately and properly exercise supervisory duties;
> 4. Problems involved with the renewal of the District's Insurance Policy; and,
> 5. Improper attempts to influence a Board Member's vote.
>
> (R-4)

[3]Board members Ms. Martello and Iiannone did not sign the document along side their printed names. Neither testified at hearing.

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The foregoing background facts, as presented, are not in dispute between the parties. However, petitioner contends that the Board in its evaluation of his performance violated the provisions of N.J.A.C. 6:3-1.22 by violating its own adopted Board policy in regard to the evaluation of his performance; that the Board failed to complete the evaluation process by April 30; that the committtee of the whole evaluation process which began subsequent to April 18, 1983, was engineered by the Board majority in a manner designed to achieve the expressed objective of its member Whitehurst at the reorganization meeting to justify a predetermination to withhold his increment for 1983-84 notwithstanding its violation of its own Board policy and of N.J.A.C. 6:3-1.22; that the Board majority has demonstrated gross bias towards him by not evaluating his performance on a fair basis; that the Board failed to submit to him within ten days of its controverted action a written statement of reasons; that the statement of reasons is solely of Board President Harper's making and not a collective effort on the part of the Board; and, that the Board violated N.J.S.A. 10:4-6 et seq., in respect of its conduct of the meeting on June 27, 1983, by failing to provide him with advance notice of the meeting. Furthermore, petitioner contends that the actual holding of the meeting on June 27, 1983, is in violation of N.J.S.A. 10:4-18, because the schedule of meetings adopted at the reorganization meeting fails to specify the precise date of each meeting.

Petitioner testified that during his 14 years of employment by the Board as its Superintendent, the relationship between him and the Board prior to April 1983, was satisfactory. Petitioner says that during the April 1983 election, Ms. Good, Leary and Stephenson, campaigned for Board membership on the platform that if elected they would get rid of him. Petitioner explains that with those three members, together with Ms. Harper and Ms. Nunn, the so-called balance on the Board shifted against him. Curiously, Ms. Nunn voted in the affirmative for petitioner's 1982-83 salary and she voted in the affirmative for his projected 1983-84 salary. Ms. Harper, as Board President, has, if petitioner is to be believed, led the opposition against him which resulted in the Board taking the controverted action in respect of his salary increment for 1983-84. It is noted that Ms. Harper has been a Board member for more than nine years. Petitioner specifically testified that he has never had a pleasant incident with Ms. Harper. In fact, he explains that during 1975, she voted in the affirmative to suspend him from his duties. Petitioner refers to Ms. Harper as a "feminist," who has difficulty getting along with men. While testifying under oath, petitioner explained that he questions Ms. Harper's mental hygiene.

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Petitioner confirms that prior to the reorganization meeting conducted by the Board on April 18, 1983, his performance was not evaluated by the Board as is required by N.J.A.C. 6:3-1.22. However, petitioner claims he prepared, as superintendent, his goals and objectives for 1982-83 and 1983-84 which he attempted to submit to the Board for its review sometime during July 1982. However, petitioner says the Board cancelled a scheduled meeting on the proposed 1982-83 goals and objectives because the then Board President, Richardson, advised him "you're doing O.K."

Petitioner acknowledges that he was in attendence at the reorganization meeting on April 18, 1983, when Whitehurst made the motion to withhold his 1983-84 increment. Petitioner complains, however, that he had had no prior notice that such a motion was to be made. Petitioner says that subsequent to the reorganization meeting when the Board, acting as a committee of the whole in respect of its purported evaluation of his performance, failed to discuss with him the goals and objectives he says he had prepared for 1982-83. In fact, petitioner complains that the Board failed, at anytime, to discuss the performance evaluation with him.

Although petitioner admits receiving a copy of the Board's final evaluation of his performance (R-2), he claims he did not receive the exhibits referred to in Appendix A. Those exhibits were to have included the Board's evaluation of his performance for July 1978, November 1978, December 1979, a mailgram sent to the Commissioner of Education by the Board on November 10, 1980, regarding petitioner's refusal to cooperate with it in completing an evaluation of his performance; a transcript of a meeting of November 6, 1980; a letter from Robert Martinez regarding a meeting held February 3, 1981; an evaluation of his performance in May 1981, a resolution of censure adopted by the Board against petitioner on May 9, 1983; and, a numerical rating on petitioner's performance for June 1983.

Regarding the June 27, 1983 meeting, during which the controverted action was taken, petitioner complains he had received no prior notice that the Board was to consider at that meeting the issue of withholding his salary increment for 1983-84. In fact, petitioner explains that at a conference meeting conducted June 20, 1983, individual members of the Board were handed an agenda, as prepared by his secretary, for the meeting to be held June 27, 1983. Petitioner says that neither his name nor the issue of his salary were included on the agenda and that his salary was not discussed at the June 20 meeting.

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Petitioner admits that when the committee of the whole was meeting subsequent to April 18, 1983, through June 27, 1983, he, in fact, was present at all such meetings because the meeting were conducted in public. However, petitioner still complains that he received no written advance notice that such meetings were to be conducted although he knew in advance that the meetings were to occur because the meetings had been announced at regular Board meetings. Petitioner notes that in respect of each of the evaluation meetings conducted by the Board, it failed to have minutes of such meetings taken.[4] Regarding the conduct of the meetings in public by the committee of the whole in respect of his evaluation, petitioner complains that while the minutes of the reorganization meeting on April 18, 1983, reflect he did request that discussion of him to be in public, he did not request the evaluation of him to be in public. Petitioner says that he informed the Board president of his desire that the meetings should not be in public but that Harper ignored that request.

Petitioner complains that at the June 27, 1983 meeting the Board failed to state any reasons at that meeting why it determined to withhold his salary increment for 1983-84. With respect to the reasons (R-4) stated in the letter signed by Board President Harper which contained the purported reasons why petitioner's salary increment was withheld, petitioner says he did not received that letter until July 11 or July 12. Regarding the insurance premium reference, petitioner's testimony is that it was he who straightened out the insurance premium policy for the Board. Petitioner suggests that the insurance premium problem occurred because the Board's insurance broker, a Mr. Skelly, and Ms. Harper were "very close." In regard to the remaining stated reasons contained within Harper's letter, petitioner testified that he has no idea of the basis for those reasons.

Ms. Harper, called as a witness by petitioner, testified that the Board does have a policy in regard to its evaluation of the performance of its chief school administrator (P-8, P-9, P-10). These policies were adopted sometime during September 1980 and on a blank evaluation form (P-10), dated January 26, 1981, a calendar of events leading to the final evaluation is set forth. That calendar provides, at least in 1981, that the Board members were to begin the evaluation process on March 1, have a meeting with the superintendent to discuss the evaluation on April 15, and that the final evaluation of

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[4]It must be noted at this juncture, however, that the Board does have in its possession an audio tape of all such meetings with the exception of one meeting when the tape recorder malfunctioned.

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the superintendent's performance was to have been completed by April 30. Harper admits that between September 1, 1982 through April 18, 1983, no such performance evaluation was completed by the Board on petitioner. Ms. Harper, contrary to petitioner's testimony, cannot recall at anytime receiving from petitioner written goals and objectives of his performance for 1982-83 and 1983-84. However, it is recalled Harper was not Board President in July 1982 when petitioner says the Board cancelled a scheduled meeting to discuss his goals and objectives.

Harper testified that when Whitehurst moved to withhold petitioner's salary increment at the reorganization meeting on April 18, 1983, that the motion was a "substantial shock" to her. Harper explained that when the committee of the whole began meeting following the reorganization meeting to prepare an evaulation on petitioner's performance, the meetings were conducted on May 6, May 17, June 1, June 8, and June 23. Each of those meetings were conducted publicly, Harper explains, because petitioner had submitted a written request to her that every such meeting be, in fact, conducted publicly (R-12). That written request, over the signature of the petitioner, and which is dated May 17, 1983, is as follows:

> Dear Ms. Harper,
>
> Any discussion relative to my evaluation of employment is respectively requested to be in public.
>
> Thank you,
> Peter J. Romanoli [petitioner] (R-12)

Harper explained that between his public statements at the reorganization meeting on April 18, 1983 that he wanted public discussion, and his handwritten request (R-12) recited above, meetings on the Board evaluation on his performance were conducted publicly because she at no time was advised by petitioner that he had withdrawn his request that such meetings be conducted publicly. In respect of the failure to have typed minutes of the evaluation meetings, Harper explains that because such meetings were considered "conference" meetings, no minutes are taken, although tapes exist for each such meeting conducted by the Board. Harper admits that during one evaluation meeting, the tape recording machine did malfunction and consequently no tape exists for that meeting.

Harper explains in respect of the meetings conducted on petitioner's evaluation, that the first meeting conducted on May 6, attended by petitioner, was to exchange

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documents between the Board and petitioner. Petitioner did submit to the Board the copy of the blank evaluation of January 1981 (P-10) and he expressed his concern of the evaluation process the Board was beginning because, in his view, his evaluation should have been completed by April 30.

Harper explains that the evaluation process provided each Board member and the superintendent himself, petitioner, to submit data on petitioner's performance. Harper says that each Board member was given copies of petitioner's past evaluations of his performance by prior Boards although such past evaluations were not retrieved from petitioner's personnel file.

At this posture, it is well to note that petitioner produced evidence which shows that the Board's Personnel Manager, Angelo Coppla, advised him that Harper requested from a secretary in the personnel office petitioner's personnel file. Coppla further advised that Harper then photocopied one document from petitioner's personnel file in the company of that secretary (P-3). In response to such advice, petitioner advised the Board's personnel manager on May 20, 1983, as follows:

> In response to your memo informing me that the Board President copied a letter from my personnel folder please be advised that if anyone repeats this type of behavior that I want to be informed. I realize that it is difficult to limit the behavior of the Board President [Harper]. No one should be permitted to copy anything from the personnel folder of any employee. It is necessary that any time material is placed in the file or removed from the file it must be done so with the consent of that person. Also you informed me that she complained that certain materials were not in my file, specifically evaluations concerning me. As you know I never look at my file. Therefore, I don't know anything about that but would be interested to know why. (P-4).

The testimony and evidence in this record is clear that prior evaluations of petitioner were not contained in his personnel file. Note that the personnel file appears to be under the control of the personnel manager, who, according to petitioner's reply memorandum to him (P-4), appears to be under petitioner's direction.

Harper testified that she did, in fact, photocopy one "single sheet" from petitioner's personnel file. While Harper acknowledges that she observed no prior evaluations in petitioner's file, she did secure prior evaluations from her own records as

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well as some evaluations from former Board members who had retained their own personal copies.

At the May 17 evaluation meeting, Harper testified that the numerical portion[5] of the evaluation was completed and she received permission from the Board to give a copy of that portion of the evaluation to the petitioner. Petitioner was present at the May 17 meeting. At the June 1 meeting, Harper says that a first draft of the narrative portion of the evaluation was completed and petitioner was in attendence, as was his attorney. Harper explains that a meeting was scheduled for June 23, in order for petitioner to respond to the evaluation, a copy of which he had received after June 8, but before June 23. Harper insists that all exhibits referred to above were included in the evaluation given petitioner.

Petitioner was present at the June 23 meeting and he orally addressed the Board in regard to his response to the evaluation. Harper says that petitioner's oral presentation on June 23 incorporated many of the written comments petitioner submitted as his formal response to the evaluations sometime on or about July 21, 1983 (R-4). Accepting Harper's explanation as true that petitioner did make an oral presentation on June 23, and proffered comments similar to his written response filed July 21, 1983, it is noted that petitioner addressed the Board by pointing out differences "* * * between the Hamiltonian and Jeffersonian concepts of Law" (P-7). In pertinent part, the written response, prepared in the third person, states:

> It is the Superintendent's impression that the Five public meetings which were held for his evaluation, one of which the board president did not take minutes and four of which were not attended by the Board Secretary or attempts to establish a base for the eventual suspension and delimination of the Superintendent of Schools [petitioner]. The Board of Education did not stay with the documented facts but went far a field to include everything it could of a negative nature in order to establish a foundation or " 'touch stone' " from which to take future action against the Superintendent. Even the word " "touch stone' " was pulled from the so-called " 'Martinez Report' " which was a previous attempt to dislodge the superintendent from his position. Hardly any part of the board's evaluation of the Superintendent complied with the law * * *

[5]The evaluation in evidence (R-2) discloses no numerical portion in the sense of a rating on a scale. The evaluation is in narrative form only.

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Harper testified that the statement of reasons (R-4) why petitioner's increment was withheld was prepared by her, in consultation with regular Board counsel who, it is noted, is different than counsel of record here. When the reasons were typed by the Board secretary at Harper's direction, the Board secretary testified that she then placed that statement of reasons in an envelope and delivered the envelope to petitioner's office. The Board secretary explained she then handed the envelope to petitioner's secretary on July 6, 1983, the very day that Harper dictated the reasons to her. It is noted here that petitioner was on vacation and not in his office that day (P-11). Harper consulted with those Board members who voted to withhold petitioner's increment as to the accuracy of the reasons shown in the evaluation.

Reasons 1, 2 and 3, as recited above, regarding the Board's action to withhold petitioner's increment are purportedly supported by the Board's performance evaluation of him (R-2). Reasons 4 and 5, however, are independent reasons without regard to the Board's performance evaluation.

In regard to reason 4, asserted problems involved with the renewal of the District's insurance policy, the evidence of record discloses that former Board President Richardson had filed a complaint with the Burlington County Prosecutor regarding the Board's payment of insurance premiums to its broker and the broker's submission of those payments to the insurance carrier. The Burlington County Prosecutor, by letter dated April 7, 1983, to former president Richardson, concluded that because of an agreement between the broker and the insurance carrier, the broker was acting consistent with that agreement and no criminal conduct was involved (R-27). By letter dated May 16, 1983, petitioner, as superintendent, was advised by the Department of Insurance that that agency discovered no evidence by the broker which would be in violation of state insurance statutes or regulations. Needless to say, some concerns existed, real or imagined, by former Board President Richardson and petitioner, as superintendent, in regard to the Board's insurance coverage and, inferentially, petitioner's real or imagined concerns of the relationship between the broker and Harper. After the Board was advised that its broker had not engaged in any improper conduct with respect to the Board's payment of premiums to him and his subsequent submission of such premiums to the insurance carrier, it began to consider proposals from various insurance companies for complete insurance coverage for 1983-84. Proposals submitted by various insurance companies for 1983-84 were submitted to the superintendent on or about June 21, 1983 (R-29). Petitioner referred such proposals to the Board's finance and purchasing

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committee on the same day. The following day, June 22, 1983, Board member Wisniewski, reminded petitioner that all insurance coverage was to expire on June 30 and he also reminded petitioner that it was on his, petitioner's, personal recommendation that the Board assigned responsibility for insurance matters to the business administrator and/or accountant and, on petitioner's personal recommendation, the business administrator was authorized by it to prepare all specifications, review them and make recommendations to the entire Board. Wisniewski then advised petitioner that all insurance proposals were being returned to him, petitioner, for him to take appropriate action (R-30).

Petitioner, by memorandum dated June 22, 1983, to the Board secretary, after having learned of Wisniewski's memorandum (R-30) returned all insurance proposals to the Board secretary for her to return the proposals to the total Board for its consideration (R-31).

Finally, on the same day, June 22, 1983, Board president Harper reminded petitioner of his prior words to the Board that he had the insurance renewal issue well in hand and that the administration was taking care of the matter. Harper expressed total displeasure with petitioner's conduct regarding his failure to carry out his prior representation to the Board that he would handle the insurance renewal proposals (R-32). The 1983-84 insurance proposals were, in the final analysis, handled by the Board without the assistance of petitioner as its superintendent (R-33).

Regarding reason number 5, improper attempts to influence a Board member's vote, as a reason for the Board to withhold petitioner's 1983-84 salary increment, Board member Leary, who was successful in the April 1983 annual school election to Board membership, testified that he received a telephone call from former Board President Richardson on April 18, 1983, the same day as the reorganization meeting. Leary was not immediately available but he returned the call. When Leary returned the call to Richardson, petitioner got on the telephone. It appears that there was some question with respect to whether the then business administrator would continue in his employment and there was an issue of petitioner desiring to terminate the employment of a janitorial employee. Petitioner wanted the business administrator to remain. Petitioner advised Leary that if Leary supported him, petitioner, regarding his desire to continue the employment of the incumbent business administrator, he, petitioner, would in return drop charges against the janitorial employee, Mr. Good, who happens to be the husband of another successful Board candidate, Mrs. Good, during the April 1983 election. Leary

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testified that petitioner and Richardson both told him at the time of that telephone conversation that if Leary failed to support petitioner and Richardson in their attempts to continue the employment of the then business administrator, petitioner and Richardson would ensure that Leary would have three rough years as a Board member.

Leary related the substance of the conversation to the remaining Board members at or about the time of the reorganization meeting. As a result, the Board at a meeting conducted May 9, 1983, adopted a resolution of censure of petitioner which provides in pertinent part:

> * * *
>
> WHEREAS, the Superintendent, by his own admission, sought to use the promise of forebearance in a disciplinary proceeding against one employee as an inducement in influence a board member to change his announced position and vote in favor of approving the contract renewal of another employee, and
>
> WHEREAS, this action constitutes the offer of a benefits, gain or advantage as consideration for a Board member's vote on an issue officially before the Board for action, and
>
> WHEREAS, this clearly constitutes behavior unbecoming a professional employee in a position of trust * * *
>
> NOW, THEREFORE BE IT RESOLVED by the Willingboro Board of Education * * * that:
>
> 1. Superintendent of Schools Peter J. Romanoli [petitioner] is hereby censured for conduct unbecoming a professional employee * * *
>
> (R-18)

The record in this matter clearly supports the inference that Board member Whitehurst, who had not attended the October 1982 meeting at which petitioner's salary for 1983-84 was acted upon, had not suggested the withholding of petitioner's increment until April 18, 1983, because he knew he did not have sufficient votes on the Board to be successful. Subsequent to the April 1983 election and at the reorganization meeting when the new Board members were sworn, Whitehurst obviously felt he had sufficient votes to carry the motion. Although such conduct appears to be putting the cart before the horse, so to speak, it is recalled that Whitehurst has been a Board member since 1981. Whitehurst testified that the first year he was on the Board, he was of the view that the "administration" was not given enough support by the Board. That view soon changed,

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however, as he found petitioner to be very hostile and uncooperative. Whitehurst testified that the longer he had the experience of working with petitioner, petitioner became more hostile and more uncooperative.

It is noted that Whitehurst is black. Petitioner is caucasian. Whitehurst testified under oath that petitioner refers to him as "boy," "asshole," and "pissant." Whitehurst further testified that at the reorganization meeting, new Board member Leary told him of the conversation with petitioner and former Board President Richardson. Whitehurst denies, as asserted by petitioner, ever saying that the Board should get rid of the white administrator so that he could be replaced with a black administrator. Whitehurst also denies using pejorative terms regarding petitioner's Italian ancestry.

Board member Wisniewski, who has been on the Board since April 1982, testified that he participated in all five meetings regarding the Board's evaluation of petitioner's performance. Wisniewski used his own personal judgment as to the quality of petitioner's performance and, though he claims to have had an amicable relationship with petitioner, Wisniewski was very concerned regarding Leary's telephone conversation with petitioner and a personal encounter he, Wisniewski, had had with petitioner during October 1982. Regarding the latter incident, Wisniewski explained that prior to the vote on petitioner's 1982-83 and 1983-84 salary at the October 1982 meeting, there was a personal conversation between him and petitioner. During the course of that conversation, Wisniewski testified that petitioner told him, "If you shove it up my ass, you're dead."

Board member Stephenson, who was a successful candidate for Board election during the April 1983 election, testified he felt qualified to evaluate petitioner's performance on the basis of his own professional experience as an administrator for Penn State University in Philadelphia. Stephenson testified he voted to withhold petitioner's 1983-84 salary increment because of petitioner's asserted inadequate performance in the Board's affirmative action program for 1982-83, and his view that petitioner obstructed Board business by presenting to it incomplete material regarding issues under discussion. Stephenson did admit that during an executive session in May 1984, one year after the sequence of events in this case occurred, he stated at an executive session of the Board that it is "time for Willingboro to have a black superintendent." Stephenson, it is noted, is black. Stephenson quickly adds, however, that that statement was made in response to

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petitioner's statement that any problems in the Willingboro school district regarding pupils or pupil discipline are caused by black kids.

Finally, it must be noted that prior evaluations of petitioner's performance by the Board (R-19, R-20, R-21, R-22) tend to show that since at least July 1978 petitioner has been criticized for his lack of emotional control when questioned or challenged by the Board, his lack of courtesy, civility, and manners, his terse, abusive and inconsiderate language to Board members and others, and according to a report of a meeting conducted on the superintendent's evaluation November 1980, petitioner is shown to be at best obstreperous regarding the Board's effort to successfully complete an evaluation on his performance. In regard to the "Martinez report," the report was the result of the Board's direction to Robert Martinez, special counsel of record here, to consider whether at that time tenure charges should be brought against petitioner in regard to his conduct. Martinez concluded that because of procedural irregularities committed by the Board, the Board would be well advised not to press tenure charges at that time (R-23).

Based on the foregoing testimony and documentary evidence adduced at the hearing, I **FIND** the following to be the facts of the matter:

1. Contrary to petitioner's testimony that his relationship with the Board had been satisfactory prior to April 1983, the total record in this matter discloses otherwise. Petitioner, as an employee of the Board and notwithstanding his position as chief school administrator in the title of superintendent of schools, holds an obligation to individual Board members to treat them at all times with the upmost respect and courtesy. Petitioner's reliance upon profanity to make a point or to express a view has the obvious result of a poor relationship between himself and Board members.

2. Though the Board has a policy with respect to the conduct of its evaluation of petitioner's performance, in this case the Board failed to comply with its own policy. That is, not until Whitehurst determined that he had sufficient votes at the reorganization meeting to withhold petitioner's salary increment for 1983-84 was any thought given to conduct an evaluation of his performance.

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3. The regulations in regard to a board's evaluation of its chief school administrator, N.J.A.C. 6:3-1.22, address the improvement of the professional skills assigned chief school administrators. It is fair to say that those regulations do not assume a chief school administrator will address board members in profane or insulting language that manifests a total lack of respect by that person for individual board members.

4. Petitioner did not have prior notice that Whitehurst was to make the motion to withhold his salary increment at the reorganization meeting on April 18, 1983. Petitioner did not have prior written notice that the Board would specifically withhold petitioner's salary increment for 1983-84 at the meeting conducted June 27, 1983.

5. At or about the same time of the reorganziation meeting, petitioner did attempt to influence a new Board member, Leary, to vote on an issue before the Board in a particular fashion in return for which petitioner would exercise his authority regarding a janitorial employee who happened to be the husband of a newly elected Board member.

6. Petitioner did in fact advise the Board prior to June 1983 that he would ensure that administrative personnel would review submitted bids on insurance coverage for 1983-84 and subsequently make recommendations to the Board as to which bid should be accepted. Petitioner failed to carry out that committment he made and, in fact, petitioner refused the direction of Board member Wisniewski and of Board president Harper to live up to that earlier committment.

7. Petitioner had notice of each meeting conducted by the Board between May 6 through June 23 in regard to its evaluation of his performance. Petitioner was, in fact, in attendance at each such meeting. Petitioner requested of the Board president on April 18, 1983, and again in writing on May 17, 1983, that each such meeting be conducted in public.

8. While the cited regulations governing the evaluation of chief school administrators require a written performance report by April 30,

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N.J.A.C. 6:30-1.22(g), there is nothing in the regulations which prohibit the Board, which fails to meet that deadline, from conducting an evaluation of its superintendent's performance thereafter. Whether an evaluation conducted after April 30 but before the close of that school year can be the basis for the withholding of an increment shall be discussed later.

9. The Board delivered to petitioner's home its evaluation of his performance on or about June 14, 1983 (R-35).

10. Petitioner had until June 23, 1983, to prepare his response to that evaluation prior to the time the evaluation became final. The Board, at the reorganization meeting conducted April 18, 1983, adopted its schedule of meeting dates, without regard to specific calendar dates but with regard to specific days of each month, together with its meeting place and location. The Board also identified its official newspapers at the same meeting.

11. The Board submitted, through its President, written reasons to petitioner in regard to the withholding of his increment.

DISCUSSION

The standard of review with respect to an increment withholding appeal, and it is emphasized that this case addresses an appeal brought by petitioner under N.J.S.A. 18A:29-14 regarding the withholding of his salary increment, is as stated in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295-296 (App. Div. 1960), where the court stated

> Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion * * *

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Accordingly, the issue before me is whether the Board had a reasonable basis upon which to believe that petitioner did not earn a salary increment for 1983-84.

In this regard, if the Board relied solely on the evaluation it prepared on petitioner's performance (R-2) and such evaluation did not occur until Board member Whitehurst made the motion at the reorganization meeting to withhold the increment, more likely than not petitioner would prevail on his claim of bias. It is quickly pointed out, however, that such a successful claim of bias presupposes that Board member Whitehurst would not have been subjected to the vituperative remarks of petitioner including, "boy," "asshole," and "pissant." A successful claim of bias, under the circumstance by which one Board member would move to withhold a salary increment but without regard to an existing performance evaluation, also presumes a normal relationship between the Board and the affected employee.

In this case, under no stretch of the imagination can the relationship between petitioner and the Board be considered a normal relationship. The record is replete with caustic comments continuously being made to Board members by petitioner throughout the course of the past several years. While it is true that petitioner began the 1982-83 school year having at least five Board members "on his side," the question before me is not whether the so-called balance of power shifted as the result of the April 1983 election as is the question whether petitioner's conduct is such that the Board of Education had a reasonable basis upon which to take the action to withhold the salary increment. The very fact that petitioner attempted to improperly influence the vote of a new member is conduct, standing by itself, to provide the reasonable basis for the Board to have acted in the way it did. An aggravating circumstance surrounding that conduct by petitioner is the threat to Leary by petitioner that unless Leary cooperated with him, Leary could expect to have three rough years as a Board member. The role of the superintendent of schools, petitioner is reminded, is not to dictate to the Board of Education what it should and should not be doing. Rather, the role of the superintendent is to be the chief executive officer for the Board and to carry out the policies of the Board it establishes. The record in this case suggests that petitioner tends to believe the Willingboro public schools are of his own personal domain and that the Board of Education, at least those members who disagree with him, are intruders in that domain. Such is clearly not the case in the legal relationship between a superintendent and a board of education.

The absolute refusal of petitioner to cooperate with the Board during June 1983 regarding insurance coverage for 1983-84 is a sufficient independent basis by itself

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to justify the Board taking the controverted action herein. When petitioner makes statements to a board of education to the extent that that board relies upon those statements, petitioner is obligated to achieve the results he promised the Board. In this case, petitioner, in another demonstration of obstrepreous behavior, simply denies ever having committed administrative personnel to that task. And, even after being directed by the Board President to handle the task, petitioner still refused.

Petitioner's argument with respect to Board president Harper raiding his personnel file is simply without merit. The fact is that Board members have every lawful right to inspect the personnel file of each and every one of its employees. Petitioner must keep in mind that he is an employee of the Board and as such he is subject to it. The absence of prior evaluations in petitioner's personnel file is a matter which can best be answered by petitioner.

Finally, written reasons were afforded petitioner on or about July 6, 1983 in regard to the increment withholding. Petitioner's office is his regular place of business and delivery there satisfies the statute.

In regard to petitioner's allegation that the Board violated N.J.S.A. 10:4-6 et seq., the Open Public Meetings Act, each and every allegation in this regard is wholely without merit. Petitioner, as superintendent of schools, has advance notice of each and every meeting to be conducted by the Board. The evidence in this case discloses that petitioner was in fact advised of each and every meeting to be conducted by the Board. There is no requirement for a board to give prior written advance notice to an affected employee that it will act to withhold an increment at a regularly scheduled meeting. In this case, the Board acted at a regularly scheduled meeting on June 27, 1983, to withhold a salary increment of petitioner. Petitioner had notice that his employment might be discussed at that meeting. That notice sufficiently satisfies the law. The meeting of June 27, 1983 was conducted as a regularly scheduled meeting of the Board. At that meeting, the Board can address old business or new business and any other matters that come before it. When the Board adopted its schedule of meetings for the 1982-83 year, all employees were put on notice that there was at least the potential for the Board to discuss their employment at any one of those regularly scheduled meetings. Had the meeting of June 27, 1983 been a specially called meeting, it is obvious that the result

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would be different. Under those circumstances, petitioner would have been entitled to prior notice. Harper opened the meeting of June 27, 1983 by reciting, in pertinent part, the following:

> The Notice requirements provided for in the Open Public Meetings Act have been satisfied. The Notice was transmitted to the Burlington County Times and the Courier Post on April 18, 1983, and posted in the Levitt Administration Building and filed with the Township Clerk on April 18, 1983 * * *

Petitioner's argument that the Board was under the obligation to specifically state how the notice was transmitted and in the manner in which such notice had been provided is without merit. The issue here presented is that the notice was not delivered precisely on April 18, 1983 but was transmitted a short time thereafter. It is clear that the recitation by Harper at the opening of the June 27, 1983 meeting was in sufficient plain language for the public to understand how notice of the Board's scheduled meeting were afforded the public. Such plain language and advice to the public is the epitome of the whole purpose of the Open Public Meetings Act.

In regard to N.J.S.A. 10:4-18 which requires that the "date" of each meeting must be announced, this Board did exactly that. The fact that the Board announced its meetings shall be conducted the first and third Mondays of each month as its regular public meetings satisfies the statutory requirement of announcing the date. Note that the statute does not require calendar day dates to be included. Rather, so long as the dates can be readily ascerned as to when a public body is going to meet such an announcement fully complies with the law.

I **CONCLUDE** that petitioner has failed to establish that the Board's determination to withhold his 1983-84 salary increment is in any way improper. The Board, even without regard to the "evaluation", has good cause to withhold petitioner's salary increment under N.J.S.A. 18A:29-14.

The petition of appeal is **DISMISSED.**

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OAL DKT. NO. EDU 8249-83

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Sept. 27, 1984
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 02 1984
DATE

Mailed To Parties:

Ronald L. Parker pab
OFFICE OF ADMINISTRATIVE LAW

ml

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EXHIBITS

J-1 Minutes, reorganization meeting, April 1983
J-2 Minutes, second regular meeting, June 1983

P-1 Minutes, meeting held October 1982
P-2 Interrogatories
P-3 Memorandum, May 20, 1983, Coppla to petitioner
P-4 Memorandum, May 20, 1983, petitioner to Coppla
P-5 Memorandum, May 20, 1983, Coppla to Harper
P-6 Memorandum, February 1984, Coppla to petitioner
P-7 Petitioner's response to Board evaluation
P-8 Board evaluation policy
P-9 Board evaluation policy
P-10 Blank evaluation instrument
P-11 Petitioner's reported absences
P-12 Board policy, in re minutes and taping of meetings
P-13 Board policy, in re Board secretary duties
P-16 Interrogatories
P-17 Prepared form for opening meetings
P-18 Memorandum, petitioner to Board secretary, August 1983

R-1 Transcript of proceedings
R-2 Board's performance evaluation of petitioner, June 1983
R-3 Memorandum, Harper to petitioner, June 1983
R-4 Letter, Harper to petitioner, July 1983
R-5 Proposed goals, July 1982
R-6 Meeting notice for May 6
R-7 Memorandum, Harper to petitioner, in re May 6
R-8 Notice to petitioner in re meeting of May 8
R-9 Meeting notice for May 17 and June 1
R-10 Notice to petitioner, in re May 17 and June 1
R-11 Memorandum, Harper to petitioner, in re petitioner's vacation
R-12 Petitioner's handwritten request
R-13 Meeting notice, in re June 8 and June 15

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R-14 Notice to petitioner, in re meeting, June 8
R-15 Meeting notice, in re June 15 and June 23
R-17 Remaining meeting schedule of Board
R-18 Resolution of censure
R-19 Board evaluation, July 1978
R-20 Board evaluation, November 1978
R-21 Board evaluation, December 1979
R-22 Report of meeting on Board evaluation of petitioner November 1980
R-23 "Martinez" report, March 1981
R-24 Evaluation instrument, May 1981
R-25 Memorandum, Harper to petitioner, in re minutes June 1983
R-26 Harper to regular Board counsel, August 1983
R-27 Letter to former president Richardson from Burlington County Prosecutor, April 1983
R-28 Letter to petitioner from Department of Insurance, May 1983
R-29 Memorandum, Stewart to petitioner, in re insurance bids, June 21, 1983
R-30 Memorandum, Wisniewski to petitioner, June 22, 1983
R-31 Memorandum, petitioner to Board secretary, in re insurance, June 22, 1983
R-32 Memorandum, Harper to petitioner, in re insurance proposals, June 22, 1983
R-33 Memorandum from Harper to Board members, in re insurance proposals, June 1983
R-34 Memorandum, Board secretary to petitioner, August 1983
R-35 Handwritten certification of Board secretary
R-36 Willingboro Township Council resolution, in re Open Public Meetings Act
R-37 Salary guides

C-1 Superior Court complaint

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PETER J. ROMANOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner in primary exceptions contends that the judge erred in not considering all the issues, specifically whether or not the word "member" in N.J.S.A. 18A:29-14 applies to the superintendent of schools in view of N.J.S.A. 18A:17-19 each set down herewith in full:

> **"18A:29-14. Withholding increments; causes; notice of appeals**
>
> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to given written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."
>
> **"18A:17-19. Salaries**
>
> The board or boards of education employing a superintendent or assistant superintendent of schools shall fix the salaries of the superin-

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> tendent and assistant superintendent of schools and the salary of a superintendent shall not be reduced during his term of office."

Petitioner further argues that he had not received prior notice that the Board was to consider the withholding of his salary increment for 1983-84. Petitioner contends that, because he had received notice of his next year's salary, the Board's action to withhold his increment constituted an improper reduction of salary. N.J.S.A. 18A:17-19

Finally, petitioner argues that he was treated in a manner so lacking in fair play by the Board and so arbitrary and unreasonable as to warrant reversal by the Commissioner of the initial decision. J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, 1969 S.L.D. 4

A close reading by the Commissioner of the initial decision and an examination of the exhibits attached in evidence and the reply exceptions filed by the Board which refute petitioner's arguments convince the Commissioner that he must agree with the initial decision.

Petitioner's argument that he is not a member as defined in N.J.S.A. 18A:29-14 in light of N.J.S.A. 18A:17-19 has no merit. Petitioner claims without dispute to be a tenured superintendent of schools pursuant to N.J.S.A. 18A:28-5, wherein teaching staff "members" clearly include superintendents, herewith set down in pertinent part:

> **"18A:28-5. Tenure of teaching staff members**
>
> ***[A]ll teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause***." (Emphasis supplied.)

Petitioner cannot have it both ways; he simply cannot claim to be a "member" of the teaching staff to acquire tenure and not be

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a "member" for other self-serving reasons. The Commissioner so holds.

Petitioner's argument that the Board failed to notice him of action to be taken on his increment cannot be given credence. Petitioner by his own admission was at every meeting of the Board from mid-April to the end of June. It boggles the mind that petitioner did not know what was going on.

The Commissioner can find no merit in petitioner's argument that, because he knew of his proposed salary in the coming year, the Board could not withhold his salary increment because such would be a reduction in salary. The Commissioner has previously dealt with such allegations in Mary O'Malley v. Board of Education of West Long Branch, decided July 15, 1980, wherein was said:

> "***Addressing first petitioner's argument that the Board's action constituted a reduction in salary since she had been noticed prior to the action of her salary for the 1978-79 school year, it is my opinion that this does not withstand analysis. In a similar circumstance, John Gregg v. Bd. of Educ. of Camden County Vocation and Technical School Dist., Camden Cty., 1977 S.L.D. 120, the Commissioner of Education upheld the Board on the identical question.***"
>
> (Slip Opinion, at p. 4)

And, further,

> "***The action of the Board withholding petitioner's employment increment for the 1978-79 school year did not constitute a reduction in salary notwithstanding the fact that notice of annual salary for that year had previously been sent to teaching staff members.***" (Id., at p. 5)

The Commissioner notes petitioner's argument that he did not receive fair play from the Board. The Commissioner cannot agree; there is not sufficient credible evidence in the record to support such a conclusion.

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.

NOVEMBER 13, 1984

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1269-84
AGENCY DKT. NO. 415-11/83A

SCHOOL DISTRICT OF THE CITY OF NEWARK,
ESSEX COUNTY,
Petitioner,
v.
STANLEY SLOVNEY,
Respondent.

Griselle Camacho-Pagan and J. Issac Porter, Associate Counsels, Newark Board of Education (Vickie A. Donaldson, General Counsel, Newark Board of Education)

Ida L. Castro, Esq., for respondent (Giblin & Giblin, attorneys)

Record Closed: August 21, 1984 Decided: October 4, 1984

BEFORE ELINOR R. REINER, ALJ:

On November 15, 1983, petitioner, Board of Education of the City of Newark, certified charges of inefficiency to the Commissioner of Education against respondent, Stanley Slovney. On February 24, 1984, the Department of Education, Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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After notice to all parties, a prehearing conference was held on March 23, 1984 and the following issues were isolated:

1. Did the alleged actions of respondent constitute inefficiency in violation of N.J.S.A. 18A:6-10?

2. If the charges are found to be true what is the appropriate penalty?

3. Did petitioner comply with the required procedure outlined in N.J.S.A. 18A:6-11?

4. If petitioner failed to comply with the procedures outlined in N.J.S.A. 18A:6-11 to what relief is respondent entitled?

Thereafter, the case was heard on May 18, 21 and 22 and June 12, 1984. Witnesses who testified and exhibits marked into evidence at the time of the hearing are listed in the appendix attached hereto.

DISCUSSION OF FACTS

At the hearing, which proceeded on the issue of whether Slovney functioned in an inefficient manner, it became clear that a number of the facts were essentially uncontroverted. They may be summarized as follows:

1. Slovney was first employed by the Newark Board of Education in September 1972 as an elementary school teacher.

2. Initially, Slovney was employed as a substitute teacher; he received a regular appointment on or about September 1974 as a social studies teacher at Westside High School.

3. Slovney became tenured in the petitioner's school district in 1975.

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4. Ordinarily, tenured teachers in respondent school district are formally observed for purposes of evaluation and improvement two times during the school year. An observation report is issued by the supervisor outlining the results of the observation. If a teacher receives an unsatisfactory observation, another observation is usually conducted the following month. If the teacher receives a second unsatisfactory, a third observation is completed by another observer. If the teacher is still "unsatisfactory" and shows no improvement, tenure charges could be brought.

5. The observer will determine if the teacher is satisfactory by looking at a teacher's:
   a) classroom management
   b) use of resources and materials
   c) control of discipline

6. Subsequent to each observation, there is a post-observation conference between the teacher and the observer. At that time, the observer will review his observations with the teacher and make suggestions. The teacher, who may have a union representative present at the conference, is at liberty to question the observer's directives.

7. Beginning in the 1979-80 school year, all tenured teachers received an annual evaluation at the end of the school year (annual evaluation) as well as a performance improvement plan (PIP). These are discussed by the evaluator with the teacher and signed by the principal.

8. In addition to formal observations and evaluations, teachers are informally observed by their department chairpersons and principals intermittently throughout the school year.

9. From September 1974 through June 1982, Slovney was a social studies teacher at Westside High School.

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10. Beginning in the 1978-79 school year Slovney received overall unsatisfactory ratings in formal observations of his classes and in most of his annual teacher evaluations at Westside High School. The following is a summary of those ratings:

School Year	Type of Evaluation	Date	Overall Rating	Evaluator
1978-79	Form. Obs.[1]	10/04/78	U[2]	Charles Driggins, Principal (P-1)
1978-79	Form. Obs.	10/26/78	U	Charles Malone, Chairperson (P-2)
1978-79	Form. Obs.	10/31/78	U	Judith Stewart, V. Principal (P-3)
1978-79	Form. Obs.	03/26/79	U	Charles Malone, Chairperson (P-4)
1979-80	Form. Obs.	10/13/79	U	Charles Malone, Chairperson (P-5)
1979-80	Form. Obs.	11/29/79	U	Charles Malone, Chairperson (P-6)
1979-80	Form. Obs.	01/07/80	U	Thomy Joyner, Admin. Super. (P-7)
1979-80	An. Tchr. Eval.[3]	06/80	U	Charles Malone, Chairperson (P-8)
1980-81	Form. Obs.	12/18/80	U	Thomy Joyner, Admin. Super. (P-9)
1980-81	An. Tchr. Eval.	06/81	U	Charles Malone, Chairperson (P-10)
1981-82	Form. Obs.	10/13/81	U	Charles Malone, Chairperson (P-11)
1981-82	An. Tchr. Eval.	06/82	S[4]	Charles Malone, Chairperson (P-12)

11. In his June 1982 annual evaluation of Slovney, Charles Malone, the department chairman at Westside High School, recommended that Slovney be transferred to another school.

12. In September 1982 Slovney was transferred to Barringer Prep as a ninth grade social studies teacher.

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[1]Formal Observation
[2]Unsatisfactory
[3]Annual Teacher Evaluation
[4]Satisfactory

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13. The following is the summary of the ratings received by Slovney at Barringer Prep:

School Year	Type of Evaluation	Date	Overall Rating	Evaluator
1982-83	Form. Obs.	10/07/82	U	Alphonse Rossi, Principal (P-13)
1982-83	Form. Obs.	10/26/82	U	Joseph Simons, Chairperson (P-14)
1982-83	Form. Obs.	01/18/83	U	Joseph Simons, Chairperson (P-15)
1982-83	Form. Obs.	05/24/83	U	Alphonse Rossi, Principal (P-16)
1982-83	An. Tchr. Eval.	06/83	U	Joseph Simons, Chairperson (P-23)
1983-84	Form. Obs.	10/03/83	U	L. Marolakos, Hist. Chairperson (P-17)
1983-84	Form. Obs.	10/05/83	U	Joseph Simons, Chairperson (P-18)
1983-84	Form. Obs.	10/07/83	U	Alphonse Rossi, Principal (P-19)

14. In the last five school years, Slovney was rated unsatisfactory in all 16 formal observations made of his classes by seven different observers. He also received unsatisfactory annual evaluations in three out of the last four school years.

15. On or about April 28, 1983, Slovney was notified of the charge against him and was issued a 90-day notice which provided him 90 days in which to correct and overcome the alleged inefficiency.

In addition to the above undisputed facts, a number of educators testified as to their observations of respondent. Charles Malone, employed by petitioner as chairman of the social studies and foreign language departments at Westside High School and certified as a supervisor and secondary school principal, observed Stanley Slovney on a number of occasions. Although he had no independent recollections of certain of those observations (i.e., P-2 and P-4), he acknowledged the veracity of what he wrote at that time. Moreover, despite being unable to recall Slovney's overall rating for 1978-79, Malone contended that evaluation forms were submitted prior to 1980. Testifying with more specificity, and referring in particular to the annual teacher evaluation in June 1980 (P-8),

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Malone recalled that at that time he recommended that Slovney be transferred to another school. Noting that Slovney had a problem maintaining discipline and that the image being projected by Slovney was not creating a good learning situation, it was Malone's view that a new environment might give Slovney the opportunity to present his program in a better atmosphere. Recalling an incident in which Slovney lost his temper and tried to physically reach for the students, who ran from the room, Malone observed that Slovney needed his assistance in order to deal with the students. Focusing on his observations of Slovney's reaction to the students, Malone believed that the students looked to incite Slovney and, in fact, employed methods to bring about reactions from him. (Thus, normal disciplinary problems, handled by other teachers without interruption, were magnified by Slovney's reaction to them.) Malone added that the disciplinary problems were increased by the fact that Slovney wrote on the board (thereby giving students an opportunity to throw erasers or make comments) and was not present at the beginning of the class period. Since the problems were ongoing, and Slovney apparently did not see fit to utilize a number of disciplinary remedies available to him, Malone recalled that he was called in to address these problems on numerous occasions. Thus, although the seriousness varied, Malone opined that he became involved in handling problems in Slovney's class on an almost daily basis.

Referring to the annual teacher evaluation in June 1981 (P-10), Malone recalled that he gave Slovney an unsatisfactory rating because of his lack of progress in utilizing the constructive criticism offered him in numerous conferences. In this vein, he pointed out that although the behavior problems were removed from Slovney's classes, the atmosphere caused a number of apparently good students to be recalcitrant and upset. Some students felt they were not getting a fair shake and brought on disciplinary problems; in other cases, the discipline problems in the class did not give the students the opportunity to do well and they contended they would do better elsewhere. It was Malone's opinion that in Slovney's classes there were nine times the usual number of confrontations and that it was a "good day when there was not a problem." Although varying techniques such as using ditto material seemed to bring about a lessening of the problem, Malone noted that Slovney did not continue to employ such measures. Rather, Slovney typed the ditto material (it was otherwise hard for the students to decipher) and handed back homework, only until he stepped back into his prior pattern of failing to do so.

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In further testimony, Malone recounted that although he rated Slovney as satisfactory in June 1982 (P-12) (Slovney had knowledge of his subject matter and had capabilities), he believed that a change was warranted and might help him. Thus, he recommended at that time that Slovney be transferred. On questioning by this judge, Malone further explained the satisfactory rating of Slovney. He recalled that Slovney had attempted to conform to certain recommendations (i.e., he put up bulletin boards and had papers typed for his use). Thus, with the view that "you get more with honey than vinegar," the satisfactory rating was to serve as an incentive for Slovney to improve his performance. Referring to his recommendation for transfer, Malone recalled that he had called Slovney's wife to get her to help Slovney, for which Slovney was very angry. Since Malone believed that Slovney was ready and apparently going to make statements against him, he was of the view that he would be in jeopardy if Slovney remained. He contended, however, that he was not angry at Slovney and the transfer was simply an effort to provide Slovney with a clean slate. In conclusion, and in general, based on his evaluations of Slovney, Malone opined that for the school years 1978 to 1982 Slovney functioned unsatisfactorily.

The substance of the observations of Charles Malone was confirmed in substantial measure by Alphonse Rossi. Employed as principal of Barringer Prep since September 1982, he conducted an observation of Slovney in October 1982, subsequent to Slovney's transfer to Barringer Prep. Recalling his observation (and referring in particular to P-13), Rossi noted the following deficiencies:

1. There was a lack of classroom rules and regulations (e.g., students arrived after the bell, passes were given out indiscriminately, and classes did not start in an orderly fashion).

2. There was no organization and/or direction provided to the class.

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3. The lesson plan was vague and no objective was stated.

4. There was a lack of discipline (i.e., students appeared to do what they wanted and no effort was made to address the problems which ensued).

5. There was no review of the learning from the previous day and, apparently, no summary provided at the end of the class period.

6. There were no motivational techniques employed; either Slovney wrote on the board for 15 minutes or was seated at this desk and "talked to" the students. He was uninvolved and did not always stay on the subject. The students seemed to be disinterested.

7. The material used was limited to that contained within the textbook, which some students failed to bring.

8. All the work or aids displayed in the room (which admittedly was shared with another teacher) was a result of the other teacher's efforts.

Noting that he had a conference with Slovney during which he advised Slovney that he was trying to help him, and made specific suggestions, Rossi recalled Slovney's response. Slovney refused to sign the observation, contending that he was a satisfactory teacher and at some point, Slovney refused even to discuss the issues with him. Rossi recounted that thereafter the discipline in Slovney's classes deteriorated; i.e., the students walked in and out of the classroom as they wished and "cut slips" were not required. In fact, as the year progressed, a "problem" occurred in Slovney's classes almost on a daily basis. Recalling that Slovney would buzz the office on many occasions, contending there was a problem, Rossi pointed out that when he arrived, he would find no disorder that required immediate attention. Rather, instead of an emergency (that a teacher would not be expected to handle), he found, for example, that the problem might be simply that a student did not bring a pen or requested a pass twice. When he discussed

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with Slovney his need to call the office on those occasions, Rossi recalled that Slovney indicated he could not control the class and needed an administrator in class at all times in order to continue to teach. (It is to be noted that Rossi stated that he got involved apparently only after he was informed by Chairperson Simons and the vice-principal in March or April 1983 that they "could not do anymore with Slovney.") In fact, it was Rossi's view that the situation had deteriorated to such an extent that Slovney's failure to properly supervise the students created a danger to himself and the students.

Rossi recounted that he again observed Slovney on May 24, 1983. At that time (which was during the 90-day period given to Slovney to correct the inefficiency), it was his opinion that Slovney was performing unsatisfactorily. Not only had there been no improvement from October of the prior year, but the performance in each category was worse. Referring to P-16, he recalled with specificity that:

1. There was no order; the students did what they wanted. They read books or newspapers. When the students left before the end of class, there was no attempt by Slovney to stop them.

2. Book work took up the entire period. Those students without books talked or looked out the window.

3. Slovney did not communicate with the students.

4. The only work displayed in the classroom was put up by the other teacher.

Rossi recalled that at the conference held with Slovney regarding his evaluation, Slovney refused to review the content of the observation with him or sign it,[1] contending instead

[1]On cross-examination, Rossi noted that an observation or evaluation which is witnessed indicates that the teacher refused to sign it or did not appear. Rossi advised that those not signed by Slovney contain the notation that he refused to sign.

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that he was satisfactory. Rossi admitted that he had little hope of Slovney improving at this point. Although he had worked with him, as of April 15, 1983, the situation had worsened.

Rossi conducted a subsequent observation of Slovney during the following school year. Noting that it was a new year and Slovney therefore had new students, Rossi recalled that the observation was still rated "unsatisfactory." He pointed out that in terms of classroom management, the environment was still the same (i.e., students walked around and looked out the window). Moreover, the teaching methods were inadequate. The students did not understand what was said and other methods such as visual aids were needed. Rossi, who noted that Slovney resented the observation and shouted, "Do you observe every teacher on staff? If you want to play games, go ahead," stated that he arranged for additional observations during the 90-day period. Based on his observations and apparently those of the other supervisors who observed Slovney, he concluded that Slovney was unable to carry out his functions as a teacher. He could not conduct a class or transmit the course content to the students. Moreover, it was his view that Slovney could not improve his performance to reach an acceptable level.

In addition to the above-noted observations, Slovney was observed on a number of occasions during a one and one-half year period by Joseph Simons, chairman of the social studies department at Barringer Prep, and a department chairman for 20 years. Referring to his observation of Slovney on October 28, 1982 (P-14), Simons recalled that he rated Slovney unsatisfactory. He stated that he observed the following:

1. Poor management of student behavior; a lack of rules.

2. The lesson was not fully developed or prepared.

3. Slovney showed no understanding of the students or differences in their abilities.

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4. There was little involvement or communication with the students; i.e., Slovney, who gave the students busy work, sat at his desk and looked at them.

5. There was a lack of motivational technique, direction, and follow-up.

In addition, Simons noted that at the conference held with Slovney in order to help him improve (during which he gave Slovney his written recommendation), Slovney denied having any problems. Rather, he told Simons to leave him alone, that it was nonsense and that he was satisfactory. Simons recalled that when he told Slovney that if he did not make changes he would be rated unsatisfactory, Slovney cursed at him. When Slovney refused to take the observation, it was placed in an envelope and left in his box.

Simons testified that as the year progressed matters became worse. Slovney repeated the same lesson over and over again (no attempt was made to vary the teaching methods), giving students no opportunity to ask questions. More important, as the year went on the students exhibited a lack of respect for Slovney and the class deteriorated. Simons saw a growing number of students come to class late, cut class, fail to bring materials to class and fail to pay attention once in class. In fact, Simons estimated that only about one-quarter to one-fifth of the class attempted to follow the lesson. Moreover, and in regard to discipline, as the year progressed a control problem developed and Simons' assistance was requested on occasion either by Slovney, a student, or another teacher. (He noted that sometimes he saw that there was chaos and went into the classroom.) Recalling that he had to help maintain order, Simons opined that a teacher should have been able to control those situations. In an effort to help Slovney, Simons offered to conduct a demonstration lesson. Although Slovney refused, Simons pointed out that it became necessary on at least ten occasions for him to conduct the lesson in order to control the class. Noting that Slovney requested assistance as often as six to seven times a day, he pointed out that he never found that a chaotic situation had been reported. Rather, when he responded and asked what the problem was, Slovney pointed to a student and charged the student with a number of actions. Simons opined that on most

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occasions, Slovney had improperly reacted to a minor problem (e.g., a student did not have a book or a pencil or was turning around). Simons felt that Slovney was afraid of the class.

Referring to his second formal observation of Slovney on January 18, 1983, Simons recalled that it too was unsatisfactory (P-15). There was an absence of improvement in needed areas. Slovney continued to put an assignment on the board, sit at his desk and take attendance. Few students started working on time or engaged in the assignment. Further, there was no review or evaluation of the assigned work. Simons noted that students asked to be transferred. (In regard to one or two of these transfers, he was told that straight A students did the work, but received an F, which could not be justified by Slovney.)

Testifying as to the conferences he held with Slovney, Simons recalled that sometimes Slovney did not show up. If he did, he questioned why Simons was bothering him and asked to be left alone. Noting that Slovney did not want to accept help or criticism, Simons stated that there was no fruitful discussion; Slovney did not demonstrate a willingness to learn.

In sum, it was Simons' opinion that Slovney was properly rated unsatisfactory on the 1982-83 final evaluation (P-23), inasmuch as the rating of unsatisfactory remained throughout the year. Although Simons indicated that this determination was based on observations of Slovney, his informal dealings with him, and his relationship with other teachers, it was mainly due to his performance in class and his dealings with the students. (Simons, who could not recall whether he knew of the charges against Slovney when he completed the evaluation, noted, however, that he had not reviewed the charges.) Referring to the evaluation conference, Simons recalled that there was no substantive discussion of the evaluation (only the PIP) at that conference because Slovney refused to discuss it. (He felt that it was unfair that Mr. Pitney was present at the conference and stated that Simons would "hear from his lawyer.") He indicated, however, that he listed the areas of concern in such a manner as not to make too many demands on Slovney.

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Although he admitted that at that time he did not expect Slovney's performance to improve, he indicated his hope that Slovney's teaching performance would change after the summer. In fact, Simons recalled that although he offered to meet with Slovney in September in order to assist him, Slovney did not attend.

In October 1983 (and during the 90-day period), Simons made another observation of Slovney's class. Unsure if he knew that the 90 days would lapse at that observation, he stated, however, that Slovney was performing unsatisfactorily. More specifically, he noted the following deficiencies:

1. Lack of student control;

2. Absence of housekeeping techniques (the board was not erased, chairs were out of order, and papers were not cleaned up);

3. Absence of introduction to lesson or motivation;

4. Absence of any real instruction (or variation in instruction); rather, there was classwork (questions to be answered) and homework to be done;

5. Absence of planned ending or clarification of the lesson;

6. Limited interaction between the teacher and students;

7. No cooperation or interest by the students; and

8. Incomplete lesson plans.

At the conference held with Slovney, Simons again pointed to Slovney's refusal to participate. Slovney refused to sign the observation and even to take possession of it. Although Simons admitted he had no expectation for Slovney's improvement, he alleged that this was still his objective.

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In further testimony, Simons recalled that Slovney took his class to the library for one week to complete a research project. Simons, who stated that the librarian conducted the class, noted that since Slovney did not provide the requisite direction to the students, he advised him that certain students needed help. Referring to additional problems in 1983, Simons recalled that when he was summoned to control Slovney's class, he found that a minor problem had occurred (as opposed to a fight) and Slovney had used poor judgment in responding to it. Slovney apparently conducted a tirade at the student, accusing the student of "everything." Opining that Slovney was playing a game when he called for assistance, Simons noted that Slovney requested assistance much more than the other teachers.

In sum, based on his evaluations and observations of Slovney which he contended were independent (he admitted that he had conferred with the principal regarding Slovney's problems), he concluded that Slovney did not provide what was necessary as a teacher; he was not an asset to the department.

A further observation of Slovney was conducted by Louis Marolakas, certified as a supervisor, and chairman of the history department at Barringer High School since 1971. Requested by Mary Bagby, principal of Barringer High School, to observe Slovney, whom Marolakas did not know, Marolakas questioned Bagby as to the purpose of it. Advised that it was routine procedure, Marolakas testified that he received no information prior to the observation. He recalled, however, that he met with the principal and vice-principal of Barringer Prep regarding the procedure and was advised to evaluate Slovney as he would a member of his own department. He was informed that the observation would be typed for him and he would then discuss it with Slovney. Although nobody advised him that there was a problem (he did not ask about tenure charges), Marolakas admitted that he assumed as much. He recalled that there was mention of a 90-day period (which was his first knowledge of that procedure) and acknowledged that he knew it involved an unsatisfactory rating and that he was to be the "outside observer." Referring to the procedural aspects of the observation, Marolakas recalled that the observation was not preannounced. Although initially objected to by Slovney (who requested union representation), Slovney, thereafter, invited him in.

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Marolakas, testifying with specificity as to his observation, concluded that the World History lesson taught by Slovney was unsatisfactory. He found that:

1. The students were not learning. (No student responded to the ten-minute question and answer period attempted by Slovney.)

2. Although Slovney had knowledge of his field, one important component (the Rosetta Stone) of the lesson on hieroglyphics taught by Slovney that day was not mentioned.

3. Slovney did not use strategies or techniques to excite the students (the students were lethargic) or take into account their different abilities.

4. The lesson was perfunctory and there was continuous writing on the board.

5. There were no stated objectives or clearly determined aims.

6. Slovney's attitude to the class was not what one would expect. Although one student traced, one read Snoopy, and two walked in unchallenged as to where they were, Slovney did not chastise them.

7. The format of the lesson plan needed improvement and specificity; there was no outline in the lesson book of objectives, activities or homework assignments.

8. There were no behavioral problems.

9. The homework assignment was not specific.

10. The subject for the report requested by Slovney was too general (there was no evidence as to the sources for it).

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11. The room was barren of such items as maps. (However, it was noted that the room was used for music and did contain music exhibits.)

At the conference held with Slovney, approximately ten days later (at which both Rossi and Simons were present) Marolakas recalled that he went over his observation (P-17) item by item. Slovney agreed with some comments and disagreed with others. On cross-examination, Marolakas noted that he was not asked to meet with others who had observed Slovney and analyze the results. He admitted that he got the feeling that Slovney was capable of improving.

Next to testify on behalf of petitioner was Dr. Columbus Salley, executive superintendent of schools for the last three years. An educator with substantial experience in school administration, Dr. Salley (subsequent to outlining the manner in which it is determined that charges are preferred) stated that he reviewed the observations and evaluations of Slovney (although not in great detail). It was his view that they revealed a recurring theme of lack of order, control and management. Although he noted that there was knowledge of the subject matter, he believed that Slovney could not properly manage the classroom; the reports were replete with chaos and disruption. In regard to his teaching performance, Dr. Salley opined that Slovney was a stereotyped lecturer who did not involve students or interact with them. In addition, he failed to structure the material for learning; the lessons appeared ill-conceived and ill-structured in terms of scope and sequence. Pointing out that literature supports the need for order and clear objectives, it was his view that a teacher must be a guide. Here, based on the manner of teaching, failure for the students was, according to Salley, predictable. He noted that the students sense of his ability to learn would be affected and a ripple effect on the whole building could occur. He concluded that Slovney was not an asset as a teacher.

In an effort to counter the above outlined observations, Slovney assumed the stand on his own behalf. Admitting that he began to have problems in the 1978-79 school year,

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Slovney attributed this to a "loosening up" (almost to the point of disorder) in the school when Principal Potts, who was not strict, took over. Recalling that the chairmen rather than the office began to handle problem children, he stated that the chairmen simply walked the halls and did not remove a child unless it was serious; as a result, the students became disorderly. In further testimony and apparently in regard to Barringer Prep, Slovney attributed the students' behavior to their perception of the looseness in the school. Slovney alleged that other teachers had the same problems or simply did not bother. He noted that at the end of the year 200 to 300 (out of 700) students would fail two or more courses. He contended that it was simply not a normal educational setup.

Referring to Malone's suggestion to him to have discussions with the students, Slovney questioned how they could occur; he alleged that discussions simply collapsed because the students did not want to talk. Recalling that Malone suggested that he discuss the answers to two or three questions with the students, Slovney pointed out that the students did not bring books and this too would "collapse." Slovney recalled that Malone suggested that he give them paper, pencils or send them home for their books. He complained that sometimes Malone did nothing. More specifically, Slovney stated that it has only been in the last two years that two classes frequently failed to bring their books, apparently necessitating calls to the office. However, he noted that even if and when he called Malone, the latter would not come to his classroom as a result of forgotten textbooks but rather would make himself available only if there was a fight. In response to Malone's suggestion to decorate the room, Slovney, who shared the room with four teachers, alleged that he felt the decorations would be taken down. In addition, he noted that in some years he used four different rooms. (Slovney admitted that Marolakas also criticized his lack of bulletin boards to which he advised him that he was using a music room.)

Slovney's testimony regarding his interactions and observations by Simons was similar, in certain respects, to that which he related with respect to Malone. Slovney, who recalled being told to make sure that the students bring books to class and do work, stated that the students stopped bringing their books to class after the first four or five weeks. Contending that the main problem was that there were no books (or that there

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was a failure to bring books), he recalled that sometimes Simons advised him either to keep extra books in the room or send out for books. Although he indicated that he was told not to keep the books in the room rather than giving them out, he alleged that five or six teachers did just that. More to the point, Slovney charged that Simons changed directions; i.e., sometimes he wanted Slovney to require more reading in the class and sometimes wanted him to impose greater discipline. Slovney recalled that if a student walked around the room, he might call Simons, who might say that he was not coming unless there was a fight.

In regard to the end-of-the-year evaluation, June 1983 (P-23), Slovney claimed he was not shown the form, was not aware of the evaluation, or informed as to how to improve his performance and, in fact, discussed only the PIP with Simons. He stated that he called his union and advised them that he did not receive one. Slovney, who contended that he therefore believed, based on usual custom, that he had been rated satisfactory, admitted on cross-examination that he did not question the union about the custom nor did he ask his chairman for the evaluation. Addressing Simons' evaluation of him on October 5, 1983 (P-18), Slovney stated that he tried, as requested by Simons, to vary his lesson.

In regard to his interaction with Rossi, and referring, in particular, to his meeting with Rossi regarding Rossi's observation of him on May 24, 1983 (P-16), he admitted advising Rossi that he was lying. He contended, in addition, that Rossi failed to answer what was wrong with "the lights or heat or what he should do if they did not listen." Alleging that it always got down to the issue of discipline (he did acknowledge that Rossi sought improvement in the areas of the bulletin board and student motivation), he complained that although he asked Rossi and Simons for a demonstration lesson (he admitted demonstrations were not even given to new people) in order to find out what was wanted (he felt they were too vague), neither demonstrated model lessons for him. Slovney recalled that Rossi's statements, in regard to his observation of him on October 7, 1983 (P-19), mirrored his previous ones. Slovney stated that he argued with Rossi, advising him that he was not realistic. Questioning how he could conduct a lesson without books and and what to do if a student did not bring his or her book, he advised Rossi that it was the supervisor's job to get the students to bring their books. Slovney perceived that the supervisors could not get the students, who made it into a game, to comply.

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On cross-examination, and in general, Slovney, a teacher for 18 years, recounted that when he was a special education teacher, prior to teaching in Newark, the same problems occurred as a result of lack of discipline in the school. Apparently referring to the lack of order, Slovney stated that he did not know what he was supposed to do to get the order which is required in all public buildings and, in particular, by students in a school. It was his view that he should not continually have to tell the students how to behave. Noting that the annex was not run like a school, he pointed out that the reading and math scores had gone down and were extremely low. He opined that a school must back up a teacher. Without the requisite order and discipline, producing a serious learning environment (absent with Potts' loose administering), Slovney alleged that a teacher is faced with situations which are "not normal." Teachers in such an environment did not have the proper control and respect. (Slovney indicated that if the student was told to stop certain behavior two times, the next step for him would be to call for help.) Referring to his transfer, Slovney stated that he saw it as a punitive measure that made no sense.

In further testimony, Slovney denied allegations that he did not vary his technique. He alleged that on some days there was required reading; on other days, he showed films or conducted discussions of the films; sometimes he required a paper or current events articles. When questioned about his "Scarsdale" statement, Slovney indicated that he meant that those students could do homework and come in and discuss it, while his students could not. Moreover, he noted that he did not send students for a note (as Marolakas had indicated was inappropriate) because he had been advised that they would miss too much work. In conclusion, Slovney stated that he felt the basis for the evaluations were vague and that the supervisor's comments (who gave him the "usual thing" during the 90-day period) were "unrealistic" and "lies." Contending that the lack of order in the school (the structure of the learning environment and the type of child) caused the problem, he alleged that it would "work" for him now because there has been a general tightening up by the State, which has made an impact and caused a change in his class at Barringer. He contended that he is capable of being a good teacher and could return to his position.

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FINDINGS OF FACT

I have reviewed the above undisputed facts, as well as the testimony adduced at the hearing, and find that they substantiate the charge of inefficiency lodged against Slovney.

The record as a whole shows a pattern of problems which persisted despite repeated and numerous recommendations made to Slovney as to specific methods and techniques to improve his deficiencies. The testimony showed that Slovney not only failed to incorporate the recommendations, but that, in fact, he refused to accept any responsibility for the problems. Rather, he persistently asserted that the problems lie solely with the school environment, the principals and the quality of Newark students. More specifically, he blamed Mr. Simons, the department chairperson, and Mr. Rossi, the school principal, for refusing to come to his classroom to deal with certain minor disruptions in his classroom. He further blamed the school officials for refusing to demonstrate a model class for him despite his request for same. In short, he refused to acknowledge or assume any responsibility for the problems of discipline and disorder in his classes and denied (albeit he has been a teacher for the last fourteen years) any deficiency in his teaching method. In sum, and quite clearly, Slovney failed to present any credible evidence to overcome the substantial and overwhelming evidence establishing his inefficiency as a teacher.

In support of this conclusion, I make the following additional and substantive **FINDINGS OF FACT:**

1. Since the 1978-79 school year, Slovney has consistently failed to maintain order in his classes and to establish proper discipline. Specifically, he has failed to :

    a. establish consistent rules and procedures for his students;

    b. take action with respect to the problem of students who come late to his classes;

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c. impose appropriate discipline on students who disrupt the class by talking, moving around, or walking in and out of the room during classes;

d. take action with respect to students who are not participating in the lesson and are engaged in other unrelated activities, such as reading comic books; and

e. take effective measures to deal with students who do not come to class prepared with their books, paper, pens, assignments, etc.

2. Slovney has failed to maintain an appropriate classroom environment. Specifically, he has failed to:

a. post rules and procedures in the classroom;

b. maintain a neat, attractive classroom;

c. put on the bulletin board material related to the lessons or any student work; and

d. create and maintain centers of interest related to the lessons.

3. Slovney has failed to demonstrate appropriate teacher characteristics in that he:

a. fails to give clear and specific instructions to students about what he wants them to do;

b. fails to show enthusiasm or vitality in his presentation of lessons, but rather appears indifferent while teaching;

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c. fails to use a variety of instructional materials or school and community resources to present lessons;

d. does not communicate with his students in an effective manner and, in fact, on certain occasions sees his students as his adversaries;

e. frequently says very little during an entire class period and speaks in a barely audible tone; and

f. demonstrates little rapport with his students.

4. Slovney utilizes inappropriate and ineffective teaching techniques. Specifically:

a. his lesson plans are inadequate; they often consist of very sketchy notes lacking teaching objectives, purpose, method and assignments;

b. he does not vary his instructional technique, either lecturing exclusively, or having students do book work during an entire class;

c. he fails to take into account differences in students' abilities and frequently appears to be totally oblivious to whether students are learning or even listening to his class;

d. he demonstrates no attempt to motivate or excite students about lessons; his lessons are not geared to arouse the students' interests;

e. he fails to clearly state objectives and give adequate directions as to assignments and how students could go about doing them;

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f. he does not implement or encourage activities in his class to foster leadership or responsibility in his students or to develop critical thinking, resourcefulness, or creativity;

g. his students are lethargic and disinterested; and

h. he does not review or analyze the lesson or take any steps to evaluate how much the students learned for use in future lesson plans.

5. Slovney has had a disruptive impact on the school in that:

a. his inability to deal with minor disciplinary problems has forced school administrators to spend a disproportionate amount of time and energy coming to his classroom to deal with Slovney or his students;

b. students who should be in Slovney's classes are frequently found in the school hallways disrupting other classes; and

c. he constantly calls the main office for assistance from school administrators for inconsequential matters such as a student's failure to bring his book or pencil to class.

6. Slovney has been given specific recommendations to improve those areas where he has been evaluated as unsatisfactory. Such recommendations have been provided to him verbally and in writing by the various persons who have observed his classes.

7. Slovney, who has frequently refused to discuss his evaluation with the evaluator, has not corrected deficiencies related to him.

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8. When he has discussed his evaluations, Slovney has refused to accept the constructive criticism offered, blaming the students, the principal and the school environment for the problems noted.

9. Slovney's deficiencies constitute inefficiency and/or incompetency.

10. Slovney has made an inadequate attempt to correct his inefficient performance despite the fact that he has knowledge of the corrective techniques and has been offered assistance and specific recommendations to improve himself.

11. Slovney's inefficiency has had an adverse impact on his students and has substantially diminished the Newark Board of Education's ability to provide a thorough and efficient education to Newark students.

12. Since his suspension, Slovney has not taken any action to improve his deficiencies. Rather, he believes that his classroom situation will improve apparently because the State Department of Education is now imposing stricter graduation requirements for students.

CONCLUSIONS OF LAW

The law, as it pertains to the instant case, is quite clear. The applicable statute, N.J.S.A. 18A:6-12, provides as follows:

> The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charges is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same.

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As may be gleaned from the above, an employee must be afforded at least 90 days in order to correct an alleged inefficiency. In the instant case, it is clear that respondent was afforded the requisite time period in order to correct his alleged inefficiency. On April 29, 1983, Slovney was issued a 90-day notice which provided him 90 days in which to correct and overcome the inefficiency alleged in the charges. Thereafter, on October 18, 1983 he was notified that the inefficiency had not abated and a recommendation would be made to the board to dismiss him as a teaching staff member. In view of this court's determination that the 90-day time period has been complied with and its finding, based on the testimony adduced at the hearing, that the inefficienicies had not abated, this court concludes that the charge of inefficiency is sustained.

PENALTY

In determining the appropriate penalty to be imposed here, this court has reviewed the alternatives open to it and the arguments of counsel in that regard. In so doing, this court has accepted petitioner's recommendation and concludes that dismissal is the appropriate penalty to be imposed.

Since the 1978-79 school year, Slovney has been receiving in the main unsatisfactory evaluations. Although he was given specific recommendations and suggestions to correct his teaching performance, it is apparent that many of the same problems continued to exist and were, in fact, noted again and again by different evaluators. The opportunity to correct his deficiencies was given to him on a number of occasions and it is to be noted that Mr. Slovney was transferred to another school in order to give him what can best be termed a "clean slate." Obviously, Slovney failed to heed petitioner's recommendations over the last five and a half years. More specifically, on April 29, 1983, respondent was given 90 days in which to improve his performance. Despite being advised of his deficiencies, and the seriousness of the situation, he was observed on various occasions and the same deficiencies were noted. In fact, this court has found that at the end of the 90-day period, Slovney had not improved in any specific areas and the situation in his classroom was of the same quality as it had been before. Apparently, it was Slovney's view at that time, and at the hearing held in this matter, that it was not his problem.

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Failing to believe that he needed to improve, it was, rather, his contention that the problem appropriately rested with other individuals, i.e., the principal, the chairman of the department, or the students. In fact, as difficult as it was for this court to believe, Slovney felt that he could return to his classroom and function as a capable and effective teacher based on the fact that the State Department of Education has imposed stricter requirements which would have an impact on the discipline and learning process of his students. In view of Slovney's obvious denial of the problem and his role in it, this court must agree with petitioner that there is no other remedy available to it than removal.

Moreover, of paramount importance to this court's determination that removal is the only appropriate sanction is this court's strongly held view that students are entitled to a teacher who maintains an appropriate classroom environment and order, establishes proper discipline in his classes, and utilizes appropriate and effective teaching techniques. As was stated in In the Matter of the Tenure Hearing of Frances Starego, 1967 S.L.D. 271, 274:

> The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent. The teacher in this case had more than sufficient opportunity to rectify his patent shortcomings and to prove his capacity to discharge effectively the responsibilities of a teacher in the public schools. The teacher's unfitness having been clearly demonstrated by numerous incidents, c.f. Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd 13 N.J.L. 326 (E. & A. 1944), and he having failed to correct his deficiencies after proper notice was given him, his right to continue his employment in the school system under the protection of tenure . . . is, in the Commissioner's opinion, rendered forfeit.

Similarly, in view of Slovney's inability to correct his inefficiency, and in light of the necessity to provide a thorough and efficient education for the children of the district, this court opines that dismissal is the only appropriate sanction.

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Based upon the above, it is therefore **ORDERED** that respondent be dismissed as a tenured employee of respondent.

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

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

October 4, 1984
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Oct. 5, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 11 1984
DATE

Ronald L. Tarker /sh
FOR OFFICE OF ADMINISTRATIVE LAW

tw/md/e

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APPENDIX

WITNESSES

For Petitioner	For Respondent
Robert Searson	Stanley Slovney
Charles Malone	
Louis Marolakas	
Alphonse Rossi	
Joseph Simons	
Dr. Columbus Salley	

EXHIBITS

P-1	Record of Observation of Stanley Slovney, dated October 4, 1978 (3 pages)
P-2	Record of Observation of Stanley Slovney, dated October 26, 1978
P-3	Record of Observation of Stanley Slovney, dated October 31, 1978
P-4	Record of observation of Stanley Slovney, dated March 26, 1979
P-5	Record of Observation of Stanley Slovney, dated October 13, 1979
P-6	Record of Observation of Stanley Slovney, dated November 29, 1979
P-7	Record of Observation of Stanley Slovney, dated January 7, 1980 (2 pages)
P-8	Teacher Annual Evaluation Report for Stanley Slovney, dated June 1980 (2 pages)

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P-9 Teacher Observation Report for Stanley Slovney, dated December 18, 1980 (2 pages)

P-10 Teacher Annual Evaluation Report for Stanley Slovney, dated June 1981 (2 pages)

P-11 Observation for Stanley Slovney, dated October 13, 1981

P-12 Teacher Annual Evaluation Report for Stanley Slovney, dated June 3, 1982 (2 pages)

P-13 Observation for Stanley Slovney, dated October 7, 1982 (2 pages)

P-14 Teacher Observation Report for Stanley Slovney, dated October 28, 1982 (2 pages)

P-15 Teacher Observation Report for Stanley Slovney, dated January 18, 1983 (3 pages)

P-16 Memo to Dr. Ronald Fry from Alphonse Rossi, dated June 2, 1983, attached to Teacher Observation Report for Stanley Slovney, dated May 24, 1983 (6 pages)

P-17 Teacher Observation Report for Stanley Slovney, dated October 3, 1983 (4 pages)

P-18 Teacher Observation Report for Stanley Slovney, dated October 5, 1983 (3 pages)

P-19 Teacher Observation Report for Stanley Slovney, dated October 7, 1983 (4 pages)

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OAL DKT. NO. EDU 1269-84

P-20 Memo to Mrs. Gladys Hillman Jones from Alphonse Rossi, dated October 13, 1983

P-21 Teacher Annual Evaluation Report for Stanley Slovney, dated June 1983 (2 pages)

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IN THE MATTER OF THE TENURE	:	
HEARING OF STANLEY SLOVNEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF NEWARK, ESSEX COUNTY.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed by respondent within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Upon careful and thorough review of the record and legal arguments put forth by respondent in his exceptions, the Commissioner finds and determines that the Board has clearly and strongly borne the burden of proof with respect to the inefficiency charges brought against respondent. Numerous observation/evaluation reports from 1978 through 1983 are replete with information attesting to inadequacies and inefficiencies in respondent's teaching and with suggestions for improvement offered by supervisory staff in two different schools. The Board transferred respondent to a new school setting in order to provide him an opportunity to start anew "with a clean slate" and yet evaluations continued to be overwhelmingly unsatisfactory.

The Commissioner cannot accept respondent's argument that insufficient observation and assistance were provided to him during the improvement period mandated by N.J.S.A. 18A:6-12. This statutory requirement mandates that at least 90 days be provided for improvement; it does not limit the time to 90 days. In the Matter of Lillian Levine, 1977 S.L.D. 1129, clearly stated that the 90-day minimal timeline does not toll during the summer months. Consequently, the Commissioner concurs with the judge's determination that the time period requirement had been complied with.

With respect to the adequacy of the supervision and support provided during the improvement period, respondent alleges that contrary to the Guidelines for Implementation of Tenure Employees Hearing Law issued by the Department of Education and school law decisions such as In the Matter of the Tenure Hearing of Franklin Johnson, School District of the Township of Cherry Hill, Camden County, decided July 2, 1981 and In the Matter of the Tenure Hearing of Donald Rowley School District of the Manalapan-Englishtown Regional, Monmouth County, decided May 23, 1983, rev'd. State Board May 2, 1984, the Board failed in its responsibility and duty to adhere strictly to the procedures set forth by statute and decisional law with respect to inefficiency charges.

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Specifically, respondent alleges that the Board failed to base its charges upon an analysis and synthesis of respondent's observations made over the 90-day period as dictated by In the Matter of the Tenure Hearing of Francis Starego, Borough of Sayreville, 1967 S.L.D. 271. He also alleges that its administrators failed to afford him good faith support and assistance during the improvement period, citing Rowley, supra, in support of this allegation. Respondent contends that any recommendations stemming from the May 23, 1983 evaluation (which he believes is the only observation conducted within the 90-day period) were not related to specific allegations of inefficiency. Further, and most importantly in respondent's opinion, the Professional Improvement Plan (PIP) (P-21) developed in June 1983 "reflects merely three areas of improvement with three tasks which his own October observation recognizes improvement by [him].***" (Respondent's Exceptions, at p. 6)

Respondent also argues that it is inconceivable to consider the last three back-to-back evaluations as providing assistance to him to improve any of the items set forth in the charges filed against him. In addition, he alleges that the Board itself never notified him as to whether or not any of the inefficiencies had been corrected; it merely reproduced the charges preferred against him in April 1983.

The Commissioner is unpersuaded by respondent's arguments that he was not provided opportunity and assistance to demonstrate improvement in his teaching and pupil control capabilities. Overall the teacher observation reports contained in the record are quite specific in the identification of inadequate performance. There is an abundance of suggested corrective action. As specifically regards the period of time following April 29, 1983, it is the determination of the Commissioner that the supportive efforts to bring about improvement were reasonable given the lengthy history of unsatisfactory performance and numerous attempts by administrative and supervisory staff to assist respondent in improving his performance over a 5-year period. In the May 24, 1983 observation report (P-16), the following examples of evaluative comments are contained therein:

"COMMENTS

"Section I. Classroom Environment/Management

***

Mr. Slovney sat at his desk closemouthed as the students entered the class, walked around the room and peered out of the windows. Several students entered the class after the late bell rang. Mr. Slovney did not react to their tardiness but rather sat motionless and silent at his desk.

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The lesson which I observed consisted of book work completed by some students not done by others. An assignment was written on the blackboard directing the students as to what they should do. With approximately fifteen (15) minutes remaining, Mr. Slovney interrupted the students with comments about exams, notebooks and other unrelated matters. Students talked, walked around and engaged each other in non-educational related actions.

***

"Section II. Teacher Characteristics

Mr. Slovney does not communicate with students. There existed in the class an adversative relationship between him and his students.

***

His lesson did not include any ideas that could have been acquired from a curriculum or study guide.

Mr. Slovney sat at his desk for the entire class period. He was non-communicative and subdued. His lesson was devoid of any enthusiasm or vitality.

"Section III. Lesson Implementation

Plans were available but were limited to the assignment placed on the board. The lesson plans included no objectives or follow-up assignment.

Mr. Slovney did not elicit any responses from his students. His sole method of teaching is book work.

A provision to address individual needs was non-existant (sic).

There was no sign that Mr. Slovney had or could motivate his students.

***

Mr. Slovney's method did not provide for analyzing, evaluating and reviewing the lesson.***" (P-16, at pp. 1-2)

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The following is an example of recommendations offered as suggestions to help ameliorate the overwhelming inadequacy of the lesson observed:

"RECOMMENDATIONS

"Section I

Display student's (sic) work. Post class rules and regulations.

***

Establish authority in the classroom. Bring the class under control before beginning the lesson.

Communicate with the students in the class. Use varied methods when presenting subject matter.

***

"Section II

Communicate with the students. Move away from the desk. Make the students part of the lesson that is being presented.

Use supplemental materials.

***

Use available curriculum guide to help develop lesson.

***

"Section III

Lesson plans should include objectives and assignments.

A steady diet of book work is not an acceptable method. Vary your presentations.

***

Arouse the students' interest by using materials not in the text.

Become more involved with the lesson that is being presented.

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Develop questions that generate students' interests.

Encourage discussions on the topic that is being presented. Have students offer opinions.

Have students debate the pros and cons of an issue.

Review material that has been presented through questioning. Evaluate responses to determine if students understand the objectives of the lesson.***" (P-16, at pp. 3-4)

It is noted that these recommendations were preceded by an exceedingly high number of recommendations made over the previous years for similar as well as other types of inadequate performance.

The October 3, 1983 observation report developed by an "outside" evaluator, someone who had no prior involvement in or access to respondent's evaluations and who had not been briefed before the observation, notes many of the same shortcomings and inadequacies of the many evaluation reports preceding this particular one. Examples of evaluative comments and recommendations are as follows:

"I. CLASSROOM ENVIRONMENT/MANAGEMENT

***

Little evidence of class organization was observed. It is recommended that Mr. Slovney reestablish class control by listing basic 'do's and don'ts' on the classroom chalkboard and explain each point to the students. Obviously, these class rules must be consistently enforced.

It is recommended that small cluster of desks be formed in the class where students may examine and quietly discuss maps, articles, pamphlets, etc. Clear concise guide sheets should be prepared for each 'centers of interest', which reinforce the lesson at hand.

No evidence of effective use of classroom time was observed. Mr. Slovney spent the greater part of the period placing notes on the chalkboard dealing with how archeologists figured out the meaning of Egyptian hieroglyphics. While Mr. Slovney was so engaged, some students did not take notes,

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while another student was reading a 'Snoopy' comic book, and another student was tracing from a stencil, numbers and letters onto a sheet of paper.

It is recommended that Mr. Slovney prepare lesson outlines which should be distributed to the students enabling him to concentrate his attention directly to the students and the lesson at hand, thus implementing greater class control.

"II. TEACHER CHARACTERISTICS

No evidence of a variety of print, non-print instructional materials were observed.

It is recommended that Mr. Slovney use a variety of print, non-print materials, and use resources of the school and community.

No evidence of curriculum study-guides.

It is recommended that Mr. Slovney obtain and utilize curriculum and study-guides in the construction and implementation of his lesson plans.

Mr. Slovney demonstrated little enthusiasm and vitality in the presentation of his class lesson.

It is recommended that Mr. Slovney vary his vocal and physical gestures to create excitement in his class lessons.

"III. LESSON IMPLEMENTATION

***

Teacher did not use effective instructional techniques while presenting his lesson. He spent the greater part of the period placing notes on the chalkboard. A question and answer period followed in which just a few students participated. The class in general was lethargic and disinterested.

It is recommended that Mr. Slovney vary his teaching strategy.

No individual student's needs or abilities were addressed.

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> It is recommended that teacher encourage and motivate students to outside projects, reading assignments, etc.
>
> No evidence of motivational techniques used to enhance the lesson.
>
> ***
>
> No student leadership, responsibility or skills were developed by the presentation of the lesson. The notes placed on the chalkboard were not from a properly prepared lesson plan.*** No details, no objectives, and no procedures were developed in the plan book.
>
> It is recommended that Mr. Slovney develop student leadership responsibility, etc. by encouraging student participation in class discussions, outside class assignments, etc.
>
> No activities were presented which allowed for student critical thinking and creativity.
>
> It is recommended that Mr. Slovney create class discussions, debates, issues, in which students are encouraged and motivated to express their opinions and beliefs.***"
>
> (P-17, at pp. 1-3)

There is merit in respondent's complaint that his Performance Improvement Plan (P-21) for 1983-84 was lacking in specificity and not reflective of the April 29, 1983 charges. This performance plan, as well as other years' plans, are, in the Commissioner's opinion, much less specific, detailed and comprehensive than the individual observation reports. The Commissioner is, therefore, constrained to caution the Board of the need to assure that annual performance evaluations and improvement plans are of the quality and depth intended by the format and process requirements set forth in N.J.A.C. 6:3-1.21.

Notwithstanding the above-noted flaw in this matter, the Commissioner does not believe it is a fatal flaw which would call for dismissal of the inefficiency charges. The evidence adduced in this matter amply supports the charges as levied by the Board. To overturn the recommended decision of the Office of Administrative Law because of such a procedural flaw would create a grave disservice to the children of the Newark Public Schools. The Commissioner is cognizant of the fact that the "outside" evaluator testified that he believed respondent could possibly improve with

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close supervision and technical assistance. However, it is the firm belief of the Commissioner that the Newark Board of Education has afforded Mr. Slovney more than ample opportunity to demonstrate improvement which has proven fruitless.

Consequently, the Commissioner accepts and adopts as his own the recommended dismissal of Mr. Slovney from the employ of the Newark Board of Education for the extensive reasons provided in the initial decision and herein. Said dismissal is effective as of the date of this decision.

NOVEMBER 19, 1984 COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 3492-84
AGENCY DKT. NO. 131-4/84

CHARLES R. STOCKTON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Mary Jane Cullen, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

Robert B. Rottkamp, Jr., Esq., for respondent (Merlino, Rottkamp & Flacks, attorneys)

Record Closed: September 6, 1984 Decided: October 4, 1984

BEFORE **JOSEPH LAVERY,** ALJ:

Charles R. Stockton (hereinafter "petitioner") appeals from a determination by which the Trenton Board of Education (hereinafter "Board") changed his place in the salary guide from step 15 to step 14 for the remainder of the 1983-84 school year. Petitioner contends that this decision violated N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6 as well as N.J.S.A. 18A:6-10.

PROCEDURAL HISTORY

This matter was initiated by a verified petition of appeal filed with the Department of Education on April 23, 1984. An answer followed on May 11, 1984. Thereafter the Commissioner declared the matter to be a contested case, forwarding it to

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the office of Administrative Law on May 16, 1984, pursuant to N.J.S.A. 52:14B-1 and N.J.S.A. 52:14F-1. The matter was scheduled for prehearing conference on July 2, 1984, but adjourned for cause. A prehearing conference ultimately convened on July 10, 1984, in the Trenton hearing rooms of the Office of Administrative Law. Subsequently, a motion for summary decision was filed by respondent on August 23, 1984. An answering letter brief from petitioner was filed on August 20, 1984, with a rebuttal letter from respondent following on September 6, 1984. On that date the record closed.

ISSUES

The issues in this case may be stated as follows:

1. Whether petitioner's appeal is time-barred for failure to be initiated within 90 days following the order, ruling, or action complained of, pursuant to N.J.A.C. 6:24-1.2.

2. Whether petitioner was entitled (a) to remain at step 15 of the LDTC (Learning Disability Teacher Consultant) salary guide for the remainder of the 1983-84 school year and (b) to be paid the corresponding salary.

Burden of Proof

The burden of proof in this matter falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed Facts

The parties at prehearing conference agreed to provide a stipulation of facts which were not in contention. That stipulation was submitted on August 7, 1984, and is set forth verbatim below:

1. Charles V. Stockton is employed as a Learning Disability Teacher Consultant (LDTC) by respondent and is under tenure with respondent.

2. Charles V. Stockton was first employed by respondent as an LDTC in March 17, 1980. At that time he was placed at Step 11 of the Learning Consultants' salary guide

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3. During the 1980-81 school year, Charles V. Stockton was placed at Step 12 of the guide; and he advanced one step on the guide each year thereafter until 1982-83 when he was placed at Step 14.

4. On or about April 15, 1983, respondent sent a letter of intent to offer a contract for employment for the 1983-1984 school year at an annual salary of $27,227.00, which corresponded to Step 15 of the guide. The letter of intent further noted that the salary was to be adjusted upon ratification of a new agreement.

5. Charles Stockton accepted the contract offered by respondent on or before May 20, 1983.

6. Commencing September 1, 1983, Mr. Stockton was employed at Step 15 of the original guide and was paid the corresponding salary.

7. A new agreement covering the period between September 1, 1983 to August 31, 1985, between respondent and the Trenton Education Association was adopted by respondent or or about October 4, 1984.

8. Upon adoption of the new Agreement, Mr. Stockton was placed at Step 14 and began receiving the salary corresponding to that step, i.e. $27,751. His first paycheck at the adjusted salary was received on November 9, 1983. Petitioner immediately complained to the Personnel and Business Office of this placement.

9. The salaries corresponding to the steps at issue are:

	1982-1983	1983-1984	
Steps	Salary	Steps	Salary
14	$ 26,576	14	$ 27,751
15	27,337	15	28,569

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10. On or about December 16, 1983, petitioner's attorney informed the New Jersey Education Association of petitioner's circumstance as outlined above. Petitioner sent a copy of said letter to respondent.

11. By letter dated January 30, 1984, Charles R. Stockton contacted respondent, specifically Thomas Mitchell, Assistant Superintendent-Business Administrator, and protested the reduction in his salary and requested reinstatement of his salary at Step 15 with the increments granted under the new Agreement.

12. By letter dated February 8, 1984, Thomas Mitchell of respondent Board denied Mr. Stockton's request, stating he believed Mr. Stockton's 1983-84 salary had been correctly calculated and that he had been "over-paid in the last three school years, a total of $2,106." The Board itself did not formally consider or act upon Mr. Stockton's request for reinstatement of his salary at Step 15.

13. On April 23, 1984, Charles Stockton filed a petition of Appeal with the Commissioner of Education.

14. The matter was transmitted to the Office of Administrative Law as a contested case on May 22, 1984.

15. At the prehearing conference held on July 10, 1984, it was agreed that the matter would be decided on a stipulated record with letter memoranda from all parties to be submitted by August 20, 1984.

The parties contend that the foregoing facts are sufficient to permit application of existing law, thus, the present motion for summary decision.

ADVERSARY ARGUMENTS

The positions of the parties on the two issues cited above may be described as follows:

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The Board's Argument:

Issue No. 1 - the 90-day time bar under N.J.A.C. 6:24-1.2.

The Board contends that petitioner may not pursue his claim on the merits. He is barred from so doing by N.J.A.C. 6:24-1.2. That rule precludes such an appeal unless it is brought within 90 days after receipt of a notice of the order ruling or other action concerning which a hearing is requested. Since he did not appeal within that time frame, petitioner's substantive tenure rights claim pursuant to N.J.S.A. 18A:28.5 and N.J.S.A. 18A:6-10 may not be considered. Petitioner knew upon receipt of his paycheck on November 9, 1983 that his salary had been adjusted, and corresponded to Step 14 rather than Step 15 of the salary guide. This is evidenced by his first complaint the following day to the Personnel and Business Office. His attorney did not notify the New Jersey Education Association until December 16, 1983. Although the Board believes the "triggering date" to be November 9, 1983, the instant petition is well out of time, even if December 16 were to be thought of as complying with N.J.A.C. 6:24-1.2.

Issue No. 2 - Whether, if the merits are considered, petitioner should be maintained at Step 15 for the 1983-84 school year.

In addressing this issue, the Board argues that petitioner has been overpaid for years. Were it not for his placement at Step 12 in error at the outset of the 1980-81 school year, he would have properly been at Step 14 on the salary guide during 1980-84, without dispute.

The board concedes that some cases have ruled that a board mistake in placement of a teacher on the salary guide precludes recoupment of monies by reducing the salary of an employee in the same school year. However, the board states that the common elements of those cases do not compare with the present. Here, the Board made an inadvertent error during the 1980-81 school year. Petitioner has benefitted from that mistake since then. He did not have his salary reduced in the 83-84 school year, and at no time received the higher salary to which he claims entitlement. It would be inappropriate now to reinforce an error in receipt of unearned salary benefits over a period of three years. This could occur if petitioner were in this instance given an even higher salary for another school year, even though it had never been granted by the Board.

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Finally, in no sense would this appeal's denial threaten an efficient operation of the school district. Petitioner has already accumulated a complete windfall; his past excess salaries are not going to be recouped. The Board is instead taking the limited action of placing petitioner in the proper step of the salary guide for 1983-84 school year.

Petitioner's Argument:

Issue No. 1 - the 90-day time bar under N.J.A.C. 6:24-1.2

Petitioner (as does the Board) relies on the same Supreme Court decision North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984). This case, in petitioner's view, holds that the annual increment provided under N.J.S.A. 18A:29-8 is not a statutory right, and is subject to annual evaluation by a local board. Here, however, petitioner's tenure rights pursuant to N.J.S.A. 18A:28-5 and 18A:6-10 are statutory entitlements, as envisioned by that Court. Once placement on a salary guide step is fixed, a vested right is acquired by the teacher. Here, the Board unilaterally reduced petitioner's placement on step because of an error for which the Board itself is responsible. For this reason, N.J.A.C. 6:24-1.2 is inapplicable.

Further, the doctrine of laches cannot be invoked. Applying the elements of that doctrine: it must be determined whether the length and reason for the delay, along with the changed conditions of either or both parties because of the delay, makes a time-bar inequitable. Using these criteria, the total period between the first notice of reduction and the time of filing of petition was five and a half months. Notwithstanding this hiatus, petitioner was continually communicating with the Board to resolve the matter amicably without formal process. During this entire period the Board failed to act. Only when satisfied that informal resolution was impossible did petitioner seek redress through the Commissioner of Education. No hardship would be thrust upon the respondent Board. It would only be considering a claim of which it was aware since November, 1983.

Issue No. 2 - Whether, if the merits are considered, petitioner should be maintained at step 15 for the 1983-84 school year.

As to the merits of the appeal, petitioner argues that the law is well established. Once a school Board sets a teaching staff member's salary, it cannot reduce

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it at a later date on the premise that an error was made. Here, petitioner was told on April 15, 1983 that he would be employed at a ten-month annual salary of $27,337 effective September 1, 1983 through June 30, 1984. This corresponds with Step 15, at which he was placed on the guide for more than two months. It is conceded by all that petitioner was in no way responsible for the Board's administrative error. More to the point, he was led to rely upon its salary decision. Therefore, he was entitled to the originally stated sum for the remainder of the school year.

In addition, it has been recognized that the lowering of a teacher's salary, once the step is assigned, violates N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10. Such a move conflicts with a vested right under the Teacher Tenure Act. Petitioner cannot as a tenured teacher be deprived of that right, once acquired. Consequently, the Board must credit him for the difference between Step 15 and Step 14 for the 1983-84 school year. It should consider him having remained on Step 15 for the entire year.

ANALYSIS

The following analysis addresses each of the issues in the order which they were presented above:

Issue No. 1: The 90-day time bar under N.J.A.C. 6:24-1.2.

Both petitioner and respondent correctly cite North Plainfield Ed. Ass'n. v. Bd. of Educ., supra, as applicable to these facts. However, the controlling rationale in that decision favors only respondent. That case, as this, involves a dispute over the correctness of the Board's assignment of an incremental step on the salary guide. The appeal to the Commissioner was taken in the school year following receipt of the first pay check issued at the disputed level. The Supreme Court upheld the Commissioner's ruling that the appeal was out of time, in language which is equally meaningful here:

> If the annual increment were a statutory entitlement, as the Appellate Division concluded, the ninety-day period of limitations contained in N.J.A.C. 6:24-1.2 would not apply, and the petition for prospective relief would have been timely. Because the award of the annual increment is not a matter of statutory right, but is subject to "denial, for inefficiency or other good cause," N.J.S.A. 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. The relevant regulation, N.J.A.C. 6:24-1.2, provides that a petition to determine

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> a controversy under the school laws "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."

Petitioner, citing N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, would argue that his tenure status should qualify as the "statutory right" spoken of in North Plainfield. For that reason, the 90 day requirement of N.J.A.C. 6:24-1.2 would not be relevant. This assertion is at variance with the facts of that case, and the Supreme Court's legal analysis. There, as here, the teachers involved were tenured. They appealed to the Commissioner almost one year after receiving the pay checks which alerted them. Their tenure status was noted by the court, but that tenure did nothing to impede an ultimate ruling that the teachers' complaint was untimely filed.

In the course of the instant proceedings, both parties stipulated the operative facts. Petitioner received his first pay check calculated within step 14 on November 9, 1983. He appealed to the Commissioner in the verified petition filed on April 23, 1984. On its face, petitioner's appeal is untimely, pursuant to N.J.A.C. 6:24-1.2. See also, Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

> Issue No. 2: - Whether, if the merits are considered, petitioner should be maintained at step 15 for the 1983-84 school year.

Since this decision turns on the threshold question of timeliness, the substantive merits embodied in this issue need not be addressed.

CONCLUSION

I **CONCLUDE**, therefore, based on the above findings, and for the reasons expressed in the **ANALYSIS** portion of this opinion that:

> Issue No. 1: - Petitioner's appeal is time-barred for failure to be initiated within 90 days following the order, ruling, or action complained of, pursuant to N.J.A.C. 6:24-1.2

> Issue No. 2: - This issue need not be decided, since the case turns on the threshold of timeliness issue.

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ORDER

I **ORDER**, therefore, that the motion pursuant to N.J.A.C. 1:1-13.1 et seq., for summary decision in favor of respondent, Trenton Board of Education be, and hereby is, **GRANTED.**

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

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

October 4, 1984
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

Oct. 5/1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 10 1984
DATE

Ronald J. Baker/phb
OFFICE OF ADMINISTRATIVE LAW

bc

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CHARLES R. STOCKTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter including the initial decision rendered by the Office of Administrative Law and the exceptions of the parties filed thereto pursuant to N.J.A.C. 1:1-16.4a, b and c, has been reviewed by the Commissioner.

It is observed that the ALJ in concluding that petitioner's appeal is time-barred pursuant to N.J.A.C. 6:24-1.2 relies upon the Court's recent ruling in North Plainfield, supra, to reach a finding that the award of an annual increment (N.J.S.A. 18A:29-14) is not a matter of "statutory right."

Given the uncontested facts of this matter as recited on pages 2 and 3 of the initial decision the Commissioner finds and determines that they are distinguishable from North Plainfield, supra, by virtue of the following reasons.

It is clear from the stipulated facts entered by the parties that petitioner actively sought to resolve his salary claim with the Board. Those pertinent facts in the initial decision upon which the Commissioner's reasoning is grounded are set below:

> "*** 8. Upon adoption of the new Agreement, Mr. Stockton was placed at Step 14 and began receiving the salary corresponding to that step, i.e. $27,751. His first paycheck at the adjusted salary was received on November 9, 1983. Petitioner immediately complained to the Personnel and Business Office of this placement.
>
> ***
>
> 10. On or about December 16, 1983, petitioner's attorney informed the New Jersey Education Association of petitioner's circumstance as outlined above. Petitioner sent a copy of said letter to respondent.

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11. By letter dated January 30, 1984, Charles R. Stockton contacted respondent, specifically Thomas Mitchell, Assistant Superintendent-Business Administrator, and protested the reduction in his salary and requested reinstatement of his salary at Step 15 with the increments granted under the new Agreement.

12. By letter dated February 8, 1984, Thomas Mitchell of respondent Board denied Mr. Stockton's request, stating he believed Mr. Stockton's 1983-84 salary had been correctly calculated and that he had been 'over-paid in the last three school years, a total of $2,106.' The Board itself did not formally consider or act upon Mr. Stockton's request for reinstatement of his salary at Step 15.

13. On April 23, 1984, Charles Stockton filed a petition of Appeal with the Commissioner of Education.***"

(Initial decision, at pp. 2-3)

The specific provisions of N.J.A.C. 6:24-1.2 read as follows:

> "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.***" (Emphasis supplied.)

In the Commissioner's judgment petitioner received a written answer from the Board's Assistant Superintendent/Business Administrator on February 8, 1984, which denied his claim for compensation on Step 15 of the new salary guide.

Thereafter, petitioner filed his appeal with the Commissioner on April 23, 1984.

The Commissioner finds and determines that the pertinent period of time which elapsed between February 8 and April 23, 1984 is less than the 90 days set forth in N.J.A.C. 6:24-1.2.

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Accordingly, having found that petitioner's appeal in the instant matter is timely, the Commissioner hereby reverses that recommended finding and conclusion in the initial decision and remands this matter to the Office of Administrative Law for further proceedings with respect to the merits related to Issue No. 2, ante, of petitioner's claim against the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1984

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 10120-83
AGENCY DKT. NO. 134-4/80
(EDU 6014-81 REMANDED)

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,
MERCER COUNTY,
Petitioner,
v.
UPPER FREEHOLD REGIONAL
BOARD OF EDUCATION,
MONMOUTH COUNTY; PLUMSTEAD
TOWNSHIP BOARD OF EDUCATION,
OCEAN COUNTY; AND MILLSTONE
TOWNSHIP BOARD OF EDUCATION,
MONMOUTH COUNTY,
Respondents.

David W. Carroll, Esq., for petitioner (Baggitt, Mancino & Carroll, attorneys)

Peter P. Kalac, Esq., for respondent Upper Freehold Regional Board of Education (Kalac, Newman & Griffin, attorneys)

Henry G. Tutek, Esq., for respondent Plumstead Township Board of Education (Kessler, Tutek, Futey & Gladfelter, attorneys)

William J. Mehr, Esq., for respondent Millstone Township Board of Education (Cerrato, O'Connor, Mehr & Saker, attorneys)

Record Closed: September 28, 1984 Decided: October 9, 1984

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OAL DKT. NO. EDU 10120-83

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

The Washington Township Board of Education petitions to end the sending-receiving relationship between it and the Upper Freehold Regional Board of Education. Matter on remand from the State Board of Education to the Commissioner of Education, thence to the Office of Administrative Law.

An initial decision was filed with the Commissioner of Education on August 3, 1983, and adopted by him on September 20, 1983. An appeal to the State Board of Education followed. On December 9, 1983, the State Board remanded "for the express purpose of supplementing the record and resolving the overcrowding issue which is the sole issue on which Washington Township's application rests."

A prehearing conference was held on January 20, 1984. The matter was heard on March 15 and 16 and April 6, 1984. Counsel were given a short period in which to make post-hearing submissions. The untimely death of petitioner's counsel forced a delay in submissions. On August 23, 1984, a motion to supplement the record was heard and decided. The record ostensibly closed on that date. On September 25, the Upper Freehold Regional Board filed another motion to supplement the record. The motion was decided on September 28, 1984.

I

The Allentown High School principal testified that, at the mid-point of the 1983-84 school year, the total on roll at the school was 815 pupils (R-26). However, because of attendance at alternative and vocational programs as well as cooperative education and senior release programs, the greatest number of pupils in the building in the morning session was 727 and the greatest number of pupils in the building in the afternoon session was 698. Both of these figures assume no absences.

The principal also testified that no classes are held simultaneously in the auditorium. Although that space is approved instructional space, it is not used for the instruction of more than one group at any one time.

The average class size for 1983-84 is 18.4 pupils. Two classes have more than 45 pupils but these are chorus and band classes.

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The County Specialist/Supervisor, who is also the Thorough and Efficient Monitor for the County Office of Education, testified that the annual evaluation report for the Upper Freehold Regional District for 1982-83 was most laudatory (R-29). Among other things, the report states:

> All facility modifications are nearing completion, with ramp and other modifications for the physically handicapped provided, according to 504 requirements. The district lawsuit against the architect and contractors, re roof construction problems, was resolved in favor of the district. Central office operations are now housed on campus effecting a $7,000 savings in yearly rental fees.

During discovery in this matter, Washington Township submitted to the respondent a copy of a report prepared by a consultant hired by it (P-8). The report deals with the functional capacity and usage of Allentown High School. It adverts at one point to the curriculum at Allentown High School as being "on hold." The County Specialist/Supervisor stated that she cannot agree. In fact, she finds quite the opposite. The report also states that the district must look to new graduation requirements by offering new programs. The county monitor stated that the district has always met and exceeded state standards for graduation. Health, safety and driver education are being offered within the 150-minute per week health, safety and physical education requirement.

In contrast to the Washington report, which refers to the elimination of science laboratories because of crowding, she observed that when she makes an on-site visit, pupils are present. She found a one-teacher to 17-pupil average in each of the classes she visited, hardly an overcrowded situation. A seven-period day would not cure overcrowding by itself. The district recently adopted a seven-period day to eliminate study halls. If the district were trying to save space, it would add periods to the day. Presently, some eighth grade pupils are allowed into the high school for a hands-on shop program. Again, this hardly indicates overcrowding. In summary, the county monitor stated that the district is at the point of being commended on its programs. The current situation is good and is not in need of change. The program and pupils are not overcrowded.

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The Chief Educational Consultant, Bureau of Facility Planning Services of the New Jersey Department of Education, testified. He stated that since September 1983, he has done a facility evaluation of Allentown High School (R-31). In 1980, he calculated a functional capacity of 712 pupils (P-17). His recalculation of September 13, 1983, was done after two greenhouses were approved at instructional areas.

The newly computed capacity is, preliminarily, 856 pupils. The greenhouses account for part of the difference. The balance of the difference is accounted for by assignment of 40 pupil stations in music to the auditorium stage. Architects' plans certified that the stage is now used for music. It was approved for permanent use by the State Department of Education and no further approval is required.

The auditorium itself is designed with fixed seating. Approximately nine square feet per pupil is provided. However, when an auditorium is used for instructional purposes, the Bureau is expected to use professional judgment in assigning a number of pupil stations to the area. In his judgment, he assigned 200 pupil stations.

Two classrooms, formerly comprising 50 pupil stations in the aggregate, were divided with State Department approval into four new rooms. Each of these is used as a special education instructional area with a capacity of eight pupils. This reduces the number of pupil stations from 50 to 32. This also reduces the preliminary capacity figure of 856 to 838. In addition, a previously undersized academic classroom was converted into a drafting room. It has been assigned 17 pupil stations. This latter change, however, was already accounted for.

When the 1981 roof repair was effected, the Board had to supply architects' plans to the State Department of Education. Those plans show this room as a drafting room. They were approved by the State Department of Education and, today, that room is permanently approved as a drafting room.

The Bureau has not assigned any capacity to any substandard space. The functional capacity of Allentown High School today is 838 pupils.

An architect employed by Upper Freehold Regional School District also testified. He is a New Jersey-licensed architect and has been involved in more than 120 school projects.

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He stated that he did the architectural work in connection with the 1981 roof structure. The plans he drew for that project were approved. He testified, as did the State Department representative, that rooms 22 and 23, originally designed as two classrooms, have since been divided with the approval of the State Department into four smaller areas used for special education. Approval of every room was given by the State Department of Education before the district was allowed to proceed with the roof project.

In connection with the roof project, lavatories, exits and partitions were revamped. The architect's office did a functional capacity based on State Department guidelines. The witness testified that until five or six years ago, the Bureau went by the guide book (R-32). During and since the energy crises, the Bureau began to allow proration of space if an area did not meet the minimum square foot requirements. For example, if a minimum of 1,200 square feet were required for 20 pupils and a school had 9,000 square feet in a particular area, the Bureau would allow the area to be used by 15 pupils. The number of square feet per pupil is not reduced; the Bureau merely allows a proration of space. In any event, the Bureau requires an identification of function for each room when any plan is submitted. At Allentown High School, when a classroom was converted to a drafting room, additional lighting was required and provided. The space could not have been approved otherwise.

The consultant employed by the Washington Township Board of Education testified that he computed a functional capacity of Allentown High School at the request of the Washington Township Board. He reviewed existing information at the county office and at the Bureau of Facility Planning Services. He also visited the school, took certain measurements and got official enrollment figures. His report (P-8) to the Washington Township Board contains his findings.

The witness testified that he looked at the functional capacity, projected enrollment and curriculum of the school. His report stressed the functional capacity and projected enrollment. He measured instructional areas only. He did not use the auditorium in his calculations nor did he use the stage. He did not include any substandard areas. He did not consider the drafting room because, in his opinion, it was a substandard space.

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The witness also found that between 1982 and 1984, Washington lost 34 pupils overall. Washington Township sends only about 56 percent of its eighth grade pupils to Allentown High School.

He found no double period laboratories in any science, no health safety or driver education listed on the master schedule but did find study halls listed on the master schedule. In his opinion, if 700 pupils were in the building, there would be more flexibility.

On cross-examination, the witness testified as to certain typographical errors in his report. He stated that the State Department method set forth on Bureau of Facility Planning Services forms was used. He stated further that those who work for the Bureau are taught how to do these calculations. In his report, he took the Bureau worksheet and applied numbers he derived from a review of plans and visits to the facility.

He stated that he was not sure if a definition of functional capacity appeared in administrative code or statute. The witness said, "It is the capacity of the school to handle students." He also stated that Allentown High School is doing this, but only because it is placing pupils in substandard rooms.

The witness testified that professional judgment does play a great part in the determinations required to calculate a functional capacity. Five or six calculations in his report reflect differences in professional judgment, differences in measurements and differences in figures provided by architects. He strictly applied all procedures and used his professional judgment.

The witness acknowledged that column V in the building capacity worksheets speaks in terms of gross area in square feet, but that he did not measure storage areas, offices and the like. When the Bureau sets a functional capacity, that is the official capacity of the building, although he might disagree professionally.

When asked why he made two visits to Allentown High School, the witness replied that he did not have to measure all rooms because he assumed that all academic classrooms contained 650 square feet or more. On the first visit he measured approximately 20 rooms. He made errors on the measurements of perhaps three. The superintendent helped him to make the measurements. The two men then went over the

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figures in the superintendent's office. That night, the superintendent telephoned him and pointed out errors of some 200 square feet.

On his second visit to Allentown High School, the witness looked at substandard rooms identified on the basis of information from the County Superintendent.

The witness agreed that the functional capacity of the building is the same as the size of the building, but that programmatic use affects the functional capacity even though there may be no change in building size. The official functional capacity of the building is established by the State Department at the opening of the building. It stays the same unless there is remodeling, expansion or change in programmatic use. If an academic classroom is not 650 square feet or more, it is not necessarily substandard. Prorated use is allowed. There are times when the maximum gross area of a room is less than 600 square feet, but the room is not substandard. The only way a room can be substandard on the basis of size alone is for it to be less than 300 square feet. A label, that is, the name given to a room, can affect approval.

The witness assigned no capacity to the classrooms that are now subdivided because he was aware of no State Department of Education approval for their use. He agrees that the application for approval can follow the subdivision. If the rooms were approved, he would accept the 32-pupil figure presented by the Bureau witness. This would raise his functional capacity figure to 722.

He assigned no pupil capacity to the drafting room. He heard the architect testify that plans were submitted to the Bureau and that lighting was upgraded. If the area were approved, the witness agrees that he would have to add 17 pupil stations to his functional capacity figure making a new total of 739.

The witness also stated that the stage and auditorium are part of the original building and, as such, are approved spaces. A functional capacity was assigned to the auditorium when it was originally approved and a functional capacity is assigned to it now. However, he did not assign any capacity in his report. The functional capacity of the auditorium is determined within the discretion of the Bureau. The Bureau's witness assigned the capacity of 200. He would have given the same capacity. The stage is part of the approved auditorium.

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The witness also stated that he equated small unapproved areas to regular classrooms with 25 pupils each. His figure cannot yield a number of pupils in unapproved facilities. It is only his estimation of substandard teaching stations.

The witness corrected an earlier statement concerning violation of state graduation requirements, stating, "It's really a requirement of colleges." He knows of no violation of any State rule as to laboratories. The district meets all State graduation standards.

In conclusion he stated that the district does not meet State graduation requirements in health and safety education based on the master schedule that he reviewed. If health and safety education are given, then the district meets the requirements. The witness did hear the county monitor testify as to these offerings. He further stated that he does not know or know from the master plan if gym classes are actually at the level he states in section VI 4 of his report.

A ten-year projection of Allentown High School pupils shows a steady decline with the number dropping to under 600 within six years. Nevertheless, in his opinion, if the district were not using substandard instructional areas, it would have to institute an eight-period day. Adding one period to the day is the equivalent of adding 46 teacher stations.

The witness also stated that an error in which he maintained that 28 percent of the space at Allentown High School is substandard rather than the actual 11 percent was due to the press of time. It was not an error of calculation but merely a typographical error. The witness also maintained that he knew things that the Bureau representative did not know, although it is not clear in the record what those things are.

The Freehold Regional Superintendent testified that the present enrollment is 815 pupils. He produced a 13-year history of actual enrollments from State Aid Reports (R-39). The Washington consultant's projections (P-9) are higher than the actual figures.

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The superintendent also testified that the high school recently adopted a seven-period day. This was an educational decision and was aimed at eliminating many, if not all study halls. The current school day runs from 8:00 a.m. to 2:15 p.m. If an eight-period day were reestablished, 41 teaching stations would be realized. This is the equivalent of a 14 plus percent space increase.

However, the district decided for educational reasons to adopt a seven-period day and at the same time to add six minutes of instruction to each of the seven periods. This represents 129 hours of additional instructional time in each due year.

The superintendent stated that the health, safety and driver education programs were all approved by the Department of Education on July 2, 1981.(R-41a, 41b, 41c, 41d). In addition, Career Education is required for all pupils.

The superintendent also testified that he was unaware of State Department approval of room 10 for some time after it actually was approved. He testified further that there are no double laboratories in physics planned for the 1984-85 school year but double laboratories in chemistry and biology are planned for that year. The chairman of the department and the physics teacher did not recommend double physics laboratories.

All counsel and the administrative law judge sitting toured Allentown High School on March 16, 1984.

II.

During the pendency of this matter, Upper Freehold moved to supplement the record. Washington Township opposed. Upper Freehold offered a letter, dated August 9, 1984, from the Chief Safety Consultant, Bureau of Facility Planning Services, to the County Superintendent and concerning six specific areas in Allentown High School. After hearing arguments on the submission, I admitted the first numbered paragraph of the letter into evidence. It states:

> Room No. 10 was approved for instruction as part of the original construction and remains an approved room. However, since the area of the room is only 860 square feet, based on 56 square feet per pupil, the room is limited to 15 pupils for a drafting class. [R-45]

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The remaining five points were not admitted because the language of each is prospective. The language speaks of what must be done in order for the respective areas to become approved space.

A letter dated July 26, 1984, from the County Superintendent of Schools to the Upper Freehold Superintendent, was denied admission. Although it deals with substandard areas in Allentown High School, I noted that the County Superintendent, while he has the authority to approve the use of substandard rooms, cannot declare a room standard as that authority lies only in the Bureau of Facility Planning Services.

Subsequently, Upper Freehold offered the occupancy permits for rooms 22 and 23, as subdivided, issued under the Commissioner's hand on September 20, 1984. These were admitted as official records of the Commissioner over the objection of Washington Township on September 28, 1984 (R-46).

Each of the admissions is an official statement by the Commissioner of Education or his agent concerning the subject that is the essence of this case, the pupil capacity of Allentown High School. As such, each bears directly on the findings of fact that must be made and that are necessary to an informed conclusion.

III.

Having reviewed the entire record in this matter, I **FIND:**

1. The official functional capacity of Allentown High School is 838 pupils, excluding any substandard areas, as established by the Chief Educational Consultant of the Bureau of Facility Planning Services.

2. The total number of pupils on roll as of January 31, 1984, was 815.

3. Maximum pupil attendance, assuming no absences, in the morning session is 727.

4. Maximum pupil attendance, assuming no absences, in the afternoon session is 698.

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5. Even if all pupils were present in each session, the building would be at least 23 pupils below functional capacity.

6. Even if the functional capacity were 739 pupils as established in testimony of the consultant employed by Washington Township, the functional capacity would not be excluded in either session.

7. The County Specialist/Supervisor has observed no overcrowding.

8. An on-site visit by the administrative law judge sitting made on March 16, 1984, revealed no evidence of overcrowding.

The testimony of the Washington Township consultant contained several inconsistencies. I do not believe, however, that he exhibited any bias or improper motive. Nevertheless, mistakes are relevant to credibility even though they do not render the testimony inadmissible. Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). An administrative tribunal may accept or reject in whole or in part the testimony of any witness. Application of Howard Sav. Bank, Newark, Essex Cty., 143 N.J. Super. 1 (App. Div. 1976).

In this matter, the parol and documentary evidence offered by the Washington Township consultant simply lack the probative force of that put forward by the Chief Consultant of the Bureau of Facility Planning Services. Even if the two calculations weighed equally, however, the calculation of the Department of Education expert is the official capacity as the private consultant conceded in his testimony.

In consideration of the above findings of fact, I **CONCLUDE** that the petitioner district has not shown that Allentown High School is overcrowded and the respondents have clearly demonstrated the converse. The Upper Freehold Regional School District, despite the many problems with which it has been plagued in recent years, has demonstrated healthy curricular growth and steady improvement of facilities.

Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

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OAL DKT. NO. EDU 10120-83

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

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

9 OCTOBER 1984
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10/10/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 12 1984
DATE

Ronald L. Parker /pbt
OFFICE OF ADMINISTRATIVE LAW

bc

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EXHIBITS

The following exhibits were added to the record upon hearing on remand.

P-8 Report to Washington Township School District, February 1984

P-9 Report of the Feasibility of Regionalization of Selected Districts in Mercer, Monmouth, and Ocean Counties, February 1982

R-26 Allentown High School Enrollment as of February 1984

R-27 Monthly Report of Allentown High School Vice Principal in Charge of Attendance, February 1984

R-28 Average Class Size Figures for 1983-84, 22 pp.

R-29 Letter, Hughes to Sokolow and Henderson, 6-1-83

R-30 Letter, Hughes to Sokolow and Henderson, 6-1-82

R-31 Report of Bureau of Facility Planning Services, 9-13-83

R-32 School Capacity Bulletin, Revised 1977, 27 pp.

R-33 Application for State Aid, 1984-85, 6pp.

R-35 Letter, Garin to Mehr, 3-14-84

R-36 Letter, Radcliffe to Bouman, Blanche, Faridy, 9-30-81

R-37 Summary, Curriculum Innovations and Changes, 1978-79 to 1982-83, 8 pp.

R-38 Curriculum proposal approved by Upper Freehold Regional Board of Education, 3-14-84

R-39 Thirteen-year history of actual enrollments from State Aid Reports

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R-40 Report on Library Use, 3-2-84

R-41a Application for Approval of Changes in Secondary School Program, Health, 5-21-81, approved 6-2-81

R-41b Application for Approval of Changes in Secondary School Program, First Aid, 5-21-81, approved 6-2-81

R-41c Application for Approval of Changes in Secondary School Program, Driver Education, 5-21-81, approved 6-2-81

R-41d Application for Approval of Changes in Secondary School Program, Human Behavior, 5-21-81, approved 6-2-81

R-42 Program of Studies, 1982-84, 40pp.

R-43 Course Selection Guide, 1984-85, 66pp.

R-44 Floor Plan for Allentown High School

R-45 Parts of letter, Holcombe to Hughes, 8-9-84

R-46 Certificates of Occupancy, 9-20-84

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WITNESSES

Richard Simon

Evelyn Bieber

Michael Macaluso

Jamil Faridy

Roy Wager

Stephen Sokolow

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BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER FREEHOLD REGIONAL, BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record and initial decision on remand have been reviewed. The matter was remanded to the Commissioner "for limited further proceedings on the issue of overcrowding." (State Board decision, dated December 7, 1983) Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. Motions to supplement the record were also filed by both parties.

The Commissioner notes, for purposes of clarification, that the previous initial decision was filed with the Commissioner on August 5, 1982 and was adopted by him on September 20, 1982.

Petitioner excepts to each of the eight findings of fact reached by the Office of Administrative Law and the conclusion that Allentown High School is not overcrowded. It also excepts to the absence of any findings related to a number of issues it considers to be key. Further, petitioner believes that the initial decision fails in its analysis of the credible evidence and documentation, as well as failing to follow the State Board's directive on remand for a complete analysis of all the evidence.

Petitioner offers seven findings of fact and four conclusions of law which it believes are fully supported by the evidence.

Petitioner contends, inter alia, that the judge did not adequately address the discrepancies between Dr. Macaluso's official determination in 1980 that the functional capacity of the high school was 712 and the 1983 figure of 856. Petitioner cites what it believes to be two errors in the 1983 report, namely the allocation of 32 pupils to four resource rooms rather than 20 as prescribed by N.J.A.C. 6:28-4.2 (b) (2) (v) and in the figure assigned to instructional capacity to the auditorium. Further, petitioner contends that Dr. Macaluso inconsistently treated classroom #6 in 1980 and 1983 and that there is no credible evidence to support its approval

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as a classroom, factors which it believes the initial decision failed to address. By petitioner's calculations, the functional capacity for Allentown High School should be 731.

In addition to the above, petitioner contends that the January 31, 1984 enrollment figure of 815 used by the judge is erroneous, asserting that the September 30, 1983 figure of 831 reported for state aid purposes should be used. Petitioner also questions why substandard facilities continue to be used by the high school if no overcrowding exists. It further questions why the county office's annual report has not recommended remedying the use of substandard facilities, particularly in light of recent legislation limiting the county superintendent's temporary approval of substandard space under N.J.A.C. 6:3-1.17. See N.J.S.A. 18A:33-1.1 (c. 373, L. 1983).

Upon careful and thorough review of the record, the decision on remand of the Office of Administrative Law and exceptions put forth by the parties, the Commissioner concurs with and accepts as his own the judge's conclusion that Allentown High School is not overcrowded. The Commissioner cannot support petitioner's contention that the judge failed in his analysis of the credible evidence and documentation; nor does he agree that there was a failure to adhere to the State Board's directive on remand.

The State Board expressly remanded this matter for further findings of fact with respect to the issue of overcrowding of Allentown High School. It is the belief of the Commissioner that ample, exhaustive evidence, testimony and documentation were received to the record and carefully considered by the judge in order for a determination to be made with respect to the issue of overcrowding, even assuming arguendo that the judge's on-site visit to the high school should be discounted as petitioner argues.

The Commissioner supports the judge's conclusion that the official functional capacity figure of 838 established by and attested to by the Chief Educational Consultant, Bureau of Facility Planning Services, is the figure to be considered in arriving at a determination relative to the issue of overcrowding. Absent a substantive showing of demonstrable error or flaw warranting the discrediting of the official capacity figure accepted by the trier of fact, the Commissioner will not overturn said finding of fact. Even if the capacity of the special education classrooms were strictly limited to 5 (assuming no request for or granting of a waiver as permitted by N.J.A.C. 6:28-4.2(c)), the figure would be reduced to 826 which still exceeds the January 31, 1984 enrollment figure of 815.

The Commissioner is unpersuaded that the judge erred in relying on the enrollment figure of 815 or that the figure is suspect as alleged by petitioner. In the Commissioner's judgment it was a reasonable prudent decision on the part of the judge to

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utilize a figure more current than the September 30, 1983 count in order to have more precise enrollment data available in reaching a determination in the instant matter.

Even assuming full attendance at all times by every enrolled pupil and a special education capacity limited to 20 for the four instructional areas in question, the functional capacity of Allentown High School is not exceeded.

The Commissioner, therefore, accepts and adopts as his own the recommendation of the Office of Administrative Law that the Petition of Appeal be dismissed. The motions to supplement the record submitted by the parties are denied because, in the Commissioner's judgment, the record as it stands provides ample support for reaching a final disposition of this matter. Petitioner has failed to establish good and sufficient reason for the withdrawal of Washington Township from its sending-receiving relationship with Upper Freehold Regional School District.

NOVEMBER 29, 1984 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 110-84
AGENCY DKT. NO. 405-11/83A

JOHN POLAHA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., for the petitioner

Robert J. Pryor, Esq., for the respondent (Capizola and Fineman, attorneys)

Record Closed: September 18, 1984 Decided: November 1, 1984

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

This matter concerns the petitioner's allegation that he is entitled by seniority to the positions of Community Education Enrichment Courses Coordinator and Director of the Adult High School. The Board of Education of the Buena Regional School District (hereinafter referred to as "Board") denied the allegation 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.

The petitioner filed a motion for default judgment alleging that the Board's answer was not filed in a timely fashion. Mr. Pryor submitted a written memorandum opposing the motion and Administrative Law Judge Lillard E. Law denied the motion on January 26, 1984.

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A prehearing conference with the undersigned was held by way of a telephone conference call on February 23, 1984, and it was agreed that the issues in the matter are:

(a) Whether the petition was filed within 90 days as required by N.J.A.C. 6:24-1.2.

(b) Whether petitioner is entitled by seniority to the dual positions of Community Education Enrichment Courses Coordinator and Director of the Adult High School.

(c) Whether the petitioner has any tenure or seniority rights as a result of holding the position of Community Education Director.

(d) Whether the Board acted in an arbitrary or unreasonable matter when it did not offer the petitioner the position in the adult high school.

(e) Whether the petitioner waived his right to the position of Community Education Enrichment Courses Coordinator.

As provided by the prehearing order, Mr. Pryor submitted on March 12, 1984, a motion to dismiss on the basis that the petition was not filed within 90 days as required by N.J.A.C. 6:24-1.2. Mr. Schwartz submitted a response to the motion on April 18, 1984. With my permission, the parties submitted additional information regarding this motion (Mr. Pryor's letter on May 4, 1984, and Mr. Schwartz's letter on May 16, 1984).

After reviewing the arguments on the motion, I informed the parties during a telephone conference call that I could not render a decision since there were factual disputes and I suggested that the parties enter into a stipulation of facts. Because the parties could not agree to a stipulation as to all the pertinent facts, the hearing took place on August 2, 1984. After receipt of briefs, the record in this matter closed on September 18, 1984.

At the hearing, the parties presented a stipulation setting forth the following facts (J-1):

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(1) In August 1979, John Polaha was hired to fill the position of Community Education Director which recently had been created by the Buena Regional School Board (J-20, J-21). The position required a principal's certificate. Mr. Polaha was rehired in 1980, 1981 and 1982 (J-22, J-23, J-24, J-25).

(2) The duties performed by Mr. Polaha consisted of:

(a) directing and running the Community Enrichment Education Program consisting of the offering of non-credit evening courses open to members of the community;

(b) directing the adult high school, which consisted of a program to permit adults to obtain a high school education and diploma;

(c) coordinating facility utilization, which involved the scheduling of activities which would take place in the various schools and facilities outside of normal school hours.

(3) In January 1983, the superintendent advised Mr. Polaha that he was recommending elimination of the position.

(4) On February 17, 1983, the superintendent directed a memo to that effect to Mr. Polaha (J-2).

(5) On February 25, 1983, Mr. Polaha responded to the superintendent (J-3).

(6) On March 8, 1983, the Board eliminated the position of Community Education Director (J-4).

(7) On March 11, 1983, the superintendent informed Mr. Polaha that the position was eliminated and that he would not be recommended for a contract for school year 1983-84 (J-5).

(8) On April 14, 1983, the superintendent advised Mr. Polaha that he would not be recommended for reemployment for 1983-84 (J-6).

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(9) On April 18, 1983, the Board acted on this recommendation (J-7).

(10) On April 19, 1983, the superintendent advised Mr. Polaha that he was not rehired (J-8).

(11) By an undated letter, Mr. Polaha requested to be paid for accumulated vacation days (J-9).

(12) On July 12, 1983, the Board of Education redistributed the duties of the former Community Education Director to (a) a part-time position, and (b) an existing administrator (J-10).

(13) A job description was advertised on July 14, 1983 for the part-time position of Community Education Enrichment Course Coordinator (J-11, J-12).

(14) On July 23, 1983, Mr. Polaha wrote to the superintendent requesting appointment to that position (J-13).

(15) By letter received on September 26, 1983, Mr. Polaha again requested the position, but not at the established salary (J-14).

(16) By letter of September 30, 1983, the superintendent attempted to clarify the position to Mr. Polaha (J-15).

(17) By letter of October 17, 1983, to Mr. Polaha's attorney, the position was offered at $10 per hour (J-16).

(18) Mr. Polaha replied on October 27, 1983 (J-17).

(19) Mr. Wodlinger replied by letter of November 1, 1983.

(20) Thereafter, Mr. Schwartz filed this appeal on November 9, 1983.

(21) The Board, on September 27, 1983, authorized the superintendent to appoint administratively an interim administrator to the position (J-18).

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(22) On October 4, 1983, the superintendent appointed the high school principal to direct the enrichment program on a temporary basis (J-19).

At the hearing, Mr. Polaha testified that he was hired by Mr. Field primarily to set up and operate an Adult High School Program. However, because of some reluctancy to initiate such a program on the part of the Board and others, the Adult High School Program did not start until September 1982.

When he was hired, Mr. Polaha did not have a New Jersey certificate as a principal, but received the certificate shortly thereafter based on his prior adult education experience in Michigan.

From the time he was hired and until September 1982, Mr. Polaha's main responsibility was to set up and operate the Community Enrichment Program. This program consisted of non-credited courses offered during the evening hours. There were three semesters during the year, and the type and number of courses varied each semester. Each course was for about eight weeks and during any given semester, there were up to 20 different courses offered to the public. Mr. Polaha, subject to the supervision of Mr. Field, was responsible for the determination of the type of courses to be offered and the selection of teachers. The teachers for this program did not have to be certified.

When the Adult High School Education Program started in the 1982-83 school year, Mr. Polaha spent about 60 percent of his time on this program and the remainder of his time on the County Community Enrichment Program. The curriculum for the adult high school is mandated by the State Department of Education. Mr. Polaha selected, subject to the approval of Mr. Field, the four certified teachers who taught the credit courses in this program.

In addition, Mr. Polaha was responsible for the coordination of building use, which meant that any citizen group that wanted to use a school facility would have to make the arrangements through the petitioner. Also, during summer 1982, the petitioner was in charge of the six-week makeup credit program for the day students for the 9th through 12th grades and Mr. Polaha did not receive any extra pay for this summer position.

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At the time of his termination, Mr. Polaha's salary was $30,613 a year (J-24). It was Mr. Polaha's understanding that the Board received state money for part of his salary.

After he was terminated at the end of the 1982-83 school year, Mr. Polaha sought another position and he worked as a full-time teacher for Atlantic County College from July 17, 1983 through June 30, 1984. Mr. Polaha's employment was temporary since he was filling in for a teacher on maternity leave.

Mr. Polaha stated that he learned about the part-time position of Community Education Courses Coordinator (P-11, P-12) when he saw the advertisement for the position on or about July 14, 1983. Mr. Polaha felt that this position was for the same job he held and that he was entitled to the position. There was no advertisement for any position relating to the supervision of the Adult High School Program.

Mr. Field testified that the Board still has a Community Enrichment Program and an Adult High School Program. According to Mr. Field, it is a state requirement that the Adult High School Program be under the supervision of a person with a New Jersey Principal Certificate. After Mr. Polaha's position was terminated, the Board placed Mr. Field in charge of that program and Mr. Field was not given any extra compensation for this responsibility.

After the position of Community Enrichment Courses Coordinator was advertised and no one applied who was willing to accept the position as advertised, Mr. Field designated Mr. Soboloski, the high school principal, to be in charge of this program (J-19). Mr. Field stated that the high school principal receives extra pay for the time he spends as Community Enrichment Courses Coordinator. This extra pay is based on a rate of $10 per hour, and Mr. Soboloski usually works approximately three to four hours a night, four nights a week.

Mr. Field stated that a counselor-broker is required for the Adult High School Program and that the person is paid $10 per hour. There was a counselor-broker for the Adult High School Program while Mr. Polaha was in charge of the program.

According to Mr. Field, the state does pay a stipend for certain vocational education programs offered as part of the Community Enrichment Program and the state

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has provided some money towards the salary of Mr. Polaha which the Board no longer receives since it does not have a full-time person employed to run the Adult High School Program.

As to the facilities coordination responsibilities formerly performed by Mr. Polaha, Mr. Field stated that each principal now performs this function for his/her individual school.

Mr. Field stated that he created the position of Community Education Director since he felt that such a position was necessary and at that time, the state was providing financial incentives to help defray the cost of such a program. Mr. Field recommended the elimination of the petitioner's position since there was a decrease in student enrollment and in state and federal monies available for education. According to Mr. Field, the money saved by the elimination of the petitioner's position can be used for school programs with higher priorities.

Charles B. Hawn, Jr., the business administrator for the Board, testified that the Board received $6,000 a year to help defray the salary cost for Mr. Polaha's position, and that the Board saved approximately $28,000 a year when it eliminated the petitioner's position.

I **FIND** that these additional facts, as set forth above, are not in dispute and are pertinent in this matter.

At the conclusion of the petitioner's case, Mr. Pryor renewed his motion to dismiss on the basis of noncompliance with N.J.A.C. 6:24-1.2. Mr. Pryor argued that the petition was not filed within the 90-day period after the petitioner saw the July 14, 1983 advertisement for the part-time position of Community Education Enrichment Course Coordinator. Mr. Schwartz argued that there was a continuing wrong in this matter and that N.J.A.C. 6:24-1.2 was not applicable.

After hearing the arguments, I denied the motion to dismiss indicating that the record clearly indicates that after Mr. Polaha became aware of the part-time position around July 14, 1983, he entered into negotiations with the Board to try to secure an acceptable position. When it appeared in the later part of October 1983 that a negotiated settlement would not be reached, Mr. Polaha filed the petition in November 1983. Based

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on these facts, I **CONCLUDE** that Mr. Polaha should not be penalized for his attempt to settle the matter through negotiations, that the 90-day period did not start until the later part of October 1983, and that the petition was filed in a timely manner consistent with N.J.A.C. 6:24-1.2.

As a witness for the respondent, Mr. Field stated that he initially recommended the abolishment of the Community Education Director position in January 1982. At that time, the Board asked him to conduct a study regarding the matter and Mr. Field reviewed the job objectives of the position of Community Education Director, the cutback in funds available for evening education programs, the various newly mandated state programs and the declining enrollment of students. Mr. Field conducted an informal survey and determined that most boards in the surrounding communities employed a part-time person to operate their evening education programs. Mr. Field concluded that the responsibilities of the Community Education Director could be handled by existing staff and the creation of one part-time position, and he again recommended the abolishment of the position of Community Education Director in January 1983.

Mr. Field stated that by law the person in charge of the Community Enrichment Program did not have to have a principal certificate and, therefore, the advertisement for the part-time position did not contain such a requirement. According to Mr. Field, there was no advertisement of a position to supervise the Adult High School Program since no new position was created and the Board designated him to administer this program.

Mr. Field testified that he does supervise the Adult High School Program and that he is assisted by the broker-counselor and a secretary. According to Mr. Field, the broker-counselor now has basically the same functions he had when Mr. Polaha was in charge of the program.

During the hearing, I advised Mr. Schwartz that the reason for the Board's termination of the position of Community Education Director was not raised as an issue in this matter and, therefore, I would not allow him to ask questions regarding the represented budget restraints which led to the elimination of this position.

I **FIND** that these additional facts are not in dispute and are pertinent to this matter. In addition, I **FIND** that the Board does not have a position designated as "Director of the Adult High School."

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Based on the facts, there is no question that Mr. Polaha had achieved tenure in the position of Community Education Director prior to the abolishment of that position by the Board. There is also no question that the Board would have hired Mr. Polaha for the part-time position of Community Education Enrichment Courses Coordinator if Mr. Polaha accepted the position at the salary fixed by the Board. Because Mr. Polaha has not argued or shown that he is entitled by seniority to any position which existed at the time of his termination and because the Community Education Enrichment Courses Coordinator was the only new position for the evening programs created by the Board, I **CONCLUDE** that Mr. Polaha is not entitled by seniority to any other position.

In his brief, Mr. Schwartz disputed Mr. Field's testimony that he supervises the Adult High School Program and argued that Mr. Fields does not have the time to supervise this program. Mr. Schwartz argued that probably the high school principal was helping Mr. Field supervise the program and that this is a violation of the petitioner's seniority. Even if I disbelieved Mr. Field's testimony, Mr. Schwartz has not shown or proven that such assistance by another staff member would be in violation of the petitioner's seniority.

Also in his brief, Mr. Schwartz argued that the Board arbitrarily decided to eliminate the position of Community Education Director and that there were no budgetary constraints since the Board had a surplus in the 1982-83 school year and an even larger surplus in the 1983-84 school year. In response to this argument, Mr. Pryor noted that the abolishment of the position was not an issue in this matter and that this was not an appropriate argument. As I already determined during the hearing, the question of whether or not there was a budgetary restraint warranting the abolishment of the position of Community Education Director was not set forth as an issue in this matter and, therefore, I will not consider this argument as presented by the petitioner.

Mr. Pryor in his brief stated that it has been clearly established that the Board has a right to abolish a full-time position and to reassign the duties of that position to existing staff members and to create one or more part-time positions. See, Vexler v. Red Bank Bd. of Ed., 77 S.L.D. 625 (1977); Tingelboch v. Hopatcong Bd. of Ed., 1983 S.L.D. ___ (decided on March 7, 1983); Klinger v. Cranbury Bd. of Ed., 190 N.J. Super. 254 (App. Div. 1982); Blumstein v. Weehawken Bd. of Ed., 1983 S.L.D. ___ (decided on Aug. 19, 1983). I agree with Mr. Pryor and I **CONCLUDE** that there has been no showing that the Board's action in this matter was in violation of Mr. Polaha's seniority rights.

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In summary, I **CONCLUDE** that Mr. Polaha is entitled to the part-time position of Community Education Enrichment Courses Coordinator. I further **CONCLUDE** that Mr. Polaha's right is limited to the position as created by the Board and that he does not have the right to require the Board to change either the hours or the financial arrangements for the position. Since no other new position for the evening education programs were created by the Board, I **CONCLUDE** that Mr. Polaha, by seniority, is not entitled to any other position.

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 1, 1984
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

11/2/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 05 1984
DATE

Ronald L. Tuker/phc
OFFICE OF ADMINISTRATIVE LAW

ml/E

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EXHIBITS ADMITTED INTO EVIDENCE

JOINT EXHIBITS:

J-1	Stipulation of facts
J-2	Letter from James B. Field to John Polaha, dated February 17, 1983
J-3	Letter from John J. Polaha to James B. Field, dated February 25, 1983
J-4	Part of the minutes of the March 8, 1983 meeting of the School Board of the Buena Regional School District
J-5	Letter from James B. Field to John Polaha, dated March 11, 1983
J-6	Letter from James B. Field to John Polaha, dated April 14, 1983
J-7	Part of the Minutes of the April 18, 1983 Meeting of the Board of Education of Buena Regional School District
J-8	Letter from James B. Field to John Polaha, dated April 19, 1983
J-9	Letter from John J. Polaha to Charles Hawn
J-10	Part of the Minutes of the July 12, 1983 meeting of the Board of Education of Buena Regional School District
J-11	Advertisement regarding certain positions, dated July 14, 1983
J-12	Job Description for the position of Community Education Enrichment Courses Coordinator
J-13	Letter from John J. Polaha to the Board of Education of the Buena Regional School District, dated July 23, 1983
J-14	Letter from John J. Polaha to James Field
J-15	Letter from James B. Field to John J. Polaha, dated September 30, 1983
J-16	Letter from Michael D. Capizola to Gary D. Wodlinger, dated October 17, 1983
J-17	Letter from John J. Polaha to James Field
J-18	Part of the Minutes of the September 27, 1983 meeting of the Board of Education of the Buena Regional School District
J-19	Memorandum from James B. Field to Kenneth Soboloski, dated October 4, 1983
J-20	Job Description for the position of Community Education Director
J-21	Employment Contract for John Polaha for the 1979-80 school year

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J-22 Letter from James B. Field to John Polaha, dated May 30, 1980

J-23 Employment Contract for John Polaha for the 1981-82 school year

J-24 Employment Contract for John Polaha for the 1982-83 school year

J-25 Employment Contract for John Polaha for the 1980-81 school year

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WITNESSES

FOR THE PETITIONER:

John J. Polaha
James B. Field
Charles B. Hawn, Jr.

FOR THE RESPONDENT:

James B. Field
Charles B. Hawn, Jr.

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JOHN POLAHA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner excepts to that portion of the initial decision that determines he has no entitlement to the adult high school principal's position which was assigned to the superintendent of schools upon the abolishment of petitioner's position. Petitioner reiterates the argument put forth previously challenging the credibility of the superintendent performing the adult high school principal duties given the fact that there was no lessening of the superintendent's other duties. He requests that the Commissioner reverse the initial decision and reinstate him to both the Community Education Enrichment and Adult High School positions.

A review of the factual circumstances in the instant matter reveals that petitioner was employed from September 1979 through June 1983 in a position which required a principal's certificate. (J-1) In accordance with the New Jersey Supreme Court's decision, Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), it is clear that petitioner attained tenure in September 1982 as principal in the Buena Regional School District in the adult/community education position. Thus, the Commissioner is in full agreement with the judge's determination that petitioner was entitled to the Community Education Enrichment Courses Coordinator position. However, the Commissioner does not concur with the judge's conclusions with respect to the issue of hourly rate compensation and the transfer of the adult high school principal position to the superintendent for the following reasons.

On April 12, 1983 the Board took action not to appoint or offer a contract to petitioner for 1983-84 "because of the position being removed from the budget." (J-7) On July 12, 1983 the Board redistributed the duties of the former Community Education Director to: (1) a part-time position at an hourly rate of $10 (J-10, J-12) and (2) an existing administrator. (J-10) Upon seeing the part-time position advertised, petitioner laid claim to and eventually was offered the position of Community Education Coordinator which he ultimately declined because he claimed entitlement to a prorated

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salary. In addition, petitioner claims entitlement to the adult high school responsibilities which were assigned to the superintendent.

N.J.S.A. 18A:28-9 clearly establishes the right of a board of education to abolish positions whenever it determines such action necessary for reasons of economy, reduction in enrollment, or reorganization. It reads:

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

Upon a careful and thorough review of the facts in this matter, it is the judgment of the Commissioner that petitioner's position was not abolished. Rather, the full-time position in which he served for four years was bifurcated by the Board, the Community Education portion of which was designated as a part-time position and reduced to one requiring teacher certification only, while the adult education portion was simply transferred to the superintendent. As in Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949); Catano v. Board of Education of the Township of Woodbridge, 1971 S.L.D. 448; and Lingelbach v. Board of Education of the Borough of Hopatcong, decided by the Commissioner June 6, 1983, reversed State Board May 2, 1984, pending N.J. Superior Court, it is determined by the Commissioner that the position in question herein, in fact, continued to exist on a full-time basis despite its purported abolishment. Thus, bifurcation of the position is deemed to be a violation of petitioner's tenure rights in that the position still existed, its responsibilities merely rearranged and assigned to a part-time hourly person and an existing administrator.

In reaching this determination, the Commissioner weighed the import of the Lingelbach decision and the words of the Court in Viemeister. While factual circumstances in this matter differ somewhat from Viemeister, the intent and purpose of the Court's reasoning certainly has applicability herein. Specifically, the Appellate Court states:

> "***The tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service. They represent important expressions of legislative

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> policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy. *** It seems to us that if the appellant had assigned teaching duties to the principal and had reduced the regular teaching staff, with due regard to pertinent considerations such as tenure status, seniority and competence, it would have fairly approached its desired result without impairing the purposes underlying the tenure provisions of the school laws. *** On the other hand, if the procedure it adopted were to be sustained the tenure of principals generally would rest on frail reeds: nothing would remain as a barrier to the removal of a principal, no matter how long and efficient his service, by the simple expedient of transferring his duties to a member of the teaching staff.***" (at 218-219)

In the instant matter the position was one which required a principal's expertise and knowledge. When petitioner fulfilled the community education portion of the position, a principal's certificate was required by the Board which is consistent with subchapter 3 of N.J.A.C. 6:44, Adult Education Standards for Reimbursement. The Commissioner duly notes that, despite the job description of July, 1983 (J-12) for the bifurcated Community Education position calling for a teacher's certificate, the Board, when unable to fill that position, appointed a principal, not a teacher, to fulfill the responsibilities of that job. Further, the Adult High School portion of the position also required principal certification in that such a high school must meet approval criteria of a secondary school in order to issue diplomas. N.J.A.C. 6:30, subchapter 2 Thus, the words of Viemeister are clearly relevant and pertinent.

Notwithstanding the above determinations, the Commissioner deems it necessary to comment on the issues of hourly compensation for the community education position and the assignment of the Adult High School duties to the superintendent, issues which are addressed in the initial decision.

With respect to the hourly compensation issue, the Commissioner determines that, had petitioner been found to be entitled merely to the portion of the prior full-time position that related to community education hourly compensation would have been in violation of his tenure rights. Lingelbach, supra Had petitioner been assigned to the part-time community education duties as a result of a bona fide reduction in force, he would have been entitled to a proration of his full-time salary. Klinger v. Board of Education of Township of Cranbury, 190 N.J. Super. 354 (App. Div. 1982) To do otherwise would violate the provisions of N.J.S.A. 18A:6-10.

The Commissioner is compelled to examine also the issue of transfer of the adult high school duties to the superintendent. Had such a transfer resulted from a bona fide reduction in force, the

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Commissioner would, nonetheless, have determined that such an action was inappropriate for the following reasons. Adult high schools are first and foremost secondary schools and as such are required to meet the approval standards of secondary schools (N.J.A.C. 6:30, subchapter 2) and therefore require the supervision of a principal.

In reviewing the staffing requirements articulated in N.J.A.C. 6:27-1.6, it is determined by the Commissioner that such a transfer of adult high school duties to the superintendent herein is inappropriate, notwithstanding the provisions of N.J.S.A. 18A:17-20 which authorizes a board of education to prescribe additional duties for its superintendent of schools. At a minimum, the adult high school position in the instant matter would require an individual to spend no less than one half of his time in the administration and supervision of that school. N.J.A.C. 6:27-1.6 Given the fact that the superintendent herein is responsible for the general supervision and other duties prescribed in N.J.S.A. 18A:17-20 for a K-12 regional district, the Commissioner concludes that it would not be possible for the superintendent to carry out effectively the responsibilities of both positions. To the extent that this determination may modify Blumstein, supra, that decision is no longer applicable.

While the Board believed it was acting in good faith when it took the steps that it did considering such action is necessary for reasons of economy, the actions are determined to be improper for the reasons stated herein.

The Commissioner cannot sanction any action which would violate the tenure rights of a full-time tenured employee or which could endanger the effective supervision of an adult high school or district. Therefore, the Commissioner reverses the initial decision recommended by the Office of Administrative Law to the extent that petitioner is to be immediately reinstated to both the community education and adult high school positions. He is to be awarded pro-rated salary for the community education portion of the position from September 1983 to the present with all emoluments and benefits attached since he is not barred by untimeliness for that portion of his Petition. (Initial Decision, ante) However, it is the determination of the Commissioner that relief for the adult education portion can be granted prospectively only on the basis of laches. Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982) The ninety-day time requirement does not bar his Petition with respect to that portion of his position because a statutory right with respect to tenure is involved. North Plainfield Education Ass'n (Koumjian et al.) v. Board, 96 N.J. 587 (1984)

Accordingly, the Buena Regional Board of Education is ordered to comply immediately with the determinations rendered herein.

COMMISSIONER OF EDUCATION

DECEMBER 17, 1984

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 9410-83
AGENCY DKT. NO. 425-11/83A

JUDITH ELSIE MEYER,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., attorney for petitioner

Stephen R. Fogarty, Esq., for the Board of Education
(Fogarty and Hara, attorneys)

Record Closed: September 21, 1984 Decided: November 1, 1984

BEFORE **JAMES A. OSPENSON,** ALJ:

Judith Elsie Meyer, a tenured elementary school prinicipal presently on a preferred eligibility list for reemployment following a reduction in force and position abolishment effective July 1, 1980, alleged two other elementary school principals presently employed by her employer, the Board of Education of the Township of Wayne, Passaic County, were less senior than she and thus unlawfully employed in abridgement of

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her tenure and seniority rights. She alleged the Board improperly and incorrectly calculated their seniority by giving credit for their military service in prior positions in the district or in prior positions in other districts. She sought judgment of the Commissioner of the Department of Education directing the Board to reinstate her to the position of elementary school principal, together with back pay to July 1, 1980. The Board admitted petitioner's tenure and seniority generally (at 12.85 years) but denied improper employment of other elementary school principals with less seniority than she and raised affirmative defenses of the bar of the doctrines of laches, estoppel and the limiting period of N.J.A.C. 6:24-1.2.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on November 9, 1983. The Board's answer was filed there on November 9, 1983. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on November 30, 1983 for hearing and determination as a contested case pursuant to 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 April 19, 1984 and an order entered establishing, inter alia, that Count I of the petition of appeal was **WITHDRAWN** by petitioner.[1]

The parties were directed to confer with a view towards fashioning and stipulating for record all relevant and material propositions of fact, together with documentation, pertaining to the employment service of petitioner and the two principals in questioned principalship positions (Lawrence A. Tilli and Americo G. Romeo). Thereafter, it was ordered, the issues herein shall be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq. on pleadings, admissions, stipulations, documentation and memoranda of law, examination

1 Count I of the present petition was identical to a petition in a previous matter between the same parties under OAL Dkt. No. EDU 9036-82, filed September 8, 1982 and decided by the Commissioner on October 7, 1983.

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and cross-examination of witnesses having been waived. All such submissions having been completed by September 21, 1984, the record closed then. At issue in the matter are the following:

a. Whether petitioner has greater seniority than two other in questioned principalship positions;

b. Whether the Board incorrectly calculated the seniority of those two persons by reason of duplications of military service credit either in prior positions within the district or in positions outside the district, within the standards and criteria of N.J.S.A. 18:28-12 and 29-11;

c. Whether the petition is barred by the doctrine of laches and/or the limiting period of N.J.A.C. 6:24-1.2.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I make the following Findings of Fact:

1. Petitioner is a tenured principal in the Wayne Township School District.

2. Petitioner served as an elementary principal continuously from October 16, 1968 until June 30, 1980.

3. During the 1979-80 school term, petitioner was advised by the Board that an elementary school principalship was to be abolished effective July 1, 1980. Petitioner was also advised that she had the least amount of seniority in the category of elementary school principal and as a result

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would not be reemployed for the 1980-81 term but would be placed on a preferred eligibility list for the position of elementary school principal.

4. During the 1980-81 term, petitioner was not employed in the Wayne Township school district.

5. On June 29, 1981, petitioner was advised the Board had appointed her to serve as an acting elementary school principal for the 1981-82 school term with her service to begin on September 1, 1981. In her capacity as acting elementary school principal during the 1981-82 term, petitioner received an annual salary of $23,500. That was approximately $7,000 less than that which she received the last year in which she served as a principal. Petitioner served as acting elementary principal until June 30, 1982.

6. On October 7, 1983, the Commissioner of Education, ruling in a case involving the same parties, found the one year of service by petitioner as acting principal during the 1981-82 term was to be added to her overall seniority in the school district. From the date of her initial employment, October 16, 1968 to the date in which she was placed on the preferred eligibility list, July 1, 1980, petitioner had acquired 11.85 years of seniority. Adding the additional year in which she served as an acting elementary school principal, petitioner's present seniority in the school district amounts to 12.85 years. (Attached hereto as J-1 is the personnel card of petitioner).

7. At the present time, petitioner is not employed by the Board; however, she remains on a preferred eligibility list in the category of elementary school principal.

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8. Lawrence Tilli, presently an elementary principal, began his employment in the Wayne Township school district during the 1960-61 school term as classroom teacher.

9. During the 1962-63 and 1963-64 school terms, Tilli was on military leave of absence. Upon returning to the school district during the 1964-65 term, Tilli resumed his position of classroom teacher.

10. During the 1969-70 term, Tilli was placed in the position of "acting principal" of the Alps Road School. Beginning during the 1970-71 school term until the present time, Tilli has served in the position of elementary school principal.

11. As of June 30, 1980, the Board determined Tilli had acquired 12.2 years of seniority as elementary school principal. The figure includes the two years' military service credit which was credited to his seniority when he served in the position of classroom teacher. (Attached hereto as J-2 is Tilli's employment card).

12. Americo G. Romeo, presently an elementary school principal, began his service as elementary school principal in the school district on February 1, 1969. He has served continuously in that position since the day of his employment. (Attached hereto as J-3 is Romeo's employment card).

13. Prior to beginning service as an elementary school principal in the school district on February 1, 1969, Romeo was employed by the Paterson Board of Education, Passaic County.

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14. Romeo began his service of employment with the Paterson Board of Education on February 1, 1950. From November 15, 1950 to November 1, 1952, Romeo served in the military. (Attached hereto as J-4 is Romeo's application for adjustment in salary. Also attached hereto as J-4A is the acknowledgment by the Paterson Board of Education that Romeo was to be at Step 8 of the salary guide at conclusion of the 1957-58 school term and was to be placed on Step 9 of the guide beginning on the first day of the 1959-60 school term).

15. On or about March 27, 1960, in a letter to Dr. Gioia, the then Superintendent of the Paterson school district, Romeo acknowledged that his military leave was not to act "as a detriment in the matter of salary or promotion." He went on to state that "normal increments were received and this leave time was applied toward tenure in Paterson. In fact, it appears that this time has already been treated as normal, non-interrupted Paterson teaching experience." (J-5).

16. The parties also submit as J-6 Romeo's payment record from the time in which he was employed, February 1, 1950, to the time in which he returned from the military, November 1, 1952. (Four page document).

17. As of June 30, 1980, Romeo was given 13.5 years of seniority even though he had begun his employment in the respondent school district in the position of elementary school principal on February 1, 1969, three and one-half months after petitioner had been employed in that position.

DISCUSSION

I

In abstraction at least, it may be suggested, petitioner's claims that her seniority

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of 11.85 years exceeded the seniority of Tilli, as of June 30, 1980, whom the Board credited then with 12.2 years, and Romeo, whom the Board credited then with 13.5 years, bear facial plausibility. And that is so because Tilli's military service of two years from 1962 to 1964 occurred at a point in his employment service with the Board before he had achieved tenure in any position. And in the case of Romeo, it can be seen, the Board credited him with two years' seniority for his military service acquired not during his service with the Wayne district but, instead, when he served in the military from 1950 to 1952 while in the service of the Paterson school district.

N.J.A.C. 6:3-1.10(c) provides:

> In computing length of service for seniority purposes full recognition shall be given to the previous years of service within the district and the time of service in or with the military or naval forces of United States or of this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

N.J.S.A. 18A:28-12 provides in part:

> . . . In computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position with the district during the time of such military or naval service.

In Corrado v. Bd. of Ed., Borough of Newfield, Gloucester County, 1984 S.L.D. — (May 24, 1984), the petitioner, a tenured special education teacher whose position of teacher of the handicapped was abolished, alleged the Board improperly terminated his employment while retaining a teacher in a remaining special education position who possessed less seniority than he. He had been credited by the Board with four years' seniority but claimed an additional 20 years' credit for active military service prior to

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employment by the Board. It was held petitioner's 20 years of military service, which occurred prior to the time of his employment with the Board, without his first having acquired tenure, did not qualify him for an equal of amount of seniority credit. Specifically, it was held:

> 2. The specific provisions of R.S. 18:13-19, now N.J.S.A. 18A:28-12, as related to the acquisition of seniority and the seniority rights of tenured teaching staff members may only be construed to grant accrued seniority to tenured teaching staff members who are required to serve in the armed forces after Sept. 1, 1940, provided they previously enjoyed a tenure status in the Board's employ that was subsequently interrupted by their being called into the armed forces of this State or the United States.
>
> 3. Tenured teaching staff members in the Board's employ after Sept. 1, 1940 who were subsequently called into the armed forces of this State or the United States were entitled to have their seniority accumulate without interruption during the period of time such service in the armed forces was rendered and credited to them upon their resumption of employment by the Board subsequent to their termination from the armed forces.
>
> 4. Petitioner's 20 years of service in the armed forces of the United States do not qualify him for an equal amount of seniority credit by the Board inasmuch his service was voluntarily rendered prior to the time he entered an employment relationship with the Board without first having acquired a tenured status pursuant to N.J.S.A. 18A:28-5 or seniority protection pursuant to N.J.S.A. 18A:28-12 as regulated by N.J.A.C. 6:3-1.10(c), as amended.
>
> 5. Petitioner therefore may only claim as a matter of seniority those four years of tenured employment service rendered to the Board after he retired from the armed forces until the Board's reduction in force which resulted in his dismissal and placement on a preferred eligibility list for reemployment. [slip opinion at 35-39].

Thus, as petitioner argued, the Board here improperly credited both Tilli and Romeo each with two years of military service toward their respective seniority totals,

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Tilli because he had not achieve a tenured status in the district at the time he left for military service from 1962 to 1964, and Romeo because his military service occurred before he was employed by the Board and when he was employed in another district. The result, said petitioner, is that Tilli as of July 1, 1980 had only 11.4 years of seniority and Romeo only a 11.5 years of seniority. Both, therefore, were junior to petitioner whose seniority total on that date is admitted at 11.85 years. She was thus then entitled, it is urged, to either position over the incumbent.

II

But petitioner's rights in abstraction are not necessarily and sufficiently to be honored in face of a reality that her petition of appeal was filed on November 9, 1983, more than three years after the Board acted, effective July 1, 1980 to abolish her position. In the intervening years, it may be seen, while petitioner acquired an additional year's seniority for her service as acting principal in 1981-82, thus elevating her total to 12.85 years, both Tilli and Romeo continued in service with the Board in their respective principalship positions and accumulated three more years of seniority credit, to date of filing of petition. At that moment, their seniority credits stood at 14.4 and 14.5 years respectively. To grant petitioner the relief of reinstatement to one of those positions as she seeks, therefore, would result in the anomaly of a junior employee ousting her senior.

What is implicated, of course, is the Board's defense the petition here is barred by the 90-day limiting period of N.J.A.C. 6:24-1.2. It provides:

> Such petition [to the Commissioner to determine a controversy or dispute arising under the school laws] 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.

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A simple resolution of the issue of the time bar in N.J.A.C. 6:24-1.2 is that untimely petitions charging improper seniority calculations have been held by the Commissioner subject to the bar. In Weir v. Bd. of Ed., Northern Valley Reg. High School District, 1984 S.L.D. — (July 20, 1984), an administrative law judge applied the bar and found no grounds for relaxation of it under N.J.A.C. 6:24-1.19 under circumstances in the case. [slip opinion at 8]. Cf. Riely v. Bd. of Ed. of Hunterdon Central High School District, 173 N.J. 109, 113-4 (App. Div. 1980); and see Newman v. Bd. of Ed., Borough of Spring Lake, 1984 S.L.D. — (Jan. 17, 1984; slip opinion at 5) ("The prompt filing and expeditious processing of actions. . .serves to preserve immediacy of the record and stabilize existing relations, e.g., between teachers and administration, and thus avoid disruption of the educational process").

Petitioner's claims here would be subject as well to the bar of the doctrine of laches, even if those rights were viewed as statutory in nature, as, for example, rights to military service credit under N.J.S.A. 18A:29-11 were viewed in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). Cf. North Plainfield Education Assn. v. North Plainfield Bd. of Ed., — N.J.. — (1984) (dec'd. June 28, 1984) (the Court held there that salary increments accruing under N.J.S.A. 18A:29-8 (unlike rights under N.J.S.A. 18A:29-11 and, presumably, rights under N.J.S.A. 18A:28-12) were not a statutory entitlement and were thus subject to the time bar in N.J.A.C. 6:24-1.2 (slip opinion at 7)). In Lavin, laches was invoked to bar retrospective relief following the Court's consideration of the length of delay, reasons for delay, and changing conditions of either or both parties during the delay. 90 N.J. at 152.

It is helpful, therefore, one may suggest, to analyze whether petitioner's claims are in fact claims of violation of her statutory entitlement. Analytically, it can be seen the claims do not implicate her rights of military service seniority credit under statute, but, instead, implicate her claims against the Board that at a given moment in time it improperly calculated the military service seniority credit of other persons. Viewed in that light, one may well question whether those claims are statutory and continuing in nature and thus subject to prospective relief by petition of appeal to the Commissioner

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more than three years after Board action effecting the circumstances complained of.[2] Time for petitioner to lodge her claims, in my view, was at least within 90 days of the effective date of the action about which she complained, that is, July 1, 1980. There is no reason upon this record why she did not. Her delay has produced changed conditions. In three years from July 1, 1980 to date of filing petition here on November 9, 1983 the incumbents of the two questioned positions by their uninterrupted service have outdistanced petitioner in seniority. Under Lavin, such changed conditions appropriately predicated invocation of the bar of the doctrine of laches. [90 N.J. at 152-5].

Petitioner argued that prospective relief should be accorded her from a date in August 1982, when she filed her first petition of appeal under EDU 9036-82.[3] Though she conceded she initially did not make any claim in that petition relating to misapplication of military service seniority credits for others, "such a possibility was brought out during the prehearing conference after that petition had been filed." She argued she advised the administrative law judge at the time that "new allegations relating to military service credit would be made depending upon discovery requests in October 1982." Within three weeks of such discovery, she moved in March 1983 to amend the initial petition of appeal but her motion was denied. Had the motion been granted, she urged, and had the court then proceeded to find in her favor on military service claims vis-a-vis others, her relief "would have dated back to August 1982," time of filing of the initial petition. Such arguments[4] must be rejected, I think, since there is no reason that petitioner could not at any time since July 1, 1980, had she then been alert to her rights, have filed a timely petition. For her to speculate her rights to relief would have dated back to date of filing of another petition asserting other diverse and unrelated claims is without basis in law and meaningless since there is no prospective relief available.

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2 But cf. Meyer v. Bd. of Ed., Twp. of Wayne, 1983 S.L.D. — (Oct. 7, 1983), the previous matter between the parties under OAL Dkt. No. EDU 9036-82, in which an administrative law judge, the writer, held such claims of improper seniority calculations of another under N.J.A.C. 6:3-1.10(k) and N.J.A.C. 6:11-3.24(a) derived from rights given by statute and were not subject to the bar of N.J.A.C. 6:24-1.2 but were subject to laches under Lavin. [slip opinion at 6-7]. Ratio decidendi of dismissal of claims was that they were barred by stare decisis. [slip opinion at 8-9, 15].

3 See ftn. 1 supra.

4 Petitioner's brief, at 12-14.

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CONCLUSION

For all the foregoing reasons, therefore, I **CONCLUDE** that the petition of appeal herein is barred by the 90-day time limitation of N.J.A.C. 6:24-1.2(a) as well as by the doctrine of laches, the petition having been filed more three years after the action taken by the Board in abolishing petitioner's position, that petitioner's delay has not been explained or justified on this evidential record, that no occasion is presented for relaxation of the time bar under N.J.A.C. 6:24-1.19, and that the petition of appeal should be, therefore, and is hereby, **DISMISSED** with **PREJUDICE.**

The Board is **DIRECTED** hereafter, nevertheless, when occasion is presented for seniority calculations of employees under N.J.S.A. 18A:28-10, 12 and N.J.A.C. 6:3-1.10(c), to make such calculations consistently with Corrado, supra, and the holding therein.

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.

November 6, 1984
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Nov. 5, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

November 8, 1984
DATE

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

js

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LIST OF EXHIBITS

J-1 Employment record of petitioner.

J-2 Employment record of Lawrence Tilli.

J-3 Employment record of Americo G. Romeo.

J-4 Application for adjustment in salary by Americo G. Romeo to Board of Education of Paterson, for military service from November 15, 1950 to November 1, 1952, application dated November 27, 1957.

J-4A Application for adjustment in salary to Board of Education of Paterson.

J-5 Letter of Americo G. Romeo to Superintendent of Schools of Paterson, dated March 27, 1960 indicating military leave was treated as normal, non-interrupted Paterson teaching experience.

J-6 Employment record of Americo G. Romeo showing salary as of July 31, 1950 through November 1, 1952.

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JUDITH ELSIE MEYER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

In the Commissioner's judgment the recommended findings and conclusions set forth in the initial decision bear further review and comment specifically with respect to those legal conclusions reached pertaining to the interpretation of the provisions of N.J.A.C. 6:24-1.2 and the application of the doctrine of laches.

In this regard the New Jersey Supreme Court recently addressed the sole issue of the application of the ninety-day time limitation (N.J.A.C. 6:24-1.2) affecting the filing of petitions of appeal before the Commissioner of Education in re North Plainfield Education Association, on behalf of Arlene Koumjian and Michel Spratford v. Board of Education of the Borough of North Plainfield, 96 N.J. 587 (1984).

The Court ruled in pertinent part as follows:

> "The narrow question on this appeal is whether the petition of two teachers to the Commissioner of Education (the Commissioner) is time barred by N.J.A.C. 6:24-1.2, which requires that such a petition be filed within ninety days of the challenged action. In the petition, the teachers sought credit on the salary scale for time spent on sabbatical. The teachers, however, did not file their petitions until more than nine months after the expiration of the ninety-day period.
>
> ***

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"The Appellate Division's misperception of the annual increment is relevant to determining the timeliness of the filing of the teachers' petition. If the annual increment were a statutory entitlement, as the Appellate Division concluded, the ninety-day period of limitations contained in N.J.A.C. 6:24-1.2 would not apply, and the petition for prospective relief would have been timely. Because the award of the annual increment is not a matter of statutory right, but is subject to 'denial for inefficiency or other good cause,' N.J.S.A. 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. The relevant regulation, N.J.A.C. 6:24-1.2, provides that a petition to determine a controversy under the school laws 'must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.'

***

"The teachers' asserted right to advance an additional step on the 1980-81 salary guide depends on the propriety of the Board's action in not advancing them on the 1979-80 guide. The time bar of the original action also precludes the dependent action for relief in future years.

"Nor does the withholding of the increment constitute a continuing violation. Such a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case. Furthermore, the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations. Cf. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S. Ct. 498, 504, 66 L.Ed.2d 431, 440 (1980) (limitations period applicable to employment discrimination claim began to run when teacher was notified of employer's decision to deny tenure).***"

(at 590, 594-5)

In the Commissioner's view the effect of reductions in force upon teaching staff members under tenure triggers the provisions of N.J.S.A. 18A:28-9 et seq., as well as the provisions of N.J.A.C. 6:3-1.10. Seniority protection afforded to tenured teaching staff members as the result of reductions in force are hereby deemed to be

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a statutory entitlement and the denial of seniority rights in future years does constitute a continuing violation. Therefore, the time bar set forth in N.J.A.C. 6:24-1.2 is inapplicable in accordance with the Court's ruling in North Plainfield, supra.

The second relevant issue which requires further deliberation is whether or not the instant proceedings are barred by the application of the equitable doctrine of laches. In this regard the Commissioner finds the Court's ruling in Lavin, supra, to be particularly instructive wherein it held in pertinent part:

> "***We turn next to the doctrine of laches, an equitable defense that may be interposed in the absence of the statute of limitations. The time constraints of laches, unlike the periods prescribed by the statute of limitations, are not fixed but are characteristically flexible. Pomeroy defines laches as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' 2 Equity Jurisprudence sec. 419, at 171-72 (5th ed. 1941). This expansive notion of laches has been articulated in some of our case law.
>
> "In Atlantic City v. Civil Service Commission, 3 N.J. Super. 57, 60 (App. Div. 1949), the court in describing laches quoted the following language approvingly:
>
> > '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., sec. 112, pp. 520-521.
> >
> > 'Long lapse of time, if unexplained, may create or justify a presumption against the existence or 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 plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the

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> 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. sec. 116 b, p. 538.
>
> "The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs. Pavlicka v. Pavlicka, 84 N.J. Super. 357, 368-69 (App. Div. 1964).***
>
> ***
>
> "***We believe that it is fair and equitable to treat all claims of this nature in like manner. This bright line treatment has the additional advantage of administrative ease. Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief. However, they should be granted credit for qualified military service in computing their salaries subsequent to making their claims.
>
> ***
>
> "We agree with the Appellate Division that laches should bar plaintiff's retroactive recovery of past due sums. We agree with the Appellate Division that it is appropriate to allow prospective application of the petitioner's military credit as of September 1978.***"
>
> (90 N.J. at 151-2, 154-5)

Contrary to the legal conclusions reached in the initial decision of this matter, the Commissioner relies on Lavin and finds and determines that the application of laches herein bars petitioner's retroactive claim to seniority which was not determined as a matter of law prior to the filing of her Petition of Appeal on November 9, 1983.

Petitioner is therefore entitled to have her seniority calculated prospectively as of November 9, 1983 in order to determine what relief, if any, is due to her as the result of these proceedings.

However, in order to arrive at a determination regarding petitioner's prospective seniority entitlement, the issue regarding the propriety of the Board's original action in crediting both Tilli

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and Romeo with two years' military service credit toward their seniority in the category of elementary principal requires further review and deliberation. It is noted that the judge in discussing the arguments raised by petitioner against such Board action commented as follows:

> "***In abstraction at least, it may be suggested, petitioner's claims that her seniority of 11.85 years exceeded the seniority of Tilli, as of June 30, 1980, whom the Board credited then with 12.2 years, and Romeo, whom the Board credited then with 13.5 years, bear facial plausibility. And that is so because Tilli's military service of two years from 1962 to 1964 occurred at a point in his employment service with the board before he had achieved tenure in any position. And in the case of Romeo, it can be seen, the Board credited him with two years' seniority for his military service acquired not during his service with the Wayne district but, instead, when he served in the military from 1950 to 1952 while in the service of the Paterson school district.***" (Initial Decision, ante)

The judge in relying on Corrado, supra, went on to conclude:

> "***Thus, as petitioner argued, the Board here improperly credited both Tilli and Romeo each with two years of military service toward their respective seniority totals***."
> (Initial Decision, ante)

The Commissioner concurs with the judge's findings that Romeo's 2 years of military service rendered prior to his employment as elementary principal should not have been counted toward his seniority in that category. Corrado, supra In view of the above the Commissioner so finds and determines herein that Romeo's two years of military service shall not be credited toward his seniority in the category of elementary principal.

The Commissioner, however, is constrained to comment further with respect to those findings by the judge regarding whether or not Tilli's two years of military service is to be credited toward his seniority in the elementary category as a classroom teacher. The Commissioner finds and determines that seniority credit for military service is accruable to those teaching staff members whose service to the school district was interrupted prior to the acquisition of tenure but who subsequently obtained tenure in said school district, in addition to those teaching staff members who were tenured prior to their entry into military service. To the extent that Corrado, supra, is contrary to the above determination, it is hereby so modified in pertinent part.

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Accordingly, it is hereby found and determined that Tilli's two years of military service which interrupted his employment as an elementary classroom teacher in the Wayne Township School District shall be credited toward his seniority in the elementary category. Such military service seniority credit, however, shall not be counted in the category of elementary principal. See Philip Howley and Dewey Bookholdt, Jr. v. Board of Education of the Township of Ewing, Mercer County, decided by the Commissioner December 20, 1982, aff'd State Board June 1, 1983.

In light of these Commissioner's determinations, the prospective application of petitioner's seniority entitlement may now be made. The comparative seniority calculations in the category of elementary principal appear in chart form below as determined by the Commissioner for Petitioner Meyer, as well as Tilli and Romeo.

Number of Years' Seniority in Category of Elementary Principal

School Year		Meyer (years)	Tilli (years)	Romeo (years)
1968-69		.85 (10/16/68-6/30/69)		.5 (2/1/69-6/30/69)
1969-70		1	.2 (4/20/70-6/30/70)	1
1970-71		1	1	1
1971-72		1	1	1
1972-73		1	1	1
1973-74		1	1	1
1974-75		1	1	1
1975-76		1	1	1
1976-77		1	1	1
1977-78		1	1	1
1978-79		1	1	1
1979-80		1	1	1
Subtotal	(A)	11.85	10.2	11.5
1980-81	(B)	-	1	1
1981-82	(C)	1	1	1
1982-83	(D)	-	1	1
1983-84	(E)	.77	1	1
1984-85	(F)	.4	.4	.4
Total	(G)	14.02	14.6	15.9

Based upon the calculated accrual of seniority in the category of elementary principal, it is clear that petitioner was the most senior elementary principal as of June 30, 1980 (A) when the Board determined to abolish one of their existing positions of elementary principal. However, as stipulated in the record of this

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matter, the Board retained Tilli and Romeo in each of the two remaining elementary principalships by virtue of the fact that it improperly and illegally credited them with two years of additional seniority credit for military service (not included in the above chart as determined by the Commissioner). As previously determined herein, petitioner is barred by laches from retroactive credit for seniority purposes during the 1980-81 school year (B) inasmuch as she filed no legal claim to the position of elementary principal during that year. However, both Tilli and Romeo were employed and rendered service as elementary principals during the 1980-81 school year which has been included in calculating their respective seniority.

During the 1981-82 school year (C) petitioner upon appeal to the Commissioner was granted seniority credit for that school year by virtue of the fact that she was reemployed as an acting elementary principal by the Board. See Judith Elsie Meyer v. Board of Education of the Township of Wayne, Passaic County, decided by the Commissioner October 7, 1983, now pending before the State Board. Tilli and Romeo were also credited with 1 year each of seniority service for the 1981-82 school year (C).

Petitioner was not employed as an elementary principal during the 1982-83 school year (D) and therefore she is not entitled to receive seniority credit. Conversely, Tilli and Romeo are each entitled to 1 year of seniority credit for their service as elementary principals during the 1982-83 school year (D).

As indicated in the above determination of the Commissioner in the seniority calculations (E) for the 1983-84 school year, petitioner is to be credited with prospective seniority credit as of the date her Petition was filed in the instant matter (November 9, 1983). Petitioner's total seniority credit for the 1982-83 school year is determined to be .77. Tilli and Romeo have each been credited with 1 year of seniority for the 1983-84 school year (E). Finally, the prospective relief to be accorded petitioner is that seniority credit she is entitled to accrue as of November 9, 1983 of the 1983-84 school year up to and including December 1984 (1984-85 school year), or 1.17 years. Said seniority credit is to be added to her overall seniority as elementary principal. Similarly, Tilli and Romeo have earned 1.4 years of seniority credit as of the 1983-84 school year up to and including December 1984 (1984-85 school year) (E, F).

In summary and in view of the seniority determinations rendered by the Commissioner as they appear calculated in chart form, ante, it is apparent that as of December 1984, the total years of seniority to be credited to Petitioner Meyer, Tilli and Romeo (G) in the category of elementary principal are determined to be as follows:

Americo G. Romeo	15.9 years
Lawrence Tilli	14.6 years
Judith Elsie Meyer	14.02 years

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In conclusion and for the purpose of these proceedings, the Commissioner finds and determines that petitioner is limited to a total of 14.02 years of accumulated seniority in the category of elementary principal. Therefore, petitioner has insufficient total seniority in this category to lay claim to either of the elementary principal positions in which Tilli and Romeo are employed.

Inasmuch as the Commissioner's final determination does not disturb the recommended dismissal of this Petition as set forth in the initial decision, it is hereby affirmed as specifically modified herein.

In all other respects the instant Petition of Appeal can be and is hereby dismissed. IT IS SO ORDERED.

DECEMBER 20, 1984

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2995-84
AGENCY DKT. NO. 127-4/84

MICHAEL A. PUNKO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Leo Kahn, Esq., for respondent
(Magner, Abraham, Orlando, Kahn & Pisansky, attorneys)

Record Closed: October 22, 1984 Decided: November 9, 1984

BEFORE **STEPHEN G. WEISS,** ALJ:

Michael A. Punko is a tenured teacher of health and physical education employed by the respondent Rahway Board of Education (Board). He has appealed in this case from the Board's withholding his 1984-85 "adjustment" increment in the amount of $1,300. In addition to seeking restoration of that increment, Punko also asks for the removal from his personnel file of a letter of reprimand, as well as a modification of his 1983-84 evaluation.

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Following the filing of the Board's answer denying any impropriety, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law for hearing 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.

TESTIMONY FOR PETITIONER

Punko has been employed by the Board since 1971 and teaches health and physical education at Rahway High School. From 1978-79 until 1983-84 he served as head varsity football coach. In his capacity as head football coach, Punko established certain disciplinary rules for team members, including prohibitions against their drinking or smoking. He believed that he had the authority, pursuant to a teacher handbook at Rahway High School, to make such rules and insisted that if any of his players violated his rules, he was free to remove them from the team. In particular, Punko pointed to the provision in the handbook that the eligibility status of students wishing to participate in extracurricular activities "shall be determined by the faculty advisors for that activity." (Exhibit J-12, p. 32).

Prior to the 1983 football season, it had always been Punko's unchallenged practice to remove from the team any students who were suspended from school. By late October 1983, he had removed three students who, in accordance with a newly established Board policy, were assigned in lieu of an "out of school" suspension to attend an "alternative education class" as the result of minor disciplinary infractions. As far as Punko was concerned, their assignment to attend this class for misconduct was the sort of disciplinary action which justified exclusion from team membership. To him, it was the same as if they had been suspended "out of school."

At some point during late October 1983, Punko was told by a vice principal, Mr. Ralph P. Manfredi, that the Board's new policy was to allow students assigned to the alternative education class to continue to engage in extracurricular activities. Punko, however, replied that he felt he had the authority to remove them anyway. Later, after yet a fourth student was removed from the team, Manfredi told Punko to reinstate them.

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Punko continued to refuse to do so because he felt that the rules he had established were important. He also felt he had not timely been informed about the alternative education class exception. Moreover, petitioner said he believed that his discretion was supported by a section of the student handbook, dealing with behavior, which provided that, "Students may attend or participate in extracurricular activities while assigned to Alternative Education Class" (Exhibit J-13, p. 23).

On November 8, 1983, Punko met with Mr. Roy Valentine, the high school principal, Mr. Manfredi, and other persons involved in the issue concerning Punko's exclusion of students from the football team. Punko was directed by Valentine to reinstate the four students to the team, but petitioner refused to do so because he still believed he had discretion in the matter. Punko pointed out to Valentine that as far as he was concerned he had established the rules at the beginning of the season and that it would not be fair to the other team members to modify them now. Punko also denied that anyone had ever suggested alternative methods for him to proceed with regard to students assigned to the alternative education class, short of their removal from the football team.

In December 1983, petitioner received a letter of reprimand from the Board which chastised him for his action and made reference to "other steps" which might occur (Exhibit J-6). Punko's professional evaluation for 1983-84 (Exhibit P-1) also mentioned his difficulties with the administration and noted that continued defiance of Board policy might result in charges against him. As a result, he sent a reply letter to Valentine pointing out his disagreement with those and certain other negative comments in the evaluation (Exhibit P-2).

On cross-examination Punko stated that as far as he could recall, he was not fully aware of the existence of the alternative education class concept until on or about October 1, although it was possibile he had heard about it earlier. He explained that when teachers initially came back to school in September 1983, they were told of the new program at a faculty meeting, but he was not present in the room at the time. Petitioner also agreed that he spoke with Manfredi several times about his not complying with the Board's policy and that he was asked to reconsider his stance. Although he denied that

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anyone had ever suggested alternative methods of dealing with the students in question, Punko candidly responded to a question from the court to the effect that no alternative would likely have been acceptable to him. As far as he was concerned, if a student was assigned to the alternative education class because of an infraction of rules, which previously would have resulted in an "out of school" suspension, that student could no longer be on the fooball team.

TESTIMONY FOR RESPONDENT

Testimony on behalf of the Board was offered first by Manfredi, one of two vice principals at Rahway High School. During late October 1983 he became aware that certain students assigned to the alternative education class were prohibited by Punko from further participation on the football team in violation of the Board's new policy. Manfredi then spoke to Punko, told him he was violating Board policy and counselled him about it. Punko, he said, replied that he has established his own set of rules and intended to enforce them. Rather than immediately report Punko's obstinate stance to the principal, Manfredi continued to attempt to counsel him in the hope that he could straighten out the problem at that level. Manfredi said he suggested that Punko resort to certain less drastic alternatives, such as letting the particular students "suit up" and play only a portion of a game. He also suggested that perhaps extra calisthenics might be required of them.

However, when Punko remained adamant, Manfredi decided to inform Valentine about the problem. Before he could do so, Valentine contacted Manfredi and told him that a parent of a boy removed from the team had called to complain about the situation. Subsequently, the meeting of November 8, 1983 referred to by Punko was held in Valentine's office and the problem was discussed. In Manfredi's presence, Valentine told Punko to reinstate the students to the team. When Punko resisted doing, so Valentine told him that he was facing a possible charge of insubordination as a result of his recalcitrance.

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According to Manfredi, the alternative education class concept began at the high school in September 1983 and was intended as an appropriate alternative to out-of-school suspensions for minor disciplinary infractions. Manfredi acknowledged that because of Punko's assignment to security responsibilities, he may not have been present in the room when the program was explained to the teachers.

The next Board witness was its president, Richard Proctor. He explained that the Board voted to withhold Punko's adjustment increment for 1984-85 because it believed that his refusal to obey Valentine's directive to follow Board policy constituted insubordination of a "fairly serious" nature. On the other hand, the Board did not want to be unduly harsh with Punko and therefore opted to not withhold his employment increment as well. See, N.J.S.A. 18A:29-14.

The next Board witness was Mr. Valentine, who has served as principal of Rahway High School for 15 years. On or about November 1, 1983, he received a phone call from a parent of a player who complained that Punko had removed the player from the team simply because he was in the alternative education class. This was the first time Valentine had heard of the problem and he checked with Manfredi about it. Manfredi told Valentine that he was already aware of the situation and that he had hoped to be able to handle it himself. A day or so later Valentine called Punko into his office. Manfredi was there also. Valentine told Punko of the Board's policy to allow students in the alternative education class to participate in extracurricular activities and directed Punko to place the students back on the team. Punko said he would not do so. According to Valentine, he also suggested that Punko could file a grievance to attempt to change Board policy, but Punko never followed up on that suggestion. Thereafter, on November 8, 1983, a formal meeting was held with Punko. Again, Valentine told Punko that he was in violation of the Board's policy and directed him to put the students back on the football team. Punko still resisted, telling Valentine that he would continue to "do it his way." At no time, said Valentine, did Punko or anyone else on his behalf ever claim that the Board's policy left room for a coach to exercise discretion with regard to exclusion of students in the alternative education class from team membership. At the conclusion of the meeting, Valentine told Punko that his action gave rise to possible disciplinary proceedings for

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insubordination and that he would have to recommend the same to the superintendent. However, for about a week or so thereafter, Valentine refrained from formally processing any recommendation in the hope that he and Manfredi could "head off" such a confrontation. When they had no success in resolving the matter, Valentine then formally brought the matter to the attention of the superintendent.

On cross-examination Valentine insisted that at no time did Punko ever claim that he felt he had the right under the Board's policy to do what he was doing. Punko's position always was that it was his way of enforcing discipline and he was not going to modify it. Valentine entertained no doubt that because of the position Punko was taking, he was being insubordinate as a teaching-staff member and the fact that his activities concerned his coaching, rather than his teaching, duties made no difference.

The final Board witness was the Superintendent of Schools, Frank D. Brunette. He explained that the alternative education class concept was designed to handle those sort of minor offenses which were believed to be primarily harmful to the student himself, rather than to others. The philosophy that the Board wished to implement in such cases was to keep those students in school and in a learning environment, rather than excluding them from the facility. Continued participation in extracurricular activities therefore was to be encouraged.

In mid-November 1983, Brunette received a memorandum from Valentine reporting on Punko's failure to follow Board policy and his refusal to reinstate students to the team (Exhibit R-2). About a week later, Brunette met with Valentine to discuss the situation and Valentine explained that although Punko's refusal was a serious act of insubordination, informal efforts had been made earlier to attempt to resolve the problem at a lower level.

Brunette, as Valentine, believed that the comments in Punko's evaluation regarding his actions as a coach were properly included in such a document. In his opinion, the purpose of a professional evaluation is to cover all facets of a teacher's performance as a professional educator, and a teacher is no less an educator while coaching.

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In January 1984, the Board met with Punko and his representative to consider whether or not the withholding of petitioner's employment and/or adjustment increment might be appropriate in addition to the letter of reprimand. At Punko's request, a court reporter was present to transcribe the proceedings and a transcript was prepared (See, Exhibit J-1, part D). Shortly thereafter, Punko was formally notified that the Board had voted to withhold his adjustment increment for the 1984-85 school year for the following reasons: "(1) Insubordination. (2) Failure to follow Board Policy in connection with students in the alternative education class." (Exhibit J-3).

FINDINGS OF FACT

Having now reviewed the testimony, the documentary evidence, and the post-hearing submissions of the parties, I herewith make the following Findings of Fact:

1. Petitioner has been employed by the respondent, Board of Education, as a health and physical education teacher since 1971 and is tenured.

2. Since 1977, petitioner has been employed at Rahway High School.

3. From 1978-79 until 1983-84 (six seasons) petitioner served as head varsity football coach at Rahway High School.

4. As head varsity football coach, petitioner established certain personal rules concerning eligibility for team membership, including a requirement that no student who was suspended would be permitted to remain on the team.

5. Prior to the commencement of the 1983-84 school year, the Board adopted a policy with respect to student attendance at an alternative education class, which was an in-school disciplinary alternative for students who previously would have been given an out-of-school suspension. The Board policy with respect to the alternative education class expressly provided that "students may attend or participate in extracurricular activities" even though they have been assigned to the alternative education class. (Exhibit J-13, p. 23.)

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6. The purpose of the alternative education class concept was to permit a more educationally appropriate alternative to an out-of-school suspension where minor disciplinary infractions were concerned, and which involved conduct that was primarily harmful to the student himself, rather than to others. The philosophy to be implemented was to attempt to keep such students in school and in a learning environment.

7. The alternative education class concept was explained to teaching-staff members sometime at the beginning of the 1983-84 school year, but petitioner apparently was not present during the course of that explanation.

8. Following the commencement of the 1983 football season, petitioner removed certain students from his team who had been assigned to the alternative education class because of disciplinary infractions. He believed that he had the authority to do this under certain provisions of a teacher handbook. (Exhibit J-12, p. 32)

9. By late October 1983, three such students had been removed from the football team by petitioner and the situation came to the attention of a vice principal, Ralph P. Manfredi.

10. Manfredi told petitioner that under Board policy, students assigned to the alternative education class were to be permitted to continue to engage in extracurricular activities such as football, and Manfredi counselled petitioner to reinstate the subject students to the team.

11. Manfredi also suggested alternative methods for handling such students, short of their removal from the team, but petitioner declined to follow Manfredi's suggestions.

12. The situation soon came to the attention of the principal of Rahway High School, Roy M. Valentine, who had received a telephone call from a parent of

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one of the students involved, complaining about the pupil's exclusion from the team by petitioner.

13. Valentine then checked with Manfredi, who confirmed the conduct involving petitioner's refusal to permit students assigned to an alternative education class to remain on the team.

14. As a result, Valentine called a meeting with petitioner, Manfredi and others in order to explore the circumstances. (Exhibit J-11). At that meeting, which was held on November 8, 1983, Valentine directed petitioner to reinstate the students, but petitioner responded that he would not do so. Valentine had also suggested that petitioner might consider filing a grievance in order to attempt to change the Board's policy.

15. Given petitioner's insistence with regard to his continued right to exclude students from the football team, Valentine decided to recommend to Superintendent of Schools Brunette that disciplinary proceedings for insubordination be brought against petitioner. However, both Valentine and Manfredi refrained from immediately processing such a recommendation in the hope that they might continue to counsel petitioner to change his policy. When that effort failed, the matter was officially brought to the attention of the superintendent.

16. Thereafter, petitioner was notified that he would not be reappointed as varsity football coach for the next (1984-85) school year. (Exhibit J-7). In addition, the Board issued a formal letter of reprimand to petitioner criticizing his insubordinate conduct and reserving the right to "take other steps as it may determine appropriate. . . ." (Exhibit J-6).

17. In January 1984, the Board met with petitioner and his representatives with respect to a consideration for withholding for insubordination petitioner's employment and/or adjustment increment. Thereafter, the Board met and

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formally determined to withhold petitioner's adjustment increment for the 1984-85 school year because of his "insubordination" and his "failure to follow Board policy in connection with students in the alternative education class." (Exhibits J-3, J-4.)

DISCUSSION

Many of the essential facts in this case are not even in dispute. While petitioner has claimed that during the course of the meeting on November 8, 1983 with Valentine, Manfredi and others, he or his representative made reference to the language of the teacher handbook and the Board policy which, they argue, vested some discretion in Punko with regard to who would be on the team, neither Valentine nor Manfredi could recall any such assertion. In addition, Manfredi indicated that from time to time he had suggested alternatives to petitioner with respect to handling students assigned to the alternative education class, short of their removal from the football team. Punko denied receiving any such alternative recommendations. Indeed, as noted previously, he responded to a question from the court to the effect that no alternative would have been appropriate—as long as the student was assigned because of a disciplinary infraction to an alternative education class further participation on the football team could not be tolerated.

Therefore, based upon my review and consideration of the testimony and other evidence in this case, it is clear to me, given the findings of fact, that the Board's action must be upheld. Punko either knew of the Board's policy or became aware of it sometime after the beginning of the 1983-84 school year. Certainly, by the time he began to have discussions with Manfredi in late October 1983, he knew that his actions were disputed by the administration. Nevertheless, he continued to "do it his own way." At the meeting on November 8, 1983, he was expressly directed to conform to the Board's policy and he patently refused to do so. That was a clear act of insubordination which cannot be tolerated. As a teaching-staff member, Punko owes a duty of allegiance to the employing Board and to the faithful carrying-out of its lawful policies and directives. He is not vested with the right to insist that his own personal standards supersede Board policy.

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While Punko appeared to me to be a person of high principles and devoted to the best interest of the students who played on his team, he failed, or refused, to recognize that with respect to the particular game that he was playing, the ball belonged to the Board.

The fact that Punko's conduct was related strictly to his activities as football coach and did not impact upon his performance as a teacher of health and physical education is irrelevant. Punko's extracurricular position was as much a part of his overall performance as a teaching-staff member as was his actual classroom performance and no authority has been cited to the court which would support a claim that there is any meaningful distinction in the withholding of increment context.

The decisions of the Commissioner are legion with respect to the fact that a board of education enjoys an inherent managerial prerogative to determine whether adjustment and/or employment increments should be withheld. Unless a board's action in this respect is demonstrated to be arbitrary, capricious or unreasonable, neither the Commissioner nor an administrative law judge can substitute his judgment for that of the board. See, e.g., Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The instant case presents no basis to deviate from that salutary principle. Petitioner was made aware that his actions were in contravention of Board policy. Despite informal efforts to counsel him in respect to his action, he refused to comply with that policy. After being given a direct order from his principal, he continued to refuse. That action was insubordinate and the Board was correct in determining to take the withholding action that it did because of the insubordination.

The petitioner's claim that he was not given an adequate opportunity to speak to the Board before the letter of reprimand was issued and his contention about the contents of his evaluation must be rejected. At issue here is the fact that a teaching-staff member was given appropriate direction to comply with Board policy and he refused to do so because of his own personal beliefs. By engaging in such conduct, Punko created the risk of the Board's determining to withhold his increment under N.J.S.A. 18A:29-14. The Board's pursuit of precisely that course of action is presumed correct. Nothing has been presented to me which would constitute any carrying by the petitioner of his burden to

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prove that what the Board did was arbitrary, capricious or unreasonable. Accordingly, the appeal 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.

November 9, 1984
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

11/13/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 16 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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OAL DKT. NO. EDU 2995-84

Witness List

For Petitioner:

Michael A. Punko

For Respondent:

Ralph P. Manfredi
Roy M. Valentine
Richard Proctor
Frank D. Brunette

Exhibit List

J-1		Stipulation of facts with attachments
J-2		Memo, September 26, 1984
J-3		Letter, February 2, 1984
J-4		Letter, January 18, 1984
J-5		Memo, January 18, 1984
J-6		Letter, December 13, 1983
J-7		Letter, December 9, 1983
J-8		Evaluation, December 7, 1983
J-9		Letter, November 29, 1983
J-10		Memo, November 23, 1983
J-11		Memo, November 3, 1983
J-12		Teacher Handbook
J-13		Student Handbook
P-1		Professional Evaluation, April 1984
P-2		Letter, April 5, 1984
P-3	id	REA-Board Agreement
R-1	id	Memo, January 10, 1984
R-2		Memo, November 9, 1983

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MICHAEL A. PUNKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Upon careful review of the record, the exceptions, and the judge's analysis in this matter, the Commissioner concurs with the findings and determinations reached by the judge. There is no question that petitioner continued to act in an insubordinate manner once he became aware that his own rules for sports participation could not supersede those of the Board. While it is understandable that petitioner initially believed he had the right to determine participation, he was clearly informed that the students in question were to be allowed to participate according to Board policy and he was given sufficient opportunity to comply. His continued refusal to obey direct administrative order certainly constitutes reasonable grounds for an action to withhold his adjustment increment.

In regard to the issue of negative comments with respect to insubordination arising out of the course of performing the coaching/extracurricular duties, the Commissioner concurs with the judge's conclusion that such information is appropriately placed in an overall performance evaluation.

Accordingly, the Commissioner agrees with the Office of Administrative Law that the Board's action in this matter was not arbitrary, capricious or unreasonable and accepts the recommendation dismissing the appeal as the final decision in this matter.

COMMISSIONER OF EDUCATION

DECEMBER 21, 1984

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4513-84
AGENCY NO. 150-5/84

WILLIAM A. GREENBERG,
Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK,
Respondent

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

James F. Clarkin, III, Esq., for respondent
(Borrus, Goldin & Foley, attorneys)

Record Closed: October 25, 1984 Decided: November 8, 1984

BEFORE WARD R. YOUNG, ALJ:

Petitioner, a tenured assistant middle school principal, alleged a violation of his seniority rights resulting from the action of the Board in abolishing his position and assigning another to the position of assistant high school principal. He also seeks a determination of a tenured status as an elementary classroom teacher.

The Board denies any impropriety and asserts that petitioner has accrued seniority only in the category of elementary school assistant principal.

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The matter was transmitted to the Office of Administrative Law on June 20, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held at the Office of Administrative Law, Newark, on July 26, 1984, at which the parties agreed to submit the matter for summary decision. The matter was briefed and the record closed upon final submission on October 25, 1984.

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

1. Petitioner was hired by respondent as a full-time Assistant Principal at the Highland Park Middle School for the school year beginning September 1, 1972.

2. At the time of petitioner's hire, he possessed certification as an elementary teacher and as a principal.

3. Petitioner served as a full-time Assistant Principal at the Highland Park Middle School for the 1972-73 school year, 1973-74 school year, and 1974-75 school year. Accordingly, with the beginning of the 1975-76 school year, petitioner achieved a tenured status.

4. From the date of petitioner's initial employment until June of 1978, petitioner continued his employment as a full-time Assistant Principal at the Middle School. In 1978, petitioner was also assigned the duties of Community Education Director.

5. Beginning with the 1982-83 school year, petitioner assumed classroom teaching responsibilities. Petitioner taught a course called "basic research skills" to 7th graders three periods per week.

6. For the 1983-84 school year, petitioner team taught a computer literacy course also involving three periods per week.

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7. From the time of petitioner's initial employment in 1972 until the end of the 1982-83 school year, the Middle School encompassed grades 6, 7 and 8. In September of 1983, the 8th grade was moved to the High School and accordingly, the Middle School has encompassed, since September 1983, grades 4 through 7.

8. The position of Assistant Principal also exists at the Highland Park High School. The incumbent in that position was appointed to the Assistant Principalship during the 1982-83 school year after first being employed by the district as a teacher.

9. During the entire period of the time that petitioner has functioned as Assistant Principal at the Middle School, the Middle School has been departmentalized.

10. Petitioner was hired by respondent as a Assistant Principal and not as a teacher and did not teach in respondent's school district prior to petitioner being hired as a full-time Assistant Principal at the Highland Park Middle School.

11. The Board of Education eliminated the position of Assistant Principal at the Middle School for the 1984-85 school year and has terminated the employment of petitioner due to a reduction in force.

HAS THE BOARD VIOLATED PETITIONER'S SENIORITY RIGHTS BY ASSIGNING ANOTHER TO THE POSITION OF ASSISTANT HIGH SCHOOL PRINCIPAL?

The thrust of petitioner's argument is based on the departmentalization of the Middle School and subsequent reorganization of the district resulting in the relocation of grade 8 into the high school. See Facts #7 and #9. Petitioner relies on Carl Cohen v. Piscataway Board of Education, 1981 S.L.D. _____ (decided October 2, 1981), aff'd State Board 1982 S.L.D. (decided February 3, 1982); Howley v. Ewing Tp. Bd. of Ed., 1982 S.L.D.

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_____ (decided December 20, 1982); and Williams v. Plainfield Bd. of Ed., 176 N.J. Super 145 (App. Div. 1980).

Cohen is not dispositive in support of petitioner's position. In that matter it was determined that, in the absence of a middle school category incorporated in N.J.A.C. 6:3-1.10, service in the middle school falls in the elementary category.

In citing Howley, petitioner errs in his use of language (which the Judge in that matter so carefully cautioned against) when he states at Pb5 that "The parties invovled were tenured in the same category of vice principal"; and at Pb6 when he states that "each petitioner's seniority had to be calculated on the basis of service in the category of vice-principal, without regard to the particular grade level"; and again at Pb 6 when he states "To the same effect is the Williams decision in which the Appellate Division held that tenure accrues in the category of principal without regard to the grade level of the principalship."

Howley clearly stands for the proposition that tenure attaches to a position, and only seniority can accrue in a category, which has meaning only in a reduction of force. The petitioners in that matter were denied relief solely because another had greater seniority in the category of high school vice-principal.

Williams is clearly distinguishable from the instant matter because the issue therein was an involuntary transfer from high school principal to elementary school principal, which was held not to be a violation of her tenure rights. Seniority rights, in the absence of a reduction in force, was not at issue.

I FIND petitioner in the instant matter to be tenured in the position of assistant principal, and to have accrued 12 years of seniority in the category of elementary school assistant principal only. N.J.A.C. 6:3-1.10(1)13. His seniority rights have therefore not been violated.

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HAS PETITIONER ACCRUED SENIORITY AS AN ELEMENTARY TEACHER?

The parties have stipulated that petitioner taught a "basic research skills" course to 7th graders in 1982-83, and taught a computer literacy course in 1983-84. See Facts #5 and #6.

Petitioner's claim is based on his possession of an instructional certificate as an elementary teacher at the time he was employed as assistant principal, and that he therefore accrued seniority in both categories. He cites Mulhearn v. Bd. of Ed. of the Sterling Regional High School District, 1982 S.L.D. _____ (decided February 2, 1982). He argues that seniority accrued prior to the effective date of amended N.J.A.C. 6:3-1.10 (September 1, 1983) is vested as the amended regulation does not suggest a retrospective application.

I agree with petitioner's interpretation of N.J.A.C. 6:3-1.10, but since seniority does not accrue until tenure is acquired, a determination must first be made if petitioner is in fact tenured as an elementary teacher.

Mulhearn is distinguishable from the instant matter. The issue therein addressed seniority acquired by a tenured teacher with multiple endorsements on her instructional certificate. Petitioner herein seeks a tenure determination (and seniority) as an elementary teacher under his instructional certificate as well as a tenure determination (and seniority) as an assistant principal under his administrative certificate.

It is undisputed that petitioner "was hired by respondent as an assistant principal and not as a teacher and did not teach in respondent's school district prior to petitioner being hired as a full time assistant principal . . . ." See Fact #10. It is also undisputed that petitioner taught one course in 1982-83 and one course in 1983-84. See Facts #5 and #6. Petitioner clearly does not meet the service requirements for tenure under N.J.S.A. 18A:28-6, and must therefore rely on his argument that he acquired tenure as an elementary teacher while employed under his administrative certificate.

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The Commissioner addressed this issue in Frances Dullea v. Bd. of Ed. of the Borough of Northvale, 1978 S.L.D. 638 and said:

> It is observed that the Legislature, pursuant to N.J.S.A. 18A:28-10, first directed the Commissioner with approval of the Board of Education to promulgate categories of teaching staff members in 1942. Thus it is clear that no such categories existed when the Supreme Court and the Commissioner issued opinions in Seidel, supra; and Horan, supra. See Maurice J. O'Sullivan v. Board of Education of Jersey City, 1961-62 S.L.D. 118. The Legislature, recognizing in 1942 the growing complexities of school systems of the State, directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, they stated that teaching staff members should attain seniority only in those categories of their employment with boards of education, regardless of the number of certificates held. N.J.A.C. 6:3-1.10 (b) and (h). Thus, a certified teacher of secondary mathematics who also holds an elementary teacher's certificate but who never served in the category of elementary teacher may not, by seniority, claim the right to replace an experienced teacher of elementary subjects. Nor may an elementary school teacher who also holds a secondary science certificate, but who has never served in the category of secondary school teacher, replace an experienced chemistry teacher. The wisdom of establishment of seniority categories is self evident in the interests of a thorough and efficient system of education. (at 641)

I **FIND** no merit to petitioner's argument that he acquired tenure as an elementary teacher while employed under his administrative certificate. Seniority in the category of elementary teacher could therefore not be accrued.

The Board is hereby **ORDERED** to place petitioner on the preferred eligibility list as an assistant elementary school principal.

I **CONCLUDE** that summary decision is **GRANTED** the Board and **DENIED** petitioner. This matter is therefore **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.

8 November 1984
DATE

Ward R. Young
WARD R. YOUNG, ALJ

11/14/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

NOV 16
NOV 16 1984
DATE

Mailed To Parties:

Ronald L. Parker/pdt
FOR OFFICE OF ADMINISTRATIVE LAW

g

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WILLIAM A. GREENBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law and the exceptions to the initial decision filed by petitioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon review of petitioner's exceptions, it is evident that his claim to the position of assistant high school principal is grounded upon his contention that the employment services he rendered as assistant principal of the Middle School are to be determined to fall within the secondary category for seniority purposes pursuant to N.J.A.C. 6:3-1.10(1).

More specifically, petitioner contends that:

> "***Paragraph L of N.J.A.C. 6:3-1.10 has a definition of 'secondary' and 'elementary.' There is no definition of either junior high school or middle school. Elementary is defined as including kindergarten, grades 1-6 and grades 7-8 without departmental instruction (emphasis supplied) (Subparagraph 16).
>
> "Accordingly, had the new rules been in effect when the Cohen case was decided and had Piscataway had a departmentalized middle school, it is clear that Judge Campbell would have reached the opposite conclusion and would have determined that the seniority of a Middle School Assistant Principal accrued in the secondary area provided that that school was departmentalized.
>
> "Accordingly, it is submitted that the Cohen case rather than supporting the general proposition that middle schools per se fall into the elementary category rather stands for the proposition that the Administrative Law Judge is to investigate the constitution of the school district and make a determination as to how a middle school should fall in each and every district. The

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> Administrative Law Judge undertook no such investigation herein and, as the stipulated record demonstrates, as the Middle School in Highland Park was departmentalized, it is clear that petitioner accrued seniority in a secondary area.
>
> "It is worth emphasizing that the high school, which previously was 9-12, was expanded to encompass the 8th grade and is now a five year high school. There is absolutely no question that petitioner acted for approximately 12 years as the Assistant Principal for 8th grade. The 8th grade was departmentalized. The 7th grade was, and still is, departmentalized, although the 7th grade is still at the Middle School. Consequently, petitioner must be entitled to the position at the high school especially in view of the fact that he has already acted as the Assistant Principal for one of the grades now at the high school. Clearly, petitioner's seniority is on the high school level.***"
>
> (Petitioner's Exceptions, at pp. 4-5)

In this regard the Commissioner finds and determines that the position taken by petitioner with respect to his claim to seniority in the category of assistant high school principal (N.J.A.C. 6:3-1.10(1)(11) is totally without merit for the following reasons:

1. The provisions of N.J.A.C. 6:3-1.10(1)(15)(16) speak exclusively to seniority accrual which attaches to instructional endorsements for services rendered in the elementary or secondary categories so defined therein.

2. The undisputed facts set forth in the instant matter clearly establish that the Middle School in the School District of Highland Park has been and continues to be operated as an elementary school notwithstanding the recent change in grade level organization. This is so for the precise reasons set forth by the ALJ on page 4 of the initial decision which places reliance on the Commissioner's prior ruling in Cohen, supra, regarding the classification and organization of middle schools.

3. In view of the above, it is further determined that petitioner's seniority entitlement falls within the appropriate category of elementary assistant principal in accordance with the provisions of N.J.A.C. 6:3-1.10(1)(13). Petitioner may not therefore lay claim to a seniority entitlement as an assistant high school principal (N.J.A.C. 6:3-1.10(1)(11)) by virtue of the fact that this is a separate seniority category in which he has not, at any time, been employed by the Board.

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Finally, the Commissioner finds and determines that petitioner has not acquired a seniority status as an elementary teacher inasmuch as the limited teaching services he rendered during the 1982-83 and 1983-84 school years were insufficient to comply with the precise time requirements prescribed in N.J.S.A. 18A:28-6 for the acquisition of tenure.

Moreover, it is undisputed that petitioner's employment for all periods of time controverted herein was essentially that rendered while he was employed in the position of elementary assistant principal.

Accordingly, the Commissioner adopts as his own those recommended findings and conclusions set forth in the initial decision as modified herein.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

DECEMBER 31, 1984

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IN THE MATTER OF THE TENURE :
HEARING OF SAMUEL C. CAPALBO, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF KEANSBURG, MONMOUTH COUNTY. :
:

Decided by the Commissioner of Education, October 31, 1983

Decision on Motion by the State Board of Education, February 1, 1984

For the Board, Dittmer & Bennett (John O. Bennett, III, Esq., of Counsel)

For the Respondent, Chamlin, Schottland, Rosen, Cavanagh & Uliano (Michael D. Schottland, Esq., of Counsel)

For the Intervenors, Zazzali, Zazzali & Kroll (Robert A. Fagella, Esq., of Counsel)

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

May 2, 1984

PENDING N.J. SUPERIOR COURT

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CEDARVILLE TEACHERS ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, July 22, 1982

Decided by the State Board of Education, May 4, 1983

Argued January 25, 1984 - Decided February 9, 1984

Before Judges Fritz and Furman.

On appeal from the State Board of Education.

John E. Collins argued the cause for appellant (Selikoff & Cohen, attorneys).

John T. Barbour argued the cause for respondent (Barbour & Costa, attorneys; John T. Barbour and William R. Barbour, on the brief).

Statement in Lieu of Brief was filed on behalf of the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

PER CURIAM

Petitioner teachers association appeals from a decision of the State Board of Education rejecting its challenge to respondent board of education's policy of annual physical examinations for all employees. The State Board sustained respondent's authority to require such annual physical examinations but did not affirm respondent's reporting form insofar as it "appears overly intrusive and unnecessary for school health purposes." The State Board remanded with a direction "for imposition of limitations so as to avoid undue intrusions into private matters.

Petitioner argues that the policy of annual physical examinations of this nature is ultra vires, despite N.J.S.A. 18A:16-2 which mandates: "every board of education shall require all of its employees . . . to undergo a physical examination . . . at least once in every year." Petitioner's reliance is upon the

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further provision of the statute that the scope of physical examinations shall be determined under rules of the State Board. No such rules have been promulgated except for tuberculosis testing. In the absence of State Board rules prescribing the scope of annual physical exams petitioner contends that local boards lack authority to implement the statutory mandate of N.J.S.A. 18A:16-2.

We reject petitioner's argument as untenable. In N.J.A.C. 6:29-1.1 the State Board has provided general authority to local boards to adopt rules to govern health services. "Health services" must be construed to encompass annual physical examinations for employees. We view the mandate of annual physical examinations in N.J.S.A. 18A:16-2 as overriding and the further statutory requirement that their scope be determined by State Board rules as substantially complied with by the delegation of authority to local boards in N.J.A.C. 6:29-1.1.

Petitioner's concern that respondent may extend the scope of physical examinations so as to infringe on the privacy of employees is premature and speculative in view of the specific direction to the contrary in the State Board remand.

We affirm.

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VICTOR R. CICCONETTI,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, October 28, 1982

Decided by the State Board of Education, March 2, 1983

Argued March 14, 1984 -- Decided August 6, 1984

On appeal from New Jersey State Board of Education.

Dorothy L. Argyros argued the cause for appellant (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys; Thomas W. Cavanagh, Jr., on the brief).

Malachi J. Kenney argued the cause for respondent (Kenney & McManus, attorneys).

Wayne J. Oppito filed a brief on behalf of amicus curiae New Jersey Principals and Supervisors Association.

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on State Board of Education (June Kanter, Deputy Attorney General, on the statement).

PER CURIAM

Petitioner served three years and seven months in the military service of the United States. After this service he was employed in three educational systems as teacher none of which offered him the "employment credit" mandated by N.J.S.A. 18A:29-11. Thereafter he was employed by respondent as a subject area chairman (S.A.C.) and placed on the first step of the S.A.C. salary guide. He claims that inasmuch as he has never received credit for his military service he is entitled to be placed four steps higher pursuant to the statute. The administrative law judge (ALJ) found the position to be a "supervisory" one requiring "at a minimum, three year's prior teaching experience" and "a separate certificate." He determined "the position of supervisor ... to be one of promotion." He concluded:

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> If petitioner is granted the relief he seeks, he would be placed in a greater position than he would have been had he been employed by the Board in prior years. Petitioner, at least theoretically, would have been employed in 1974 as a teacher, placed on the fifth step of the appropriate salary guide in recognition of his four years' military service. Five years later, 1978-79, he would have been on the ninth step of the MA +30 guide, or at a salary of $16,416. Had he been appointed as chairperson for 1979-80 in that circumstance, there is no doubt that the chairpersons' salary guide would command he begin at step one, or $18,400. Here, petitioner demands placement on step five, or $21,400, which, if granted, would indeed be discriminatory against those chairpersons who here worked their way through the Board's system. Such a result is not equitable, nor is it the result intended by the statute. The statute indicates that a teacher receives credit for up to four years of military services as if he had been teaching, those four years. Here, petitioner, by virtue of receiving a salary of $18,400 in 1979-80, which is the salary he would have received had he been appointed to the position from within the district, includes credit for his military service.

The Commissioner of Education adopted the findings and determination of the ALJ. On petitioner's appeal to the State Board of Education it concurred, as do we.

Initially we observe that the findings of fact of the ALJ might reasonably have been reached on sufficient credible evidence in the whole record and we will not disturb them. Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973).

It is unfortunate that words such as "equitable" appear in the initial decision and that a suggestion of waiver appears from comments of the Commissioner relating to the desirability of early placement discussion because it is clear to us the decisions below do not turn on these considerations at all. The issue, and the basis for the decision below, concerns the nature of the statutory largesse. Petitioner, borrowing from Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 151 (1982), characterizes this as a "reward" and complains in effect he was deprived of something more in the nature of a prize. But as is clear from Lavin in context, this statutory reward "takes the form of crediting the military service as teaching experience." Ibid.

This is precisely the principle which the agency recognized here and precisely the "reward" which was tendered petitioner: the structure of the S.A.C. salary guide in fact credited petitioner for

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at least four more years' teaching experience than he actually had, all as the ALJ noted and found. The Legislature certainly did not intend to reward petitioner beyond that which another with identical teaching experience would have received at respondent's hands simply because petitioner had not sought nor received his statutory due at a prior learning institution.

Affirmed

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CINNAMINSON TEACHERS' ASSOCIATION ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 26, 1983

For the Petitioners-Appellants, Selikoff & Cohen
(John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, Slimm, Dash & Goldberg
(John L. Slimm, Esq., of Counsel; Bruce E. Barrett, Esq., On the Brief)

The State Board of Education notes for the record, an error at page 4 of the slip opinion, paragraph (14), which should refer to the 1982/83 school year, rather than the 1981/82 school year. With this correction, the State Board affirms the decision of the Commissioner of Education for the reasons expressed therein.

February 1, 1984

PENDING N.J. SUPERIOR COURT

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CINNAMINSON TEACHERS ASSOCIATION, APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY, RESPONDENT.	:	APPELLATE DIVISION

Decided by the Commissioner of Education, June 27, 1983

Decided by the State Board of Education, December 7, 1983

Submitted: November 21, 1984 - Decided December 26, 1984

Before Judges Matthews, Furman and Cohen.

On appeal from the New Jersey State Board of Education.

Selikoff & Cohen, attorneys for appellant (Joel S. Selikoff, of counsel; Mr. Selikoff and Barbara E. Riefberg, on the briefs).

Slimm, Dash & Goldberg, attorneys for respondent (John L. Slimm, of counsel; Bruce E. Barrett, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education, submitted a Statement in Lieu of Brief (Jaynee La Vecchia, Deputy Attorney General, on the Statement).

PER CURIAM

This controversy focuses upon a dress code. The Cinnaminson Teachers Association (Association) appeals from the December 7, 1983 decision of the State Board of Education (State Board) upholding the validity of the dress code adopted by the Cinnaminson Board of Education (Board). The Association commenced this action by filing a petition of appeal with the Commissioner of Education (Commissioner) asserting that the dress code for teaching staff members adopted by the Board is arbitrary and capricious, vague and overbroad and violative of the Association's members' rights under the First, Fifth and Fourteenth Amendments of the United States Constitution. These allegations were denied by the Board and the matter proceeded to plenary hearing.

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Five days of hearing were conducted before an administrative law judge who thereafter issued an initial decision recommending dismissal of the petition. Applying the criteria for review of dress codes set forth by the State Board in Carlstadt Teachers Association v. Board of Education of the Borough of Carlstadt, 1980 S.L.D. 371 and by this court in Cumberland Regional Education Association v. Board of Education of Cumberland Regional High School District, Docket No. A-1422-80T2 (decided January 8, 1982), the initial decision recommended that the Cinnaminson dress code not be found to be arbitrary or capricious. The law judge specifically recommended as one of his proposed findings that the code bears "some substantial relationship to the goals of pupil achievement, pupil discipline and [Board member] Taylor's concern for a few teachers dressing inappropriately at the high school level." He further recommended that the code be found to provide sufficient flexibility in style and mode of dress so as to place no undue limit on an individual's right of selection and freedom of expression. Finally, he recommended that the code be found to be not overly vague or overbroad. The initial decision did advise that guidelines be developed by the Board with the assistance of its superintendent so as to avoid possible inconsistent interpretation and enforcement of the dress code.

The Commissioner adopted the recommended findings and conclusions of the initial decision and dismissed the petition of appeal. On appeal, the State Board affirmed the Commissioner's decision. This appeal ensued.

We affirm substantially for the reasons expressed in the initial decision as adopted by the Commissioner and the State Board.

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MICHAEL J. COHEN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
EAST BRUNSWICK BOARD OF EDUCATION,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 30, 1982

Decided by the State Board of Education, March 2, 1983

Argued January 25, 1984 -- Decided March 12, 1984

Before Judges Fritz and Furman.

On appeal from New Jersey State Board of Education.

Martin R. Pachman argued the cause for appellant (William Wallen, on the brief).

Robert M. Schwartz argued the cause for respondent.

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of New Jersey State Board of Education (June Kanter, Deputy Attorney General, on the statement).

PER CURIAM

East Brunswick Board of Education appeals from a determination of the State Board of Education, affirming the decision of the Commissioner of Education who had affirmed the initial decision of an administrative law judge, that Michael J. Cohen had been improperly terminated inasmuch as he had acquired tenure and the termination was not accomplished pursuant to the tenure law. The sole ground urged is "that under the unique and unusual circumstances of the instant case, respondent [Cohen] did not acquire a tenure status." We affirm.

It is beyond dispute that compliance "with the precise conditions articulated in the [tenure] statute" results in the acquisition of tenure. Zimmerman v. Board of Education of Newark, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). The record brought up supports the conclusion that, without regard for the reasons which permitted the happening, Cohen did comply precisely with the statutory conditions for tenure. The finding of the

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administrative law judge to that effect, which found concurrence in both the decision of the commissioner and its affirmance by the State board, is reasonably and readily available from the record and we will not disturb it. Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973).

Appellant's argument that "mistakes of law or administration which it has made in good faith" should relieve it from the burden of statutory tenure is unpersuasive. Nor do the School Law Decisions cited by appellant support its position.

Affirmed.

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MICHAEL S. COLAVITA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 3, 1983

For the Petitioner-Appellant, Klausner & Hunter (Stephen E. Klausner, Esq., of Cousnsel)

For the Respondent-Respondent, Chase & Frana (Donald C. Chase, Esq., of Counsel)

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

May 2, 1984

PENDING N.J. SUPERIOR COURT

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WILMA COLELLA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF ELMWOOD PARK,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 10, 1983

Decided by the State Board of Education, July 6, 1983

Argued March 20, 1984 - Decided July 19, 1984

Before Judges Joelson and McElroy.

On appeal from final decision of the State Board of Education.

Jan K. Seigel argued the cause for appellant.

June Kanter, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Kanter, on the brief).

Robert A. Fagella argued the cause for respondent Colella (Zazzali, Zazzali & Kroll, attorneys; Mr. Fagella, of counsel and on the brief).

PER CURIAM

Appellant Board of Education appeals a final determination of the State Board of Education affirming a decision of the Commissioner of Education holding appellant's transfer of Wilma Colella from her tenured position as principal of its high school to that of vice principal of that school was improper under the tenure statutes.

It is our judgment that, in the factual circumstances presented, the decision of the Commissioner of Education constitutes a proper analysis of and correctly interprets the applicable statutes.

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Accordingly, we affirm the final decision of the State Board of Education dated July 6, 1983 substantially for the reasons given in the decision of the Commissioner of Education dated March 10, 1983.

Affirmed.

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IN THE MATTER OF THE TENURE	:	
HEARING OF BARRY F. DEETZ,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE VILLAGE	:	DECISION
OF RIDGEWOOD, BERGEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 4, 1983

For the Respondent-Appellant, Rothbard, Harris & Oxfeld
(Emil Oxfeld, Esq., of Counsel)

For the Petitioner-Respondent, Aron & Salsberg
(Ellen S. Bass, Esq., of Counsel)

The record in this matter presents a confusing and complex chain of events which culminated in the certification of tenure charges by Petitioner, Ridgewood Board of Education, against Respondent, Barry F. Deetz, alleging in nine charges that Respondent had been involved in the use of marijuana. The complaint against Deetz originated with his wife's former husband and was supported by the written statements of his wife's two sons. These charges were brought in the context of a raging custody dispute between Respondent's wife and ex-husband over the two sons who had submitted the statements against Respondent Deetz.

In its first report on this case, the Legal Committee concluded that the educational forum was an improper place to resolve what appeared to be an essentially family matter. It recommended that the Commissioner's decision, which adopted the findings of the ALJ upholding seven of the charges and ordered the dismissal of Deetz, be vacated. We reviewed the exceptions submitted in response to our Legal Committee's first Report in the Deetz case. Upon reconsideration of the issues, thorough review of the record and consideration of tne exceptions submitted in response to our Legal Committee's latest Report, the State Board cannot avoid the conclusion that, because the proofs in this case are suspect and without corroboration, the decision in this case is not supported by a preponderance of credible evidence.

The State Board fully endorses the decisions of the Commissioner in which he has upheld dismissal of teachers whose involvement with drugs was proven. See, e.g. In the Matter of the Tenure Hearing of Mary Jane Cito, decided by the Commissioner September 1, 1983; In the Matter of the Tenure Hearing of Jeffrey Wolfe, 1980 S.L.D. 721, aff'd State Board 1980 S.L.D. 728, aff'd Docket No. A-1610-70T2 (App. Div., Oct. 5, 1981). We note that the great majority of these drug-related cases have also involved criminal proceedings and the application of N.J.S.A. 2C:51-2, which provides

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that a person who holds public employment forfeits his position if he is convicted of a crime involving a dishonesty or one of a third degree or above. While the quantum of proof required in the administrative proceedings is not proof beyond a reasonable doubt, as in a criminal procedure, the determination as to whether the charges are true in fact must nonetheless be supported by a preponderance of believable evidence. In the Matter of the Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526, 529. The same standard applies where, as here, no criminal charges have been filed.

The testimony in this case was voluminous, covering fourteen days of hearings during which the familial relationships between the individuals involved, as well as the substantive charges, were detailed. J.R. and S.R., on whose written statements and testimony substantiation of the charges rest, are the sons of Mrs. Deetz and her ex-husband, who was the originator of the complaint herein. Although Mrs. Deetz's ex-husband was awarded temporary custody of the two boys, both parents have continued to vie for custody. The record indicates that the relationship between Mrs. Deetz's ex-husband and the Deetzs was characterized by resentment growing out of this bitter custody battle. See Initial Decision, at 2-3. The children were not immune from this hostility, as evidenced by the unrefuted testimony of John Zatsko, a former boarder in the family's home. Zatsko testified to the intention of J.R. and S.R. to break up the relationship between Respondent Deetz and their mother. He related that the brothers, at the instigation of their father, intended to discredit Respondent by planting marijuana in his classroom. T 6/4/82, p. 16 et seq. Zatsko further testified that the boys' father had prepared and typed a "report" for the boys to use in connection with the plot against Respondent, T 6/4/82, p. 19, which they used as the basis for the handwritten reports submitted to the principal. T 6/4/82, p. 101. Zatsko also described times when J.R. and S.R. made phone calls to their mother to annoy and disturb her. T 6/4/82, p. 22. While the ALJ found that Zatsko's testimony was "somewhat exaggerated" and concluded that the negative relationship between Zatsko and Mrs. Deetz's ex-husband and sons made his credibility suspect, the State Board cannot ignore the fact that, even if Zatsko's testimony was "somewhat" exaggerated, this entire case is colored by the personal animosity existing among the individuals involved. Accordingly, we must consider this background as we evaluate whether the charges are supported by a preponderance of credible evidence. To refuse to do so would be an abdication of our responsibility as the ultimate administrative decision-maker in this controversy. See Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452-53 (1982).

Six of the seven substantive charges upheld by the ALJ in this matter involve marijuana-related transactions between Deetz and the two boys. Each of those charges presuppose the presence of marijuana in the school or Respondent's involvement with that sub-

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stance.[1] The Administrative Law Judge determined that Respondent: (1) asked S.R. for marijuana seedlings, (2) was growing marijuana in his classroom, (3) asked S.R. to transplant some marijuana seedlings growing in his classroom, (4) told his class about the seedlings he was growing, (5) asked for and accepted marijuana cigarettes from the boys at a Christmas party, (6) bought $5.00 worth of marijuana from S.R., and (7) failed to report to school officials that the boys were dealing marijuana in the school despite knowledge of this fact for a substantial period of time. Substantiation of all except the last charge was based on the written statements and/or testimony of the two brothers, which the ALJ found to be credible even where there was conflicting evidence and no corroboration.

Although it is established that the State Board of Education may make its own independent findings of fact, Dore v. Bedminster Tp. Bd. of Ed., supra, at 452, the State Board recognizes that review of decisions rendered by an Administrative Law Judge, which are, as here, affirmed by the Commissioner, should consider the "...proofs as a whole with due regard to the opportunity of the one who heard the witnesses to judge their credibility..." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-3 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). At the same time, as set forth above, we have a responsibility to assure that the decision in this case is supported by a preponderance of credible evidence. See Dore v. Bedminster Tp. Bd. of Ed., supra; In the Tenure Hearing of Arlene Dusel, supra. As previously stated, substantiation of the charges in this case rests on the written statements and/or testimony of the two boys, who the ALJ found to be credible. We think that the ALJ's reliance on those statements and testimony was erroneous. Therefore, we have concluded that her

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[1] At the hearing, Respondent's counsel moved dismissal of the charges on this ground. T 6/3/82, p. 143 et. seq. Our review of the record reveals that the presence of marijuana was never established in this case either by expert testimony or by direct testimony supported by a foundation. In fact, the Initial Decision fails to address this question at all. We note that the relevant case law indicates that where tenure charges are predicated on possession of a controlled substance, the nature of that substance must be established by admission or by expert testimony, either in a prior criminal proceeding or in the administrative proceeding. See, e.g. In the Matter of the Tenure Hearing of Jeffrey Wolfe, supra; In the Matter of the Tenure Hearing of David Earl Humphreys, supra; In the Matter of the Tenure Hearing of Arlene Dusel, supra. Review of narcotic cases arising under the school laws shows no instance where the existence of the controlled substance was presumed. While we do not hold that circumstantial evidence can never demonstrate the presence of narcotics, direct testimony supported by a proper foundation would be a minimal requirement in such cases. That minimal standard was not met here.

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decision is not supported by a preponderance of the evidence and must be reversed.

The ALJ upheld charges one, two, three, four and eight solely on the uncorroborated statements and/or testimony of the two boys. Testimony contradictory to that of the boys was presented on charges two and three, which alleged that Respondent grew marijuana in his classroom. Examination and cross-examination of Thomas Rosseau, T 8/9/82, p. 66 et seq., Arne Olsen, T 8/9/82, p. 85 et seq., Marion McGinnis, T 8/9/82, p. 89 et seq., Robert Olsen, T 8/9/82, p. 98 et seq., and Marguerite McCartney, T 6/4/82, p. 146 et seq., all of whom were Respondent's fellow-teachers, some even sharing the same classroom, revealed that none had seen or identified marijuana plants in any way associated with Respondent Deetz. Yet the ALJ found the two boys credible and did not allow the testimony of the six teachers to "detract from the strength of the evidence" supplied by J.R. and S.R. Initial Decision, at 13. We find that the fact that none of the six teachers called to testify, one of whom was a biology teacher who often used the same room and plants as Respondent, had heard about or seen Respondent's alleged plants or seedlings raises serious questions about the veracity of the statements made by J.R. and S.R.[2]

Further, although the boys asserted, in the support of charge four, that it was common knowledge among the students that Respondent was growing marijuana in his classroom, no other students were produced to verify this claim. In fact, after a lengthy examination of the school principal regarding statements from students other than J.R. and S.R., it was concluded that information from other students played no part in the case and was in no way a basis for the charges against Respondent Deetz. T 4/13/82, p. 74. Even the ALJ conceded that a negative inference could be drawn from the failure to provide student corroboration as to charge four. Initial Decision, at 15.

Although we recognize that corroboration of student testimony is not required, it has long been established that student testimony must be examined with great caution. See, e.g. In the Matter of the Tenure Hearing of Portia Williams, decided by the Commissioner August 27, 1981, aff'd State Board March 24, 1982, aff'd Docket No. A-4036-81T3 (App. Div., Dec. 15, 1982). While this stricture generally has been applied where the students were under ten years old, see Portia Williams, supra, at 8, the same caution has been used in evaluating the testimony of teenagers. See In the Matter of the Tenure Hearing of Nathan James Michaels, decided by the Commissioner January 30, 1984, aff'd State Board September 5, 1984.

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[2] Although no contradictory evidence other than Deetz's denial was presented to S.R.'s statement or testimony as to charge 1 that Respondent asked him for some seedlings, we note that charge 1 is dependent on charges 2, 3 & 4.

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In Michaels, a high school science teacher was charged with spreading rumors involving sexual misconduct about another teacher. Although the case centered largely on the question of the reliability of student hearsay, the ALJ, in evaluating the credibility of one student witness' direct testimony, reasoned that the testimony could be explained by the sixteen year old's need to bolster his self-image with a reputation for sexual prowess, a not unusual adolescent characteristic. Id., Initial Decision, at 8. In concluding that the Board had failed to prove the charges in that case, the ALJ emphasized that adolescent psychology and the school milieu tended to explain the hearsay and rumors. Id., at 11. Similar concerns are present here, dictating caution in evaluating the testimony of the two boys and indicating the danger in upholding the charges solely on the basis of that testimony. The proceedings here were fraught with the animosity existing between Mrs. Deetz's ex-husband and sons and the Deetzs; there was contradictory adult testimony and no corroboration of Charges 1, 2, 3, or 4 was offered. In such a context, student testimony must be evaluated with great caution, caution that was not exercised by the ALJ in this case.

The State Board finds that it strains the imagination that, of the entire class and all Respondent's students, only the two brothers came forward to complain, and that no other students, parents, or teachers corroborated the charges against Respondent of growing marijuana in the classroom or discussing the seedlings in class. Moreover, not only was there no corroboration of the boys' version of the events in Charges 1, 2, 3, and 4, where it is difficult to imagine that such events would go unnoticed by other senior high school students and teachers, but the corroborative evidence offered by Petitioner regarding Charge 5 is highly suspect. Charge 5 revolved around a 1980 Christmas party at the residence of Mrs. Deetz's ex-husband where it was alleged by the brothers that Respondent Deetz requested, accepted, and offered to pay for marijuana cigarettes from them. Petitioner's corroborating evidence concerning the Christmas party was fortuitously revealed to Petitioner for the very first time late in the afternoon of the day immediately before it was heard. T 10/19/82, p. 32. Petitioner's witness Jack Sadofsky testified that he saw Respondent Deetz upstairs during the party. T 10/19/82, pp. 138-139. Respondent was alleged to have entered an upstairs bedroom and to have requested a marijuana cigarette.

Serious doubt was cast upon Sadofsky's observation of Respondent at the Christmas Party through the testimony of Ralph Esposito. Esposito testified that he saw Sadofsky at Mrs. Deetz's ex-husband's home on the afternoon of the party, not during the evening party as had been related by Sadofsky. T 10/28/82, pp. 2-18. In attempting to deal with this inconsistency about time in the testimony, the ALJ concluded that the fact that Sadofsky "may be in error as to the exact time when he saw Esposito, i.e., in the afternoon or in the evening, does not significantly taint his testi-

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mony." Initial Decision, at 18. In the opinion of the State Board, this conflicting testimony leaves unresolved a key issue of fact. If Sadofsky was not present during the party, then he could not place Respondent Deetz upstairs, and thus the corroboration offered for the brothers' testimony would be severely damaged. Yet, the ALJ disposed of this challenge by saying that the discrepancy in times did not "significantly taint" Sadofsky's testimony. When a discrepancy such as this is resolved so as to bolster otherwise suspect and uncorroborated testimony[3], the State Board believes that it reduces the reasonableness and substantiality of the evidence against Respondent as a whole.

Finally, Charge 9, which asserted that Respondent knew of the brothers' drug dealing for some time but had not reported the information to school officials, was supported by testimony of

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[3] In its exceptions to the Legal Committee Report of October 24, the Board argued that the Legal Committee had ignored Probation Officer Michael Marconni's testimony, which the Board claimed corroborated the brothers' testimony that Respondent Deetz requested, accepted and offered to pay for marijuana cigarettes from them in an upstairs bedroom during the Christmas party, as well as their testimony as a whole. Initially, we note that the Legal Committee did review that testimony, along with all other testimony in the case, and concluded, as does the State Board, that it did not substantiate the boys' allegations. Marconni's Report, P-10, was developed pursuant to his custody investigation. It included, among numerous allegations pertaining to the fitness of the boys' father to have custody, an assertion by the boys' mother that their father allowed them "at Christmas, in the presence of a teacher from their school, to make baggie gifts of marijuana from a larger bag of drugs. The smaller drugs were around to the house guests." P-10. In testifying as to an addendum to that Report, P-20, Marconni claimed that Respondent Deetz told him that he had observed the boys giving out marijuana as gifts on one occasion and that he was given a bag as a gift and gave it away. T 2/25/83, Vol. I, p. 13. Deetz denied ever telling Marconni that he saw the bags of marijuana or that he received one as a gift. T 2/25/83, Vol. II, p. 30. The State Board notes that the accuracy of Marconni's Report and Addendum is called into question by the fact that at least one person quoted in the Report, Detective Lembo, later signed an affidavit denying that he had made the statements attributed to him. T 2/25/83, Vol. I, p. 30. Further, even if Marconni's Report as to the alleged incident was accurate and even if it had been established that Deetz was the teacher who observed the incident, the fact that the brothers gave out marijuana to guests at the party does not in any way corroborate the boys' testimony that Deetz requested, accepted and offered to pay for marijuana cigarettes in an upstairs bedroom. Finally, since Marconni's testimony does not corroborate any of the incidents alleged by the brothers, it cannot provide corroboration for their testimony as a whole.

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Mr. Honsinger, the school principal, and certification of Dr. Stewart, the superintendent. Although we agree with the principle that teachers should not withhold information that might help deal with drug abuse, Initial Decision, at 27, we note that it was not established that Respondent knew for a fact that the boys were dealing drugs or even that they were engaged in such activity.[4] We find that Respondent's failure to report information that we are not sure he had does not justify dismissal from his position.

In sum, we find that the quantum of proof required to sustain the charges in this case is lacking. The animosity arising from the interfamilial dispute raised question for us about the credibility of the two boys. The lack of corroboration and conflicting testimony further undermined their credibility in our eyes and made their entire testimony and statements suspect. We have therefore concluded that the ALJ's total reliance on the brothers' statements/testimony in arriving at her decision was misplaced and that, in the absence of other evidence substantiating the charges, the determination here is not supported by a preponderance of credible evidence.

Attorney Exceptions are noted.
Betty A. Dean opposed.
November 7, 1984

PENDING N.J. SUPERIOR COURT

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[4] We note that the extent of S.R.'s and J.R.'s actual involvement with drugs is not clear even from the extensive testimony they gave. See, for example T 6/2/82, p. 61 et seq. and T 6/3/82, p. 79 et seq. It does not seem reasonable to impute to respondent actual knowledge that the boys were dealing drugs in the school where the record establishes neither that the boys were engaged in such activity nor that respondent actually knew about it.

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EDISON TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	
	:	

Decided by the Commissioner of Education, December 29, 1983

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

For the Respondent-Appellant, Joseph Ferenczi, Esq.

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

August 8, 1984

PENDING N.J. SUPERIOR COURT

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PETER FISCHBACH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 29, 1983

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Greenberg & Covitz (Morton Covitz, Esq., of Counsel)

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

July 11, 1984

PENDING N.J. SUPERIOR COURT

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JAMES J. FLANAGAN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT	:	

On remand from New Jersey Superior Court, Appellate Division, Docket No. A-1826-81-T1, August 31, 1983

For the Petitioner-Respondent, Kaye & Davison
(Duane O. Davison, Esq., of Counsel)

For the Respondent-Appellant, Murray & Granello
(Karen A. Bulsiewicz, Esq., of Counsel)

Petitioner herein was tenured in the full time, 12-month position of Supervisor of Audio-visual in the Camden City School District when his position was abolished for economy reasons. Prior to his appointment as Supervisor, he had achieved tenure as an elementary school teacher. He also served for approximately two school years as an administrative assistant in the office of Staff Development. After his position was eliminated petitioner was reassigned to a 10 month full time teaching position in the district's Title I program. He challenged this transfer by filing a petition of appeal with the Commissioner of Education in September 1979, wherein he contended that he was entitled, by virtue of his seniority as a supervisor, to assume another of the supervisor's positions in the district then held by teachers with less seniority. The Administrative Law Judge recommended and the Commissioner of Education held that petitioner was tenured in the position of general supervisor and so was entitled to preferred eligibility for reinstatement as a general supervisor. Both the State Board of Education and the Superior Court, Appellate Division, affirmed this decision on December 2, 1981 and January 24, 1983, respectively. Respondent Board of Education filed a petition for certification before the New Jersey Supreme Court which was granted June 22, 1983 and the matter remanded to the Appellate Division for reconsideration in light of the decision in Lichtman v. Ridgewood Village Board of Education, 93 N.J. 362 (1983). In a supplemental decision, entered August 31, 1983, the Appellate Division in turn remanded the matter to the State Board of Education for further proceedings consistent with the Supreme Court's directive.

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For reasons hereinafter expressed, it is the determination of the State Board of Education that scrutiny of the facts of this case in light of Lichtman requires reversal of the decision previously rendered.

Each body that considered this matter has found that petitioner held certification as a general supervisor, attained tenure as a general supervisor and so enjoyed seniority as a general supervisor, notwithstanding that the tenure qualifying position he held was in a specific subject area. As the determination of this issue is not affected by Lichtman, it may not be deliberated further, and must be considered definitively resolved for purposes of this case. It should be noted, however, that even if the State Board were at liberty to reconsider this question, it is now persuaded that the finding was correct in the context of the regulatory scheme applicable to this case.

While recognizing both general and subject supervisor categories, the regulations governing seniority did not respond to the change in supervisor's certification, testified to by Dr. Fred Price (see 2T:6-6), that eliminated subject area supervisor endorsements. Under this revised scheme petitioner held a general supervisor certificate. He was not required to hold any further certificate. Hence, as he was appropriately certificated for tenure purposes, N.J.S.A. 18A:28-5 et seq., the determination of his seniority was governed by N.J.A.C. 6:3-1.10(K)(27) which provided:

> "...any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate except those subjects or fields for which a special certificate has or shall be required by the State Board of Education..."*

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*The problem thus created by the elimination of subject area endorsements has been addressed by amendments to these regulations authorizing each district to include in its job description a requirement that candidates for each supervisory position created by the district hold, in addition to the general supervisor's certificate, an instructional certificate in the particular subject area served by that supervisory position. 15 N.J.R. 1017(a).

Because of his seniority as a general supervisor, he became eligible for any supervisory position in the district as to which his seniority as a supervisor exceeded the seniority of other general supervisors.

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But certification is not the sole measure of preferred eligibility for seniority purposes under Lichtman. While the court there specifically considered whether tenured part-time teachers may assert seniority rights to full time positions, the analysis of relevant criteria for making such seniority determinations pertains with equal force to all seniority decisions and hence to the claims advanced by petitioner herein.

The court in Lichtman stressed the importance of "actual experience" holding that:

> ...appellant's seniority accrues from her actual service in the particular position for which she is certified.... Furthermore, the nature and duties of the five-day-a-week position that she sought were identical to those of her three-day-a-week position which had been eliminated.
> (Id. at 369) (Emphasis added.)

That actual experience weighs heavily in the seniority equation is poignantly demonstrated by the court's disapproval of the State Board's analysis in Aslanian v. Fort Lee Bd. of Ed., 1980 S.L.D. 1475, aff'd App. Div. Docket No. A-4745-79TI (3/27/81), unreported), upon which the State Board relied in deciding Lichtman. The petitioner in that case held certification as a teacher of art although her actual work experience was as a part-time teacher of testing. Her claim to seniority as an art teacher was rejected on the ground that part time teachers should be treated differently than full time teachers for seniority purposes. The court found this reasoning unpersuasive. It did not disagree with the result in Aslanian, however, because the duties of the new position were different from those of the abolished position she had previously held:

> "...her duties as a teacher of testing were fundamentally different from those of a teacher of art, which position she sought and for which she claimed seniority rights based on her prior service under a teacher of art certificate... [T]he critical differences between the respective teaching positions were primarily attributable to the different duties entailed in each position..."
> (93 N.J. at 367)

Here, as in Aslanian, the certification needed for the abolished position is appropriate for the positions sought, but the duties encompassed by each are different, thereby defeating petitioner's seniority claims. Both the testimony offered by the Superintendent of Schools, Dr. Smerin, and the duties enumerated for the abolished position and for those supervisory positions to which

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petitioner asserts a seniority claim (J-1 in evidence) clearly establish that the duties expected of him as Supervisor of Audio-Visual are fundamentally different from, and in no way provided actual experience for, any supervisory position other than the one in which he served.

Dr. Smerin testified that each of the supervisory positions required specialized skills and knowledge and that the background and training needed for one would not be transferrable to another. (IT:45-1 to IT:56-19) Cursory review of the job descriptions comprising J-1 in evidence confirm this: while the Audio-Visual supervisor was responsible for promoting the preparation of media materials and supervising the operation of the audio-visual laboratory, the special education supervisor provides demonstration lessons for special education teachers, recommends therapy and medical services and consults with parents concerning out of district placements; the home economics supervisor prepares lists of food suppliers, plans new home economics classrooms and develops courses of study; the health, safety and physical education supervisor administers the driver education program and organizes the football training camps; and the supervisor of guidance services and testing coordinates the testing programs and provides for home instruction when necessary.

Petitioner conceded that his background would not prepare him for duties required of supervisors of guidance, student health or bilingual education. (IT:96-23 to 99-11). He contends, however, that he has more practical experience in elementary education and in the office of staff development than the supervisors currently holding these positions by virtue of his experience as an elementary school teacher and as an administrative assistant in the Office of Staff Development. While this experience would make him a qualified applicant for these positions, however, it does not entitle him to preferred eligibility on the basis of seniority. The relevant inquiry consistent with Lichtman is whether the certification required for, and the duties and responsibilities attending, the position abolished were the same as the certification and duties of the position to which petitioner asserts a seniority claim. The answer is simply that while he holds appropriate certification, he has actual experience only as a supervisor of audio-visual instruction, and the duties performed by him in that position did not equip him with the critical actual experience needed to perform duties expected of a supervisor in the other supervisory positions staffed by the district. For this reason he is not entitled to preferred eligibility on the basis of seniority for reemployment in any of those positions.

Accordingly, having considered the applicability of Lichtman to the facts herein, and having found that petitioner's experience as an audio-visual supervisor does not constitute actual experience for purposes of any of the supervisory positions to which

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petitioner asserts a seniority claim, the State Board of Education concludes that petitioner does not enjoy any seniority rights to those positions and recommends that the decision to the contrary previously entered in this matter be reversed and the petition of appeal filed by Flanagan be dismissed.

Ruth H. Mancuso opposed in the matter.
Attorney exceptions are noted.
September 5, 1984

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FERDINAND A. IMPROTA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 3, 1982

Dismissed by the State Board of Education, July 7, 1982

Before Judges Fritz, Furman and Deighan.

On appeal from New Jersey State Board of Education.

Frank E. Catalina argued the cause for appellant (Krieger, Ferrara, Feinsilver, Flynn and Catalina, attorneys).

Sheldon H. Pincus argued the cause for petitioner-respondent (Bucceri & Pincus, attorneys).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

PER CURIAM

The Weehawken Board of Education (Board) appeals from the denial by the State Board of Education of its motion to file a notice of appeal nunc pro tunc from a determination of the Commissioner of Education affirming an initial decision by an administrative law judge adverse to the Board. The Board also purports to appeal from the decision of the Commissioner of Education. We affirm.

It appears beyond dispute that the Board's initial effort to appeal from the determination of the Commissioner to the State board occurred subsequent to the time limited by N.J.S.A. 18A:6-28. The Board argues that N.J.A.C. 6:2-1.2, which deems a decision of the Commissioner to have been filed three days after the date of mailing to the parties, should be construed to give the State Board discretion in extending the statutory time. This argument misconceives the purpose of the regulation. The regulation recognizes that while the date of the decision is unquestionably the true date of filing, some accommodation must be provided to assure,

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in the interests of due process, that the parties received notice of the decision in fact in time to permit a full 30 days before the expiration of the statutory period. Clearly the regulation is not intended to create an artificial filing date or to provide leeway for a dilatory appellant. The record in this matter indicates that the Board's appeal to the State Board was filed after the expiration of 30 days following receipt by its counsel of the decision.

Historically and traditionally statutory time limitations for filing administrative appeals have been deemed jurisdictional. See, for instance, Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956) and Lowden v. Bd. of Rev., 78 N.J. Super. 467 (App. Div. 1963); see Alfonso v. Board of Review, 89 N.J. 41 (1982), app. dism. and cert. den. ___ U.S. ____, 103 S.Ct. 30, 74 L.Ed. 2d 45 (1982). We are not persuaded that the exception carved out of this traditional approach by the majority in White v. Violent Crimes Compensation Board, 76 N.J. 368 (1978) is appropriate here.

Review in this court is available as a matter of right only from final determinations of the administrative agency, in this case the decision of the State Board. The "final determination" of the State Board was that the appeal to it should be dismissed. For reasons stated above, we believe this decision is unassailable.

Implicit is the fact that there is no right of appeal from the determination of the Commissioner of Education. Accordingly, so much of the Board's notice of appeal as purports to appeal from that determination is dismissed.

Affirmed.

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IRVINGTON EDUCATION ASSOCIATION AND JEANNE DONADIO,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, ET AL.,	:	APPELLATE DIVISION
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, October 15, 1982

Decided by the State Board of Education, May 4, 1983

Argued: January 10, 1984 Decided: February 9, 1984

Before Judges Michels, King and Dreier.

William R. Miller argued the cause for appellant Board of Education of the Township of Irvington (Miller & Kinney, attorneys; William R. Miller, on the brief).

Thomas M. McCormack argued the cause for Intervenor (Russ Molloy, on the brief).

Russell Weiss, Jr. argued the cause for the New Jersey School Boards Association amicus curiae (Paula A. Mullaly, attorney; Mr. Weiss, on the brief).

Richard A. Friedman argued the cause for respondent Irvington Education Association (Ruhlman, Butrym & Friedman, attorneys; Richard A. Friedman, on the brief).

Jaynee LaVecchia, Deputy Attorney General argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, of counsel; Jaynee LaVecchia, on the brief).

PER CURIAM

Defendant Board of Education of the Township of Irvington appeals from a decision of the State Board of Education precluding the local board from acting as a self-insurer for health insurance benefits provided for its employees, represented by petitioner, Irvington Education Association. The Administrative Law Judge initially had found that such an implied power existed for

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defendant, but this decision was overturned by the Commissioner of Education on the strength of an informal Attorney General's opinion, (letter opinion to Acting Commissioner of Education dated June 15, 1982) and the Commissioner's findings were in turn affirmed by the State Board. A narrow question is therefore presented to us, namely whether a local board of education may act as a self-insurer in the field of health insurance. The parties acknowledge that there is no express authority to do so, and therefore the authority, if it exists, must be implied from the local board's general powers set forth in N.J.S.A. 18A:11-1(d) and the compensation power in N.J.S.A. 18A:27-4.

The law governing a local board's power in this instance is far from clear, and persuasive arguments can be made on both sides of the question. On balance, however, we find that the lack of express authority, the availability of viable substitutes, the absence of a uniform scheme of statutory protection for such self-insurance funds and the legislative history in analogous situations all favor our affirmance of the administrative determination.

Petitioner urges that the open-ended liability that would be engendered if we find self-insurance to be permitted here should itself defeat defendant's claim. We disagree. There are areas of open-ended liability imposed throughout the municipal and school laws which could cause economic difficulties. For example liability under the Tort Claims Act, Workers' Compensation, defense of employees, and other areas of responsibility are recognized as proper subjects for group self-insurance by two or more boards of education under N.J.S.A. 18A:18B-1 et seq. (L. 1983 C. 108). There is no mandatory insurance; a school board insurance group is specifically authorized to elect not to obtain third-party protection, N.J.S.A. 18A:18B-3. It is therefore not the mere incurring of an open-ended liability that defeats defendant's proposed plan, but rather the lack of specific authority to accept such open-ended responsibility in the area of health benefits.

Petitioner claims such authority, as noted earlier under the general powers and compensation power sections of the Education Act, and cites Teamsters Local 331 v. Atlantic City, 191 N.J. Super. 404 (Ch. Div. 1981), aff'd o.b. 191 N.J. Super. 394 (App. Div. 1983). While we are fully in accord with the Teamsters Local 331 opinions, that case is inapposite to the issue under discussion here. In the Teamsters case, in order to provide health benefits to its employees, the City of Atlantic City gave the employees a raise in an amount sufficient to pay the Union's charges for health insurance. The municipality was not a self-insurer. While the Teamsters Local 331 case does stand for the proposition that the statutory alternatives for providing health benefits are not exclusive, the case did not reach the point of whether the municipality there (or the board of education here) could be a

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self-insurer.[1] Were the issue before us merely whether the school board, if it wished to provide health care benefits to its employees, would be limited to either a private insurance program under N.J.S.A. 18A:16-13 or to participate in the State program under N.J.S.A. 52:14-17.34, the Teamsters Local 331 decision would have set that question to rest. It is clear that a board of education may both provide health benefits and seek a method of doing so other than by the methods expressly authorized by the two cited statutes. The issue, however, is whether it may undertake self-insurance for these benefits without statutory authorization and appropriate regulation.

N.J.S.A. 18A:18B-2, as noted earlier, authorizes self-insurance pools for two or more municipalities for express purposes, to wit:

> a. Any loss or damage to its property, real or personal, motor vehicles, equipment or apparatus;
>
> b. Any loss or damage from liability resulting from the use or operations of motor vehicles, equipment or apparatus owned or controlled by it;
>
> c. Any loss or damage from liability for its own acts or omissions and for acts or omissions of its officers, employees or servants arising out of and in the course of the performance of their duties, including, but not limited to, any liability established by the 'New Jersey Tort Claims Act,' N.J.S. 59:1-1 et seq., or by any federal or other law;
>
> d. Loss or damage from liability as established by Chapter 15 of Title 34 of the Revised Statutes, Labor and Workmens' Compensation (R.S. 34:15-1 et seq.);
>
> e. Expenses of defending any claim against the board, district, officer, employee or servant arising out of and in the course of the performance of their duties, whether or not liability exists on the claim.

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[1] N.J.S.A. 40A:10-17 governing municipal group life, hospitalization health and accident insurance is practically identical to N.J.S.A. 18A:16-13 covering the same subject matter for boards of education. The New Jersey State Health Benefits Program Act, N.J.S.A. 52:14-17.25 et seq. covers not only State employees but also participating municipalities and school districts under N.J.S.A. 52:14-17.34.

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An earlier version of this legislation, A3229, introduced in the 1981 Assembly contained provisions that would have authorized such pooled self-insurance for health and similar benefits:

> ...Pursuant to a group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, health and accident, drug prescription, or health care benefit plan [Section 2(e)].

This section, however, was deleted prior to the passage of N.J.S.A. 18A:18B-1 et seq. While we can find no legislative history concerning the deletion of this language, an inspection of the remaining authorized areas for self-insurance pools, quoted earlier, shows that they all relate to common-law or statutory responsibilities of the school board, and not to voluntary assumptions of liability. In each of the areas, loss to property, motor vehicle liability, Tort Claims Act responsibility, Workers' Compensation benefits and defense reimbursement responsibility, each board of education is by law a self-insurer, unless it obtains appropriate insurance -- none of which is mandatory. N.J.S.A. 18A:18B-1 et seq. merely authorizes the pooling of this self-insurance, with suitable safeguards.

The Statement of the Senate Education Committee appended to the statute noted:

> Assembly Bill No. 1372 permits local school districts to self-insure through pooling the resources of several districts.
>
> The self-insurance option, for practical reasons, has been available only to comparatively large school districts with extensive professional and nonprofessional labor forces. Unless a district is able to pay the cost of insurance premiums, an administrative fee and anticipated claim payments at an amount considerably lower than the conventional premium already being paid by the district, there is no self-insurance alternative available to that school district alone. This bill would allow the many smaller districts through New Jersey to avail themselves of a self-insurance program in a pooling arrangement with other districts. [Emphasis added]

The Senate Education Committee statement recognizes that the option of self-insurance in these areas is available to school districts, but we note that the Legislature has in some instances regulated such practices. For example N.J.S.A. 18A:20-25 requires insurance of all insurable property, but N.J.S.A. 18A:20-26 permits a form of self-insurance in conjunction with an established municipal insurance fund. Similarly under the Workers' Compensation laws,

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although insurance is required, under the supervision of the Commissioner of Insurance an employer is permitted to act as a self-insurer. N.J.S.A. 34:15-77. In other areas there is no regulation of self-insurance for school boards, cf. N.J.S.A. 40A:10-6(b) and (c) for municipal regulation. If a board of education has determined not to obtain liability insurance for its own acts or those of its employees under the Tort Claims Act, N.J.S.A. 59:1-1 et seq., or other than as may be required by law for the use and operations of any motor vehicles or other equipment, responsibility is imposed by general law.

In the case before us, however, a new open-ended responsibility is to be voluntarily incurred. There is no requirement that health benefits be paid to an employee. School districts are creatures of statute, and have only such powers as are granted to them under the school laws either expressly or by necessity or fair implication. Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education, 79 N.J. 574, 579-580 (1979). There is no express authorization for open-ended health benefits to be paid. The Legislature has permitted only the insuring of a fixed obligation for health insurance in N.J.S.A. 18A:16-13 et seq. and, as determined in the Teamsters Local 331 case, the courts have upheld the fixed obligation of a pay raise distributed to a union in order that insurance be purchased.[2]

The local board argues that under its proposed plan it has retained only the first $900,000 of liability and reinsured the excess to the extent of the next $1,000,000 in responsibility with a licensed reinsurance company, thus limiting its responsibility. Although the board acknowledges that it would be responsible for any excess claims over $1,900,000 the unlikely nature of such a claim has not been challenged by plaintiff. Even though the board has this excess insurance protection, we are of the opinion that the retention of this first $900,000 in responsibility by providing direct benefits, as opposed to a statutorily authorized insurance program, exceeds the authority of the board. We note in addition that a second option is given to a board that does not wish to contract with an insurance company to provide the desired health benefits. Since 1972 the New Jersey State Health Benefits Program Act has permitted participation by municipal and board of education employees. Given these two options, and without a further showing

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[2] New Jersey Civ. Serv. Assoc. v. Mayor of Camden, 135 N.J. Super. 308 (Law Div. 1975) is not to the contrary. There the court properly held that dental service although not specifically authorized by statute, came within the health insurance or general compensation powers of a municipality. We are not given the terms of the dental services agreement, but assume that it was a fixed cost contract, since the court repeatedly equated it with dental insurance.

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of need by the board for direct payment of health benefits, we will not infer the power to pay the same from the general powers clause of N.J.S.A. 18A:11-1(d).

We recognize that the local board has entered into its current contract with its employees and the reinsurer in good faith, assuming that it had the implied power to provide the disputed benefits. We are dealing here with public moneys and an adverse fiscal impact on the local board if we were to require an immediate termination of the current plan. We therefore will stay the operation of our order directing the termination of this self-insurance program until the end of existing contract year. This stay will also have the effect of permitting the local board or the amicus New Jersey School Boards' Association to apply to the Legislature for a specific authorization for the disputed program.

We affirm the decision of the State Board of Education.

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, et als.,	:	APPELLATE DIVISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, December 16, 1982

Decided by the State Board of Education, May 4, 1983

Argued January 17, 1984 - Decided March 12, 1984

Before Judges Ard and Trautwein.

On appeal from a Final Decision of the State Board of Education.

Melvin S. Narol argued the cause for appellants (Jamieson, McCardell, Moore, Peskin & Spicer, attorneys; Mr. Narol, of counsel and on the brief).

William F. Hartigan, Jr. argued the cause for respondents (McLaughlin & Cooper, attorneys; Mr. Hartigan, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General, attorney for the State Board of Education filed a statement in lieu of brief (James J. Ciancia, Assistant Attorney General, of counsel; Jaynee LaVecchia, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

This appeal concerns a teacher transfer dispute. It is taken from a May 7, 1983 decision of the State Board of Education (State Board) affirming the Commissioner of Education's (Commissioner) December 1982 decision rejecting the initial decision of an Administrative Law Judge (ALJ) and therefore upholding the teacher transfer which generated this controversy.

This matter commenced upon the filing of a verified complaint in the Chancery Division of the Superior Court, Mercer County, by Lawrence Ivan and Thomas Murray against their employer, the Princeton Regional Board of Education (Board), its

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superintendent of schools and the principal of the Princeton High School. In an order entered July 15, 1981 the Chancery Division judge transferred the complaint to the State Department of Education. The complaint alleged that the involuntary transfer of Ivan and Murray from their physical education teaching positions at the Princeton High School to physical education teaching positions at a Princeton elementary school and middle school respectively was illegal. Specifically, the involuntary transfers of Ivan and Murray were alleged to violate the Civil Rights Act, 42 U.S.C. sec. 1983, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. and New Jersey Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Additionally, Ivan and Murray alleged that the Board's actions were taken with malice and in bad faith; were violative of their due process and equal protection rights secured by the New Jersey Constitution as well as their First Amendment Rights secured by the United States Constitution, and violated a negotiated agreement between the Princeton Regional Educational Association and the Board for the period July 1, 1980 to June 10, 1982. In its answer the Board denied all alleged violations of law and asserted among its separate defenses that Ivan and Murray were transferred within the scope of their certificates and therefore the transfers were proper. Thereafter Ivan and Murray applied to the ALJ assigned to the matter for iterim relief and temporary restraints prohibiting the transfer from taking effect during the pendency of this action. On August 11, 1981 the ALJ granted the requested temporary restraints. The Board moved before the Commissioner to review the substantive order entered by the ALJ. On September 8, 1981 the Commissioner set aside the temporary relief awarded to Ivan and Murray. Ivan and Murray thereupon filed a motion for leave to appeal to us and for emergency relief because a review was not immediately available from the State Board. We granted temporary relief. However, on September 10, 1981 the Supreme Court of New Jersey vacated our order and reinstated the September 8, 1981 decision of the Commissioner.

Following two prehearing conferences, Ivan and Murray withdrew their claims based upon the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and the Civil Rights Act, 42 U.S.C. sec. 1983. The matter then proceeded to a hearing before the ALJ. In his comprehensive initial decision rendered October 29, 1982 Judge Thomas concluded "...that the principal and the superintendent acted arbitrarily and in bad faith by recommending to the Board that Ivan and Murray be transferred." Judge Thomas further concluded that

> Based on the testimony of two Board witnesses, I believe that the Board acted in good faith, albeit on the basis of the Superintendent's arbitrary and bad faith recommendation. The Superintendent's testimony, in support of his reasons for the transfers of Ivan and Murray, is specious, and the evidence in that regard is far from persuasive.

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> The Board in this matter followed the recommendation of the Superintendent who testified that the recommendation for transfer was made by the administrative council and 'may' have been made to him by the Principal.

The initial decision determined however that no violation of the Open Public Meetings Act occurred and recommended that Ivan and Murray be reinstated to their teaching positions in the high school. The Commissioner upon review of the exceptions filed and the tapes recording the meetings of the Board of Education rejected the recommendation contained in the initial decision and upheld the transfers of Ivan and Murray to other schools within the school district. The Commissioner specifically found that the petitioners did not prove that the transfers were to punish them in retaliation for the filing of a grievance.[1] This appeal followed.

Appellants' sole ground for urging reversal is that the decision of the State Board is not supported by substantial credible evidence. We agree.

Initially, we deem it significant that the complete record of the proceedings before the ALJ was not available to the Commissioner when he rejected the initial decision of the ALJ.[2] Exhaustive testimony was taken over a period of five days before Judge Thomas in which substantially all persons involved in the decision of the Board to transfer Ivan and Murray testified. It is inconceivable to us that the Commissioner and the State Board could properly conduct a review of the ALJ's initial decision without this record. It is additionally clear to us that the transcript of tapes of the Board of Education's meetings on recommendations of the Superintendent of schools and the immediate Principal of Ivan and Murray at the high school afforded an insufficient basis for testing the reasonableness of Judge Thomas' initial decision. N.J.S.A. 52:14B-10(d) provides that a final decision by an agency head shall be based only upon "...the evidence of record at the hearing...." Decisional law adds emphasis to this requirement.

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[1] The grievance concerned the complaint that neither Ivan nor Murray had been informed by their principal that he had changed a failing grade in physical education to a daughter of the president of the Board to one showing that she had been medically excused. Ivan supported Murray in this grievance filed by the Princeton Regional Education Association.

[2] We fully recognize the time constraints under which the Commissioner must act in reviewing an initial decision of an ALJ. See N.J.S.A. 52:14B-10(c). However, we cannot understand the Commissioner's statement, in his decision rejecting the initial decision of the ALJ, that he "...has reviewed the entire record of the matter controverted..." (Emphasis supplied.)

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> ....While the Commissioners may arrive at a different conclusion from the examiner and may thus overturn his decision, they may not do so in conformity with the concept of due process unless they have at their disposal as full an appreciation of all the evidence as the person whose decision they are overturning.
>
> [Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F. 2d 583, 585, n.3 (D.C.Cir. 1970]

See Manalapan-Englistown Education Ass'n. v. Bd. of Ed. of the Manalapan-Englishtown Regional School Dist., 187 N.J. Super. 426 (App. Div. 1981).

Rather than remanding the matter to the State Board and in turn to the Commissioner for their review of the entire record of the proceedings before the ALJ, we determine to exercise original jurisdiction under R. 2:10-5 in light of the fact that the transcripts of the entire proceedings have been provided to us.[3]

We have carefully reviewed these transcripts and conclude that there is adequate substantial and credible evidence in the record clearly supportive of the findings and conclusions of the ALJ that Ivan and Murray were transferred under circumstances clearly demonstrating bad faith. Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963); Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, 55 N.J. 501, 507-508 91970). It matters not that the Board acted in good faith, as the ALJ found, when it relied on the recommendation of the Superintendent and Principal. It had to follow that the Board's ultimate decision adopted this recommendation and thus became infected with, albeit innocently, the underlying bad faith of the Superintendent and Principal.

Accordingly, we reverse the decision of the State Board of Education and affirm the recommendation of Judge Thomas substantially for the reasons set forth in his initial decision dated October 29, 1982.

Reversed.

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[3] This was only possible because we requested these transcripts before hearing oral argument.

(Supreme Court Order of Remand to Commissioner, June 14, 1984)

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JERRY M. JOHNSON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 29, 1983

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

For the Respondent-Respondent, Rubin, Lerner & Rubin
(David B. Rubin, Esq., of Counsel)

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

June 6, 1984

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LOVELL KENDALL,	:	
PLAINTIFF-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	APPELLATE DIVISION
DEFENDANT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 16, 1983

Decided by the State Board of Education, July 6, 1983

Argued May 15, 1984 -- Decided May 29, 1984

Before Justice Sullivan and Judges King and Bilder.

On appeal from the New Jersey State Board of Education.

Ezra D. Rosenberg argued the cause for appellant (Katzenbach, Gildea & Rudner, attorneys; Arnold M. Mellk, of counsel); Jeffrey M. Hall, on the brief).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

M. Allan Vogelson argued the cause for respondent (Supnick, Mitnick, Vogelson, Josselson & DePersia, attorneys).

PER CURIAM

This appeal presents the issue whether appellant, a tenured school teacher employed by the Camden City Board of Education, automatically forfeited her tenured position by virtue of her conviction of welfare and medicaid fraud involving some $11,696.45. The State Board of Education (Board) held that appellant was subject to the provisions of then N.J.S.A. 2A:135-9 (now N.J.S.A. 2C:51-2) which mandated the forfeiture of office or position of any public employee convicted of a crime involving moral turpitude. The Board held that welfare fraud and medicaid fraud were per se crimes involving moral turpitude. The Board also rejected appellant's contention that as a tenured teacher, she could be dismissed only in accordance with the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., which calls for the filing of written charge notice and hearing before dismissal. We affirm.

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Appellant was a tenured teacher in the Camden City public school system. While so employed, a two-count indictment was returned against appellant charging her with welfare and medicaid fraud. On February 28, 1979 she entered a plea of "guilty" to the charges in the Superior Court, Camden County, Law Division. Two days later the local superintendent of schools suspended appellant without pay. On May 1, 1979 judgment of conviction was entered and appellant was sentenced to a jail term and ordered to make restitution.

In the meantime, and on March 30, 1979, appellant filed a petition with the State Commissioner of Education charging that her suspension was unlawful as no charges had been filed against her pursuant to N.J.S.A. 18A:6-11. She asked that her suspension without pay be voided and that she be restored to her teaching position with back pay. The local board answered saying that appellant had been convicted of a crime of moral turpitude, to wit: welfare fraud and Medicaid fraud on May 1, 1979, and that pursuant to N.J.S.A. 2A:135-9, by virtue of her conviction, she had forfeited her position as of May 1, 1979.

On March 2, 1981 the local board adopted a resolution stating that appellant, a tenured staff person, "is terminated effective May 1, 1979, as a result of her conviction of a crime of moral turpitude on that date, to wit Welfare Fraud and Medicaid Fraud, pursuant to the statutes of New Jersey in such case made and provided."

Action on appellant's petition was delayed for some time due to a reorganization at the State Board of Education and it was not until March, 1981 when the matter was transferred to the Office of Administrative Law as a contested case.

The Administrative Law Judge rendered his decision on February 1, 1983. He noted that the issues presented established a question of law not requiring a hearing and that the parties had submitted the matter for summary decision on cross motions and letter briefs. The decision held that N.J.S.A. 2A:135-9 which was in force at the time of appellant's conviction applied to her; that the crime of which she had been convicted per se involved moral turpitude since intent to defraud was an essential element of the crime, and that the only purpose to be served by a hearing under the Tenure Employees Hearing Law would be to determine whether the conviction was for a crime involving moral turpitude which had already been established by the very nature of the crime. Accordingly, the judge held that appellant forfeited her position immediately upon her conviction, she was not entitled to relief and her petition was dismissed. On review, the Commissioner of Education affirmed the findings and determinations of the Administrative Law Judge and adopted them as his own. Appellant then appealed to the State Board of Education which after reviewing the record, affirmed the decision of the Commissioner of Education.

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We agree that appellant was subject to the then provisions of N.J.S.A. 2A:135-9. The statute speaks in the broadest terms of "any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof." While no reported case has dealt with its applicability to tenured school teachers, we are informed that the Commissioner and the State Board of Education have uniformly taken the position that the statute applied to such employees. We also agree that welfare fraud and medicaid fraud, of which appellant was convicted, per se involve moral turpitude as an essential element of the crime is an intent to defraud.

It is clear that N.J.S.A. 18A:6-10 et seq. is not intended to apply to the situation here presented. It deals with charges against a tenured employee in the public school system involving inefficiency, incapacity, unbecoming conduct, or other just cause. The whole thrust of the statute is directed towards the administration of the public school system. The elaborate procedures contained therein are intended to deal with school administration not with convictions of crime involving moral turpitude where forfeiture of employment is mandated.

Appellant's contentions that the forfeiture provision of N.J.S.A. 2A:135-9 was not mandatory or self executing and that in any event due process requires that a hearing be had are lacking in merit. Concededly, there may be situations where the crime of which the public employee has been convicted may or may not involve moral turpitude. In such case, a hearing would be required to determine that issue. However where, as here, an essential element of the crime is an intent to defraud, the conviction per se establishes the element of moral turpitude. In such case, no hearing is necessary or required and the statute mandates automatic forfeiture. This whole question was discussed at length by Judge Bilder in O'Halloran v. DeCarlo, 156 N.J. Super. 249 (Law Div. 1978), aff'd 162 N.J. Super. 174 (App. Div. 1978), certif. den. 79 N.J. 469 (1978), cert. den. 442 U.S. 917, 61 L. Ed. 2d. 284 (1970). In that case a police officer was convicted of conspiracy to violate the public bidding laws. At issue was the question whether he had forfeited his office by virtue of the provisions of N.J.S.A. 2A:135-9. The officer claimed that the forfeiture provision was not mandatory or automatic and that he was entitled to an administrative hearing on the question of moral turpitude. Judge Bilder held that an essential element of the crime of conspiracy to violate the public bidding laws was an intent to defraud so that the offense for which the defendant was found guilty was one involving moral turpitude within the meaning of N.J.S.A. 2A:135-9 and required forfeiture of office which was immediate and automatic upon conviction. In such a situation, the judge held, the defendant was not entitled to an administrative hearing. Id. at 255.

We concluded that O'Halloran, supra, provides a complete answer to all of appellant's contentions. Affirmed.

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RONALD S. KULIK,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 3, 1983

For the Petitioner-Appellant, Ronald S. Kulik, Pro Se

For the Respondent-Respondent, McCarter & English
(Lois M. Van Deusen, Esq., of Counsel)

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

May 2, 1984

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IN THE MATTER OF THE TENURE	:	
HEARING OF GERTRUDE (TRUDY)	:	
LENNON, SCHOOL DISTRICT OF THE	:	STATE BOARD OF EDUCATION
BOROUGH OF SPOTSWOOD, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 29, 1983

For the Respondent-Appellant, Rothbard, Harris & Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

For the Petitioner-Respondent, Golden, Shore, Zahn & Richmond (Philip H. Shore, Esq., of Counsel; John B. Wolf, Esq., On the Brief)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent is dismissed from her position as of August 29, 1983, the date of the Commissioner's decision in this matter.

Ruth H. Mancuso and Nancy Schaenen abstained.

March 7, 1984

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KAREN LINGELBACH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 6, 1983

For the Petitioner-Appellant, Zazzali, Zazzali & Kroll
(Robert A. Fagella, Esq., of Counsel)

For the Respondent-Respondent, Trapasso, Dolan & Hollander
(David J. Weaver, Esq., of Counsel)

Petitioner was continuously employed by the Hopatcong Board of Education as a full-time social worker for the school years 1971 through June 30, 1982. The Hopatcong Board also employed a psychiatric social worker "for many years." (slip opinion, at 4) At its meeting on April 26, 1982, the Hopatcong Board voted to abolish full-time social worker positions as part of an economy and reorganizational plan. An excerpt from the Board's minutes follows:

> "***the Board abolished the positions of full-time social workers as part of an economy and reorganizational plan effective the 1982-83 school year and thereafter, pursuant to the provisions of N.J.S.A. 18A:28-9."
> (Stipulation of Facts, Ex. E)

Petitioner, as a tenured employee, was placed on the preferred eligibility list for reemployment pursuant to the provisions of N.J.S.A. 18A:28-12.

In July 1982, the Hopatcong Board voted unanimously to establish the "position of part-time, hourly social workers" at the rate of $12.00 per hour. (Stipulation of Facts, Ex. F) Petitioner was offered a part-time, hourly paid, social worker position for the 1982-83 school year, which she declined. (Stipulation of Facts, Ex. H)

In her Petition of Appeal to the Commissioner of Education, Petitioner averred that the Board's employment of part-time social workers to perform the duties previously performed by Petitioner violated her tenure rights. (Petition of Appeal, para. 7) Included in its defenses, the Board averred that a board of education has the power and authority to abolish a full-time tenured position, so long

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as there is a rational basis for its action. (Answer, at 3) The Commissioner determined that the Hopatcong Board's action was within its management prerogative to reorganize the administrative and supervisory structure in the district pursuant to N.J.S.A. 18A:28-9. For the reasons expressed below, the Legal Committee recommends that the decision of the Commissioner be reversed.

The statute under which this Board acted to abolish full-time social worker positions is N.J.S.A. 18A:28-9. It is repeated below:

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

We first note that the above statute is found in that body of statutory law known as the Teacher Tenure Law. N.J.S.A. 18A:28-1 et seq. The Teacher Tenure Law affords teaching staff members

> "some measure of security in the ranks they hold after years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy." Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949)

N.J.S.A. 18A:28-9 upholds the right of any board of education to reduce the number of teaching staff members, whenever the board determines it is necessary for reasons of economy, reduction in enrollment, or change in the administrative or supervisory organization of the district.

Based on two of the three reasons enumerated in the statute, economy and reorganization, the Hopatcong Board eliminated Petitioner's position. Flexibility, although not enumerated in the statute, was listed as well. (Prehearing Order, at 2) Petitioner, its tenured social worker, was terminated effective June 30, 1982. Elaine Zekind, the full-time, nontenured, psychiatric social worker, was not reemployed for the 1982-83 school year. (Stipulation of Facts, Ex. E) Thus, Petitioner and the psychiatric social worker were not reemployed for the 1982-83 school year. Instead, the Board hired two part-time hourly paid social workers.

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Tobie Kramer, a psychiatric social worker, was hired to provide services at the middle school and high school levels as follows:

7:30-12:30 for 4 days (slip opinion, at 12; Stipulation of Facts, at 5)	@	5 hrs.	=	20 hrs.
4:00-9:00 on Fridays (Stipulation of Facts, Ex. J)			=	5 hrs.
		Total	=	25 hrs.

Kramer's experience was seen to be a benefit in crisis intervention. (slip opinion, at 12)

Cassandra Kolloff, social worker, was hired to provide services at the elementary school level as follows:

8:30-12:30 for 4 days	@	4 hrs.	=	16 hrs.
1:30-2:30 for 4 days	@	1 hr.	=	4 hrs.
2:00-5:00 and 6:00-8:00 on Fridays (Stipulation of Facts, at 5, Ex. J)				
		Total	=	25 hrs.

Kolloff's services might be termed regular social work services, as opposed to psychiatric.

Petitioner's regular hours were as follows:

8:00-2:40 for 5 days (slip opinion, at 9)	@	6 hrs.	=	30 hrs.

In its reorganization, the Hopatcong Board did not reduce the number of social worker staff. It would appear to have reduced the total number of service hours provided by staff. In terms of hours alone, and setting aside other variables, we can say that one full-time social worker position remained after the reorganization: that is, the hourly positions held by Kramer and Kolloff collectively constituted one full-time position (30 hours) and 2/3rds of a second full-time position (20 hours). If, however, Kramer's work required a 25-hour psychiatric social worker, at least Kolloff's schedule could have been covered by Petitioner without making any schedule changes in the plan of reorganization. With a minimum of effort, a 5/6ths position could easily have been preserved for Petitioner. Evening staffing was not presented as an alternative to Petitioner (slip opinion, at 9), presumably because of limitations set in the negotiated agreement. (Stipulation of Facts, Ex. D) The exact nature of these limitations was not revealed by the record. (But see, Ex. R-3, at 11-12) In any event, we believe tenure should have prevailed and Petitioner should have been offered the 5/6ths position which was intact.

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What the Hopatcong Board did here was hire an hourly employee on a 25-hour-per-week basis, at less cost, than Petitioner's salary pro-rated at 5/6ths. Petitioner's position still existed after the reorganization. Its schedule was merely rearranged, converted to 5/6ths part-time, and given to the hourly employee at less cost. Thereafter, the hourly employee performed the same duties previously performed by Petitioner. This is distinguished from Klinger v. Cranbury Board of Education, Superior Court of N.J., App. Div., Dkt. No. A-2227-81-T3, Nov. 10, 1982, where the Board reduced Klinger to three and a half days a week, and paid him 7/10ths of his full-time salary.

The Hopatcong Board argued that single staffing is inefficient and presented as one of the benefits attributed to the employment of hourly social workers, the greater flexibility afforded by the dual system of delivery of services. (slip opinion, at 12) One would surmise that a dual system of delivery of services resulted from the Board's decision to employ two hourly social workers; however, the record reveals a dual system had been in place prior to the reorganization. Petitioner, the regular social worker, had been employed since 1971. The Board had also employed a psychiatric social worker "for many years." (slip opinion, at 4)

Essentially, and as we see it, the Board revised the hours of one of its social worker positions, that which was held by Petitioner, to permit Friday evening hours. The duties of the position remained unchanged from those duties which existed prior to the reorganization. Additionally, the services of two hourly employees were obtained at less cost than Petitioner's salary.

The record in this case contains Petitioner's Annual Performance Evaluations for the years 1980, 1981 and 1982. (Ex. P-1) They are exemplary. No professional needs were identified in any of those annual evaluations. Petitioner's efforts were found to be commendable by her supervisor. We note that, over the three-year period, Petitioner was commended for providing home visitations.

Boards of education, faced with declining revenues, must perforce consider various alternatives when it becomes necessary to curtail funds and reduce its tenured staff pursuant to N.J.S.A. 18A:28-9. Nevertheless, we cannot countenance, as one such alternative, an interpretation of N.J.S.A. 18A:28-9 which would permit a board of education to economize in the manner shown here. The Hopatcong Board, by terminating Petitioner, a tenured employee, and thereafter hiring hourly employees to perform the same duties and responsibilities as Petitioner, abridged her tenure rights under N.J.S.A. 18A:28-5, 9 and 12. To permit this board of education to discharge, without cause, an employee such as Petitioner, who has served long and well, and secured a tenure status, would nullify the Teacher Tenure Law and would result in that which the Legislature sought to prevent when it recognized tenure. The State Board of Education does not support such an interpretation and reverses the

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decision of the Commissioner of Education. We remand to the Commissioner to determine what damages, if any, in the way of salary, the Petitioner lost as a result of the Board's action.

Exceptions are noted.
May 2, 1984

PENDING N.J. SUPERIOR COURT

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BARBARA LUKAS, ALFRED PIERCE, HERBERT GAISS, AUDREY WILLIAMS and others similarly situated,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES, NEW LISBON STATE SCHOOL, WOODBRIDGE STATE SCHOOL, MARLBORO PSYCHIATRIC HOSPITAL, and GRAYSTONE PARK PSYCHIATRIC HOSPITAL,	:	APPELLATE DIVISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 19, 1983

Decided by the State Board of Education, July 6, 1983

Argued June 13, 1984 - Decided June 28, 1984

Before Judges Fritz, Furman and Deighan.

On appeal from the State Board of Education.

Bennet D. Zurofsky argued the cause for appellants (Reitman, Parsonnet, Maisel & Duggan, attorneys; Mr. Zurofsky and Sidney Reitman, on the brief; Thomas S. Adair, of counsel).

Regina A. Murray, Deputy Attorney General, argued the cause for respondents (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM

At issue on this appeal from the State Board of Education is whether petitioners, teaching staff members in State non-correctional human services facilities, were eligible to acquire tenure under N.J.S.A. 18A:7B-11. We hold that they were so eligible.

The State Facilities Education Act of 1979, N.J.S.A. 18A:7B-1 et seq., abolished the Garden State School District, the educational agency in State correctional facilities. The 1979 enactment governs teaching staff members in State non-correctional, as well as correctional, facilities. Under prior law, Garden State School District teaching staff members were eligible to acquire

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tenure pursuant to N.J.S.A. 18A:28-5 and 18A:60-1. N.J.S.A. 18A:7B-11 provides: "All rights and privileges enjoyed by teaching staff members of the Garden State School District shall be enjoyed by teaching staff members employed in State facilities." Clearly, one of such rights and privileges is that of acquiring tenure. We perceive no ambiguity in the 1979 enactment; if any ambiguity arguably existed, our construction should be liberal in favor of tenure eligibility, Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74-75 (1982).

The State, in opposition, relies upon the Statement of the Senate Education Committee attached to the bill which was enacted as N.J.S.A. 18A:7B-11. That statement expresses the legislative purpose that employees of the Garden State School District retain all their tenure and salary rights but gain no additional ones; it makes no reference to and has no bearing on the rights and privileges accorded by the enactment to employees of non-correctional facilities such as petitioners, including, specifically, the right to acquire tenure prospectively.

Our holding of petitioners' tenure eligibility does not end the matter. Petitioners' status at the time of their layoffs or displacements in August 1981 has not been factually determined on this record. N.J.S.A. 18A:7B-11 did not on its effective date, July 1, 1980, vest tenure in previously untenured teaching staff members in State non-correctional human services facilities. As we construe it, the 1979 enactment provided petitioners and others similarly situated with the right to earn tenure by continuing employment subsequent to its effective date, upon meeting the tenure requirements of N.J.S.A. 18A:28-5 and 18A:60-1. Whether petitioners held appropriate certificates issued by the State Board of Examiners and were employed for three consecutive calendar years or the equivalent prior to their layoffs or displacements should be resolved on remand. In our view, the period of employment conditional to vesting of tenure may have been served both before and after the effective date of N.J.S.A. 18A:7B-11.

We reject as without merit on this record petitioners' additional argument that the State Board of Education erred in denying petitioners' motion for certification as a class action. See R. 4:32-1.

We affirm the denial of class action certification. We reverse the ruling that petitioners had no right to acquire tenure. We remand for a factual determination in accordance herewith whether petitioners were entitled to tenure at the time of their layoffs or displacements. We do not retain jurisdiction.

Pending N.J. Supreme Court

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IN THE MATTER OF THE TENURE HEARING OF DONALD MARTIN, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY AND DONALD MARTIN V. BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, December 16, 1983

For the Petitioner-Appellant, McOmber & McOmber (J. Peter Sokol, Esq. of Counsel)

For the Respondent-Cross-Appellant, Rothbard, Harris & Oxfeld (Mark J. Blunda, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent is dismissed from his position as of December 16, 1983, the date of the Commissioner's decision in this matter.

July 11, 1984

PENDING N.J. SUPERIOR COURT

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MATAWAN REGIONAL TEACHERS ASSOCIATION ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 1, 1983

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Mark J. Blunda, Esq., of Counsel)

For the Respondent-Respondent, Vincent C. DeMaio, Esquire

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

May 2, 1984

PENDING N.J. SUPERIOR COURT

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IN THE MATTER OF THE TENURE :
HEARING OF GEORGE McCLELLAND, : SUPERIOR COURT
RESPONDENT-APPELLANT. : APPELLATE DIVISION
_____:

Decided by the Commissioner of Education, March 25, 1983

Decided by the State Board of Education, July 6, 1983

Argued: June 12, 1984 -- Decided July 20, 1984

Before Judges King, Dreier and Bilder.

On appeal from a final decision of the State Board of Education.

William S. Greenberg argued the cause for appellant (Greenberg, Kelley & Prior, attorneys; Mr. Greenberg, John B. Prior, Jr., Linda K. Stern, on the brief).

David W. Carroll argued the cause for respondent Washington Twp. Board of Education (Baggitt, Mancino & Carroll, attorneys; John A. Selecky, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education (Jaynee LaVecchia, Deputy Attorney General, on the statement).

PER CURIAM

George McClelland, a tenured teacher in the Washington Township (Mercer County) school district has appealed from a decision of the Commissioner of Education dismissing him for conduct unbecoming a teacher and for insubordination. These specific charges were based upon "his habitual flagrant conduct in touching, caressing and hugging minor female students in his charge." The case was initially tried before an Administrative Law Judge who found that respondent indeed had touched students by hugging them, scratching their backs and sitting them on his lap, conduct that occurred in front of other students in a classroom setting. The judge specifically found that McClelland's "touching of pupils, both male and female, was a father-figure type gesture, rising from an inner conviction that body contact has certain psychological values...." In 1978 and again in 1982 the Superintendent of Schools spoke to McClelland telling him on the first occasion that touching of students could be misconstrued and he should refrain from such conduct even though the touching was done in a fatherly manner. In the latter discussion, the Superintendent told him directly that "no matter how fatherly you might think that touch is, you are not to

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touch the girls." An Administrative Assistant working at the school testified that soon after the latter warning to McClelland she saw him with "his hand under the student's sweater," and then on a later occasion saw him "scratching a girl's back on the top of her sweater." Several girls complained of this conduct, after viewing a film entitled "Girls Beware."

The Administrative Law Judge found specifically that McClelland's failure to comply with the Superintendent's orders was not "a conscious act of defiance, but...a reflexive habit deeply ingrained from his many prior years of teaching." He further found a lack of evidence that McClelland's touching of any pupil was "lecherous, deviant, covert, surreptitious, sexually oriented, vicious or cruel." The Administrative Law Judge rejected dismissal as too severe a sanction, and determined that McClelland should be penalized by a loss of salary after certification of the charges by the Board of Education, as well as the loss of a salary increment. In arriving at this determination he specifically made credibility findings concerning some of the students who had testified before him, A.C. and J.M., and of the Administrative Assistant as to the specifics of what she had observed.

The Commissioner accepted the Administrative Law Judge's findings with the exception of the credibility appraisal of J.M. and the Administrative Assistant. The Commissioner further rejected the Administrative Law Judge's explanation of McClelland's behavior, noting that none of the complainants were boys and that "[r]espondent's proclivities herein far exceed the bounds of good judgment and restraint." The Commissioner further noted "respondent's continued refusal to accept advice and admonitions from his superiors to refrain from touching his pupils," and that his refusal or inability to follow such advice raised serious questions about his self control. Having found that McClelland had been insubordinate and guilty of conduct unbecoming a teacher, the Commissioner determined that respondent should be dismissed. The State Board of Education affirmed the decision of the Commissioner but advanced the effective date of the dismissal to the date of the Commissioner's decision.

The principal point upon which we could disagree with the Commissioner's and State Board's decisions would be their overturning of the credibility findings made by the Administrative Law Judge. Our review of a State agency's factual findings is to determine whether they could reasonably have been reached on credible evidence in the record, considering the entire matter before the agency, and whether "due regard" had been given to the opportunity of the Administrative Law Judge to judge the credibility of the witnesses that appeared before him, respecting "the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). We may only review the record anew if we are "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction." State v. Johnson, 42 N.J. 146, 162 (1964).

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We are not here reviewing the findings of the Administrative Law Judge, but rather the findings of the State Board of Education. See N.J.S.A. 52:14B-12; In re Suspension of License of Silberman, 169 N.J. Super. 243, 255 (App. Div. 1979), aff'd o.b. 84 N.J. 303 (1980). The Commissioner and State Board of Education have the duty directly to review the record before the Administrative Law Judge, bringing to bear the agency's own expertise. Here the Commissioner duly noted the standards set down in the Close and Mayflower Securities cases, but found that from the record and his own understanding of human frailties, a different credibility determination was required. The analysis was not unlike that in Silberman where the Board first "evaluated the evidence in the light of its expertise," and then "carefully and sensibly considered the examiner's findings, statements and reports, and demonstrated appropriate grounds for refusing to accept them in areas which affected the result." [169 N.J. at 256].

Our review of the State Board's and Commissioner's findings requires a determination of whether the final action was "arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies...." Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). It is apparent that the Commissioner did not arbitrarily overturn the Administrative Law Judge's credibility determinations. Whether we agree or disagree with the conclusions reached is irrelevant, since it is clear from the record that the Commissioner made a reasoned decision supported by substantial credible evidence in the record.

McClelland argues that dismissal was too severe a penalty, especially in light of his outstanding reputation as a teacher which was developed before the Administrative Law Judge by testimony of students, parents, teachers and administrators. He essentially argues that dismissal as a penalty here is arbitrary and capricious. The Commissioner found specifically:

> Prudence would dictate that no matter how innocent the teacher might feel his touching of pupils might be, after having been first warned and then directed to cease such activities, a professional teacher in full awareness and control of his actions would have heeded his superior.

In the present instance respondent's failure to comply raised in the Commissioner's mind very real concerns as to respondent's inability to control himself. Although the Commissioner's imposition of the remedy of dismissal is harsh, we cannot say that it lacks substantial support by credible evidence in the record. It therefore should be and is affirmed.

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GLORY MIRABELLO,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 20, 1982

For the Petitioner-Cross/Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Beattie & Padovano
(Ralph J. Padovano, Esq., of Counsel)

For the Amicus Curiae, New Jersey School Boards Association, Susan Galante, Esq.

This matter was previously the subject of a Legal Committee Report dated June 23, 1983. Exceptions to the Legal Committee Report were filed by Petitioner-Cross/Appellant and a response thereto was filed by Respondent-Appellant.

In its report of June 23, 1983, the Legal Committee recommended reversal of the Commissioner's decision based on its interpretation of Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). Spiewak settled the issue of whether public school teachers who provide remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria of N.J.S.A. 18A:28-5. The New Jersey Supreme Court concluded that such teachers are eligible for tenure, so long as they meet the statutory criteria. The Supreme Court concluded further that:

> "the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court."

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Based on the plain language of the Supreme Court, the Legal Committee recommended that teachers terminated prior to the date of the Supreme Court's decision in Spiewak, June 23, 1982, should be foreclosed from relief.

Since the issuance of the June 23, 1983, Legal Committee Report in this matter, a growing body of case law by the Superior Court of New Jersey, Appellate Division, has held that Spiewak would be given a retroactive effect for those teachers who had commenced litigation prior to the Supreme Court's decision. See Monaco v. Board of Education, Borough of River Edge, Appellate Division, Docket No. A-2964-81T2 (May 23, 1983) (unpublished), certif. denied _____ N.J. _____ (July 13, 1983); Maxfield v. Ridgewood Board of Education, Appellate Division, Docket No. A-2946-81T3 (April 20, 1983) (unpublished), certif. denied _____ N.J. _____ (July 13, 1983); and Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Appellate Division, Docket No. A-3813-81T1 (March 2, 1983) (unpublished), certif. denied _____ N.J. _____ (July 13, 1983). But see Epps v. Jersey City Board of Education, Appellate Division, Docket No. A-3171-79-T3 (January 3, 1983) (unpublished).

Based on the holdings in Monaco, Maxfield and Middlesex, the Legal Committee revised its report of June 23, 1983, and issued a Revised Legal Committee Report on October 18, 1983. All parties filed replies thereto. We modified some language at page 5 of the Revised Legal Committee Report, and with that modification, adopt the Revised Legal Committee Report as the State Board's decision in this matter.

We uphold Glory Mirabello's entitlement to relief, including tenure benefits equal to other tenured teachers, reinstatement, and retroactive relief as follows:

1. We affirm the Commissioner's determination that Glory Mirabello is a tenured part-time teaching staff member.

2. We clarify the Commissioner's order which reinstated Glory Mirabello as a "supplementary teacher" to include the language used by the Administrative Law Judge at page 6 of the Initial Decision:

> "***Mirabello is to be reinstated to her entitlement as a tenured part-time supplementary teacher, her assignment in either the Title I or S.C.E. program a management prerogative***."

We believe clarification of the Commissioner's Order of reinstatement is necessary in the context of this case, since the Board has claimed throughout this proceeding, and the record tends to support it, that there were no Supplementary Teacher positions, at least as defined by the Board, in existence during the 1981-82 school year. (Ex. J-7; Tr. II, 30, 31) Notwithstanding the unavail-

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ability of a Supplementary Teacher position, the record shows there were two Title I/S.C.E. positions available during the 1981-82 school year. (Ex. J-7) The Administrative Law Judge concluded that regardless of the Board's distinction among the three types of teachers, that is, whether one was employed as a Supplementary Teacher, a Title I Teacher, or a State Compensatory Education Teacher, it was a "distinction without a significant difference." (Slip opinion, at 4) In the Administrative Law Judge's opinion, all are supplementary teachers. Since the Commissioner affirmed the Administrative Law Judge's findings and adopted them as his own, we can only conclude that the Commissioner intended Glory Mirabello's reinstatement as a "tenured part-time supplementary teacher" to mean assignment in either the Title I or State Compensatory Education program or a combination of both, depending on management prerogative. With this clarification, we affirm the Commissioner's determination that Glory Mirabello is entitled to reinstatement as a Supplementary Teacher, Title I, State Compensatory Teacher, or combination thereof, depending on the availability of positions in the district.

3. On the basis that such remedial teaching positions were and are available, we decline to determine the seniority category issue which has been raised on this appeal. (Point I, Brief on Behalf of Petitioner/Cross-Appellant)

4. We remand this matter to the Commissioner of Education for determination of the amount of compensation, accrued sick leave, and other benefits to which Glory Mirabello is entitled, on a pro rata basis where applicable.

Petitioner has sought no back pay award for the period prior to the 1981-82 school year. (Brief on Behalf of Petitioner/Cross-Appellant, at xv) We hold that Glory Mirabello is entitled to proper step placement on the regular classroom teachers' salary guide and a back pay award beginning with and since the 1981-82 school year, to be paid in accord with the regular classroom teachers' salary guide in effect in each year, on a pro rata basis, mitigated by unemployment compensation and other earnings, if any. We suggest placement at step 9 on the regular classroom teachers' salary guide for the 1981-82 school year; placement at step 10 for the 1982-83 school year; and placement at step 11 for the 1983-84 school year. Notwithstanding our suggestion regarding appropriate placement on the salary guide, we do not consider this to be a closed issue. The separate issue of credit on the salary guide for her prior teaching experience with other school districts was not considered in our deliberations. To the extent the parties cannot agree on salary guide placement, it should be clarified by the Commissioner on the remand.

5. Enrollment in the Teachers' Pension and Annuity Fund is not within our jurisdiction and should be addressed to the appropriate agency.

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In summary, the State Board affirms the Commissioner's decision, with a remand for the purpose of determining the compensation and accrued benefits to which Glory Mirabello is entitled.

January 4, 1984

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KENNETH MISCIA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 31, 1983

Reversed by the State Board of Education, October 26, 1983

State Board granted Motion for Reconsideration, December 7, 1983

For the Petitioner-Respondent, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Accardi & Koch (Joseph S. Accardi, Esq., of Counsel

The State Board of Education reconsidered this matter at its meeting on January 4, 1984, Petitioner's Motion for Reconsideration having been granted on December 7, 1983. The Legal Committee's Recommendation, that the State Board decision of October 26, 1983, be set aside, and that the March 31, 1983 decision of the Commissioner be affirmed, was adopted by the State Board with two dissenting votes. The Legal Committee's Recommendation is repeated below, and is followed by the State Board decision.

RECOMMENDATION

This matter is currently before the State Board of Education for reconsideration, Petitioner's Motion for Reconsideration having been granted on December 7, 1983.

In his moving papers, the Petitioner argued that the October 26, 1983 decision to reverse the Commissioner, thereby denying him reinstatement to the position of principal which he held, "brings into question whether tenure is accrued in a position or whether the scope of the certificate required by a board of education somehow defines the scope of tenure accrual." The Petitioner further argued, among other things, that our October 26, 1983 action "constitutes a complete reversal of the State Board's decision in the matter of Colella v. Elmwood Park Board of Education made on July 6, 1983." (The Colella case was factually similar to this matter.)

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Because this case presents such a significant potential for understanding the nature of educational policy, and because of the threshhold question of tenure protection and statutory rights which Miscia argues accrue to his benefit, the Legal Committee has thoroughly reviewed its prior recommendation that the Commissioner's decision be affirmed, as well as the view expressed by the majority in the initial vote of October 26, 1983.

Having granted what the Legal Committee is convinced is a very careful study of the issues in this case, we recommend that the October 26, 1983 action of the State Board, reversing the Commissioner, be set aside and further, that the initial recommendation of the Legal Committee, to affirm the Commissioner's Decision of March 31, 1983 be affirmed.

However, before making that motion, we think it is necessary and useful to comment as to the Legal Committee's initial recommendation and the majority position in the initial decision of October 26, 1983.

The central question seems to turn on whether or not the action of the East Hanover Board of Education, in removing Miscia without his consent from the position of principal, amounts to a dismissal, in contravention of his tenure rights, or whether such action, without a reduction in salary, constitutes a "demotion," within the discretion of the Board and not violative of Miscia's tenure rights.

Relying on Morell v. Parsippany-Troy Hills, Superior Court of N.J., Dkt. No. A-1619-80T2, December 16, 1981, unreported, certif. denied 89 N.J. 419 (1982), the majority adopts the latter view, that a board of education is within its rights to consider the educational benefit to its students when making transfers of its personnel. Here, the majority obviously feels that the legal "tenure" issue is only part of the several considerations that must affect a decision of the State Board of Education. More important than what might be viewed as the narrow legal issue, the majority view is of the role in establishing wise educational policy, which this case, and others like it, brings to the benefit of the State's children. In considering the expanding research which describes the absolutely critical role that a school principal plays in determining the quality of education, the majority felt that Miscia's non-reduction in salary and a concurrent transfer to a position within the same certificate did not violate his tenure, even when accomplished without his consent.

However, the Legal Committee respectfully disagrees that the tenure issues herein involved are the less significant of the questions raised.

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It is our view that Miscia suffered a dismissal from his tenured principal position. Specifically, our view is premised on the legal principles enunciated in Colella v. Elmwood Park Board of Education, 1983 S.L.D. _____ (decided March 10, 1983), affd. State Board of Education, July 6, 1983, as well as on the practical analysis of the Elmwood Park Board (and any other Board) in granting an initial "promotion" to one, from whatever position he held, to a "higher" position of principal. N.J.S.A. 18A:28-6 was specifically enacted to define tenure rights in promotion.

No law exists which grants any employee a right of expectation toward advancement along a career ladder. A teacher cannot expect, as a matter of law, to be promoted to a vice-principal; a vice-principal cannot expect to be a principal, any more than a principal can legally claim a right to advancement to Superintendent. We hold the view that having been awarded any such promotion by free choice of the board, that opposite protection exist. That is, after having served the requisite period of time in a new position, as defined in N.J.S.A. 18A:28-6, one cannot be involuntarily removed without suffering a breach of tenure protection. The rights of expectation exist only to the extent that an employee will continue to serve in a tenured position while during good behavior and efficiency.

This does not remove the Board's legal remedies if it desires to remove a tenured employee which it sights as necessary because of inefficiency, incapacity, improper conduct or other just cause. Any practical faults of the procedure for removal, do not rest with the removed employee; nor should Miscia, in this case, be made to suffer the effects of the perceived ineffectiveness of the system.

Miscia was dismissed from his position of principal without having received the proper opportunity to improve, if his removal was based on inefficiency. Nor did the Board afford him an opportunity of a tenure hearing, thus violating his specific tenure rights.

The Legal Committee moves its initial recommendation.

Finally, we must separate the discussion of this case to the extent that tenure does not extend to a certificate but to a "position." This view exists with N.J.S.A. 18A:28-6 and supports the notion that the "position" of one against whom a complaint is made, is subject to the loss of that position upon an affirmative showing of incapacity, inefficiency or other just cause.

Indeed, successful tenure charges cause the removal from a "position." Successful charges do not result, proximately, in removal of a certificate.

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DECISION

The October 26, 1983 action of the State Board of Education, reversing the Commissioner of Education, is set aside. The State Board of Education affirms the March 31, 1983 decision of the Commissioner of Education.

S. David Brandt and P. Paul Ricci opposed.
January 4, 1984

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LOIS MISHKIN,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 4, 1983

Decided by the State Board of Education, September 7, 1983

Argued October 17, 1984 -- Decided November 2, 1984

Before Judges Gaulkin and Long

On appeal from the State Board of Education.

Joel S. Selikoff argued the cause for appellant (Selikoff & Cohen, P.A., attorneys; Mr. Selikoff and Barbara E. Riefberg, on the brief).

Raymond D. O'Brien argued the cause for respondent (O'Brien, Liotta & Mandel, attorneys; Mr. O'Brien and Deborah I. Lynch, on the brief).

June Kanter, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General, attorney, Ms. Kanter, on the brief).

PER CURIAM

Lois Mishkin petitioned the Commissioner of Education to declare that the Mountainside Board of Education wrongfully refused to employ her in a "four day per week speech correctionist position." Following transfer and hearing as a contested case (N.J.S.A. 52:14F-1 et seq.), Administrative Law Judge Weiss issued his Initial Decision in which he concluded that "the action of the [Board] in this matter did not impinge in any way upon [Mishkin's] tenure or her seniority rights" because Mishkin's "conduct in December 1979 was in the nature both of a resignation from her part-time employment and a waiver of any right to the reemployment, other than to a full-time position which was never again created by the Board." The Commissioner adopted the recommendation that Mishkin's appeal be dismissed, but reversed "that part of the ALJ's findings which pertains to [Mishkin's] entitlement to a full-time position as speech correction teacher, should the Board create such

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position." The State Board of Education affirmed the decision of the Commissioner "for the reasons expressed therein." Mishkin now appeals from the State Board decision.

Our review of the record satisfies us that the factual findings made by the ALJ, which were adopted by both the Commissioner and the State Board, are amply supported by the record. In particular we regard as soundly based the administrative findings that Mishkin had failed to prove that she had been treated in an "arbitrary and capricious" manner or that she had been "constructively dismissed." There is no warrant for us to disturb those findings. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982). Based on those findings and the reasons expressed by the ALJ and adopted by the Commissioner and the State Board, we affirm the dismissal of Mishkin's petition asserting entitlement to a "four day per week speech correctionist position."

We reject, however, the State Board's conclusion that Mishkin's tenure and seniority rights to a full-time position were "effectively terminated upon the acceptance of her resignation by the Board."[1] In her December 21, 1979 "resignation" letter Mishkin specifically affirmed that "I am prepared to work on a full-time basis." Had she refused the part-time position when it was first created, she would have remained "upon a preferred eligible list in the order of seniority for reemployment." N.J.S.A. 18A:28-12; Boguszewski v. Demarest Board of Education, 1979 S.L.D. 232. We find neither reason nor authority to regard her "resignation" letter as a relinquishment of those statutory rights.

The dismissal of Mishkin's claim to employment in a four day per week speech correctionist position is affirmed; but we hold, contrary to the decision of the State Board, that Mishkin retains the rights afforded by N.J.S.A. 18A:28-12 with respect to any full-time speech correctionist position, if any such position should be reestablished by the Board.

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[1] The Board apparently did not urge, in any of the administrative proceedings, that Mishkin's "resignation" terminated such tenure and seniority rights; nor did the Board so urge in its brief filed in this court. At oral argument before us, however, Board counsel did support that aspect of the State Board decision.

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BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT-APPELLANT and CROSS-RESPONDENT,

V.

RUTH LEVITT and ESTHER E. SASLOE,

PETITIONERS-RESPONDENTS and CROSS-APPELLANTS.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, February 4, 1983

Decided by the State Board of Education, June 1, 1983

Submitted September 18, 1984 -- Decided November 29, 1984

Before Judges Pressler, Brody and Havey.

On appeal from final decision of the New Jersey State Board of Education.

Louis C. Rosen, attorney for appellant and cross-respondent (Dwayne C. Vaughn, on the brief).

Giblin & Giblin, attorneys for respondents and cross-appellants (Michael P. Kemezis and Kenneth M. Bushell, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of New Jersey State Board of Education (Regina A. Murray, Deputy Attorney General, on the statement).

PER CURIAM

The issue on this appeal is whether the Commissioner of Education is empowered to award post-judgment interest to a successful claimant who has been awarded a money judgment. We find that the Commissioner of Education has that power and accordingly reverse that portion of the State Board of Education's determination denying interest. Otherwise we affirm.

In 1971 petitioners Ruth Levitt and Esther E. Sasloe instituted proceedings with the Commissioner of Education (Commissioner) against the respondent Board of Education of the City of Newark (board). Essentially, petitioners argued that their

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assignment by the board as long-term substitute teachers from 1945 through 1961 improperly prevented them from acquiring tenure protection and also denied them proper placement on the teacher's salary guide, longevity increments, leaves of absence and other fringe benefits which should have accrued to them as regular teaching staff members. They sought compensation for the wages, fringe benefits and credits that they would have received had they been properly assigned. The Commissioner issued his decision on October 5, 1977. He adopted the findings of the hearing examiner, found that petitioners were regular full-time teachers during the years in question and ordered the board to compensate them for the back pay and benefits due to them. Although the board did not appeal from the Commissioner's decision, it failed to make the necessary calculations or to tender payment to petitioners in accordance with the Commissioner's decision. The board's attorney, however, assured petitioners that "payment was in the process," and on September 8, 1978, wrote to petitioners' attorney, advising him that "the sum due your clients respectively is Ruth Levitt $34,186.00 and Esther Sasloe $27,250.00." On April 30, 1979 he sent another letter with computations showing that the board owed $34,186 to Levitt and $26,500 to Sasloe. Despite these statements, the board made no tender of any sum to either petitioner. In view of the board's noncompliance with the Commissioner's order petitioners commenced an action in the Superior Court, Chancery Division to compel compliance. The trial court vacated the Commissioner's decision finding that he had misinterpreted the applicable school laws. Petitioners appealed to this court. We reversed, holding that the trial judge erred in permitting the collateral attack on the Commissioner's order. We also held that although the Commissioner's order of October 5, 1977 was a final order, it required further implementation since the Commissioner had not computed the sums actually due petitioners. We remanded to the Commissioner to make these findings.

On remand, the administrative law judge to whom the contested case was assigned, recommended the grant of summary judgment in favor of the petitioners in the amount of $34,186 to Levitt and $26,550 to Sasloe. The administrative law judge also recommended the award by the Commissioner of post-judgment interest.[1] On February 5, 1983 the Commissioner accepted the findings and determinations of the administrative law judge but reversed the interest award, concluding "...that there is no statutory prescription for such awards...." He nevertheless

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[1] The petitioners stipulated as part of the pretrial order in this proceeding that "[t]he petitioners lay claim to simple interest on the principal for a period of two years at 12 percent as of the date of the Commissioner's final decision in this matter." The administrative law judge therefore limited the interest award to two years at 12%.

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observed that "...the Commissioner deplores in the strongest possible terms the cavalier treatment by the board of petitioners' claims and his decision herein not to award interest does not preclude petitioners from seeking such relief in the appropriate forum." The State Board of Education affirmed on the board's appeal. Respondent board appeals from the order granting summary judgment, and petitioners cross-appeal the denial of post-judgment interest.

We are satisfied that the board's contention that summary judgment should not have been granted fixing the amounts due petitioners is without merit. The decision by the State Board of Education affirming the summary judgment entered by the Commissioner is supported by sufficient credible evidence on the record as a whole. R. 2:11-3(e)(1)(D).

Petitioners contend on their cross-appeal that they are entitled to post-judgment interest on their award and that the Commissioner was empowered to allow such interest.

In considering petitioners' contentions, we must address two entirely separate issues. The first is whether and under what circumstances interest is allowable against a public body and the second is whether, to the extent it is allowable, it may be awarded by the Commissioner in the absence of express statutory authority.

In considering the susceptibility of a public body to an award of interest against it, a distinction must first be drawn between pre-judgment interest and post-judgment interest. Where private litigants are involved, the allowance of pre-judgment interest in contract and contract-like actions, even where a claim is liquidated, is not a litigant's right but rests rather in the court's discretion, required to be exercised in accordance with equitable principles and considerations. See Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123, 131 (1976). Where the debtor is a governmental agency and interest in the cause is not provided for by statute, particular circumspection in the granting of pre-judgment interest is required and a showing of overriding and compelling equitable reasons must be made in order to justify the award. See Consolidated Police, etc., Pension Fund Commn. v. Passaic, 23 N.J. 645 (1957). See also City of East Orange v. Palmer et al., 52 N.J. 329 (1968); Fasolo v. Div. of Pensions, 190 N.J. Super. 573 (App. Div. 1983); Youth & Family Serv. Div. v. Middlesex Cty., 188 N.J. Super. 1 (App. Div. 1982); East Orange v. Bd. of Chosen Freeholders, Essex Cty., 89 N.J. Super. 493 (App. Div. 1965).

An adjudicated liability, however, obviously stands on a completely different footing from an unadjudicated claim of liability. Thus, in the case of private litigants, the grant of post-judgment interest is ordinarily not an equitable matter within the court's discretion but is, as a matter of long-standing practice, routinely allowed. See, e.g., Erie Railway Co. v. Ackerson, 33 N.J.L. 33 (Sup. Ct. 1868); Simon v. N.J. Asphalt &

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Paving Co., 123 N.J.L. 232 (Sup. Ct. 1939). This practice has been codified by court rule. See R. 4:42-11(a), providing for post-judgment interest on all judgments, awards and orders for the payment of money "except as otherwise ordered by the court and except as otherwise may be provided by law." The rule, by its own terms, applies to all money judgments irrespective of the identify and status of the judgment debtor. Nor is there any general statute prohibiting post-judgment interest against public bodies. They are, as a matter of custmary practice, subject to post-judgment interest unless the court for good cause otherwise orders. Thus, it is clear that in a contract or contract-like action the court may, in appropriate circumstances, award pre-judgment interest against a public body and will ordinarily award post-judgment interest against a public agency absent a showing a good cause to the contrary.

The question then is whether in awarding money damages to a petitioner, the Commissioner has the same power with respect to both pre-judgment interest and post-judgment interest as the court has in entering a money judgment. We conclude that although this power has not been expressly accorded to the Commissioner by statute, it is nevertheless an ancillary power which he must be deemed to have in order fully to execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws. See N.J.S.A. 18A:6-9.

It is a well-settled principle of administrative law that the statutory powers accorded an agency "should be liberally construed to permit the agency to achieve the task assigned to it, and that such administrative agency has such implied incidental powers as may reasonably be adapted to that end." In re Suspension of Heller, 73 N.J. 292, 303 (1977), quoting In re Com'r of Bank. v. Parkwood Co., 98 N.J. Super. 263, 271-272 (App. Div. 1967). These incidental powers have been extended to the fashioning of remedies, including the award of specific items of compensatory damages not expressly enumerated by statute. See Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973); Jackson v. Concord Company, 54 N.J. 113 (1969). Applying this principle here, we are satisfied that N.J.S.A. 18A:16-9 vests jurisdiction in the Commissioner to award post-judgment interest as incidental to his power to fix money judgments.

The Supreme Court has repeatedly "reaffirmed the great breadth of the Commissioner's powers," recognizing that he has "fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws. N.J.S.A. 18A:6-9." Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 525 (1978). His jurisdiction over school litigation encompasses questions regarding tenure rights, N.J.S.A. 18A:28-5, and allows him to fix dollar amounts due for retroactive benefits when a question of the accrual of tenure rights is resolved in a teacher's favor. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 84 (1982); N.J.S.A. 18A:6-10. In our view, interest on a money award which the Commissioner is authorized to grant is an essential and integral part of the award itself since the purpose of the fixed-sum award is

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to make petitioner whole. Pre-judgment interest is in contemplation of law "damages" for the illegal detention of a legitimate claim or indebtedness. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 506 (1974). It therefore serves to "indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed." Busik v. Levine, 63 N.J. 351, 358 (1973), app. dism. 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed. 2d 733 (1973); Fasolo v. Div. of Pensions, supra, 190 N.J. Super. at 584. Post-judgment interest is based on the same rationale, enhanced, however, by the dimension of an adjudication of improper withholding. As a result of the adjudication, the debtor's obligation to pay is derived not only from the parties' transactional relationship but from the legal process itself.

As we understand the thrust of the board's argument, it does not primarily urge that it is immune from an interest award but rather that such an award, even in respect of a Commissioner's money order, must be made by a court. It relies for this proposition on Fallon v. Scotch Plains-Fanwood Bd. of Ed., 185 N.J. Super. 142 (Law Div. 1982). There plaintiffs had instituted an action in lieu of prerogative writs to obtain interest from the local board of education on sums which they had expended for transportation and tuition costs for their neurologically impaired child. Plaintiffs had successfully petitioned the Commissioner of Education for this compensatory relief and the Commissioner, classifying plaintiffs' child as neurologically impaired, had ordered defendant to reimburse plaintiffs for these sums. Defendant resisted plaintiffs' claim for interest, asserting that they had failed to exhaust their administrative remedies by not having requested that award from the Commissioner. The trial court rejected defendant's argument, holding that "...plaintiffs' entitlement to interest and costs involve the interpretation of legal questions and the exercise of judicial discretion. The Commissioner of Education is not clothed with the authority to determine plaintiffs' claim presented herein." Id., 185 N.J. Super. at 148.

We overrule this holding of Fallon. In our view, an award of interest, whether pre-judgment or post-judgment, is more appropriately made by the Commissioner as part of his determination of the cause than by a court which could do so only by undertaking a complete review of the entire record of the case. The Fallon holding encourages piecemeal litigation and results in a wholly unjustifiable waste of the resources of both the litigants and the court system. It is clearly more sensible and more economical for the Commissioner to make the determination in the first instance. A party dissatisfied with that determination would have, of course, the same right to seek review thereof as he has with respect to any other administrative determination.[2] We are therefore persuaded

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[2] Note, however, that where an agency, in exercising its quasi-judicial function, denies interest on an award which it itself is obliged to pay, this court's review would be de novo. See Fasolo v. Div. of Pensions, supra, 190 N.J. Super. 573.

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that the Commissioner not only has the incidental power to award interest but, furthermore, that the interest of the judicial and administrative process as well of the litigants, would be advanced by his exercise thereof rather than deferring the question to a court for separate adjudication. In considering whether or not to allow interest, and, if so, how much, the Commissioner should, of course, be guided by the same principles respecting the award of pre-judgment interest and post-judgment interest which controls the judicial exercise of this power.[3]

Applying these principles to this case, we are first satisfied that we need not consider the issue of pre-judgment interest at all in view of petitioners' stipulation that they were limiting their request to post-judgment interest for the two years immediately preceding the conclusion of these proceedings. We are constrained nevertheless to comment on the question of when post-judgment interest would otherwise have started to run in view of the Commissioner's 1977 final order which did not fix the precise amount of money to which petitioners were entitled. As we have noted, this court had previously held that that order was a final determination. Nevertheless, we are of the view that post-judgment interest cannot start to run until the precise amount of money damages is fixed. Under all of the circumstances of this case, we regard the money damages to have been fixed on September 8, 1978, when the board conceded the amount of its obligation or, as to petitioner Sasloe, on April 30, 1979, when the board corrected its calculation of the amount due her. This method of fixing the date upon which post-judgment interest would have begun to run is analogous to the procedure followed by the Civil Service Commission where the Commission enters the final order of liability but directs the parties to submit affidavits to resolve the amount of back pay due. N.J.A.C. 4:1-5.5(g)(h).

Ordinarily, we would remand this matter to the Commissioner for his determination as to whether or not post-judgment interest, the only matter here in question, should be awarded. We do not do so, however, because he has already clearly stated his view that in the circumstances of this case petitioners are entitled to that award. We leave to the Commissioner's discretion, however, the question of the rate of interest to be allowed.[4]

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[3] In awarding post-judgment interest, we caution that ordinarily a public body should be accorded a reasonable time under the circumstances to make payment of the judgment before post-judgment interest begins to run.

[4] The rates fixed by R. 4:42-11(a) are not necessarily applicable to judgments and orders entered by non-judicial agencies. See also Fasolo v. Div. of Pensions, supra, 190 N.J. Super. 573.

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The order of the State Board of Education is modified with respect to the interest issue only, and we remand to the Commissioner of Education for further proceedings consistent with this opinion. In all other respects, the order appealed from is affirmed. We do not retain jurisdiction.

[197 N.J. Super. 239 (App. Div. 1984)]

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NEW MILFORD EDUCATION ASSOCIATION,ANITA SCULT, LINDA MACCHIO, JANET FLIEGER, ELAINE GLINE AND DEBORAH BOGYO,	:	
APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD,	:	
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 20, 1982

Decided by the State Board of Education, May 4, 1983

Argued February 23, 1984 - Decided March 14, 1984

Before Judges Fritz and Furman

On appeal from the State Board of Education.

Sheldon H. Pincus argued the cause for appellants (Bucceri & Pincus, attorneys; Gregory T. Syrek, on the brief).

Gerald L. Dorf argued the cause for respondent (Dorf and Glickman, attorneys; Mark S. Ruderman, of counsel and on the brief).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney).

PER CURIAM

The sole issue on this appeal is petitioners' entitlement to back pay pursuant to retroactive salary guide placement as tenure-eligible Title I and State compensatory education teachers under Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). They filed their petition on July 10, 1981, two weeks subsequent to our decision in Spiewak, 180 N.J. Super. 312 (App. Div. 1981), which the Supreme Court affirmed on June 23, 1982. We were advised at oral argument that respondent has abandoned its cross-appeal.

At oral argument the State Board of Education sought our guidance without taking an adversarial position. Respondent local board of education relies upon the Supreme Court footnote in

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Spiewak, 90 N.J. at 83, footnote 2: "Teachers not before the Court will . . . not be entitled to any back pay award."

Under the circumstances, including petitioners' diligence in pursuing their claims of tenure status and the pendency of those claims prior to the Supreme Court decision in Spiewak, we perceive no mandate in the Spiewak footnote which bars us from applying the substantive holding of Spiewak, both in this court and in the Supreme Court, in petitioners' favor.

We are mindful that the Supreme Court denied petitions for certification in Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, 94 N.J. 583 (1983), Monaco v. Board of Education of the Borough of River Edge, 94 N.J. 591 (1983) and Maxfield v. Board of Education of the Township of Ridgewood, 94 N.J. 591 (1983), in all three of which we reached the same result as we reach today.

We reverse and remand for further proceedings not inconsistent herewith to determine the amount of back pay to which each of the petitioners is respectively entitled. We do not retain jurisdiction.

Pending N.J. Supreme Court

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

Decided by the Commissioner of Education, September 26, 1983

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

For the Petitioner/Cross-Appellant, David A. Wallace, Esq.

For the Applicants for Intervention, Salvatore Rainone, Esq.

This appeal involves the dismissal of a tenured teacher for acts of physical force against two of his students. The initial question presented is whether Respondent's conduct constituted corporal punishment under N.J.S.A. 18A:6-1. Secondly, if Respondent inflicted corporal punishment, does his conduct warrant dismissal as a tenured teacher with the New Milford School District.

The two students involved in this incident are twin brothers. They were ninth graders at the time of their encounter with Respondent. During gym class, each refused to follow Respondent's directives. Each testified that he was punched in the chest by Respondent during the incident. (Tr. 11/22/82, at 42; Tr. 11/23/82, at 13) The incident was of very short duration, lasting no more than a few minutes. The hearing spanned four days. There were three corroborating student witnesses. Respondent's witnesses included a student, the school nurse, another gym teacher who shared the facilities and Respondent who testified on his own behalf.

The Administrative Law Judge, hereinafter "ALJ," found, by a preponderance of the credible evidence, that Respondent inflicted corporal punishment on the two boys, and that Respondent's actions constituted conduct unbecoming a teacher. In determination of the penalty, the ALJ considered the nature of the offense in light of all the circumstances. The ALJ noted that this was a gym class, which by its nature is an active setting and allows for physical interaction among students and teachers. The ALJ further observed that Respondent did not demonstrate a total lack of self-control, nor did he seem to intend to inflict physical pain. Significantly, the ALJ noted no indication of premeditation, cruel or vicious actions by Respondent. There was no finding of specific intent to inflict corporal punishment. Finally, the ALJ concluded that Respondent's conduct was not "sufficiently flagrant" to warrant for-

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feiture of tenure rights and recommended that Respondent be denied his salary increment for the 1983-84 school year and forfeit one month's salary.

The Commissioner held that Respondent resorted to the use of unlawful physical force in disciplining the two boys and exhibited conduct unbecoming a teacher. The Commissioner held that Respondent's unbecoming conduct was sufficient to warrant dismissal.

We adopt the conclusion of the ALJ and the Commissioner that corporal punishment was inflicted upon the two boys. We are satisfied that this conclusion is supported by a preponderance of the evidence. Finding this, we have addressed ourselves to the appropriateness of the penalty imposed by the Commissioner. In our review of this issue, we are mindful that the State Board of Education has a great obligation to protect the children of this State from corporal punishment and a concomitant obligation to remove unfit teachers from the classroom. We also recognize the individual interest of the Respondent in a career encompassing 13 years of service with the New Milford School District. We have addressed the appropriateness of the penalty imposed, against this background, the public interest being paramount in our minds. It is our considered opinion that discipline short of dismissal should be imposed in the circumstances of this case. We do not find the Respondent's acts were so egregious as to warrant dismissal and adopt the findings and recommendation of the ALJ on this issue.

The test to be applied in matters of this kind is set forth in Bd. of Ed. of the City of East Orange v. Thomas Tiefenbacher, Superior Court of N.J., App. Div., Dkt. No. A-165-82T3, December 5, 1983, quoting from In re Fulcomer, 93 N.J. Super. 404, 421-422 (App. Div. 1967):

> "We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.

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> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the township board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.
>
> At the time appellant was suspended he had 23 years' teaching experience and held a master's degree. He had been employed since 1954 by the Holland board. It appears that if this teacher, who is aged 56, is reemployed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary - in this case an annual pension of at least $3,500. We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.
>
> The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system."

We believe that the Commissioner mistakenly exercised his discretion in this matter and that the dismissal of Respondent for this single, isolated incident is unreasonable and excessive. Reciting an incomplete reference to In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, 1969 S.L.D. 159, aff'd State Board of Education, October 7, 1970, aff'd Superior Court of N.J., App. Div., March 7, 1972, the Commissioner applied the words of a quotation found in Appleby to this matter. Appleby,

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however, does not stand for the proposition that a single, isolated incident is sufficient to warrant dismissal of a teacher from his position. The holding in Appleby reads as follows:

> "The Commissioner finds and determines that respondent, by a series of incidents of conduct unbecoming a teacher, has shown his unfitness to be continued in his employment in the Vineland school system. The Commissioner dismisses respondent's motion for dismissal of the charges, as recommended by the hearing examiner for the reasons stated in the hearing examiner's report, and directs that respondent be dismissed from his employment with the Board of Education of the City of Vineland, effective as of the date of his suspension by that Board." 1969 S.L.D. 174.
> (Emphasis supplied.)

In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, which is cited in the Appleby quote, found summary dismissal for a single offense was an unnessarily harsh penalty in light of all the circumstances therein:

> "The Commissioner finds and determines that Frederick L. Ostergren inflicted improper corporal punishment upon a pupil in his charge, and that such action constitutes conduct unbecoming a teacher. He finds further that under the circumstances set forth herein, this action does not warrant dismissal. The Commissioner therefore remands this matter to the Board of Education for appropriate action in accordance with the principles set forth herein." 1966 S.L.D. at 188.

As in Ostergren, the tenure charge herein does not arise out of a series of incidents. It constitutes one incident which occurred in a gym class. It comprised no more than a few minutes. This is not to say that a single incident would never be the basis for dismissal of a tenured teaching staff member. Redcay, supra. But here, the physical contact did not cause any serious harm. There was no showing of premeditation or specific intent. There was no showing of a propensity for violence. There is no showing of a series of incidents as found in Appleby, supra. The Board attempted to interject another alleged incident into these proceedings which was held to be prejudicial and was rejected by the ALJ. (Tr. 12/13/82, at 63-77) Beyond this, it is highly significant that the Board did not introduce Respondent's record with the school district into these proceedings. (Tr. 3/24/83, at 6)

In summary, we do not find the incident herein to be sufficiently flagrant to warrant dismissal. See Redcay, supra. Based on the foregoing, and applying the legal standards established in the cases listed earlier, we are of the opinion that the Commissioner's decision to dismiss Respondent from his tenured position was an

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inappropriate penalty. We grant the stay, deny intervention in these proceedings, reverse the Commissioner's decision, and adopt the findings and conclusions of the ALJ.

For the record, we note the typographical error appearing at paragraph 4, page 15 of the slip opinion.

Betty A. Dean and Robert J. Wolfenbarger opposed.

April 4, 1984

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BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,	:	
PLAINTIFF-APPELLANT,	:	
V.	:	
JOAN R. NOLAN,	:	
DEFENDANT-RESPONDENT.	:	
	:	SUPERIOR COURT
JOAN R. NOLAN,	:	APPELLATE DIVISION
PLAINTIFF-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,	:	
DEFENDANT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 22, 1982

Decided by the State Board of Education, April 6, 1983

Submitted: June 4, 1984 -- Decided: June 15, 1984

Before Judges Bischoff, Petrella and Brody.

On appeal from an Interlocutory Order of the State Board of Education and on transfer from the Superior Court, Chancery Division, Camden County.

Brown, Connery, Kulp, Wille, Purnell & Greene, attorneys for appellant (Paul Mainardi, on the brief and reply brief).

White & Uzdavinis, attorneys for respondent (John L. White, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (James J. Ciancia, Assistant Attorney General, of counsel; Jaynee LaVecchia, Deputy Attorney General, on the brief).

Paula A. Mullaly, General Counsel for the New Jersey School Boards Association, amicus curiae (Cynthia J. Jahn, on the brief)

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PER CURIAM

This appeal challenges the authority of the Commissioner of Education pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., to review and disapprove voluntary settlements by parties proceeding under that law.

These proceedings commenced on February 23, 1981, when the Merchantville Board of Education (Board) filed "tenure charges" and supporting evidence with the Commissioner of Education (Commissioner) against its secretary, Joan R. Nolan. She was charged with misappropriation of $1,548 in public funds, and with utilizing her position as Board secretary in a small school district to pay herself additional monies of salary without Board authorization. Ms. Nolan filed an answer denying the charges and asserting a counterclaim. Pursuant to N.J.S.A. 18A:6-16, the matter was transferred to the Office of Administrative Law. On September 9, 1981 Nolan moved to compel the Board to pay her salary for the period of her suspension prior to the certification of tenure charges and for the period of time commencing the 121st day following the certification of charges. Her motion was granted. N.J.S.A. 18A:6-14. The Board refused to comply with that order to pay salary and with other similar orders subsequently entered.

The hearings proceeded on the charges and, as a result of conferences held by the ALJ and counsel, the parties entered into a settlement agreement to resolve the tenure charges. That agreement was memorialized in a consent order later incorporated into the initial decision which terminated the case and dismissed the tenure charges. The consent order contained the following preamble:

> It appearing, subject to review and approval by the Commissioner of Education, this matter in dispute has been resolved by agreement between the parties as follows:
>
> The settlement contained the following terms:
>
> 1. The Board will pay Joan R. Nolan one year's salary with appropriate deductions;
>
> 2. The Board consents to dismissal of the tenure charges;
>
> 3. Joan R. Nolan will resign from her position;
>
> 4. Joan R. Nolan will not pursue any claim against the Board;
>
> 5. The parties will exchange general releases.

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The initial decision recommended that the Commissioner approve the proposed settlement. However, after review, he rejected it and remanded the matter for a plenary hearing. The Commissioner reasoned that because the charges were of such a serious nature (misappropriation of Title I funds), a full hearing was necessary to consider the varied personal, local and statewide public interests. The Board moved for reconsideration of the Commissioner's decision and Nolan, by letter, informed the Commissioner she no longer wished to proceed with the settlement and she appealed to the State Board. The State Board affirmed the Commissioner and remanded the matter for further hearing. The Board then appealed to this Court.

On August 30, 1983, Nolan, as plaintiff, filed a complaint in the Chancery Division against the Board setting forth the tenure charges and the facts as above and seeking salary payments. That matter was transferred to this Court and here consolidated with the tenure charges.

On this appeal the Board contends the settlement agreement was consistent with well-established law and policy favoring settlement of disputes and the Commissioner's rejection of the agreement was without his authority; that the decision rejecting the agreement and compelling the Board to continue to prosecute Nolan was without statutory authority, express or implied; and the disapproval of the settlement was in contravention of well-established policies which avoid unnecessary expenditures and unnecessary delays.

The Board's contentions lack merit. It is clear that the Commissioner does have the statutory authority to review, approve or disapprove settlements in tenure charge proceedings. Settlement here was disapproved because the proposed settlement would permit Nolan who was charged with a serious offense, without a public hearing of the matter, to seek similar employment elsewhere in the State, and thus subvert the purpose of the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq. In rejecting the settlement the Commissioner said:

> The Commissioner is fully cognizant of the heavy burden imposed upon him to carefully and fully consider the impact of his determination on the parties to the controverted matter, as well as the possible consequences of his decision upon the statewide system of education. While the commissioner in no way seeks to predetermine the guilt or innocence of respondent, he cannot in good conscience condone a settlement which would permit a board secretary/business administrator charged with the misappropriation of funds to seek and obtain employment elsewhere within the public schools of New Jersey or any other state until the hearing process established for reaching a determination in such matters has run its full course.

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> The Commissioner is further constrained to observe that he regards the entire matter of the settlement of tenure charges as being particularly subject to his most careful and deliberate scrutiny. The Commissioner believes such diligence to be essential in ensuring that the purposes of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) are not subverted in a piecemeal fashion through settlements of convenience obtained at the expense of public funds and which may fail to fully take into account both the local and statewide public interest. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

The determination of the Commissioner is neither arbitrary nor capricious. It is consistent with legislative policies expressed or fairly to be implied in the statutory scheme administered by the agency. It is reasonable and represents a proper application of relevant statutory provisions and sound public policy. Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). The record contains sufficient evidence to support the agency's determination. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Silberman License Suspension, 169 N.J. Super. 243, 255-256 (App. Div. 1979), aff'd 84 N.J. 303 (1980).

The Commissioner acted properly in rejecting the Board's action in settling a case in order to cut expenditures when the result would allow someone charged with the offense of misappropriation of public funds to avoid prosecution by resigning and thus seek employment elsewhere.

An examination of the Tenure Employees Hearing Act reveals a statutory procedure which places broad discretion in the Commissioner to either dismiss or direct a hearing on filed charges. In re Fulcomer, 93 N.J. Super. 404, 411-418 (App. Div. 1967). Clearly implied is the power to approve or reject any proposed settlement of tenure proceedings.

The parties impliedly recognized this when they prefaced the consent order dismissing tenure charges with the statement that the proposed settlement was "subject to review and approval by the Commissioner of Education." The State Board reached the same conclusion in a case it decided at the same time it decided the Nolan case.[1] In Cardonick v. Bd. of Ed. of Borough of Brooklawn, EDU. No. 7093-81, Slip op. at 5-6, 1981 S.L.D. _____ aff'd, State Board (April 6, 1983), the State Board said:

> On the basis that the board believes the teacher is unfit, it makes the commitment to expend its

---

[1] The Attorney General, in an opinion dated April 5, 1983, captioned Settlement of Tenure Cases, reached this same conclusion.

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> monetary resources, provide board personnel, and hire legal counsel to obtain relief; i.e., dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. Where it is in the public interest to fully determine the issues, a plenary hearing is required.
>
> We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendent (sic) terms and conditions should be submitted to the Commissioner of Education for his prior scrutiny 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 rights, and that the agreement is consistent with the public interest.

The Board argues that the holding of the Cardonick case, if applied at all, should only be applied prospectively. We disagree. The principles expressed in Cardonick do not represent a new rule subject to the "prospective only" doctrine. They represent a compilation of well-known established law and policy determinations. They apply to Nolan as much as they did to Cardonick.

The Board contends further that the "impact of the settlement order was to override the substantive impact of the determination of the ALJ concerning interim salary and replace that entitlement with a lump sum payment." In effect, it argues all issues relative to a salary payment to defendant during the pendency of the proceedings should also be remanded to the State Board for a plenary hearing on the merits.

We disagree. The salary payment issue is controlled by N.J.S.A. 18A:6-14 which clearly requires a local board to pay a tenured staff member full salary during the period prior to the determination of the charge by the Commissioner of Education.

The Board argues that notwithstanding its obligation to pay salary, there is a counterbalancing obligation and debt owed by Nolan to the Board in the amount of the monies improperly taken and

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the Board asserted its "common law right to offset." It refused to pay Nolan, contending their right to offset will more than cover the amount of salary due. In fact, it has not paid salary to date.

Firstly, the order directing the Board to pay salary was entered November 10, 1981 and no appeal has been taken from it.

Secondly, the right to the claimed offset is a civil issue outside the authority and jurisdiction of the Commissioner of Education to determine. The issue was specifically excluded from the proceedings before the ALJ and from the consent order of settlement.

We conclude there was no merger of the salary issue and the remand for hearing on the tenure charges by this appeal. The order to pay salary remains in full force and effect. It was not before us on this appeal which challenges only the disapproval of the Commissioner of the proposed settlement.

The determination of the State Board affirming the action of the Commissioner and remanding the matter for a further hearing is affirmed.

The action instituted in the Chancery Division is dismissed.

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NORTH PLAINFIELD EDUCATION ASSOCIATION, on behalf of ARLENE KOUMJIAN and MICHEL SPRATFORD,

RESPONDENTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY.

SUPREME COURT

Decided by the Commissioner of Education, December 15, 1981

Decided by the State Board of Education May 5, 1982

Argued March 19, 1984 -- Decided June 28, 1984

On certification to the Superior Court, Appellate Division.

Regina Murray Mahoney, Deputy Attorney General, argued the cause for appellant State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel).

Arnold S. Cohen argued the cause for respondents (Rothbard, Harris & Oxfeld, attorneys; Sanford R. Oxfeld, of counsel and on the brief).

PER CURIAM

The narrow question on this appeal is whether the petition of two teachers to the Commissioner of Education (the Commissioner) is time barred by N.J.A.C. 6:24-1.2, which requires that such a petition be filed within ninety days of the challenged action. In the petition, the teachers sought credit on the salary scale for time spent on sabbatical. The teachers, however, did not file their petitions until more than nine months after the expiration of the ninety-day period.

An administrative law judge (ALJ) concluded that the petition had been filed out-of-time. The Commissioner affirmed the findings of the ALJ, and the State Board of Education (the State Board) affirmed the decision of the Commissioner.

In an unreported decision, the Appellate Division reversed the State Board, reasoning that the teachers had a statutory right to credit on the salary scale without regard to performance and that the time bar of N.J.A.C. 6:24-1.2 could not affect that right. We

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granted certification. 95 N.J. 205 (1983). We now reverse the judgment of the Appellate Division and reinstate the decision of the State Board.

I

The undisputed facts are that Arlene Koumjian and Michel Spratford are tenured teachers employed by the North Plainfield Board of Education (the Board). Pursuant to the collective bargaining agreement between the Board and the North Plainfield Education Association (the Association), the teachers took a sabbatical leave for the second semester of the 1978-79 academic year to pursue full-time graduate study. Each received 75% of full pay and earned a master's degree while on sabbatical.

At the beginning of their sabbaticals, Koumjian was on step seven and Spratford was on step eight of the bachelor's degree category of the salary guide. When they returned to classroom teaching in September 1979, each remained on the same step, although in the master's degree category for the 1979-80 year. They did not receive credit for time spent on sabbatical for purposes of advancing along the salary scale, but they received a salary inrement because of their placement in the master's degree category.

On November 12, 1979, the Association filed a grievance with the Board claiming that the failure to move the teachers to the next step on the salary guide for the school year 1979-80 constituted a violation of the negotiated agreement. The Board denied the grievance and the Association sought arbitration. On July 22, 1980, the arbitrator ruled in favor of the Board, finding that the agreement between the Board and the Association did not provide for the accumulation of credit on the salary scale for time spent on sabbatical. The arbitrator found further that the Board's practice was to deny credit for time spent on sabbatical and that the Association unsuccessfully had attempted to amend the labor agreement in 1978 by adding a provision that a teacher on sabbatical "shall not suffer loss of status on salary guide." The teachers neither denied knowledge of the Board's practice nor sought to correct or modify the award. See N.J.S.A. 2A:4-7.

The following school year, 1980-81, each teacher advanced one step on the guide - i.e., Koumjian advanced to step eight and Spratford to step nine. On September 29, 1980, the Association filed a petition with the Commissioner requesting an order directing the Board to advance the teachers an additional step, i.e., to move Koumjian to step nine and Spratford to step ten. In essence, the teachers sought prospective relief that would obviate the denial of credit for the time spent on sabbatical and would reverse the Board's decision for future years.

Under N.J.S.A. 52:14F-1 to -11, the Commissioner transferred the matter as a contested case to the Office of Administrative Law. The ALJ granted a motion to dismiss the petition as having been filed out-of-time, finding that petitioners

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knew that they would not receive credit for time spent on sabbatical when they received their pay checks around September 15, 1979. Nonetheless, petitioners did not file their petition with the Commissioner until more than a year later on September 29, 1980. Because this appeal focuses on the timeliness of the filing of the petition, we do not address the substantive issue whether the Board acted correctly in denying the annual increment.

II

Public school teachers receive a wide range of employment benefits, some provided by statute and others by collective negotiations, the objects of which are to provide economic security to teachers and to enhance the quality of education of school children. The statutory benefits include minimum salary schedules (N.J.S.A. 18A:29-7); higher rates of pay for attaining certain advanced academic degrees (N.J.S.A. 18A:29-7); full credit in terms of employment increments and seniority for up to four years of service in the armed forces (N.J.S.A. 18A:29-11); and annual increments of at least $250 (N.J.S.A. 18A:29-7) for each year of service in the school district (N.J.S.A. 18A:29-8) until the maximum salary is reached.

The present controversy concerns the annual increment under N.J.S.A. 18A:29-8, which provides:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

A teacher's entitlement to a salary increase under N.J.S.A. 18A:29-8 is subject to denial by a school board "for inefficiency or other good cause***." N.J.S.A. 18A:29-14. That is, the annual increment is in the nature of a reward for meritorious service to the school district. Board of Educ. of Bernards Twp. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979). Evaluation of that service is a management prerogative essential to the discharge of the duties of a school board. See id.; Clifton Teachers v. Clifton Bd. of Educ., 136 N.J. Super. 336, 339 (App. Div. 1975). The determination of an annual increment after evaluation by a school board serves the dual statutory objectives of affording teachers economic security and of encouraging quality in performance.

Fundamental to the decision of the Appellate Division is its misperception of the increment as a "statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered." The Appellate Division arrived at that conclusion by analogizing the annual increment under N.J.S.A. 18A:29-8 to one accruing to a teacher who has served in military service during wartime. Under N.J.S.A. 18A:29-11, such a teacher "shall be entitled to receive equivalent years of employment credit

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for such service as if he had been employed for the same period of time ***" in a public school.

As explained by Justice Schreiber in Lavin v. Hackensack Bd. of Educ., 90 N.J. 145 (1982):

> The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable. [Id. at 151.]

From that perspective, salary increments accruing under N.J.S.A. 18A:29-11 are distinctly different from those awarded under N.J.S.A. 18A:29-8. The annual increment under N.J.S.A. 18A:29-11 accrues because of time spent in military service without regard to performance as a teacher. By contrast, the annual increment under N.J.S.A. 18A:29-8 is subject to annual evaluation of teacher performance. Consequently, that Court's analogy of an annual increment to the statutory entitlement for veterans is invalid.

The Appellate Division's misperception of the annual increment is relevant to determining the timeliness of the filing of the teachers' petition. If the annual increment were a statutory entitlement, as the Appellate Division concluded, the ninety-day period of limitations contained in N.J.A.C. 6:24-1.2 would not apply, and the petition for prospective relief would have been timely. Because the award of the annual increment is not a matter of statutory right, but is subject to "denial for inefficiency or other good cause," N.J.S.A. 18A:29-14, it is subject to the time bar provided in the regulation issued by the Commissioner pursuant to that statute. The relevant regulation, N.J.A.C. 6:24-1.2, provides that a petition to determine a controversy under the school laws "must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested."

The ALJ found that the teachers were aware of the challenged action when they received their first paycheck for the 1979-80 school year - i.e., about September 15, 1979. From that paycheck, the teachers knew that they had not received their annual increment and that they had not advanced on the salary scale. Their

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petition was not filed until September 29, 1980, more than nine months after the expiration of the ninety-day period of limitations. Consequently, the ALJ correctly concluded that the petition was time-barred.

The teachers contend, and the Appellate Division agreed, that although the time bar may apply to the 1979-80 increment, it does not apply to future years. That is, the teachers seek to circumvent the time bar by requesting relief for the years 1980-81 and thereafter. On that premise, the ninety-day period of limitations would not run, for example, until the teachers received notice of their position on the 1980-81 salary guide. We disagree.

The teachers' asserted right to advance an additional step on the 1980-81 salary guide depends on the propriety of the Board's action in not advancing them on the 1979-80 guide. The time bar of the original action also precludes the dependent action for relief in future years.

Nor does the withholding of the increment constitute a continuing violation. Such a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case. Furthermore, the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations. Cf. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S. Ct. 498, 504, 66 L.Ed. 2d 431, 440 (1980) (limitations period applicable to employment discrimination claim began to run when teacher was notified of employer's decision to deny tenure).

We reverse the judgment of the Appellate Division and reinstate the decision of the State Board of Education.

CHIEF JUSTICE WILENTZ and JUSTICES CLIFFORD, SCHREIBER, HANDLER, POLLOCK, O'HERN and GARIBALDI join in this opinion.

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IN THE MATTER OF THE TENURE	:	
HEARING OF MARY ALICE O'HARA,	:	
SCHOOL DISTRICT OF THE CAMDEN	:	STATE BOARD OF EDUCATION
COUNTY VOCATIONAL-TECHNICAL	:	DECISION
SCHOOL, CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, June 22, 1983

For the Respondent-Appellant, Mary Alice O'Hara, Pro Se

For the Petitioner-Respondent, Davis & Reberkenny
(Robert F. Blomquist, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Oral argument, the motion for supplementation of the record and disqualification of law firm, and the issuance of subpoena duces tecum are denied.

S. David Brandt abstained.

February 1, 1984

PENDING N.J. SUPERIOR COURT

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IN THE MATTER OF THE TENURE	:	
HEARING OF CARMINE PELLECHIO,	:	SUPERIOR COURT
SCHOOL DISTRICT OF THE TOWNSHIP	:	APPELLATE DIVISION
OF NORTH BERGEN, HUDSON COUNTY	:	
_____	:	

Decided by the Commissioner, August 23, 1982

Decided by the State Board of Education, May 4, 1983

Argued: February 15, 1984 Decided: February 28, 1984

Before Judges Michels, King and Dreier.

On appeal from the State Board of Education.

Louis P. Bucceri argued the cause for appellant Carmine Pellechio (Bucceri & Pincus, attorneys).

June Kanter, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Grey J. Dimenna, Deputy Attorney General, on the brief).

William Wallen argued the cause for respondent North Bergen Board of Education (Martin R. Pachman, attorney).

PER CURIAM

This appeal is taken from a final decision of the State Board of Education which determined that appellant had not served the required statutory period to qualify for tenure in a position as vice-principal in the North Bergen School District. There is no doubt that the State Board properly denied appellant tenure status for failure to comply with the statutory time requirements. N.J.S.A. 18A:28-6. The agreement of settlement cannot confer tenure status. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 76 (1982); IFPTFE 195 v. State, 88 N.J. 393, 402-404 (1982); Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65, 75 (1962).

Any remedy for wrongful demotion must be by an action at law, not by conferring tenure status in violation of the statute. The decision of the State Board is affirmed for the reasons expressed in its written opinion of May 4, 1983.

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BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	
APPELLANT,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
ETTA ROONEY AND THE UPPER SADDLE RIVER EDUCATION ASSOCIATION,	:	
RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, January 22, 1982

Decided by the State Board of Education, July 7, 1982

Submitted October 18, 1983 -- Decided February 23, 1984

Before Judges Botter, Pressler and O'Brien.

On appeal from New Jersey Board of Education.

Beattie & Padovano, attorneys for appellant (Ralph J. Padovano, on the brief).

Bucceri & Pincus, attorneys for respondents (Louis P. Bucceri, of counsel and on the brief).

A statement in lieu of brief was filed by Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education (Jaynee LaVecchia, Deputy Attorney General, on the statement).

PER CURIAM

Etta Rooney was employed by appellant Board of Education of Upper Saddle River (the Board) as a certificated school nurse with tenure. In 1975 her employment was terminated because of a reduction in force and she was placed on a preferred eligibility list. From 1975 until August 1980 the Board employed two certified school nurses at its campus containing three school buildings for grades K through 8. Effective September 1, 1980, one of the remaining two nurses retired and was replaced by two uncertificated "school aides" to assist the remaining nurse in performing clerical

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and administrative duties and in rendering first aid.[1] Rooney filed a petition asserting that her reemployment rights were violated. The Administrative Law Judge agreed, finding that the employment of the school aides was "pretextual" and that the substitution of uncertificated nursing personnel, who performed the same duties as a "costlier" certified school nurse would perform, was in violation of Rooney's rights. The Commissioner of Education adopted the administrative law judge's findings and determination. The Board was ordered to reinstate Rooney as a school nurse with salary and remuneration as of October 20, 1980 with mitigation for "substitute earnings." The State Board concurred in the Commissioner's decision and this appeal followed.

The findings in the agencies below are supported by ample credible evidence, and we find no reason to disturb those findings on this appeal. Mayflower Securities Co. v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). We have considered appellant's numerous contentions and conclude that none warrant our altering the decision below regarding Rooney's reemployment rights. However, the issue of mitigation of damages was not determined below. Damages for loss of salary are generally subject to mitigation by actual earnings or potential earnings had the employee made reasonable efforts to secure other suitable employment. Mullen v. Board of Educ. of Jefferson Tp., 81 N.J. Super. 151 (App. Div. 1963); see Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 34-38 (1981). Because the hearing's principal focus was the issue of liability, that is, the Board's right to employ two aides rather than reemploy Rooney, the issue of mitigation was not fully developed. In the circumstances we deem it appropriate to remand the case for further hearings and findings on that issue.

The determination below ordering Rooney's reinstatement is affirmed, but the case is remanded to the agency below to determine the compensation less mitigation to which Rooney is entitled for the period of time during which she was improperly denied employment. We do not retain jurisdiction.

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[1] The "school aides" were registered nurses.

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IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD ROWLEY,	:	
SCHOOL DISTRICT OF MANALAPAN-	:	STATE BOARD OF EDUCATION
ENGLISHTOWN REGIONAL, MONMOUTH	:	DECISION
COUNTY.	:	
	:	

Decided by the Commissioner of Education, May 23, 1983

For the Petitioner-Appellant, Dawes & Brown, P.A., (Sanford D. Brown, Esq., of Counsel)

For the Respondent, Chamlin, Schottland, Rosen, Cavanagh & Uliano, Esqs. (Thomas W. Cavanagh, Jr., Esq., of Counsel)

The operative facts in this case, detailed in the opinion of the Administrative Law Judge, hereinafter "ALJ," and P-1 in evidence, are as follows: On March 11, 1982, the Superintendent filed 19 written charges of inefficiency against Respondent Rowley, who was advised by letter dated March 16, 1982, that pursuant to N.J.S.A. 18A:6-11 he had 90 days within which to correct those inefficiencies. Prior to that time, Respondent had been formally observed on eight occasions during the 1981-1982 school year and had, in weekly meetings with the Superintendent, discussed the problems that had arisen in connection with his teaching. During the statutory period following the filing of charges, Respondent was observed on five separate occasions by five different teaching supervisors. Each time he was furnished written comments and suggestions detailing specific measures to cure noted inefficiencies, and he participated in conferences with the individuals who had conducted the observation. While none of these evaluators referred specifically to the list of charged inefficiencies, all but one of them, the new principal, were well acquainted with Respondent's teaching ability, having observed him in the past.

It was the failure of the evaluators to make specific reference to the charged inefficiencies that the Commissioner and the ALJ focused upon in concluding that sufficient efforts had not been made to assist Respondent in overcoming his inefficiencies. The ALJ recommended and the Commissioner directed that the tenure charges certified against Respondent be dismissed and that he be reinstated to his teaching position.

Upon its review of the record and applicable legal principles, the Legal Committee recommended that this decision be reversed by the State Board. It is now settled that, under N.J.S.A. 18A:6-11, a local board of education is duty bound to assist a tenured teaching staff member, against whom it has filed charges of

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inefficiency, in improving his teaching performance before removing him from his teaching position. In the Matter of the Tenure Hearing of Franklin Johnson, Cherry Hill School District, Camden County, 1981 S.L.D. _____ (July 21, 1981) (slip opinion, at 12). The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he is still capable of effective teaching. He can only avail himself of that opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.

Respondent alleged, and the decision below found, that this assistance was not rendered because the formal charges lacked specificity, and further, because review of his performance during the improvement period was not specifically restricted to the enumerated charges. The State Board does not agree that this rigid rule is mandated by the statute. Respondent was not unaware of those problems attending his classroom teaching that had supplied the basis for the charges. Those problems had been identified and specific suggestions for addressing them had been offered throughout the school year in which these charges were brought. During that time Respondent had been evaluated on eight separate occasions and had the benefit of weekly conferences with the Superintendent. (Ex. P1, 33B). He knew what the alleged inefficiencies were and he knew what suggestions had been made in the past to cure them. See Order, entered January 25, 1983, denying Respondent's motion to dismiss, at page 4, wherein the ALJ noted that earlier evaluations "clearly (show) the genesis of the...charges in specific understandable language so that there is no doubt as to (their) meaning..." In the Matter of the Tenure Hearing of Michael E. Secula, School District of West Morris Regional, Morris County, 1977 S.L.D. 967, 972. The evaluations and suggestions offered during the improvement period reiterated many of those concerns, not surprisingly as they were made in most cases by supervisors who had an ongoing familiarity with Respondent's teaching problems. (Ex. P-1, at 36A-C, 39A-C, 40D, 41A-D.) (See, Secula supra.)

In the decision below, concern was also noted because no single evaluator or team of evaluators worked with Respondent throughout the improvement period. But it is not repeated evaluations by a single evaluator during the improvement period, but a cohesiveness of effort before and after the filing of charges that enables the Board ultimately to measure a teacher's improvement by a synthesis of observations. See Teaneck Bd. of Ed. v. Ethel P. Hogue, 1983 S.L.D. _____ (decided January 13, 1983); Cf., ALJ opinion, at 7; In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County, 1967 S.L.D. 271, 272, Aff'd, State Board of Education, 1968 S.L.D. 273. The Board here has shown that during the 90-day period its supervisory personnel renewed earlier efforts to address the problems they had already noted. It has shown, further, that the teacher failed to respond to the evaluators' suggestions, even though he was aware of the weak-

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nesses previously identified, knew that he was obliged to show improvement in order to avoid certification of tenure charges and, most importantly, knew that he was being evaluated both to assist him in meeting that objective and to measure the success of his own efforts. The proffer of these facts suffices to establish that the Board has met its responsibility under N.J.S.A. 18A:6-11. The burden then shifted to Respondent to come forward with sufficient credible evidence to overcome the Board's proofs in support of the inefficiency charges. In the Matter of the Tenure Hearing of Dominic Parisi, School District of the City of Elizabeth, 1974 S.L.D. 631, 634. To require the strict correlation between the enumerated inefficiencies and the evaluations conducted during the probationary period called for by the Commissioner in this case elevates form at the expense of substance. The continuity in supervisory personnel, all of whom provided detailed and concrete advice before and after the filing of inefficiency charges, protects both the teacher's interest in being afforded a meaningful opportunity to improve and the Board's interest in monitoring whether or not real progress has been made.

Accordingly, the State Board reverses the decision of the Commissioner and dismisses Respondent from his teaching position on the grounds of inefficiency.

Exceptions are noted.
May 2, 1984

PENDING N.J. SUPERIOR COURT

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EVELYN RUDOLPH-NACHTMAN AND ROBERT HERBERT,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 29, 1984

For the Petitioners-Respondents, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Kalac, Newman and Griffin
(Peter P. Kalac, Esq., of Counsel)

At the conclusion of the 1981-82 school year, the Middletown Township Board of Education abolished unit supervisor positions as part of a reduction in force. Robert Herbert and Evelyn Rudolph-Nachtman, who had served as unit supervisors prior to the reduction, were reassigned to elementary teaching positions for which they held certification. Nachtman had previously acquired tenure in that category. Herbert, who had served only one year as a classroom teacher, was assigned to a non-tenured classroom position.

After the reduction in force, supervisory positions in the district included: assistant superintendent for curriculum, a supervisor of special education classes and programs, 12 department supervisors in the secondary schools and, as of August, 1982, a supervisor of special services. Both Herbert and Nachtman asserted that because they were certified as General Supervisors, their reassignment to elementary teaching positions violated their seniority rights in that category and/or in the category of subject supervisor. In addition, Herbert claimed seniority as supervisor of special services based on his service for two years in a special assignment, which involved evaluating the special services function and developing a job description for the position that was ultimately created. Herbert also asserted that he had acquired tenure as a classroom teacher.

The Administrative Law Judge (ALJ) found that the reassignment of Herbert and Nachtman was proper under the seniority regulations in effect on September 1, 1983. In reaching this conclusion, the ALJ analyzed the duties of unit supervisors and those of elementary supervisors and supervisors in the secondary program, as well as the functions performed by Herbert while on special assignment. He determined that although the unit supervisor's responsibilities had evolved to include some evaluations of 9th grade teachers and some curriculum responsibility for the 9th and 10th grade levels,

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the functions performed by Herbert and Nachtman were primarily in the curriculum area in the elementary schools. See Initial Decision, at 11. Specifically, their major function had been to smooth the transition of pupils between 6th and 7th grades and to work on the sequential arrangement of curriculum for grades kindergarten through 9th, with emphasis on kindergarten through 7th. Id., at 10 and 11. The ALJ further noted that both Nachtman and Herbert had always been considered by the district to be elementary supervisors. Id., at 10. Thus, even though there was some overlap in that Herbert and Nachtman supervised and/or evaluated 9th grade teachers who may have had secondary certification, Id., at 12, the ALJ concluded that the position of unit supervisor was not substantially similar to the positions of supervisor of special services, supervisor of special education, athletic director or department supervisor in the secondary schools, which then existed in the district. Therefore, neither Herbert nor Nachtman had seniority rights in any of those positions. Id., at 13. He further concluded that Herbert's service in the developmental position while on special assignment did not confer on Herbert tenure in the position that was ultimately created. Id., at 13. However, he found that Herbert had acquired tenure as a classroom teacher pursuant to N.J.S.A. 18A:28-6 by virtue of the fact that he had been tenure eligible when he served as a classroom teacher and had accrued more than a year and one day additional time toward tenure while subsequently employed as unit supervisor. Id., at 14.

The Commissioner affirmed the ALJ's decision as to the effect of Herbert's service while on special assignment and upheld his determination that Herbert had acquired tenure as a classroom teacher. Commissioner's Decision, at 20. The Commissioner, however, held that reassignment of Herbert and Nachtman violated their seniority rights. In so holding, he reasoned that the Commissioner's decision in Flanagan v. Board of Education of Camden, 1980 S.L.D. 1283, was controlling and that Herbert's and Nachtman's supervisory activities were not solely limited to the elementary category because their responsibilities included grades 7-9. He concluded that both were entitled to any position in the district that was within the scope of their certification and from which they were not specifically excluded by virtue of a board-adopted job description setting forth specific additional certification requirements. Id., at 19.

The State Board agrees that Herbert's service on special assignment in a developmental position did not give rise to tenure rights in the position of special services supervisor when it was created, but that Herbert had achieved tenure as a classroom teacher. The State Board also agrees that Flanagan, supra, is controlling as to whether Nachtman and Herbert have seniority rights in other supervisory positions in the district. We are however constrained to point out that the Commissioner's decision in that case was reversed by the State Board when the matter was reconsidered on remand from the Appellate Division. Flanagan v. Board of Education of Camden, 1980 S.L.D. 1283, aff'd, State Board, December 2, 1981,

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aff'd, Docket No. A-1826-81-T1 (App. Div., January 24, 1983), cert. granted, June 22, 1983, remanded Docket No. A-1826-81-T1 (App. Div., Aug. 31, 1983), rev'd, State Board, Sept. 5, 1984. For the reasons set forth below, the State Board concludes that our decision in Flanagan dictates reversal of the Commissioner's determination in the instant case.

In Flanagan, a tenured Supervisor of Audio-visual challenged his transfer to a teaching position after his supervisory position was eliminated, asserting that his seniority as supervisor entitled him to other supervisory positions in the district. The Commissioner held that he was tenured in the position of general supervisor and so was entitled to preferred eligibility for reinstatement as general supervisor. Both the State Board and the Superior Court, Appellate Division, affirmed this decision. The New Jersey Supreme Court however remanded the matter to the Appellate Division for reconsideration in light of Lichtman v. Ridgewood Village Board of Education, 93 N.J. 362 (1983), which held that actual experience in a particular position weighs heavily in the seniority equation. The Appellate Division, in turn remanded the matter to the State Board of Education for further proceedings consistent with the Supreme Court's directive. Based on the decision in Lichtman, the State Board reversed the original determination.

Lichtman involved the assertion of seniority rights by a part-time teacher to a full-time teaching position in which the duties were identical to those of her part-time position. Lichtman v. Ridgewood Bd. of Ed., supra. The New Jersey Supreme Court held that a tenured part-time teaching staff member with proper certification may claim seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and has responsibilities identical to those of the part-time position in which employment was actually held. Id., at 364. In so holding, the court emphasized that:

> ...the nature and duties of the five-day-a-week position that [claimant] sought were identical to those of her three-day-a-week position which had been eliminated. As a tenured employee, appellant accumulated seniority rights by virtue of her employment in the position for which she was certified. The service and experience she compiled in this position -- her seniority -- properly entitled her to a preference over a non-tenured applicant.

Id. at 369.

Upon reconsideration in light of Lichtman, the State Board therefore concluded that the petitioner in Flanagan was not entitled to other supervisory positions in the district because, despite his certification as a general supervisor, "the duties performed by him as an audio-visual supervisor did not equip him with the critical

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actual experience needed to perform the duties expected of a supervisor in the other supervisory positions staffed by the district." Flanagan, supra, at 6-7

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. For the reasons set forth in the Initial Decision, we conclude that there is not a substantial identity between the functions performed by Nachtman and Herbert and other supervisor positions existing in the district.[1] Even though there was some overlap with the secondary program in that Herbert and Nachtman supervised and/or evaluated 9th grade teachers and had some curriculum responsibility for the 9th and 10th grade levels, the functions they performed were primarily in the curriculum area of the elementary schools. We find that the existence of some overlap does not constitute the substantial identity required by Flanagan where, as here, the primary functions performed in one position are different from those of other existing positions. The decision of the Commissioner is reversed.

Attorney Exceptions are noted.
December 5, 1984

PENDING N.J. SUPERIOR COURT

[1]We note that although the district considered Herbert and Nachtman to be elementary supervisors, the Initial Decision rested on the duties they performed rather than the district's characterization. Initial Decision, at 13. See Boeshore v. North Bergen Board of Education, 1974 S.L.D. 805.

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY SCARPIGNATO,	:	SUPERIOR COURT
SCHOOL DISTRICT OF EDGEWATER,	:	APPELLATE DIVISION
BERGEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, May 9, 1983

Decided by the State Board of Education, September 7, 1983

Argued September 25, 1984 -- Decided October 4, 1984

Before Judges J. H. Coleman and Simpson.

On appeal from final determination of the State Board of Education.

Louis P. Bucceri argued the cause for appellant Anthony J. Scarpignato (Bucceri and Pincus, attorneys; Mr. Bucceri, of counsel; Susan A. Weinberg, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education, filed a statement in lieu of brief; Jaynee La Vecchia, Deputy Attorney General, on the statement.

Steven J. Zaben argued the cause for respondent School District of Edgewater.

PER CURIAM

This is an appeal from the decision of the State Board of Education (State Board), which slightly modified and affirmed the decision of the Commissioner of Education (Commissioner), dismissing appellant from his tenured teaching position. We are satisfied from our study of the entire record and the arguments presented that the decision of the State Board, which adopted essentially the determinations of the Commissioner, who in turn adopted the findings and recommendations set forth in the initial decision of Administrative Law Judge Naomi Dower-LaBastille, is supported by sufficient credible evidence on the record as a whole. Consequently, we find no warrant to disturb that decision. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-563 (1978); Dore v. Bedminster Tp. Bd. of Educ., 185 N.J. Super. 447, 453 (App. Div. 1982); Pietrunti v. Bd. of Educ. Brick Tp., 128 N.J. Super. 149, 159 (App. Div.), certif. den. 65 N.J. 573, cert. den. 419 U.S. 1057 (1974); Redcay v. State Board of Education, 130

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N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944); R. 2:11-3(e)(1)(D).

Accordingly, the decision of the State Board is affirmed essentially for the reasons expressed by Administrative Law Judge Dower-LaBastille.

Affirmed.

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EDWARD M. SCHMIDT,	:	
PETITIONER-RESPONDENT,	:	
AND	:	
ROBERT LAIB,	:	SUPERIOR COURT
PETITIONER-APPELLANT,	:	APPELLATE DIVISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 20, 1982

Decided by the State Board of Education, December 1, 1982

Argued December 13, 1983 -- Decided July 30, 1984

Before Judges Botter and Pressler.

On appeal from State Board of Education.

Howard Schwartz argued the cause for appellant.

Wayne J. Oppito argued the cause for respondent Schmidt.

William Wallen argued the cause for respondent New Providence Board of Education (Martin R. Pachman, attorney).[1]

Regina Murray Mahoney, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, attorney, Ms. Murray, on the brief).

The opinion of the court was delivered by
BOTTER, P.J.A.D.

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[1] The New Providence Board of Education took no position on the issue of law involved in this case and expressed no preference for the conflicting interpretations urged by Laib and Schmidt.

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Petitioners, Schmidt and Laib, were both tenured elementary school principals in the New Providence school district when the anticipated closing of an elementary school made it necessary to determine their seniority status. Schmidt had been employed by the New Providence Board of Education (local board) as a principal since 1969 under 10-month and 12-month contracts. Laib had been employed by the local board since 1971 under 12-month contracts. The administrative law judge recommended that employment for 10-month academic years (N.J.S.A. 18A:1-1) and 12-month school years (N.J.S.A. 18A:36-1) should each count equally as a full year for seniority purposes. The Commissioner of Education ruled that service for a 10-month academic year should count only as 10 months of seniority and that service for a 12-month school year should count as 12 months of seniority. Counting military service credits, Laib would have greater seniority than Schmidt under the Commissioner's ruling. If academic years of service were treated as the equal of school years of service, Schmidt would have more seniority than Laib. The State Board of Education reversed the Commissioner's decision and adopted the decision of the administrative law judge for the reasons given by him. This appeal followed, and we now affirm.

Promulgated pursuant to N.J.S.A. 18A:28-10, the standards for determining seniority resulting from reductions in teaching staff are governed by N.J.A.C. 6:3-1.10. Subsection (b) provides:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.

N.J.A.C. 6:3-1.10(e) provides:

> Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously in two or more categories, seniority shall be counted in the category in which he spends the greatest percentage of his time. If the percentage of time spent in two or more categories shall be equal, the person shall be permitted to elect in which category his seniority shall be counted. Notwithstanding the provisions of this Section, the seniority of a principal who teaches shall be counted in the appropriate principal's category.

N.J.S.A. 18A:29-6, which relates to salary schedules for teaching staff members, defines "year of employment" as employment by a full-time teaching staff member "for one academic year."

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N.J.S.A. 18A:1-1 and N.J.S.A. 18A:29-1 define "academic year" generally as the period between the beginning of school in a district after the general summer vacation and the beginning of the next succeeding summer vacation period.[2] In part because this period of approximately 10 months is deemed a year of employment, it was necessary to provide in N.J.A.C. 6:3-1.10(e) that not more than one year of employment can be counted toward seniority in any one academic or calendar year. This means that a person who works for longer than an academic year in any calendar year cannot receive more than one year of seniority credit. Thus, a full calendar year of employment is the equal of a full academic year of employment. There is nothing in the statutes or regulations to suggest that for seniority purposes an employee who works for longer than an academic year in any one calendar year should be given more than one year of credit.

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

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[2] N.J.S.A. 18A:29-6 speaks of the opening day of school after the general summer vacation, "or 10 days thereafter."

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ROBERT SCHMIDT,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF WEEHAWKEN, HUDSON COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 19, 1982

Decided by the State Board of Education, May 4, 1983

Argued December 20, 1983 - Decided February 1, 1984

Before Judges Pressler and O'Brien.

On appeal from the State Department of Education.

Louis P. Bucceri argued the cause for appellant (Bucceri & Pincus, attorneys; Mr. Bucceri, of counsel and on the brief).

Brian N. Flynn argued the cause for respondent Board of Education of Weehawken (Krieger, Ferrara, Flynn and Catalina, attorneys; Mr. Flynn, of counsel and on the brief).

Theodosia Tamborlane, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Michael J. Haas, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Robert Schmidt is a tenured teacher employed by respondent Weehawken Board of Education (Board). He appeals from a decision of the State Board of Education, affirming the determination of the Commissioner of Education that, as a consequence of the Board's reduction in force, he was entitled to a part-time position teaching English and language arts. It was petitioner's contention that the determination of his employment rights was incorrect because he was improperly denied seniority credit for the academic year 1980-81 during which he had been assigned by the Board to teach reading in the basic skills improvement program (BSI). The basic controversy between the parties on this appeal is whether petitioner was properly certified for that assignment.

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Insofar as we can determine from this record, the parties agree that in order for petitioner to receive seniority credit for the remedial reading assignment, that assignment itself would have to have conformed with the teacher certification requirements of the New Jersey State Department of Education's guidelines. The opinion of the administrative law judge, the accuracy of which is not challenged in this respect by the parties, notes that the certification requirements are identically set forth in the Department's "Guidelines for Approval of Application for Basic Skills Improvement Program" (1981) and "Basic Skills Preventive and Remedial Programs Using State Compensatory Education Funds" (1979). Those requirements provide that

> Teachers of students in BSI progrms (sic) ["in remedial programs" in the 1979 document] must be appropriately certified.
>
> Elementary teachers are eligible to teach reading, mathematics and language arts in grades K-12. They are eligible to teach all subjects in grades K-8 and may teach the common branch subjects such as reading, writing, mathematics and spelling on the secondary level, grades 7-12.
>
> Teachers of mathematics are eligible to teach only in their subject area in grades K-12.
>
> Teachers of reading are eligible to teach only in their subject area in grades K-12.
>
> Teachers of English are authorized to do vocabulary building, reading reinforcement, and to provide books and opportunities to read. They are not authorized to teach how to read or to provide remedial instruction in reading.
>
> Teachers holding English certification and who were employed as teachers of reading on February 4, 1976 are eligible to teach reading.

The assumption made by the administrative law judge, the Commissioner, and the State Board was apparently that unless a teacher is either a certified elementary teacher or was certified to teach English and in fact taught reading prior to February 1976,[1] he must be certified as a reading teacher in order to be eligible to teach BSI remedial reading. Petitioner was certified as an English teacher in 1972 and as a reading specialist in 1979. The question before us, which we regard as having been inadequately addressed by

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[1] The guideline provision permitting a teacher who both taught reading and was certified as a teacher of English prior to 1976 follows the grandfather clause of N.J.A.C. 6:11-6.2(c).

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the agency decisions, is whether for purposes of the BSI guideline of "appropriately certified," a teacher certified as a reading specialist may be assigned to teach remedial reading.

The qualifications for certification for both reading teachers and reading specialists are set forth in the administrative code. Thus, in order for a teacher to obtain a specific field endorsement in reading on his instructional certificate, he must have completed 24 semester-hour credits in that field. N.J.A.C. 6:11-6.3(a)(1)(ix). There appears to be no further requirement for the obtaining of that endorsement. The reading specialist certificate is not an instructional endorsement but rather a so-called educational services certificate, that is, it expressly entitles its holder to teach teachers of reading. With respect to this certificate, N.J.A.C. 6:11-12.20 provides in full that

> (a) This certificate is required for service as a reading specialist in a public school district.
>
> (b) A reading specialist is one who conducts in-service training of teachers and administrators, coordinates instruction for individuals or groups of pupils having difficulty learning to read, diagnoses the nature and cause of individuals' difficulty in learning to read, plans developmental programs in reading for all pupils, recommends methods and material to be used in the district reading program, and contributes to the evaluation of the reading achievement of pupils.
>
> (c) The requirements, effective for new applicants after July 1, 1975, are:
>
> 1. A standard New Jersey certificate in any instructional area;
>
> 2. Two years of successful teaching experience;
>
> 3. Successful completion of a graduate degree program in reading approved by the New Jersey State Department of Education; or
>
> 4. A program of graduate studies of 30 semester hours or equivalent consisting of the following:
>
> i. Reading foundations;
> ii. Diagnosis;
> iii. Correction of reading problems;
> iv. Supervised practicum in reading; plus

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v. Study in at least three areas from the following:

(1) Children's or adolescent literature;
(2) Measurement;
(3) Organization of reading programs;
(4) Psychology;
(5) Supervision;
(6) Linguistics.

It therefore seems obvious to us that anyone who qualifies for a reading specialist certificate a fortiorari qualifies for a reading teacher endorsement. Indeed, when the question of his qualification to be a reading teacher first arose after the 1980-81 academic year, petitioner applied for and obtained the reading teacher endorsement. We would therefore be inclined to conclude that at least for purposes of the BSI guidelines, a reading specialist certificate is the functional equivalent of a reading teacher endorsement and hence that a reading specialist is eligible for assignment to teach BSI remedial reading.

In comparing the two certifications, it was the observation of the administrative law judge that "as ludicrous as it may appear, the Certificate of Reading Specialist does not itself entitle one to teach reading." Thus, he concluded that

> Only those teachers possessing elementary or reading certificates may teach reading, and those with English certification who were teaching reading on February 4, 1976. I FIND petitioner did not possess an appropriate certificate to teach reading, nor did Brian Long or Thomas Urchuk, and their assignment to S.C.E. classes at any time was ultra vires.

The Commissioner, in his opinion, immediately after criticizing the raising of form over substance in another context, stated that he found

> ***no merit in petitioner's speculative argument concerning his license to teach reading with a certificate of reading specialist. The Commissioner observes that such certificate is classified in Regulations and Standards for Certification under "Educational Services Certificate Endorsements" rather than under "Instructional Certificate Endorsements."

The State Board did not address the question at all.

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We appreciate the distinctions implicit in an instructional endorsement and a teaching-training certificate. We note, however, that the pertinence of these distinctions in the context of the BSI guidelines was not addressed by the administrative law judge, the Commission[er] or the State Board. We further note that the guidelines themselves, above quoted, require as a basic proposition only that a teacher be "appropriately certified." The balance of the relevant guideline does not refer at all to a reading specialist. Therefore, we are satisfied that reading specialists were not expressly excluded as eligible reading teachers and may be included if their certification is the functional equivalent of a reading teacher endorsement. We regard it, moreover, as evident that the reading specialist qualifications not only embrace the reading teacher's qualifications but are also of a higher order altogether. We agree with the administrative law judge's perception that excluding reading specialists from the category of those eligible to teach remedial reading is ludicrous. It certainly appears to be an exclusion which, were we to sustain it, would merit the Dickensian censure.

In our review of this record, the administrative code, and the Department's BSI guidelines we see nothing which compels the conclusion that a reading specialist is not, as a practical matter, as eligible to teach remedial reading as those who are specifically deemed to be qualified for that assignment. We are, however, of the further view that this is a question which in the first instance should be specifically and expressly addressed by the State Department of Education. The issue here involves matters within that agency's expertise, and it may be that there are reasons not readily apparent to us which would justify the distinction made here. Cf. Gloucester Cty. Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384 (1983).

We therefore remand this matter to the State Department for its reconsideration of the eligibility of a reading specialist to teach BSI remedial reading. The State Department may conduct such further proceedings and give the parties such further opportunity to be heard orally or in writing as it deems appropriate consistent with due process requirements. The findings and conclusions of the State Department shall be filed with the Clerk of the Appellate Division and served upon the parties within 90 days after the date thereof and a supplemental briefing schedule will be then determined. Jurisdiction is retained.

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LOIS SHELKO, :

APPELLANT, :

V. : SUPREME COURT

BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY. :

:

Decided by the Commissioner of Education, September 11, 1981

Decided by the State Board of Education, May 5, 1982

Argued: May 1, 1984 Decided: August 7, 1984

On certification to the Superior Court, Appellate Division.

Richard A. Friedman argued the cause for appellant (Ruhlman, Butrym and Friedman, attorneys).

Michael J. Haas, Deputy Attorney General, argued the cause for respondent, State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by
O'HERN, J.

The narrow issue in this case is whether a teacher in a local special educational program that is taken over by a county special services district enjoys the tenure protection of N.J.S.A. 18A:28-16, even though other programs of the district continue to be locally administered thereafter. That statute protects the tenure rights of teachers transferred to Educational Services Commissions, Jointure Commissions, or other described agencies. The question arises because the statute, in guaranteeing that "all * * * tenure * * * rights of all teaching staff members * * * shall be recognized and preserved by the agency assuming operational control," speaks in terms of a school, not a school program. We hold that the statute applies when a local school program is taken over by a county special services school district.

Specifically, the question here is whether petitioner acquired tenure with the Mercer County Special Services School District by virtue of having served as a teacher in the Ewing Township school system for two years and then in the Mercer County district for the next two years, during all of which time she was assigned to the same special education program. The Administrative Law Judge (ALJ), the Commissioner of Education, the State Board of Education, and the Appellate Division have reached varying determinations on the issue, and the case is not free from difficulty.

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In 1976, Lois Shelko was hired by the Ewing Township Board of Education as a teacher in its "Project Child" program, providing instruction to multiply-handicapped infants, pre-schoolers and kindergartners. All funds for the program came from state or federal grants. For many years, Ewing had been the local education agency in Mercer County that applied for the funds for the program, which served the needs of the educationally-handicapped young of Mercer County. Such programs are highly specialized, beyond the normal capacity of local school districts, and are appropriate for regional delivery.

In 1977, concerned parents encouraged Mercer County to create a special services school district to deliver such educational programs for the handicapped. Peter Buermann, the director of the Ewing program, acted as consultant to the new county district and helped draw up the application to the State Department of Education for the necessary funding. The funds were thereafter made available to the Mercer district.

On Buermann's recommendation, the Mercer district hired Lois Shelko for the 1978-79 school year. The only question is whether her years of employment with Ewing may be tacked on to her years with Mercer, thus giving her tenure of employment.

As noted, the question has not been resolved without difficulty at the various levels of decision. The ALJ recommended against tenure because he did not think that the consultant, Buermann, had authority to bind the nascent special services school district. In his view, under N.J.S.A. 18A:28-16, Ewing had "consciously and affirmatively" to agree that Mercer "would 'take over' the program of the former." The Commissioner of Education disagreed, finding there was a "tacit understanding and agreement" that the petitioner's program was being transferred with Ewing's cooperation to the new jurisdiction. The State Board of Education divided on the issue, agreeing with the ALJ that the course of events did not establish an agreement that the program was being transferred with Ewing's cooperation to the Mercer district; four members opposed the decision. The Appellate Division divided on the issue: The majority found that no agreement existed and that the word "school" in the statute did not include a "school program." The dissenting judge disagreed with such a narrow interpretation of "school," and recommended a remand to decide whether an agreement existed between Ewing and Mercer.[1] We now reverse primarily becausewe view teacher tenure as a matter of status, not of contract.

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[1] Adding to the confusion is that in the course of litigation the case was resolved under different statutes. Two of the forums - the State Board of Education and the Appellate Division - decided the case under N.J.S.A. 18A:28-6.1, which preserves teachers' tenure rights if a school closes. There the central question was whether or not an "agreement" existed between Ewing and Mercer. The other two - the ALJ and the Commissioner - resolved the question as we do, under 18A:28-16, which preserves tenure rights if agencies "undertake the operation" of a school. Because we resolve the case under the latter statute, we do not pass upon what constitutes an "agreement" between boards under N.J.S.A. 18A:28-6.1.

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See Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63 (1982). Regardless of the subjective considerations of her two successive employers, petitioner met the objective criteria of the statute and is entitled to tenure.

I.

Provision for regional delivery of educational services has implications for teacher tenure. As the forms of governance have altered, the Legislature has adopted varying responses. To illustrate: L. 1951, c. 128 and L. 1955, c. 240 guaranteed the tenure rights of any high school or junior high school teacher in the constituent districts taken over by a regional district, N.J.S.A. 18A:13-42; L. 1952, c. 236, sec. 20 protected teachers in the event of any change in the method of government of the school district or school districts by which they were employed on the date of such change, N.J.S.A. 18A:28-15; and L. 1967, c. 31 sought to preserve teachers' rights upon the creation of a new regional district, N.J.S.A. 18A:28-6.1.

County special services school districts were first authorized by L. 1971, c. 271. Under that law, a county's board of chosen freeholders may establish a district for the education and treatment of handicapped children. The act, commonly referred to as the Beadleston Act, N.J.S.A. 18A:46-29 to -46, defines a handicapped child in the language of N.J.S.A. 18A:46-1 as "any child who is mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted, multiply handicapped, or pre-school handicapped." The State Board of Education is authorized to prescribe rules and regulations for the organization, management, and control of such special services schools. N.J.S.A. 18A:46-30.

Again concerned by the implications for teacher tenure, the Legislature specifically addressed the effects of the takeover of local programs by a county special services district in L. 1973, c. 267, sec. 1, effective November 29, 1973:

> Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count

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> toward the acquisition of tenure to the same extent as if all of such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, as the case may be. [N.J.S.A. 18A:28-16.]

As originally introduced, the bill provided that "all teaching staff members shall continue in their respective positions * * *." S. No. 411, 195th Leg., 2d Sess. (1973). In his conditional veto, Governor Cahill concluded that this provision, read literally, might be interpreted to require the retention of teachers even if their position was not necessary in the new regionalized school district, or if the teacher no longer wished to continue working in that capacity. He also distinguished between tenure and seniority rights, and believed that the

> most appropriate way of dealing with the reemployment rights of non-tenured teachers is to amend this bill to require that they must be given notice of whether they will be offered a contract for the coming academic year on or before April 30, in accordance with P.L. 1971, c. 436 ([N.J.S.A.] 18A:27-10 et seq.). This would give the non-tenured teachers the same rights they would have had if no transfer were to occur, while preserving the rights of the employer to decide whether to rehire a probationary teacher.

The bill was enacted with his recommendation and the pattern that he predicted was essentially followed in this case, with a slight variation due to the overlapping sequence of time involving the creation of the school district. Mrs. Shelko, though not tenured after working two years in Ewing, was offered contracts for the two succeeding years with Mercer.

Why then did the State Board of Education not apply the statute specifically enacted to deal with the situation presented? In its decision and in its legal committee's report, the Board emphasized the source of the funds for the program as a consideration in its decision. It said:

> Ewing has simply discontinued acting as the local education agency for the purpose of administering funds from other sources for a program which Ewing was not required to operate. Cf. Capella v. Board of Education of Camden County Vocational Technical School, 145 N.J. Super. 209, 214 (App. Div. 1976) [(no tenure rights for part-time teachers of optional adult evening classes)].

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However, at the time of the Board's decision in September 1981, it did not have the benefit of this Court's decision in Spiewak, supra, 90 N.J. 63. In that case, we dealt with tenure in the context of teachers who provide remedial and supplemental education to handicapped children and are compensated with federal funds rather than local school monies. The Court disapproved Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11, certif. denied, 84 N.J. 469 (1980), which held that tenure was unavailable to teachers paid with federal funds and not retained on a contractual basis. The Court further noted that "the Point Pleasant court also relied on Capella [supra, 145 N.J. Super. at 209]," 90 N.J. at 79, and said:

> The decision in Point Pleasant relies on the wrong legal principles. By focusing on the contractual relations between the parties and not the statutory criteria for tenure, the court in Point Pleasant overlooked the authority which holds that tenure is a legal right governed by statute rather than contract.
> [Spiewak, supra, 90 N.J. at 76.]

II.

Focusing not upon the contractual relations between the parties but strictly upon the language of the statute, as required by Spiewak, we find that its terms encompass the case before us. Our overwhelming sense of the reality of the situation is that this is precisely the kind of takeover the Legislature contemplated. It is conceded that before and after the transition we are essentially looking at the same teachers, the same students, the same curriculum, and the same classroom. When a transition from local to district control of such a program looks, sounds, and acts like a takeover, we should treat it as a takeover.

In 1971, the State Department of Education actively encouraged Ewing Township to serve as the local education agency to be eligible to receive federal funds and provide educational services for multiply-handicapped children. Under federal law it was necessary that there be such a local sponsor. Ewing agreed to take on this responsibility. It served the young people of the county through a variety of programs. Such programs served those who had orthopedic, neurological, or communication impairments. The Ewing District served the children of Mercer County through two such facilities, one at Titusville and one at the Kisthardt Center. The particular program that Lois Shelko was hired for served communication-handicapped children between the ages of three and five. The "uncontroverted facts" that the ALJ found included the following:

> It is to be noticed here that during 1977-78, petitioner continued to perform her contractual duties for the Ewing Board at the Kisthardt Center of Project Child; that her immediate

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> supervisor, the Director of Special Services [Buermann], was performing unpaid consultant services to the newly created Board of the County Special Services Unit; and that during the spring of 1978, the Director of Special Services conducted a meeting of all Ewing's Project Child staff members. The Director explained at that meeting that the newly created Mercer County Special Services School District would assume the operation of Project Child as of the 1978-79 academic year and that the Ewing Board would no longer be the local education agency for purposes of the project's funding, organization, or operation.
>
> Petitioner received, without making application or being interviewed for, a proffered contract of employment, dated April 25, 1978, from the Mercer County Special Services School District for 1978-79, which she accepted * * *. The Ewing Board offered petitioner neither a contract of employment nor a written notice that her employment with it would not be continued for 1978-79, according to the provisions of N.J.S.A. 18A:27-3.2.

In addition, there was admitted into evidence a letter from the president of the Mercer County Special Services School District, dated March 29, 1978, that specifically recited that

> [d]uring the past school year, the Ewing Township Board of Education accepted the responsibility as the receiving local education agency to provide the special education program for the multiply handicapped children in Mercer County. This program is to be terminated June 30, 1978, and will be absorbed by the Mercer County Special Services School District.

In his testimony, Mr. Buermann explained:

> Q. And it was understood that in meeting those needs the Mercer County District would supplant Ewing's role; isn't that a fact?
>
> A. We would meet the needs, yes.
>
> Q. And take over Ewing's place. Without saying how it happened or whether it was transferred or whatever, it was understood that Mercer County would replace Ewing; isn't that a fact?

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A. Among other things, yes.

Q. With respect to the program Mrs. Shelko was involved in?

A. Yes.

His testimony paralleled that of Marion Doherty, vice-president of the Mercer County Special Services School District. She put it simply:

Q. It was understood that at the conclusion of the '77-'78 school year that students served at the Kisthardt Center would be served by Mercer; correct?

A. Yes.

It would be very difficult to argue with any degree of conviction that the Ewing program was not taken over by the Mercer County School District.

The Superintendent of the Mercer County School District sought to distinguish the program on the basis that the Ewing program did not have an individualized education program (IEP) as required by N.J.A.C. 6:28-1.8. It is questionable whether that requirement applied to children aged three to five, until L. 1981, c. 415, and, moreover, there was no evidence that the Mercer Board made any change either in the curriculum or the practices of the program actually taught by Lois Shelko.

It is true that the April 1978 contract of the Mercer School District contained a proviso that it was entered into "with the understanding that programmatic approval has not yet been obtained from the New Jersey State Department of Education, and that if such approval is not obtained prior to the 1st day of September 1978, then this contract shall be null and void and without force and effect." But we have already seen that tenure is not a matter of contract but of status. Spiewak, supra, 90 N.J. 63.

It may be argued, however, that Lois Shelko's program was not a school within the meaning of N.J.S.A. 18A:28-16 and that therefore she is not covered by the statute. This, however, would read all practical meaning out of the statute, because by definition the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled. In Stuermer v. Board of Educ. of the Special Services School Dist. of Bergen Cty., 1978 S.L.D. 628, the Commissioner of Education explained that "[s]ince Jointure Commissions were created only for the purpose of special education classes, 'school' as referenced in N.J.S.A. 18A:28-16 must mean

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special education classes."[2] This straight forward analysis based on the realities of the statute avoids engaging in the esoteric quest of defining "what is a school," although there is ample precedent that a program for the disadvantaged would meet that definition. Areba School Corp. v. Mayor & Council of Randolph, 151 N.J. Super. 336 (App. Div.), certif. denied, 75 N.J. 586 (1977) (residential institution for treatment and education of emotionally disturbed children is a "school" under municipal zoning ordinance).

In the Matter of the Closing of Jamesburg High School, 83 N.J. 540 (1980), does not dictate a contrary result. There, neighboring school districts agreed to accept students from the defunct Jamesburg High School, but made no agreements to accept Jamesburg teachers. The Commissioner then ordered that a proportional number of tenured Jamesburg teachers be transferred as well. The Court held that the express language of N.J.S.A. 18A:28-6.1 required an agreement, which was absent, and that the Commissioner had no inherent power to force such an agreement. By contrast, N.J.S.A. 18A:28-16, the statute in question here, does not require an agreement between the two districts. See also In the Matter of Franklin Educ. Ass'n v. Board of Educ. of the Wallkill Valley Regional School District, 1980 S.L.D. ____ (OAL Docket Nos. EDU 3315-80 and 3564-80) (Dec. 12) (when the "very same" students previously educated in local school are educated by new regional high school, there is a "change in * * * government" under N.J.S.A. 18A:28-15 and teachers' tenure rights are preserved).

Nor do we believe that the Legislature would have intended that tenure not extend to the new employment because the program was not, at the time, one mandated for provision by the Ewing school district. We need only observe, as we did in Spiewak, that the statute that confers tenure speaks only of "teaching staff members. "90 N.J. at 82. It does not speak of teachers in programs that are mandated or funded by state or federal law. We do not believe that

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[2] Therefore, consistent with the harmonious interpretation of the statutes, he held that "schools" or "grades" in N.J.S.A. 18A:28-6.1 must be interpreted in the same manner as for N.J.S.A. 18A:28-16 and -17. In Stuermer, the precise issue was whether a tenured teacher of the Hackensack Board continued to enjoy that tenure after termination of the Hackensack program for deaf pupils for reasons of economy, which program was taken over by the county board pursuant to agreement between the two boards. The county board there argued that the program for the deaf was not structured on the basis of grades, and thus was not a grade or a school within the meaning of N.J.S.A. 18A:28-6.1. Since N.J.S.A. 18A:28-16 and -17 were not effective until 1973, her transfer was covered by the less explicit prior law, N.J.S.A. 18A:46-43. The Commissioner found that her tenured stature was preserved upon her joining the county board even though she had not served three continuous years with the county.

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the Legislature would have intended that these teachers of the disabled, engaged in perhaps the most difficult of educational service, would not enjoy the protection of teacher tenure law. As we have seen, the Legislature, as each occasion arose, shaped our tenure laws to fit evolving educational patterns.

We note in this regard as well that N.J.S.A. 18A:46-6 now provides that each board of education is under a statutory duty to identify children between the ages of three and five years who "require and would be benefited by special education programs and services which may prevent their handicaps from becoming more debilitating." L. 1981, c. 415. The programs and services required for handicapped children between the ages of three and five may be provided, among other things, by either special programs and services in the district or through a county special services school district. N.J.S.A 18A:46-6.1. New Jersey prides itself on its commitment to education for the handicapped. We doubt that the Legislature would have any less concern for the teachers of the handicapped.

In short, we are satisfied that Lois Shelko was a qualified teacher in the Ewing special education program that was taken over by the Mercer County Special Services School District, and that the tenure protection of N.J.S.A. 18A:28-16 applies to her. Such judicial recognition of tenure rights is not a warrant for waste, inefficiency, or incompetence. Adequate provisions remain in the law to deal with those circumstances. See Bethlehem Tp. Bd. of Educ. v. Bethlehem Tp. Educ. Ass'n, 91 N.J. 38 (1982) (local school boards must adopt policies to evaluate tenured teachers); Spiewak, supra, 90 N.J. at 82 (good faith economic reasons will justify termination of tenured teacher).

The judgment of the Appellate Division is reversed. The matter is remanded to the State Board of Education to fashion an appropriate remedy.

POLLACK, J., dissenting.

For two school years, 1976-77 and 1977-78, plaintiff was employed by Ewing District (Ewing) to teach in an optional special education program, "Project Child," which was funded by the state and federal governments. Ewing did not provide any financial support from its current expense budget, and students outside Ewing participated in the program. In 1977, the Mercer County Board of Chosen Freeholders created Mercer County Special Services School District (County District) for the education of handicapped children, and Ewing discontinued "Project Child" at the end of the 1977-78 school year.

The County District entered into a contract with plaintiff for two school years, 1978-79 and 1979-80, at the end of which it terminated her employment. The majority reasons that plaintiff's two years with Ewing must be added to her two years of employment with the County District and concludes that she is a tenured teacher

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of that district. The effect of that decision is to compel the County District to grant tenure to plaintiff, although the County District determined two years after first employing her that it did not wish to continue her employment. In reaching its conclusion, the majority hinges its decision on N.J.S.A. 18:26-16, which provides for the preservation of tenure rights when a board under the jurisdiction of the commissioner "shall undertake the operation of any school previously operated by a school district in this State * * *." Crucial to the majority decision is the determination that "Project Child" is a "school", the operation of which was undertaken by the County District.

Neither the administrative law judge, who found that plaintiff could not tack her years of service with Ewing to the years served with the County District, nor the commissioner, who set aside the judge's decision, determined whether "Project Child" was a "school." The Appellate Division, however, disagreed with the conclusion that "Project Child" was a school as did the State Board of Education. So do we.

As the Appellate Division explained in its unreported decision:

> Petitioner argues that the term 'school,' as that word is used in the phrase 'any school previously operated by a school district' in N.J.S.A. 18A:28-16, means 'program' as well. The Administrative Law Judge thought not and the Board thought not. We think not also. This is in part because we are permitted to accord deference to the interpretation of the law applied by the administrative agency affected. The Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973). But see Mayflower Securities, supra, 64 N.J. [85] at 93. This is also because to us intent is also apparent from the plain language of the statute. The Legislature, not at all without opportunity to expand the perimeters of the tenure grant, limited the expression and the context to the school situation, speaking in context, for instance, of the undertaking of 'the operation of any school' and 'the agency assuming operational control of the school.' Even without reference to the obvious meaning of the word 'school,' we observe that it is the institution that is 'operated.' It is much more likely that programs are administered rather than operated. Where a statute has a clearly expressed meaning, there is no room for construction or interpretation. [Slip op. at 3-4.]

As previously indicated, the majority resolves this matter under N.J.S.A. 18A:28-16 without reference to whether an agreement existed under N.J.S.A. 18A:28-6.1 between Ewing and the County

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District to continue "Project Child." We find, however, that the requirements of N.J.S.A. 18A:28-6.1 are not satisfied. The reason is that the County District never entered an agreement with Ewing with respect to "Project Child."

As the State Board of Education found:

> The Commissioner overruled the initial decision on the ground that the facts spelled out 'a tacit understanding and agreement' between Ewing and respondent that the program in which petitioner was employed was being transferred with Ewing's cooperation to respondent's district. In our view, the course of events did not establish an agreement of the type contemplated by N.J.S.A. 18A:28-6.1.

We further conclude that the majority misplaces its reliance on the Commissioner's opinion in Stuermer v. Bd. of Educ. of the Special Services School Dist. of Bergen Cty., 1978 S.L.D. 628. In Stuermer, the teacher had acquired tenure with the Hackensack Board of Education by which she was employed in a required program for deaf pupils. When the Hackensack Board discontinued that program, the defendent Board assumed operation of the program. In the present case, the County District did not agree to assume operation of Ewing's program, and plaintiff did not have tenure with Ewing. To the extent that Stuermer held the word "school" in N.J.S.A. 18A:28-16 to include a "program," we believe the Commissioner erred. In reaching that conclusion, we note that the State Board of Education, which has the ultimate administrative responsibility, has not adopted the Commissioner's misinterpretation.

Finally, we find the decision of the Appellate Division to be consistent with our later decision in Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982), upon which the majority relies. Spiewak expressly recognizes that tenure is a legal right governed by statute rather than contract. The right to tenure ordinarily depends on service for three years with the same school district. See N.J.S.A. 18A:28-5. Thus, if a teacher has two years' service with School District A and then is employed by School District B for two more years, the teacher does not acquire tenure. Unless a teacher's service fits within an exception to the general rule, service with one school district may not be "tacked" on to service with another district. We find the majority opinion, which ignores these basic principles, to be flawed.

Although the right to tenure does not depend on the agreement between a school board and a teacher, a teacher must, nonetheless, satisfy the statutory requirements for tenure. Here, "Project Child" was not a "school" within the intendment of N.J.S.A. 18A:28-16 and, even if it were so viewed, the County District was not assigned the operation by Ewing and did not undertake the operation of "Project Child" from Ewing. Consequently, she does not satisfy the statutory requirements.

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As Spiewak expressly recognizes, "the tenure statute in no way deprives a school board of flexibility. A board can deny tenure to a teacher simply by dismissing her before she has completed the required years of service." Spiewak, supra, 90 N.J. at 79. By terminating Mrs. Spiewak's relationship two years after it first employed her, the County District complied completely with that requirement.

We would affirm the judgment of the Appellate Division.

Justices CLIFFORD and SCHREIBER join in this opinion.

For reversal and remandment-Chief Justice WILENTZ, and Justices HANDLER, O'HERN and GARIBALDI, JJ.-4.

For affirmance-Justices CLIFFORD, SCHREIBER and POLLOCK-3.

[97 N.J. 414 (1984)]

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WALTER STILL, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 24, 1982

Decided by the State Board of Education, December 1, 1982

Submitted January 5, 1984 -- Decided August 6, 1984

Before Judges Fritz and Furman.

On appeal from New Jersey State Board of Education.

Selikoff & Cohen, attorneys for appellant (Joel S. Selikoff, of counsel; Barbara E. Riefberg, on the brief).

Davis & Reberkenney, attorneys for respondent (Kenneth D. Roth, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of New Jersey State Board of Education (Jaynee LaVecchia, Deputy Attorney General, on the statement).

PER CURIAM

Respondent Board of Education of Cherry Hill (Board) was advised by the personal and treating physician of petitioner, by a physician examining for the Board and by two doctors (father and son who practiced together) who had examined petitioner (including hospitalization for testing and "a thourough [sic] evaluation") for a workers' compensation action that petitioner should be restricted to light work.[1] One of the latter two doctors (the father) also suggested petitioner "refrain from any heavy lifting." Since the nature of petitioner's job -- school custodian -- would not accommodate a light duty-no lifting restriction, the Board placed petitioner, who had exhausted all his accumulated sick leave, on an

[1] The administrative law judge found that petitioner refused "to authorize the Board to secure copies of his medical records." That finding was readily available from the testimony.

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unpaid leave of absence. Petitioner appealed to the Commissioner of Education asserting that this was illegal because of tenure and was in any event arbitrary, capricious and unreasonable under the circumstances.

Following a plenary hearing, an administrative law judge, on ample findings, determined petitioner was not tenured and that the Board's action was justified by the circumstances. The Acting Commissioner of Education adopted these findings and determinations as his own and the State Board of Education affirmed. Petitioner appeals. We affirm.

We observe at the outset that administrative action must be accorded a presumption of reasonableness and that the person who challenges it must shoulder the burden of satisfying the court that the action was in fact arbitrary. Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104 (App. Div. 1969), aff'd o.b. 54 N.J. 11 (1969). However, this presumption does not provide a free pass for unwarranted arbitrary action.

It must also be understood at the outset that petitioner was not discharged. He was put on a leave of absence. His return was conditioned solely upon medical consent to his doing the only work which was available for him, it being apparent that custodial work requires lifting, cannot reasonably be characterized as light work and, according to Board policy, may not be converted into a light work job classification.

We turn first to the tenure issue. We are satisfied that the consideration of this by the administrative law judge was sound and our approbation in this respect is based substantially on that which he said in the initial decision. In a finding inescapable from the record and which we will not disturb, Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973), he found that "petitioner has been employed at all times for a series of one-year fixed terms." N.J.S.A. 18A:17-3, the source of tenure for janitorial employees such as plaintiff, clearly excepts from its tenure provisions those "appointed for a fixed term."

With regard to the leave of absence issue, it is clear to us, as it was to the agency, that the medical facts juxtaposed with the job at hand clearly identify a situation in which a medical leave of absence could in no way be characterized as arbitrary or unreasonable. Among other findings, the administrative law judge found that medical restrictions had in fact been placed on the petitioner and that "he could not perform his duties as he had in the past." These findings, as is the case with the balance of the findings in the initial decision of the administrative law judge, might reasonably have been reached on sufficient credible evidence in the whole record and accordingly we will not disturb them. Mayflower Securities v. Bureau of Securities, supra.

We can do little better than did the administrative law judge:

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> Therefore, I CONCLUDE that these medical restrictions by petitioner's physicians, combined with petitioner's refusal to submit his medical records for examination by the Board's medical inspector, show that the petitioner was physically unable to continue in his position. Consequently, his placement on medical leave of absence without pay until such time as he produces a statement from his physician certifying that he is able to return to his regular full time duties was a proper action taken by the Board.

Finally, the argument of petitioner that the determination of the Board here, confirmed during the agency appeals, "contravened legislative policies enunciated in the Worker's [sic] Compensation Act and law against discrimination" is obtuse and clearly without merit. R. 2:11-3(e)(1)(E).

Affirmed.

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IN THE MATTER OF THE TENURE	:	
HEARING OF ORAZIO TANELLI,	:	SUPERIOR COURT
SCHOOL DISTRICT OF THE TOWN OF	:	APPELLATE DIVISION
MONTCLAIR, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, September 18, 1981

Decided by the State Board of Education. May 5, 1982

Argued April 16, 1984 -- Decided June 20, 1924

Before Judges Bischoff, Petrella and Brody.

On appeal from State Board of Education.

Ezra D. Rosenberg argued the cause for appellant (Katzenbach, Gildea & Rudner, attorneys; Arnold M. Mellk, of counsel; Mr. Rosenberg on the brief).

Lois M. Van Deusen argued the cause for respondent Montclair Board of Education (McCarter & English, attorneys; Andrew T. Berry, of counsel; Ms. Van Deusen on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Michael R. Clancy, Deputy Attorney General, on statement in lieu of brief).

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

This appeal requires us to consider the interplay between the doctrine of collateral estoppel and the evidence rule against hearsay. Appellant was dismissed from the position of tenured high school teacher in the Montclair school district. The State Board of Education (Board) determined that the dismissal was warranted under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., because of "unbecoming conduct." The only evidence before the Board in support of the charges was appellant's conviction in the Superior Court[1] for being a disorderly person when he "repeatedly

[1] The parties throughout these proceedings have referred to a "municipal court conviction." Appellant was first found guilty in the municipal court. Because he appealed, the matter was heard de novo in the Law Division pursuant to R. 3:23-8(a). There he was again found guilty. The Appellate Division affirmed the Law Division conviction.

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telephone[d] another for the purpose of annoying or molesting such person." N.J.S.A. 2A:170-29(4). The victim of the offense was appellant's principal.

N.J.S.A. 2C:51-2(a)(2) requires forfeiture of a public office or position if the holder "is convicted of an offense involving or touching such office, position or employment." The matter was referred to an Administrative Law Judge who summarily recommended dismissal under the forfeiture statute. The Board reversed because the offense occurred before the effective date of the forfeiture statute and remanded for a hearing. The Board said in its mandate:

> [T]he sole purpose of the hearing will be to allow [appellant] to present mitigating facts and arguments as to whether under all the circumstances, [appellant] has been guilty of conduct unbecoming a teacher, and if so, what penalty should be imposed.

In its opinion the Board directed that appellant "should not be permitted to re-litigate the facts established by his trial and conviction in the Montclair Municipal Court; his guilt is res judicata."

Complying with the mandate of the Board, the Administrative Law Judge barred appellant from presenting evidence that he did not make the harassing telephone calls but received appellant's evidence in mitigation. Witnesses testified without contradiction to appellant's good character and teaching effectiveness both before and after[2] the conviction. The judge accepted "the charge [of unbecoming conduct] as true" but found that it did not warrant dismissal. He assessed a penalty of eight months' salary. The Commissioner affirmed but the Board reversed and ordered dismissal. We affirm the Board in deference to its authority and judgment.

The Board found that "reinstatement of [appellant] to his teaching position would not be in the best interest of the students, who look to their teachers as role-models, would undermine the authority of the principal, who is the educational leader of the school, and would interfere with the harmonious operation of the educational process." Appellant argues that the Board erroneously gave preclusive effect to the conviction and that its action was not supported by substantial credible evidence.

Essentially appellant contends that the Board's action was inconsistent in that it first remanded for a hearing to determine in light of mitigating factors whether the charges were sustained and he should be dismissed, and then disregarded the mitigating factors

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[2] The local board did not suspend appellant during pendency of the proceedings.

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and found that the conviction per se established the charges and warranted dismissal.

The Board was not inconsistent. In its first decision it determined that even though the conviction established appellant's guilt of the offense, the offense may or may not be "unbecoming conduct" warranting dismissal depending upon mitigating circumstances. In its second decision it concluded, in effect, that because appellant offered no evidence to mitigate the seriousness of the conduct underlying the offense, the offense alone warranted dismissal despite mitigating circumstances aliunde the offense. Appellant has consistently denied his guilt of the offense and therefore offered no explanation that would remove its sting. There is evidence from which one may infer that appellant acted out of revenge or pique for being passed-over twice when a new department head was appointed.

The doctrine of collateral estoppel may be applied in a removal proceeding to establish misconduct previously established in a court proceeding. In re Coruzzi, 95 N.J. 557 (1984). The conviction there of an indictable offense was deemed sufficient ground for removing a state court judge. Collateral estoppel has been similarly applied in attorney disbarment proceedings. In re Rosen, 88 N.J. 1, 3 (1981); In re Mirabelli, 79 N.J. 597, 602 (1979).

Collateral estoppel must be applied equitably, not mechanically. Here, several factors call for its application. The misconduct at issue was previously established in a quasi-criminal trial where the burden of proof was greater than the burden required in this proceeding. See In re Coruzzi, supra, 95 N.J. at 567. In addition, knowing the stakes were high, appellant fully and vigorously defended himself in the prior proceeding. Finally, as previously noted, the Legislature has since required forfeiture upon conviction alone without regard for mitigating factors.

Appellant argues that Evid R. 63(20), an exception to the hearsay rule, bars use against him of a disorderly persons conviction to prove facts in the tenure proceeding that were essential to sustain the judgment of conviction. The rule reads:

> In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence is admissible of a final judgment against a party adjudging him guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable offense if committed in this state, as against that party to prove any fact essential to sustain the judgment. [Emphasis added.]

The Rule permits use of a judgment of conviction for only an indictable offense to prove facts at issue at civil proceedings. A judgment of conviction for a non-indictable offense may not be used

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for that purpose. Burd v. Vercruyssen, 142 N.J. Super. 344, 353 (App. Div. 1976), certif. den. 72 N.J. 459 (1976).

Appellant's point is not met by simply noting that the present proceeding was before an administrative agency where hearsay is admissible. N.J.A.C. 1:1-15.8(a). Where, as here, the judgment of conviction was the only evidence on the point, the Board could not find "unbecoming conduct" in the absence of a residuum of "legally competent evidence." N.J.A.C. 1:1-15.8(b). Weston v. State, 60 N.J. 36, 51 (1972).

The judgment of conviction, however, was not used as evidence of appellant's unbecoming conduct. Rather, it was used to estop appellant from retrying the facts that sustained the judgment because he already had his day in court on those issues. See State v. Gonzalez, 75 N.J. 181, 186-192 (1977). The evidence rule against hearsay cannot bar proper application of the doctrine of collateral estoppel. See Crowall v. Heritage Mut. Ins. Co., ____ Wis.2d ___, n. 4, 346 N.W.2d 327, 330, n. 4 (Ct. App. 1984). To be sure, in many cases inconsequential non-indictable offenses are adjudicated informally by a plea of guilty or a brief trial in the municipal court. In such a case collateral estoppel would not be applied. That was not the case here. It should also be noted that collateral estoppel may not be applied against a defendant in a criminal proceeding where he is guaranteed the right to trial by jury on all issues. State v. Ingenito, 87 N.J. 204, 216-217 (1981).

We have carefully examined the record and conclude that it contains sufficient credible evidence to support the Board's decision. We must therefore defer to its judgment. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982). While its findings and conclusions are terse, the Board clearly considered appellant's conduct so inimical to the good of the school system and its students that he can no longer stay on. Appellant argues that the Board ignored his past service, his apparent effectiveness as a teacher and the evidence of his general good character. We disagree. The Board expressly remanded for evidence of mitigating factors and there is no reason to believe they were overlooked. The dissenting votes of four Board members attest to the difficulty the Board had in arriving at its decision. Had appellant acknowledged his conduct and offered an explanation, the impact of his bizarre and unseemly behavior might have been softened.

Appellant's remaining points are clearly without merit and need not be discussed. R. 2:11-3(e)(1)(E).

Affirmed.

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IN THE MATTER OF THE TENURE :
HEARING OF ALAN S. TENNEY, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
PALISADES PARK, BERGEN COUNTY. :
:

Decided by the Commissioner of Education, September 12, 1983

For the Petitioner-Appellant, Eisenstein & Govan
(Jack F. Govan, Esq., of Counsel)

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

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

John T. Klagholz opposed.

February 1, 1984

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IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS TIEFENBACHER,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF EAST ORANGE, ESSEX COUNTY.	:	
	:	

On Remand from the New Jersey Superior Court, Appellate Division, Docket No. A-165-82T3, December 5, 1983

Decided by the Commissioner of Education, February 22, 1982

Decided by the State Board of Education, August 6, 1982

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Cross Appellant, Love & Randall (Melvin Randall, Esq., of Counsel)

As a result of actions against a student by Thomas Tiefenbacher, health and physical education teacher in East Orange, the Board of Education of the City of East Orange certified charges of conduct unbecoming a teacher against Tiefenbacher pursuant to N.J.S.A. 18A:6-11. The ALJ found that Tiefenbacher had in fact inflicted unwarranted physical punishment upon a pupil, D.H., and that this conduct was so gross that he therefore ordered that Tiefenbacher forfeit his tenure.

The Commissioner set aside respondent's dismissal and instead ordered that the appropriate penalty for Tiefenbacher was forfeiture of 120 days' pay. The State Board affirmed the Commissioner but modified the penalty imposed by the Commissioner. Thus, the State Board reinstated the dismissal originally ordered by the Administrative Law Judge.

Upon appeal to Superior Court, Appellate Division, the case was remanded to the State Board on the penalty issue with direction to reconsider the proper penalty to be imposed.

Upon reconsideration and for the reasons to follow the State Board again directs that Tiefenbacher be dismissed from his teaching position as originally ordered by the Administrative Law Judge. The State Board adopts the findings of the ALJ as expressed in his opinion and therefore finds the version of the incident described by Mrs. Wong, a teacher-witness, and by D.H., the injured student, to be more credible than the interpretation offered by Tiefenbacher.

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From the transcript and testimony before the ALJ we learn that on December 8, 1980, Mrs. Wong returned to her fifth grade classroom where Tiefenbacher was teaching a health class to find D.H. crying because he had been pushed against a cabinet/blackboard by Tiefenbacher. Further, Tiefenbacher had taken D.H. to the back of the room and had pushed him against a metal desk. Then Tiefenbacher took D.H. outside the classroom, into the hall where Mrs. Wong saw them in a "little cranny" with Tiefenbacher's hands on D.H. "twisting his face." Mrs. Wong pulled D.H. away and took him back into the classroom whereupon Tiefenbacher tried to pull open the classroom door. About 20 minutes after the hallway incident, Tiefenbacher returned to Mrs. Wong's class and asked to speak with D.H. Upon Mrs. Wong's refusal to give permission, Tiefenbacher went over to D.H. and spoke with him anyway. In the Matter of the Tenure Hearing of Thomas Tiefenbacher, OAL DKT. NO. EDU 0978-81 (January 6, 1982), 4-5.

It was necessary to apply ice to D.H.'s neck to reduce the swelling and redness noted by Mrs. Wong; D.H. also required medical attention for the neck and back pain resulting from the incident with Tiefenbacher. Knowledge of this sequence of events, including the resulting injury, is essential to the State Board's analysis and decision to dismiss in this case.

It has been agreed by all who have heard this case that Tiefenbacher's actions on December 8, 1980, were excessive and that he physically abused D.H. Various criteria are suggested and used in determining the appropriate penalty to be imposed in corporal punishment cases. It is essential to note first that one incident of behavior may prove the unfitness of a teacher to remain in the classroom if that incident is "sufficiently flagrant". Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944), at 371

In addition, corporal punishment cases in New Jersey present a variety of tests and standards by which to measure the behavior of an individual teacher. Cases suggest that we look to the setting of the incident between the teacher and student. Where the offensive touching by the teacher occurred during a baseball game, in the "heat of a contest," these circumstances might alter the severity of punishment required to discipline a teacher. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 187.

Ostergren, indicates also that we ought to look for provocation by the student as a mitigating factor in evaluating the teacher's response. Ostergren, supra, 187. The degree of self-restraint demonstrated by a classroom teacher, "essential to the satisfactory discharge of a teacher's professional responsibility must also be examined in deciding whether or not to impose the severest penalty, forfeiture of tenure. In the Matter of the Tenure Hearing of Betty Nacht, 1980 S.L.D. 431, 438.

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The record of the incident between the student and teacher must be reviewed for evidence in the teacher's conduct of premeditation and intent to punish. In re Fulcomer, 93 N.J. Super. 404 (1967), 421. Cruel or vicious acts must also be noted. The teacher's prior professional record must be considered before imposing a penalty. Fulcomer, supra.

The duration of the incident, whether it was finite or on-going and the age of the student involved must also be considered. In the Matter of the Tenure Hearing of Douglas Nogaki, 1984 S.L.D. ____ (April 6, 1984).

Examination of the Tiefenbacher incident in light of these criteria forces us to place this event at the extreme end of a continuum running between least penalty and greatest penalty. These same criteria force the State Board to find the behavior of Thomas Tiefenbacher to be egregious enough to meet the sufficiently flagrant test as discussed in Redcay, supra.

The Tiefenbacher incident occurred in a traditional classroom setting, not in a gym class or other situation which might permit more latitutde in permissible physical behavior or contact between a teacher and his or her students. Further, we find it impossible to classify D.H.'s "fussing" with a neighboring classmate, defined by D.H. as arguing (Transcript, Tuesday, October 6, 1981 at page 66), as provocation sufficient to justify Tiefenbacher's physical response. We find the language in Fulcomer to be particularly appropriate in noting that "Other proper means were available to him to maintain discipline or compel obedience." In re Fulcomer, supra, 421. The magnitude of Tiefenbacher's response to two students' argument was completely unwarranted. We further note among the factors available for our review that although D.H. was tall, he was a ten-year old, fifth-grade student at the time of this incident.

It is when we examine the events of December 8, 1980 as found by the Administrative Law Judge for evidence of premeditation and intent to injure or punish, as suggested in Fulcomer, that we especially tip the scale toward severe punishment for Tiefenbacher. The initial physical contact between D.H. and Tiefenbacher, when the student was pushed against the cabinet and then against a metal desk, was severe enough to amount to corporal punishment, N.J.S.A. 18A:6-1. However, when the teacher removed the student from the classroom to the hall, he had had sufficient time to consider the wisdom of further contact with D.H. and should have known that his behavior had gone beyond anything that was acceptable in a mature, thinking adult. When he followed Mrs. Wong and D.H. back to the classroom and tried to enter despite Mrs. Wong's protestation, Tiefenbacher demonstrated a complete absence of the self-control we require in those we hire as classroom teachers. With Tiefenbacher's return to Mrs. Wong's class 20 minutes later, he demonstrated a persistence which supplies an element of premeditation and intent to punish intolerable in a teacher.

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The duration of the episode when coupled with the severity of the initial attack makes this interaction sufficiently flagrant as a single incident to warrant the severest penalty. Regardless of years of service, Tiefenbacher's inability to show self-restraint and his disproportionate response to an unthreatening classroom discipline problem convince the State Board that he does not belong in a classroom setting.

Accordingly, we adopt the findings of the Administrative Law Judge and the penalty imposed by him and determine that Thomas Tiefenbacher forfeit his tenure.

Attorney exceptions are noted.
September 5, 1984

PENDING N.J. SUPERIOR COURT

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WILLIAM T. VEROST,	:	
RESPONDENT-APPELLANT,	:	
V.	:	SUPERIOR COURT
THE BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,	:	APPELLATE DIVISION
PETITIONER-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, October 18, 1982

Decided by the State Board of Education, May 6, 1983

Argued January 24, 1984 -- Decided February 6, 1984

Before Judges Antell and McElroy.

On appeal from decision and determination of the State Board of Education

Emil Oxfeld argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys; Mr. Oxfeld of counsel).

Ellen S. Bass argued the cause for respondent (Aron & Salsberg, attorneys; Ms. Bass of counsel and on the brief).

June Kanter, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Ms. Kanter on the letter brief).

PER CURIAM

The determination under review is affirmed for the reasons given by the Commissioner of Education in his decision dated October 18, 1982, affirmed with one modification by the State Board of Education May 6, 1983, which we find to be supported by sufficient credible evidence on the record as a whole. R. 2:11-3(e)(1)(D).

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SHERI ZORFASS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-RESPONDENT,	:	DECISION
V.	:	
JANET MIKLOS,	:	
THIRD PARTY RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 2, 1983

Decision on Motion by the Commissioner of Education, March 7, 1984

Decision on Motion by the State Board of Education, May 2, 1984

For the Petitioner-Respondent, Klausner and Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Davis and Reberkenny
(William C. Davis, Esq., of Counsel)

For the Respondent-Appellant, Selikoff and Cohen
(Steven R. Cohen, Esq., of Counsel)

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

August 8, 1984

PENDING N.J. SUPERIOR COURT

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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