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State of New Jersey
Department of Education
225 West State Street
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NEW JERSEY
SCHOOL LAW DECISIONS
Indexed

January 1, 1975 to December 31, 1975

vol. 2

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Department of Education
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NEW JERSEY
SCHOOL LAW DECISIONS
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January 1, 1975 to December 31, 1975

vol. 2

FRED G. BURKE
COMMISSIONER OF EDUCATION

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Michelle Siderio,

Petitioner,

v.

Board of Education of the Township of Riverside, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Christopher N. Peditto, Esq.

Petitioner is a teacher who was employed for the two academic years 1972-73 and 1973-74 by the Board of Education of the Township of Riverside, hereinafter "Board," and was not reemployed for a third successive academic year. She alleges that she was not given proper termination notice pursuant to the statutory provisions of *N.J.S.A.* 18A:27-10; therefore, she prays for reinstatement and compensation in her former position.

The Board asserts that it has complied with the statutory provisions of *N.J.S.A.* 18A:27-10 and further asserts that petitioner's position was abolished.

This matter is submitted to the Commissioner of Education for adjudication on Briefs and exhibits.

The Board relies on petitioner's statement of facts. (Respondent's Brief, at p. 1)

A letter from the Board Secretary was sent to petitioner on March 29, 1974, and reads as follows:

"The position you hold *may* be eliminated due to the lack of students.

"Mr. Kollmeier will speak with you." (*Emphasis supplied.*) (Exhibit A)

Petitioner alleges that this letter does not meet the statutory provisions of *N.J.S.A.* 18A:27-10 which reads as follows:

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

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"b. *A written notice that such employment* will not be offered." (*Emphasis supplied.*)

N.J.S.A. 18A:27-11, also pertinent to the determination to be made herein, reads as follows:

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year *or a notice that such employment will not be offered,* all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." (*Emphasis supplied.*)

Additionally, *N.J.S.A.* 18A:27-12 states:

> "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

The primary purpose of these statutes is to give teachers timely notice when they are not to be reemployed in order that they may seek other employment.

After receiving the notice (Exhibit A), petitioner notified the Board by letter dated May 17, 1974, as follows:

> "I hereby notify you in writing *** that I *** accept your offer of employment for the coming school year." (Exhibit B)

The Board Secretary then notified petitioner by letter of May 22, 1974, that she would refer her letter to the Board for action at its June 12, 1974 meeting. (Exhibit C) At that regular meeting the Board abolished petitioner's position and by letter from the Board secretary dated June 21, 1974, it notified her as follows:

> "Pursuant to the action taken by the Board of Education of the Township of Riverside at the meeting of March 20, 1974 you were notified that the position you held might be eliminated.
>
> "Subsequent to that meeting the Administration completed the registration of students in the High School for their course selections and it was determined that due to the lack of enrollment one position in English be eliminated for the year 1974-75.
>
> "[At] the meeting of June 12, 1974 (which you attended in person) the Board of Education of the Township of Riverside passed the following two motions,

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"On motion by C. Viggiano, 2nd H. Lewis and carried unanimously 'That upon the recommendation of the administration and for reasons of economy, the Board does abolish one position in the English Dept.'

"Roll Call Vote – Aye – W. Hoffman, H. Lewis, C. Olgianti, P. Poore, A. Townsend, C. Viggiano, J. Welsh, G. Williams, L. Fisher

"Nay –

"On motion by H. Lewis, 2nd C. Viggiano and carried unanimously 'That the Board not offer Mrs. Michelle Siderio a contract for the 1974-75 school year due to the lack of enrollment in the English Dept. and that her position be eliminated. The Board Secretary shall so notify Mrs. Siderio.'

"Roll Call Vote – Aye – W. Hoffman, H. Lewis, C. Olgianti, P. Poore, A. Townsend, C. Viggiano, J. Welsh, G. Williams, L. Fisher

"Nay –

"Your letter of May 17, 1974 was not considered as an acceptance of any offer of an alleged contract. No contract has been or will be offered."
(Exhibit D)

The precise issues requiring the Commissioner's determination are these:

1. Does the notice of non-reemployment (Exhibit A) meet the requirements of *N.J.S.A.* 18A:27-10?

2. In the event that it does not, what effect does the Board's action abolishing petitioner's position have on her employment status?

The Commissioner has addressed these questions and interpreted the pertinent statutes in several recent decisions. Among them are: *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975), affirmed State Board of Education May 7, 1975; *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County,* 1975 *S.L.D.* 112 (decided February 26, 1975), rev'd State Board of Education June 4, 1975; *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975), rev'd and remanded State Board of Education June 4, 1975.

The thrust of these decisions deals, in part, with the timeliness and the form of board notices of non-reemployment, and whether or not boards can decide in a private executive session not to reemploy a teacher. In *Armstrong, supra,* the Commissioner determined that the notice of non-reemployment was untimely; therefore, he concluded that Armstrong was entitled to a new contract under the same terms and conditions as in the previous year's contract, but with

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such increases in salary as required by the board's policies. *N.J.S.A.* 18A:27-11 The Commissioner upheld the board's authority to terminate that contract in accordance with its termination clause. In *Fallon, supra,* petitioner did not receive a proper and timely notice of non-reemployment pursuant to the pertinent statute; therefore, she notified the board of her acceptance of employment for the coming school year. The board then met on June 11, 1974, and abolished Fallon's position pursuant to *N.J.S.A.* 18A:28-9 which reads as follows:

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

Pursuant to this statutory provision, the Commissioner upheld the abolishment of Fallon's position, although he cautioned all boards of education to adhere strictly to the requirements of *N.J.S.A.* 18A:27-10.

The matter herein is similar. The Board, accepting petitioner's statement of facts, concedes that the notice (Exhibit A) did not adhere to the strict procedure required by *N.J.S.A.* 18A:27-10; however, the Board cites *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193, and quotes the Commissioner as stating that he looked to the "clear intention" of the Board, rather than to the technical perfection of the language. The Commissioner determines, however, that *Currie* does not apply in the instant matter because the statutes requiring notice of non-reemployment were signed into law effective September 1, 1972, and the relief which they provide was unavailable to teachers in 1966.

The Commissioner determines, therefore, that the notice (Exhibit A) does not meet the requirements of *N.J.S.A.* 18A:27-10, and petitioner did receive a contract offer pursuant to *N.J.S.A.* 18A:27-11 which she accepted in writing pursuant to *N.J.S.A.* 18A:27-12.

Having decided that petitioner had a valid contract of employment for the 1974-75 academic year as provided for by the pertinent statutes, the Commissioner must now consider the Board's determination to abolish her position. (Exhibit D)

The authority vested in the Board to abolish positions is not questioned (*N.J.S.A.* 18A:28-9), nor has there been shown any evidence or suggestion of bad faith. Petitioner received a contract by statutory provision (*N.J.S.A.* 18A:27-10) because of the Board's failure to adhere to that statute's precise provisions; however, the Board believed it had acted properly in not awarding her a contract. (Exhibit A) These facts distinguish the instant matter from *Arthur L. Page v. Board of Education of the City of Trenton et al., Mercer*

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County, 1973 *S.L.D.* 704, affirmed State Board of Education, May 1, 1974 and *John M. Rainey v. Board of Education of the City of Trenton, Mercer County,* 1974 *S.L.D.* 647 which are cited by petitioner in support of his argument. Page and Rainey were offered and accepted contracts of employment for the ensuing calendar year, after which their positions were abolished. The Commissioner determined in both those matters that the action of the board was "frivolous" and not in good faith; therefore, he reinstated those petitioners.

Because of these distinctions and the statutory authority of the Board to abolish positions, the Commissioner holds that the Board's action in the instant matter was proper and taken in good faith; therefore, petitioner's position ceased to exist after June 30, 1974. (Exhibit D) Considering the fact that petitioner was entitled to a contract, *ante,* and, assuming that the contract contained a termination clause, petitioner is entitled to compensation under the terms of the 1974-75 contract for the period of time expressed in the termination clause, and to full compensation for the 1974-75 academic year if no termination clause exists, less mitigation of moneys earned in other employment and the standard deductions made for all teaching staff members. See State Board of Education decisions in *Armstrong, supra,* and *Fallon, supra; Adam Martin v. Board of Education of the City of South Amboy, Middlesex County,* 1973 *S.L.D.* 496, aff'd State Board of Education, 1974 *S.L.D.* 1412.

Except for the relief provided as compensation, the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

August 6, 1975
Pending before State Board of Education

You are viewing an archived copy from the New Jersey State Library.

Ellen Sue Oxfeld,

Petitioner,

v.

Board of Education of the Township of South Orange-Maplewood, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent, Lieb, Wolff & Samson (David Samson, Esq., & John E. Finnerty, Esq., of Counsel)

Petitioner is a tenured teacher in the employ of the Board of Education of the Township of South Orange-Maplewood, hereinafter "Board." She appeals a determination of the Board denying her appointment to a part-time Title I teaching position which she had requested while on leave of absence from her regular teaching position. The Board denies that she has entitlement to the controverted position.

This matter is submitted jointly for Summary Judgment by the Commissioner of Education on the pleadings, stipulation of facts, and Briefs.

Petitioner, for reasons of personal health, requested and was granted a leave of absence without pay from her elementary teaching position from February 1, 1974 through June 30, 1974. (Exhibits A-1, A-2, B) Petitioner underwent surgery on January 2, 1974. Subsequently, in May 1974, petitioner met with the Board's personnel director and requested a transfer from her full-time teaching position to a part-time teaching position whenever one might become available. No part-time teaching position was offered to petitioner but she was informed on June 25, 1974 that a full-time teaching position was available to her for the forthcoming 1974-75 year. Petitioner declined to accept this appointment stating that she believed full-time employment might jeopardize her health. In so doing, she stated that:

> "***Since at the present time, I have been told, there are no openings for part-time employment, I respectfully request a leave of absence as full-time teacher. I remain available, however, for any part-time position which should become available.
>
> "If medical certification of my physical condition is necessary please so notify me and I will forward you a letter from my physician.***"
>
> (Exhibit C)

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The Superintendent notified petitioner of approval of this second leave of absence without pay effective from September 1, 1974 through June 30, 1975, and further stated that:

> "***It is my understanding that you have been in touch with [the personnel director] with regard to part-time employment. I suggest you continue to communicate with his office." (Exhibit D)

A half-time ten month Title I teaching position became available and was posted in the school district in September 1974. This position was one for which petitioner was certified and consisted of tutoring small groups of children in mathematics and reading. (Exhibit H) Petitioner, making application for a transfer to this position, stated therein that she believed her "***status as a tenured member of the South Orange-Maplewood staff would be applicable to such an opening.***" (Exhibit E) Petitioner, among others, was interviewed twice for this position. However, the Board on October 21, 1974, appointed a nontenured person to fill the part-time position contending that the appointment was solely within the discretion of the Board. (Exhibit F, G)

Petitioner claims entitlement, by reason of her tenured status, to this part-time position for which she made application. In this regard, petitioner argues that she, as a tenured teacher on leave of absence for one year, was entitled to a part-time position when she had made known to the Board her desire for such a position at the time she rejected, for reasons of health, a full-time teaching assignment. (Memorandum of Law of Petitioner, at pp. 4,6)

Petitioner further asserts that she, being qualified and certified for this part-time position, was entitled to preferential treatment and that the Board's failure to appoint her was in violation of the school laws. In support of this assertion, petitioner cites *Veronica Smith and Sayreville Education Association v. Board of Education of the Borough of Sayreville, Middlesex County,* 1974 *S.L.D.* 1095. Since it was determined that Veronica Smith was not entitled to a position by reason of lack of certification and work experience as a school nurse, petitioner argues that she, conversely, being both certified and experienced as an elementary teacher, was entitled, at a minimum, to be placed on a preferred eligibility list for a part-time position. Petitioner further argues that her excellent evaluations and her previous appointment as a tenured teacher provide ample reason for such preferential treatment. It is observed in this regard that petitioner's evaluations are highly commendatory of her work performance. (Exhibit J)

Petitioner argues that her request for a part-time assignment was no capricious whim but based upon the fact that she was as yet unable to teach full-time. She further charges that the Board at no time acted on her request, but that the school's administrators interviewed and recommended for the part-time position another candidate who did not enjoy the protection of tenure. Petitioner charges that this failure of the Board to act is a procedure "***wholly inconsistent with the school laws, and, as such, must be reversed by the Commissioner.***" (Memorandum of Law of Petitioner, at p. 16) In

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support of this contention petitioner cites *Norma Whitcraft et al. v. Board of Education of the Township of Cherry Hill, Camden County,* 1974 *S.L.D.* 901.

Petitioner initially sought an order from the Commissioner directing the Board to hire her for the part-time position herein controverted, retroactive to October 21, 1974, and to provide her with all salary and emoluments pertaining thereto. However, on July 11, 1975, notification was received by the Commissioner that petitioner had resigned her teaching position, thus rendering moot her prayer for appointment to a part-time position. Nevertheless, certain issues remain viable and the Commissioner proceeds to a determination.

The Board, for its part, argues that it was under no obligation to transfer petitioner to a part-time teaching position, regardless of her reason for rejecting full-time employment. In support of this argument the Board cites *Anne U. Clark v. Board of Education of the City of Margate, et al., Atlantic County,* 1974 *S.L.D.* 678; *Norma Whitcraft, supra;* and *Josephine De Simone v. Board of Education the Borough of Fairview, Bergen County,* 1966 *S.L.D.* 43.

The Board, similarly rejecting the contention that petitioner was entitled to preferential treatment for a part-time position, charges that petitioner seeks thereby to have the Commissioner extend beyond the legislative intendment the protection of the tenure statutes. The Board avers that, were petitioner to prevail, "***then *all* tenured teachers on leaves of absence would be able to compel school boards to transfer them to part-time positions. Such a result is obviously contrary to any reasoned view of school law.***" (*Emphasis in text.*) (Memorandum of Law of Respondent, at p. 7)

Finally, the Board refutes the contention that action is required on its part to reject petitioner's request for transfer to a part-time position. In this regard the Board points out that *N.J.S.A.* 18A:25-1 makes no such requirement but merely states that:

> "No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed."

The Board states that "***[a]lthough petitioner's application was considered, the board refused to approve it.***" (Memorandum of Law of Respondent, at p. 10) Thus, the Board asserts that, in the light of *N.J.S.A.* 18A:25-1, while affirmative action is required of a board of education prior to the effective date of transfer of a teacher, no similar official action is required of a board to reject a request for such a transfer, as herein.

The Commissioner has reviewed the entire record in the matter, *sub judice,* and has carefully considered and weighed the arguments of law set forth in the Briefs and Reply Briefs of the respective parties. It is observed that considerable attention is given therein to a determination of whether petitioner *due to her health problems* requested a transfer from her sixth grade teaching position to a part-time teaching position. Such consideration bears no relevance at this

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juncture. Petitioner made a good faith offer to present medical certification at the time of her request for a second leave of absence. (Exhibit C) The Board saw fit not to require such medical verification. This being so, the Commissioner concludes that, absent proof to the contrary, sufficient medical reason existed to justify the Board's approval of petitioner's second requested leave of absence for reasons of personal health. (Exhibits C, A-1)

Petitioner lays claim by reason of her tenure status to a part-time teaching position other than that which she held while teaching for the Board. Such reasoning is in error. In *De Simone, supra,* it was determined that part-time teaching staff members do, in fact, acquire tenure when they serve the required periods of time pursuant to *N.J.S.A.* 18A:28-5. It was further determined therein that, although De Simone had gained tenure as a part-time teacher, she had no entitlement to continue as a half-time kindergarten teacher when the Board found it necessary to establish a full-time kindergarten teaching position. Therein it was said that:

> "***The protection afforded petitioner by the tenure laws is in her position as a teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. *Greenway v. Camden Board of Education,* 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 *N.J.L.* 46 (1942) As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but *she could be transferred to other teaching positions for which she was qualified.* ***The Commissioner finds, therefore, that respondent Board could, by a majority vote of the whole number of its members ***, exercise its discretionary authority to assign petitioner to teach two kindergarten sessions.***" (*Emphasis supplied.*) (1966 *S.L.D.* at 47)

Herein, petitioner, near the end of her first leave of absence without pay, was offered a full-time position for the forthcoming school year. Such offer is evidence of good faith on the part of the Board. For reasons of personal health, petitioner declined to accept this offered assignment and requested and was granted a second leave of absence. She simultaneously requested consideration for any part-time position which might be open. When such position did become available, petitioner, having made application therefor, was afforded an interview. The group of applicants was narrowed to four, whereupon petitioner was again interviewed. Such consideration is further evidence of good faith on the part of the Board and its agents in giving due consideration to its tenured employee for the requested transfer.

Although the Board clearly had the legal discretionary right to assign petitioner to the part-time position she sought, it was under no legal obligation to do so, nor to place her on a preferred eligible list. *Clark, supra; De Simone, supra.* The Commissioner so holds.

The protection of the tenure statutes does not extend to preferential treatment of a teacher requesting a transfer. Nor does *N.J.S.A.* 18A:25-1 make

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such requirement. It is an accepted principle of law that in interpreting statutes they are to be given their ordinary meaning. As was said by the Commissioner in *Louis Alfonsetti et al. v. Board of Education of the Township of Lakewood, Ocean County*, 1975 *S.L.D.* 297:

> "***The courts have said that:
>
> > '***In every case involving the interpretation 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 of its creation.***' *Watt v. Mayor and Council of Borough of Franklin*, 21 *N.J.* 274 (1956) (at p. 277)
> >
> > '***Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth***.' *Duke Power Co. v. Patten*, 20 *N.J.* 42 (1955) (at p. 49)
> >
> > ***
> >
> > '***The purpose of [statutory] construction is to bring the operation of a statute within the apparent intention of the Legislature.***' *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203 (1954) (at p. 209)
> >
> > '***A statute should not be construed to permit its purpose to be defeated by evasion.***' *Grogan v. DeSapio*, 11 *N.J.* 308 (1953) (at p. 322)
> >
> > '***We are enjoined to interpret and enforce the legislative will as written, and not according to some unexpressed intention.***' *Hoffman v. Hock*, 8 *N.J.* 397 (1952) (at p. 409)***"
> >
> > (1975 *S.L.D.* at pp. 299-300)

The Board's broad discretionary power was not fettered by statutory restriction in filling its part-time Title I teaching position. Nor had it bound itself by promising to transfer petitioner, as in *Whitcraft, supra*, which like *Smith, supra*, is inapplicable by reason of totally diverse circumstances. The Board's determination to offer the part-time position to a candidate other than petitioner is entitled to a presumption of correctness. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Boult and Harris v. Passaic Township Board of Education*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1947); *Pepe v. Livingston Board of Education, Essex County*, 1969 *S.L.D.* 47

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For the aforementioned reasons and absent a showing of bad faith, unreasonableness, or impropriety on the part of the Board, it is determined that the within Petition of Appeal is without merit. Accordingly, it is dismissed.

COMMISSIONER OF EDUCATION

August 6, 1975
Pending before State Board of Education

Edward M. Corcoran, Andrew Knapik and Anthony Dellanno, Sr.,

Petitioners,

v.

Board of Education of the Hanover Park Regional High School District and Morris County Department of Education, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Edward M. Corcoran, *Pro Se*

For the Respondents, Green, Silver & Waters, (Jacob Green, Esq., of Counsel)

Petitioners, parents of pupils resident in the Township of East Hanover, Morris County, aver that the Board of Education of the Township of East Hanover, hereinafter "Board," and the Board of Education of the Hanover Park Regional High School District, hereinafter "Regional Board," together with a Morris County transportation coordinating agency, combined in a denial of transportation aid to petitioners in the 1973-74 school year. They further aver that such denial constitutes an illegal infringement of their rights to equal protection of the law, and they request the Commissioner of Education to award them the sum of one hundred fifty dollars per child pursuant to statutory prescription. *N.J.S.A.* 18A:39-1 The Regional Board, on its own behalf and for the other named respondents, maintains the controverted denial of transportation aid was legally appropriate and requests a dismissal of the Petition of Appeal with prejudice.

The matter is submitted for decision by the Commissioner on a stipulation of facts, the pleadings, and Briefs.

Petitioners' children were not eligible in September 1973, pursuant to age requirements established by the Board, for entrance into the kindergarten program of the East Hanover Township public schools. The Board's policy

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required pupils to be five years of age on or before October 1 in the year of application. Petitioners, however, enrolled their children in a nonprofit, private school in the area in that month and in October 1973 made application to the Regional Board, which was empowered by *N.J.S.A.* 18A:39-1 to make arrangements for private school transportation, for transportation aid of $150.00 per child. The application was refused on that occasion by both the Regional Board and the County coordinating agency, and subsequent applications were also refused. The County coordinating agency of reference is organized pursuant to *N.J.S.A.* 18A:39-11 to act in an administrative capacity, without sovereign authority, to arrange for the "joint transportation" of pupils from a group of school districts in Morris County.

The basis of such refusal to grant aid was the Board's policy, although other component districts in the Regional District or within the authority of the County coordinating agency "***had age requirements which would have allowed petitioners' children to have attended public school, and conferred a corollary entitlement to transportation aid if attending private school.***" (Stipulation of the Parties)

The statutes pertinent to this matter are cited in their entirety as follows:

N.J.S.A. 18A:39-11

"The boards of education of 2 or more school districts may provide jointly for the transportation of pupils to and from any school or schools within or outside the districts.

"Whenever in the judgment of the county superintendent of schools transportation of pupils to any qualified school other than a public school could be more economically accomplished by joint transportation with 2 or more school districts, he may order such joint transportation, assign the administration to one board of education and prorate the cost on a per pupil mileage basis to the other boards of education involved."

N.J.S.A. 18A:39-1

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

"When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from the Marie H. Katzenbach School for the Deaf or any remote school other than a public school, not operated for profit in whole or in part, located within the State provided such schools are not more than 20 miles from the residence of the pupil and the per pupil cost of the lowest bid

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received does not exceed $150.00 [now $200.00 – see *post*] and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes. It shall be the obligation of the parent, guardian or other person having legal custody of the pupil attending a remote school, other than a public school, not operating for profit in whole or in part, to register said pupil with the office of the secretary of the board of education at the time and in the manner specified by rules and regulations of the State board in order to be eligible for the transportation provided by this section. Whenever any regional school district provides any transportation for pupils attending schools other than public schools pursuant to this section, said regional district shall assume responsibility for the transportation of all such pupils, and the cost of such transportation for pupils below the grade level for which the regional district was organized, shall be prorated by the regional district among the constituent districts on a per pupil basis after approval of such costs by the county superintendent. This section shall not require school districts to provide any transportation to pupils attending a school other than a public school where the only transportation presently provided by said district is for school children transported pursuant to chapter 46 of this Title[1] or for pupils transported to a vocational, technical or other public school offering a specialized program. Any transportation to a school, other than a public school, shall be pursuant to the same rules and regulations promulgated by the State board as governs transportation to any public school.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of pupils to a school in an adjoining district when such pupils are transferred to the district by order of the county superintendent, or when any pupils shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"Nothing herein contained shall limit or diminish in any way any of the provisions for transportation for children pursuant to Chapter 46 of this Title."

[1]Section 18A:46-1 et seq.

(The statute as recited was in effect in September 1973 and is pertinent to this dispute. It was amended by *c.* 78, *L.* 1974, effective August 5, 1974.)

The facts cited, *ante,* in the context of the two statutes, pose the issue for consideration in the instant Appeal. In particular, there is the fact that petitioners' children were denied transportation aid on the basis of age requirements for kindergarten entrance adopted by the Board while other children within the Regional District or in neighboring districts served by the County agency were afforded such aid. As stated in the conference of counsel in

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this matter held January 21, 1975, the question posed by such facts is "***whether or not such treatment of petitioners constitutes discrimination and a denial of equal protection under the law of the State of New Jersey." (Conference Stipulation "d")

Petitioners argue that the treatment afforded them was discriminatory and was in fact a denial of equal protection under law. In particular, they cite *Robinson v. Cahill,* 119 *N.J. Super.* 40, 48 (*Law Div.* 1972), 62 *N.J.* 473 (1973); *Robson v. Rodriquez,* 26 *N.J.* 517 (1958); *West Morris Regional Board v. Sills,* 110 *N.J. Super.* 234 (*Chan. Div.* 1970), aff'd 58 *N.J.* 464 (1971); *Everson v. Board of Education of Ewing Township,* 133 *N.J.L.* 350 (*E.&A.*1945), aff'd 330 *U.S.* 1, 67 *S.Ct.* 504, 91 *L.Ed.* 711 (1947), in support of this argument. In effect they aver that school pupils residing within the Hanover Park Regional High School District and within school districts wherein private transportation is arranged by the Morris County coordinating agency are similarly situated in like circumstances and must be treated similarly. Specifically, they cite the decision of the Superior Court of New Jersey in *Robinson v. Cahill, supra*:

> "***While the phrase 'equal protection of the laws' is not used in the *New Jersey Constitution,* concepts of equality comparable to the rights of equal protection under the Fourteenth Amendment are derived from a number of provisions of our State Constitution. ***[R]eference is made to Art. I, par. 1 and Art. IV, § 7, pars. 7, 8 and 9, as to the 'group of constitutional provisions *** adverted to as the 'equal protection' clauses.'***"
>
> (119 *N.J. Super.* at 48)

They further aver that the State Constitution can be even more demanding than Fourteenth Amendment mandates with respect to equal protection insofar as the education of school pupils is concerned. Support for this avowal is found by petitioners in *Pingry Corp. v. Township of Hillside,* 46 *N.J.* 457 (1966) and in *Robinson v. Cahill, supra.* Petitioners also maintain that the decision of the New Jersey Supreme Court in *West Morris Regional Board v. Sills, supra,* supports the proposition that "*** the geographical accident of the location of their (pupils) homes is not a relevant distinction on which statutory classifications can be validly established.***" (Brief of Petitioners, at p. 7)

Petitioners additionally find significance in the fact that the aid denied them in this instance "***is State aid because *N.J.S.A.* 18A:58-7 directs the State to contribute, from State funds, 75% of the cost of said aid.***" (Brief of Petitioners, at p. 9) Thus, they argue, there is herein an "***administration of a State aid program that aids local inequalities thereby denying equal protection as asserted by the New Jersey Supreme Court in *Robinson v. Cahill****." (Brief of Petitioners, at p. 9) They find no significance in the Commissioner's decision in *O'Connor v. North Hunterdon Regional High School Board, Hunterdon County,* 1968 *S.L.D.* 116, since they allege the factual situation was different and since *Robinson v. Cahill, supra,* was decided five years later.

The Regional Board cites *N.J.S.A.* 18A:39-1 and *O'Connor, supra,* as the

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basis for an argument that petitioners have no entitlement under State statute or decisions of the Courts for the relief they seek. Further, the Regional Board avers that the decision of the Supreme Court in *West Morris Regional v. Sills, supra,* is a refutation of petitioners' invocation of the equal protection argument. In particular the Regional Board finds significance in the Court's summarization of the effects of the statute *N.J.S.A.* 18A:39-1:

> "***[A] school district must transport public school students living more than the stated distances from their assigned schools, 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. Hence the private student will or will not receive transportation depending upon the district of his residence, *i.e.*, whether statutes require transportation of public students living in his district.***" (58 *N.J.* at 475)

Further, the Regional Board cites *Two Guys from Harrison, Inc. v. Furman,* 32 *N.J.* 199, 231-232 (1960), that the equal protection clause "***does not require statewide uniformity in all things." (Brief of the Regional Board, at p. 7) It is enough, the Regional Board avers, if petitioners' children received "***the same consideration and treatment as all those children similarly situated in their district." (Brief of the Regional Board, at p. 8) Support for this argument is found by the Regional Board in the recent decision in *Shenkler v. Board of Education of the Borough of Ho-Ho-Kus, Bergen County,* 1974 *S.L.D.* 772, aff'd State Board of Education April 2, 1975. The Regional Board also refutes petitioners' argument that the decision in *Robinson v. Cahill, supra,* is applicable herein, and it cites the following excerpt from that decision in support of such refutation:

> "***We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis on which the State must act. The difficulties become apparent in the argument in the case at hand.***" (62 *N.J.* at 492)

The Commissioner has reviewed the stipulated facts in this matter in the context of the arguments of the parties and finds no merit in petitioners' complaint. Their children have been treated equally to all other children similarly situated in their district of residence. There is no requirement known to the Commissioner either in the school laws or decisions of the Courts that mandates an alternate equation. Indeed, the statute *N.J.S.A.* 18A:39-1 and prior decisions of the Commissioner and the Courts firmly support the Regional Board's position and negate petitioners' arguments. *O'Connor v. North Hunterdon, supra; West Morris Regional Board v. Sills, supra; Robinson v. Cahill, supra* The Commissioner so holds.

The decision of the New Jersey Supreme Court in *West Morris, supra,* is directly on point and, in fact, in the Commissioner's judgment has rendered the

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instant complaint *stare decisis*. There, as here, the statute of relevance was *N.J.S.A.* 18A:39-1 and the question for determination was whether or not school pupils attending private schools were, under all circumstances, entitled to transportation aid pursuant to equal protection principles. In addition to the citation quoted, *ante*, from that decision, the following excerpts are directly relevant to the issue of whether or not equal protection, as applied to the instant matter, embraces a wider parameter than the local school district unit:

> "***At any rate plaintiffs' attack rests upon the central assumption that district lines are inherently irrelevant so that all private school students must receive identical treatment as among themselves. It, of course, is elementary that the equal protection clause does not require statewide uniformity in all things. Home rule necessarily runs the other way. If the subject is appropriate for local preference or decision, a statute may provide for local option or referendum. *Two Guys from Harrison, Inc. v. Furman*, 32 *N.J.* 199, 231-232 (1960);*Jamouneau v. Harner*, 16 *N.J.* 500, 517-521 (1954), *cert.* denied, 349 *U.S.* 904, 75 *S. Ct.* 580, 99 *L. Ed.* 1241 (1955); *Paul v. Gloucester County*, 50 *N.J.L.* 585, 608-609 (E. & A. 1888). See also *James v. Valtierra*, 402 *U.S.* 137, 91 *S. Ct.* 1331, 28 *L. Ed.* 2d 678 (1971); *Salsburg v. Maryland*, 346 *U.S.* 545, 552-553, 74 *S. Ct.* 280, 98 *L. Ed.* 281, 288-289 (1954); *Lloyd v. Dollison*, 194 *U.S.* 445, 24 *S. Ct.* 703, 48 *L. Ed.* 1062 (1904). (58 *N.J.* at 477)

And,

> "***In the case at hand, the subject was not left to local option, for, as related above, we have accepted defendants' view that under *N.J.S.A.* 18A:33-1 the school district must transport 'remote' public school students, as defined administratively, and that if such transportation is required, it follows that transportation must be furnished to the private school student in accordance with *N.J.S.A.* 18A:39-1. Thus the question is whether identical statewide treatment which is not required if the legislative power is delegated for local decision, becomes a constitutional imperative because the Legislature itself made the final decision. We see no reason thus to limit legislative discretion.***" (*Id.* at 478)

And,

> "***The basic legislative theme is apparent. Having required school districts to provide transportation to public school students, the Legislature decided to extend to the student who chooses to attend a remote private school the same transportation benefit which is provided within his school district for those who attend a remote public school. Thus the exercise of the constitutional right to elect to attend a private school is freed of a financial consequence, in this respect.
>
> "The question is not whether the Legislature could have gone further and ordered transportation for all private school students who live remote from their private schools without regard to the treatment accorded to

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public school pupils within the districts of their residence. The Legislature may choose from among rational objectives. Here the Legislature chose to extend to the private school student a right to transportation on the same basis upon which transportation would have been available if he attended public school in his district, *i.e.,* remoteness from the school, and in that way to deal evenly with him and the public school student within that district. We see nothing irrational or invidious in this legislative concept, and the legislative choice is not made intolerable merely because another choice might also be reasonable. *Cf. Bailey v. Engelman,* 56 *N.J.* 54, 58-59 (1970).***" (*Id.* at 479)

And,

"***The area within which the State may act to advance the public welfare is vast. The Legislature must have leeway in deciding whether to act, and if so, how far to go. It would disserve the public interest to say that the Legislature may take no step unless it goes the whole distance which constitutionally could be travelled. Especially is this true when the subject involves the expenditure of public moneys. The competing demands are such that modest objectives must be allowed even though more pervasive ones would be welcome. So long as the limited objective is not invidious in design or effect, a statute may not be invalidated merely because it would also be reasonable to do more.

"We therefore conclude that the statute does not deny equal protection of the laws because it provides transportation only to private school students who reside in districts which must furnish transportation to the public schools." (*Id.* at 480-481)

Thus, in *West Morris Regional, supra,* the statute *N.J.S.A.* 18A:39-1 is clearly held to be consonant with principles of equal protection of law and the Commissioner cannot find a reversal of such holding, as petitioners do, in *Robinson v. Cahill, supra.* Indeed, the Commissioner opines that there is enforcement of the same view in this latter decision:

"***In *West Morris Regional Board of Education v. Sills, supra,* 58 *N.J.* 464, we dismissed a claim that the equal protection clause of the Fourteenth Amendment was offended by a statute providing for transportation of only those students at private schools who resided in school districts which furnished such transportation to public schools. We said 'at least as of now, *** there is no constitutional fiat that educational expenditures be identical for all students throughout the State' (p. 478). We thus read the decisions of the United States Supreme Court. We recognized that 'It, of course, would be another matter, if local option were designed for an invidious end, such as racial discrimination' (p. 478), and cited in that regard *Griffin v. County School Board of Prince Edward County,* 377 *U.S.* 218, 84 *S. Ct.* 1226, 12 *L. Ed. 2d* 256 (1964), and other cases.***" (62 *N.J.* at 484)

In any event, the "State statutory scheme" which serves as the foundation

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for school support is clearly the principle at issue in *Robinson, supra.* (See 62 *N.J.* at 515.) In the judgment of the Commissioner, determinations set forth therein do not negate the decision in *West Morris, supra.*

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 8, 1975
Pending before State Board of Education

Board of Education of the Union County Regional High School District No. 1,

Petitioner,

v.

Dr. William H. West, Union County Superintendent of Schools, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Johnstone and O'Dwyer (Franz J. Skok, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General (Jane Sommer, Deputy Attorney General)

Petitioner, the Board of Education of the Union County Regional High School District No. 1, hereinafter "Board," avers that the Union County Superintendent of Schools, hereinafter "County Superintendent," capriciously and arbitrarily refused to approve the payment of the full amount of State Aid due the Board for transportation reimbursement costs incurred by the Board during the 1973-74 school year. The Board requests the Commissioner of Education to order and direct the County Superintendent to approve such payment at this juncture. The County Superintendent admits that he refused to approve a full State Aid payment to the Board but maintains that such refusal was not arbitrary or capricious but correctly grounded in the authority conferred on him by specific statutory mandate. He has advanced a Motion for Summary Judgment to dismiss the Petition.

The matter is submitted for decision by the Commissioner on the pleadings and Briefs of counsel. The basic facts are not in dispute.

On June 8, 1971, the County Superintendent addressed a memorandum to all secretaries of the boards of education in Union County reminding them that

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pursuant to the rule of the State Board of Education (*N.J.A.C.* 6:21-16.1) all contracts for transportation services were to be submitted for approval on or before September first in each year. Other memoranda of specific pertinence were sent to the Board herein in 1972. (See Answer to the County Superintendent, attachments c, d, and e.) However, the Board did not submit three such contracts for transportation services in school year 1973-74 on or before the date of September 1 or, in fact, until the month of February. Thus the Board's submission was tardy for a period in excess of five months in that year.

On February 14, 1974, the County Superintendent indicated in a conversation he had with the Board Secretary that State Aid for transportation services contracted by the Board for school year 1973-74 would not be approved retroactively to September 1 but prospectively from the date of approval. The net effect of this action of the County Superintendent was a reduction of approximately $4,500 from the amount of State Aid to which the Board would otherwise have been entitled.

On February 21, 1974, the Board Secretary addressed a letter to the County Superintendent which requested a review and reconsideration of the matter. (See Answer to the County Superintendent, attachment h.) In his letter the Board Secretary said, *inter alia*:

> "***As you have indicated, this School District stands to lose thousands of dollars in State Aid due to the failure of this office to submit transportation contracts to the County Superintendent prior to the beginning date of operation. *There is no doubt as to the correctness and justification of your ruling.* I personally, and the Board of Education, earnestly request that you review this matter and consider restoration of full State Aid, as all contracts meet the requirements of the State Department of Education, and were entered into for the benefit of our Special Education students.***" (attachment h) (*Emphasis supplied.*) (See also affidavit of Board Secretary with respect to reasons for tardy submission.)

In a return letter of February 26, 1974, the County Superintendent indicated that there was no change in his position. His letter in its entirety is set forth as follows:

> "This is in response to your letter of February 21 about the reduction of State Aid on transportation contracts for the current year. As I reviewed the contracts we have, there are only three on which the penalty will be applicable. They are called in your listing:
>
> H.C. - 1 – which is with Stockholm, total of the contract $2,400;
> L.S. - 1 – contract with S. & E., total amount of contract $7,200;
> M.S. - 1 – again with S. & E. in the amount of $2,499.
>
> "Because these were so very late in arriving, the aid will be applicable from

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the date approved in late February until the end of the year. Therefore, there will be some reduction in the amount of your district will obtain.

"I did grant the approval on the large contract for Wussler to Union Catholic that goes around several districts in addition to your own district, because it would be unreasonable to apply a penalty to so many other districts that had nothing whatever to do with the delay of getting the information here on which approval could be given.

"This year was not the first in which we had difficulty getting these contracts in in timely fashion. As you have been told, heretofore, it is because the matter has gotten continuously worse over recent years that I have become more concerned. I have tried to make clear at meeting after meeting over the years that it is important that we have these contracts in early enough so we can determine before the routes begin in September whether they are approvable or not, so that all can be apprised of the true situation in time to make necessary adjustments." (Answer, attachment a)

There followed another request for reconsideration from the Board Secretary on March 25, 1974, wherein the Board's reasons for delay were explained and new procedures to correct prior deficiencies were set forth. The County Superintendent did not relent. The instant Petition was then filed. It requests the Commissioner to direct the County Superintendent to restore a total of $4,511.56 in State Aid payments to the Board.

Thus the issue is joined. Succinctly stated, this issue is whether or not in the matter, *sub judice,* the County Superintendent properly and legally used the authority conferred on him by the statutes (*N.J.S.A.* 18A:46-23) and rule (*N.J.A.C.* 6:21-16.1) for the approval of transportation contracts to deny effective State Aid reimbursement to the Board until the day of contract approval. The Board avers the County Superintendent exceeded the parameters of his authority. The County Superintendent maintains that an apportionment of State Aid towards the cost of transportation contracts is payable only from the date of contract approval forward to the date of contract termination.

The statutes and rule of general and specific pertinence to a consideration of this issue are recited as follows:

Re: Authority of the County Superintendent

N.J.S.A. 18A:7-5

"Each County superintendent shall devote his entire time to the duties of his office, and he shall have general supervision of all the public schools of the districts of the county except those city school districts in which there shall have been appointed superintendents of schools."

Re: Approval of Transportation Contracts

N.J.S.A. 18A:39-2

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"Any board of education having power to provide for the transportation of school pupils in its district to and from school may provide such transportation by a bus or busses owned by it or may enter into contract for such transportation, *approved by the county superintendent,* for a term not exceeding four years." (*Emphasis supplied.*)

Re: Approval of Transportation of Handicapped Pupils

N.J.S.A. 18A:46-23

"The board of education shall furnish daily transportation within the state to all children found under this chapter to be handicapped who shall qualify therefor pursuant to law and it shall furnish such transportation for a lesser distance also to any handicapped child, if it finds upon the advice of the examiner, his handicap to be such as to make such transportation necessary or advisable.

"The school *district* shall be *entitled* to *state aid* for such daily transportation in the amount of 75% of the cost to the district of furnishing such transportation to a program approved under this chapter in New Jersey *when the necessity* for such *transportation* and the *cost and method* thereof *have been approved by the county superintendent of the county in which the district paying the cost of such transportation is situated.*" (*Emphasis supplied.*)

Re: Authority of the State Board of Education

N.J.S.A. 18A:39-21

"The state board shall make rules governing the transportation of pupils to and from school to carry out the provisions of this chapter."

Re: General Regulations of the State Board

N.J.A.C. 6:21-16.1

"(a) All *contracts* for transportation or renewals thereof shall be made in triplicate and *shall be submitted to the county superintendent for approval on or before September 1 in each year.*

"(b) Each contract or renewal thereof shall be accompanied by a certified copy of the minutes of the board of education authorizing the contract.

"(c) If the county superintendent shall approve the contract or renewal, one copy shall be filed with the county superintendent, one with the board of education, and one with the contractor.

"(d) If the *county superintendent shall not approve the contract* of renewal, it *shall be without force or effect.*

Note: All transportation contracts require the approval of the county

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superintendent regardless of whether State aid is involved."
(*Emphasis supplied.*)

Additionally, the statute *N.J.S.A.* 18A:58-7 provides that seventy-five percent of transportation costs incurred by local boards of education shall be payable to such boards when "***the cost and method thereof have been approved by the county superintendent***."

The Board avers that such statutes and rules do not confer on the County Superintendent the authority to deny a full apportionment of State Aid funds merely because the transportation contracts it submitted, which were otherwise in order, were received after the date of September 1, 1973. The Board maintains that such date must be construed to serve as an administrative guideline and not as an "absolute, unconditional deadline" beyond which the County Superintendent was entitled to exercise a discretion to withhold State Aid funds. (See Brief of the Board, at p. 4.) Further, the Board maintains that even assuming, *arguendo,* that the County Superintendent was mandated by statute and rule, *ante,* to use the authority he exercised in this instance, or had discretion to exercise the action was capricious and arbitrary since other contract submissions were similarly tardy but were not subjected to penalty by reason of that fact. In the Board's view the authority of the County Superintendent with respect to the approval of transportation contracts is a limited one which requires a determination only with respect to the "***necessity for such transportation and the cost and method thereof.***" *N.J.S.A.* 18A:46-23

The County Superintendent maintains, by affidavit, that State Aid has, in prior years, been withheld on occasion by him when transportation contracts were not properly filed for approval. Further he avers that his intent in the controverted action herein was not to invoke a "penalty" but to comply with State regulations. He differentiates his action to withhold approval for State Aid reimbursement for the three contracts while granting it for two similarly tardy submissions on the basis of the fact that the three contracts were for new services while the other two were for continuing transportation route arrangements.

In his Brief, the County Superintendent argues that a need to insure the safety of transportation arrangements for school pupils and the financial protection of contracting districts, together with other factors, "***make clear the importance of prompt submission of district transportation contracts for approval.***" (Brief of the County Superintendent, at p. 4) It follows, he avers, that until such contracts are submitted they are not in force or effect and if the submission is subsequent to September 1 of a school year "***calculation of state aid should be based on the cost of the contract to the district from the date of approval to the termination of the contract.***" (Brief of the County Superintendent, at p. 5) Therefore, he concludes, it was proper in the circumstances, *sub judice,* to approve State Aid payments for the three contract routes only from February 22, 1974, when such routes were approved forward to the end of the 1973-74 school year.

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The Commissioner has reviewed the facts of this matter in the context of the arguments, *ante*. He observes that the County Superintendent's expressed view of the rule *N.J.A.C.* 6:21-16.1 would, if given general effect, require a mandatory application to mean that any and all late submissions of transportation contracts for approval must result in a deletion of State Aid for which school districts would otherwise be eligible. It is noted, however, that in the instant matter, the County Superintendent did not interpret the rule so strictly. He refused approval of full State Aid appropriation for certain contracts which were tardily submitted while approving others wherein the tardiness was equally as flagrant. In practical terms his interpretation of the rule differs, therefore, from his argument.

Thus, the questions which are posed are concerned with whether or not

1. the County Superintendent's authority to "approve" transportation contracts carries with it a corollary discretionary authority to withhold State Aid reimbursement when such contracts are submitted subsequent to September 1 in a given school year;

2. late submission of contracts for approval mandates the action without exception;

3. such action is precluded altogether absent a specific direction of the Legislature or State Board of Education which clearly sets forth a penalty.

In considering these questions the Commissioner finds no significance in the fact that penalties for tardy filings of transportation contracts are not set forth with specificity either in statute or rule. The delegation of authority by both statute and rule to the County Superintendent for the "approval" of transportation contracts is complete and emphasized by repetition. As the State's representative, the County Superintendent is clearly the one entrusted with a supervisory function both vitally important and essential if pupils are to be afforded the protection which is required.

It follows, then, that flagrant and repeated refusal or failure to conform to the statutory prescription for the filing of transportation contracts may be considered by the County Superintendent as reason for the invocation of a penalty. When, as here, the penalty is a refusal to retroactively approve a contract for State Aid reimbursement the penalty is not inappropriate. The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 8, 1975

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the Union County Regional High School District No. 1,

Petitioner-Appellant,

v.

Dr. William H. West, Union County Superintendent of Schools, Union County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 8, 1975.

For the Petitioner-Appellant, Johnstone and O'Dwyer (Franz J. Skok, Esq., of Counsel)

For the Respondent-Appellee, William F. Hyland, Attorney General (Jane Sommer, Deputy Attorney General)

The decision of the Commissioner of Education is affirmed. This affirmance is not to be construed as a penalty against the Union County Board of Education; but, rather, as a furtherance of, and in compliance with, the statutory and regulatory scheme encompassing State transportation aid. The State Board affirms on the ground that the County Superintendent is permitted by law and acted within his authority to approve State transportation aid covering the period from the date the transportation contract was approved until the end of the school year.

November 5, 1975

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Elsie Seybt,

Petitioner,

v.

Board of Education of the Borough of Hawthorne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Balk, Jacobs, Goldberger, Mandell, Seligsohn & O'Connor (Jack Mandell, Esq., of Counsel)

For the Respondent, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

Petitioner is a tenured teacher in the employ of the Board of Education of the Borough of Hawthorne, hereinafter "Board." She claims entitlement to higher salaries than those which she received from the Board for the 1973-74 and 1974-75 school years. The Board denies that she has legal entitlement thereto and further asserts that the matter should be dismissed by reason of laches.

The matter is jointly submitted for Summary Judgment by the Commissioner of Education on the pleadings, Briefs, and documentation at a conference of counsel held April 28, 1975.

Petitioner had been compensated for a number of years at the maximum (thirteenth) step of the bachelor's degree salary guide, hereinafter "guide," when in April 1973, the Board adopted a guide for the 1973-74 school year which set forth $14,105 as the maximum salary for the thirteenth step. Petitioner, however, was notified on April 16, 1973, that the $500 increment would be withheld as the result of unsatisfactory evaluations and recommendations by her administrators. (R-1) Thus, petitioner was paid $13,605 as opposed to the Board's established maximum of $14,105 for those teaching staff members with her experience and training. (P-1; P-2; R-3)

After similar notification one year later, petitioner was paid $14,092 for the school year 1974-75, whereas the Board's established maximum for that school year for a teacher with a bachelor's degree and the required number of years of experience was $15,092. (P-3; P-4; R-2) Thus, the Board, giving as a reason unsatisfactory work performance, over a period of these two years withheld from petitioner two $500 increments, while at the same time making certain other upward adjustments in her salary. (P-1; P-2; P-3) It is stipulated that petitioner was notified by her administrator of his intention to recommend the withholding of these increments prior to the time the Board acted to establish her salary for each of these years.

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Petitioner contends that the words "employment increment" and "adjustment increment" are "words of art" defined specifically by *N.J.S.A.* 18A:29-6 as follows:

> "*** 'Employment increment' shall mean an annual increase of $250.00 granted to a member for one 'year of employment'***

and

> "*** 'Adjustment increment' shall mean, in addition to an 'employment increment,' an increase of $150.00 granted annually*** to bring a member***to his place on the salary schedule according to years of employment***."

Petitioner contends that, since she had been on the maximum step of the guide for several years prior to 1973-74, the salary scale increases, herein, may not properly be termed either "employment increments" or "adjustment increments," but must be considered to have been adopted pursuant to *N.J.S.A.* 18A:29-4.1. Petitioner reasons that such salary policies, once adopted, are binding on the Board for a two-year period and are contractual in nature. *Norman A. Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.* 26; affirmed State Board of Education 29 Petitioner further contends that, absent conditions precisely set forth in the salary policy itself, the Board was contractually bound by the terms of its negotiated agreement to pay petitioner $14,105 for 1973-74 and $15,092 for 1974-75. Petitioner asserts that the Board, being a creature of the State and possessing only those powers delegated to it by the Legislature, is, like the Legislature, prevented by Article I, Section X of the Constitution of the United States, from acting in such fashion as to impair the terms of a binding contract. It is further argued that the Commissioner has not been reluctant to order boards of education to compensate their teaching staff members in accord with adopted salary guides. *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975); *John McAllen, Jr. v. Board of Education of the Borough of North Arlington, Bergen County,* 1975 *S.L.D.* 90 (decided February 24, 1975), aff'd State Board of Education June 4, 1975

Petitioner contends that the affirmative doctrine of laches is inapplicable and cites, *inter alia,* in support thereof *Philip Fisher et al. v. Board of Education of the Township of Woodbridge, Middlesex County,* 1965 *S.L.D.* 40 wherein it was held by the Commissioner that:

> "***Laches is inexcusable delay in acting. The mere efflux of time alone is not sufficient to constitute laches. Material prejudice to one party's interest as a result of the delay is a necessary element.***" (at p. 42)

And,

> "***No dismissal or abolition of a position is involved here, but only the payment of wages improperly denied. The Commissioner finds that ***

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respondent has suffered no change of position or material detriment thereby.***" (at p. 43)

Petitioner prays for an order from the Commissioner declaring that her salary increases were improperly withheld and directing the Board to compensate her at the aforementioned applicable maximum rates for the two-year period herein controverted.

The Board, conversely, argues that it has specific authority to deny *any* increase in salary for inefficiency or other good cause. The Board contends that petitioner's argument that the term "increment" may never apply to an increase in salary which a teacher at the maximum step may receive is "***a distinction without a difference.***" (Brief for Respondent, at p. 3) Further, it is inconceivable and preposterous to conclude that a teacher, having arrived at the maximum step of the salary scale, must be awarded an increment despite inefficiency and unsatisfactory performance. The Board avers that, particularly at this level, the denial of increment for good cause would be most appropriate. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (*App. Div.* 1960)

The Board, pleading the affirmative defense of laches, asserts that by reason of delay on petitioner's part the matter should be dismissed. In the alternative, for the reasons herein set forth, the Board seeks a determination that it had the legal right to deny petitioner the controverted increases for inefficiency and other good cause.

Petitioner's citation of *Fisher, supra,* is on point. For the reasons set forth by the Commissioner therein, being directly parallel to the revelant facts in this matter, it is determined that this case may not properly be dismissed by reason of delay attributable to petitioner. Petitioner gave timely notice of her intent to contest the Board's withholding of her second increment. (R-2) In any event, no financial obligation accrued to the Board by reason of other financial commitments or contracts, in view of petitioner's continued employment in her teaching position. Absent a showing that petitioner failed to act with reasonable promptitude or caused thereby detriment affecting the public purse, the equitable doctrine of laches is inapplicable in this instance. The Commissioner so holds. *Marjon v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938)

Petitioner contends that in the absence of conditions precisely set forth in the negotiated agreement itself, the Board is contractually obligated to pay her at the negotiated agreements' stated maxima for a two-year period. In this regard petitioner avers that an increase in the maximum may not properly be termed an employment increment or an adjustment increment. The Commissioner does not agree. In the instant matter, the Board has in fact established over the past years three levels of compensation at its maximum (thirteenth) step of the guide. Step 13B and step 13C were more recently added to the previous scales which formerly contained only one level of compensation at the thirteenth step. (P-1; P-3) The end effect is the same as if the Board had added two additional steps to its guide, regardless of the nomenclature attached thereto. It is also clear that in the two years controverted herein the negotiated agreement specified $500 as an

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increment at both level 13B and 13C. (P-1; P-3) It is also apparent that additional adjustments were effected at these levels, which adjustments were not denied petitioner.

Thus, the Commissioner is called upon to determine the narrow issue of whether the $500 increments could legally be withheld from petitioner at Step 13B in 1973-74 and at Step 13C in 1974-75. The Board cites *Kopera, supra,* wherein it was stated by the Court that:

> "***We hold that it is lawful and reasonable for West Orange to require 'favorable reports by superintendents and those charged with supervisory responsibility and approval by the Board of Education [as] a prerequisite to the granting of all increases in salary.'***" (60 *N.J. Super.* at 294)

And,

> "***Appellant further argues that the denial of the increment and the increase was in effect a reduction in salary of the appellant, and West Orange was, therefore, required to proceed in accordance with *N.J.S.A.* 18:13-17. That is not so. The failure to receive an increase of salary does not constitute a reduction.***
>
> "As was said in *Redcay, supra,* at page 370 of 130 *N.J.L.*, 'The system cannot function except by the services of capable and efficient principals and teachers,' and local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination and they have the right to adopt any reasonable means toward that end.***" (60 *N.J. Super.* at 297-298)

Petitioner argues that *Kopera, supra,* is inapplicable by reason of the subsequent legislative enactment of Chapter 236, Laws of 1965. (Brief for Petitioner, at p. 7) This argument must fail in the light of *Westwood Education Association v. Board of Education of the Westwood Regional School District,* aff'd Docket No. A-261-73, New Jersey Superior Court, Appellate Division, June 21, 1974, *cert. den.* 66 *N.J.* 313 (1974). Therein it was stated by the Court that:

> "***[A] local board of education, pursuant to *N.J.S.A.* 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and that this right is not negotiable under the provisions of *N.J.S.A.* 34:13A-5.3. See *Association of New Jersey State College Faculties v. Dungan,* 64 *N.J.* 338 (1974).
>
> "Appellant, relying upon previous decisions of the Commissioner of Education, contends that *N.J.S.A.* 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. Cf. *Kopera v. Board of Education of West Orange,* 60 *N.J. Super.* 288 (*App. Div.* 1960)***"

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Westwood, supra, is controlling. Therefore, *Ross, supra,* is in error as are those other Commissioner's decisions which held that a board must insert in its salary schedule a provision stating the procedures and conditions under which it may withhold an increment. Such cases include, *inter alia, Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County,* 1971 *S.L.D.* 127; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County,* 1971 *S.L.D.* 120. For a history of pertinent cases consult *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449.

The Supreme Court of New Jersey stated in *Lullo v. International Association of Fire Fighters,* 55 *N.J.* 409 (1970) that:

> "***It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. ***[P]ublic agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion.***" (at p. 440)

Thus, it is clear that "***the negotiation privilege may not intrude on the statutory authority or render it a nullity.***" *Nancy Weller v. Board of Education of the Borough of Verona, Essex County,* 1973 *S.L.D.* 513, 523

The statute *N.J.S.A.* 18A:29-14 provides that a board of education

> "***may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education.*** It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The New Jersey Superior Court in *Westwood, supra,* makes no distinction as claimed by petitioner that "employment increment" and "adjustment increment" are artful words limited in application to those definitions set forth in *N.J.S.A.* 18A:29-6. Nor will the Commissioner impose such a limitation.

Absent a showing of illegal, arbitrary, capricious action, bias, or bad faith on the part of the Board, petitioner has no entitlement to the controverted increments. The Board's determination is entitled to a presumption of correctness. The Commissioner so holds. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

There being no relief to which petitioner is entitled, the Commissioner finds the within Petition without merit. Accordingly it is dismissed.

COMMISSIONER OF EDUCATION

August 21, 1975
Pending before State Board of Education

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Gloria Ulozas,

Petitioner,

v.

Board of Education of the Matawan Regional School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the Matawan Regional School District, hereinafter "Board," was not reemployed for the 1973-74 academic year, and alleges that the Board's determination not to reemploy her constituted an unconstitutional invasion of her rights under the State and Federal Constitutions, as well as under applicable statutory law.

A hearing was conducted in the office of the Monmouth County Superintendent of Schools, Freehold, on September 23 and October 7, 1974 before a hearing examiner appointed by the Commissioner of Education. Briefs were filed after the hearing. The report of the hearing examiner follows:

The litigants stipulate that petitioner was employed initially under contract from February 1, 1971 through June 30, 1971. Thereafter, she was employed under contract for the next two academic years, 1971-72 and 1972-73. She was not reemployed for 1973-74.

On October 2, 1972, during her third year of employment, petitioner notified the Board that she was pregnant and expected to give birth on March 28, 1973; therefore, she requested a leave of absence as follows:

> "I wish to request a maternity leave of absence *** effective on March 19, 1973 and terminating on May 12, 1973.***" (J-1)

The request was approved, but petitioner delivered early and had to leave her teaching position on January 5, 1973. She remained at home until April 2, 1973, at which time she returned to her teaching position. On April 5, 1973, she was notified that she would not be reemployed; however, she remained in her teaching position until the close of the academic year, June 30, 1973.

Petitioner's specific allegations are that she was improperly denied reemployment because of her maternity leave and her resultant home-related obligations, and because of allegations that she was absent excessively.

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The Board not only denies these allegations but asserts that petitioner is guilty of laches in that she did not file her Petition of Appeal until January 28, 1974, almost ten months after she learned she would not be recommended for reappointment.

In the judgment of the hearing examiner, petitioner is guilty of laches and the Petition of Appeal should be dismissed on those grounds.

In *Barbara Witchel v. Peter Cannici and Board of Education of the City of Passaic, Passaic County,* 1967 *S.L.D.* 1, affirmed State Board of Education January 3, 1968, the Commissioner commented as follows:

> "***The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances to determine whether there has been unreasonable and inexcusable delay which would bar action.***" (at p. 3)

In *Harenberg v. Board of Education of the City of Newark et al.,* 1960-61 *S.L.D.* 142, the Commissioner stated that he

> "***has established no specific period of time after which an appeal is barred. Thus in *Gleason v. Bayonne Board of Education,* 1938 *S.L.D.* 138, nine months' delay by a dismissed mechanic was laches; *Carpenter v. Hackensack Board of Education,* 1938 *S.L.D.* 593, six months' delay by dismissed teacher held laches; *Aeschbach v. Secaucus Board of Education,* 1938 *S.L.D.* 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; *Wall v. Jersey City Board of Education,* 1938 *S.L.D.* 614 at 618, eleven months' delay of protest by teacher held laches; *Gilling v. Hillside Board of Education,* 1950-51 *S.L.D.* 61, nine months' delay by re-assigned janitor was laches. That the period of time constituting laches varies with the nature of the issue is also apparent. Thus, in *Jackson v. Ocean Township Board of Education,* 1939-49 *S.L.D.* 206, a delay of two months in protesting the award of a transportation contract was unreasonable; while in *Duncan, et al. – In re Annual School Election, East Rutherford,* 1939-49 *S.L.D.* 89, a delay of only three weeks constituted laches in contesting the results of an election.***" (at pp. 144-145)

And,

> "***The issue raised here is one of suspension from public employment. In cases of this kind the courts have stressed the importance of prompt action.
>
> "In *Park Ridge vs. Salimone,* 36 *N.J. Super.* 485, affirmed, 21 *N.J.* 28, the Court said:
>
> > 'The courts have long recognized the need for prompt action by public employees in seeking judicial review of their discharge. The

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> reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages.' [36 *N.J. Super.* at 494-495]

"The Supreme Court in its affirmation made this further statement at page 46:

> 'But, the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone.*** Although the statutes there involved – in *Marjon, supra* [*Marjon v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938)] – 'concerned tenure, the principle is the same.'

"In *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57 at 61, it was said:

> 'The law of this State is well settled that in the case *sub judice,* a public employee's right to reinstatement, even assuming, but not deciding, that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy and its application is warranted here.'***" (at pp. 145-146)

The decision in *Harenberg, supra,* 1961-62 *S.L.D.* 203, by the Superior Court, Appellate Division, affirmed the Commissioner's findings but decided the case on its merits as follows:

> "***the decision of the Commissioner and the State Board that the continuance of her suspension was proper and our affirmance thereof, and the considerations mentioned by the Commissioner in his decision, justify the conclusion that it is now too late to attack the retirement. However, we prefer to decide this point on the merits***. The judgment is affirmed." (at p. 210)

In *Flammia v. Maller,* 66 *N.J. Super.* 440 (*App. Div.* 1961), the Court said at page 453:

> "***The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands; 19 *Am. Jur., Equity,* § 492, p. 340 (1939). It is the equitable counterpart of statutes of limitation. The adjudicated cases 'proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the

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alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' *Galliher v. Cadwell,* 145 *U.S.* 368, 372, 12 *S. Ct.* 873, 36 *L. Ed.* 738 (1891).

"We had occasion to discuss the doctrine of laches in *Auciello v. Stauffer,* 58 *N.J. Super.* 522, 529 (*App. Div.* 1959), where we quoted from *Bookman v. R.J. Reynolds Tobacco Co.,* 138 *N.J. Eq.* 312, 406 (Ch. 1946):

> 'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies.***'

"Laches can be a defense only where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. *Mitchell v. Alfred Hofmann, Inc.,* 48 *N.J. Super.* 396, 403 (*App. Div.* 1958), certification denied 26 *N.J.* 303 (1958).***"

In *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County,* 1967 *S.L.D.* 78, affirmed State Board of Education 86, the Commissioner in considering the question of laches wrote:

"***Justice Heher said in the case of *Marjon v. Altman,* 120 *N.J.L.* 16, at page 18:

> 'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *** *Taylor v. Bayonne,* 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners,* 72 *Id.* 131; *Drill v. Bowden,* 4 *N.J. Misc.* 326; *Oliver v. New Jersey State Highway Commissioner,* 9 *Id.* 186; *McMichael v. South Amboy,* 14 *Id.* 183.'***" (at p. 85)

In *Beisswenger et al. v. Board of Education of the City of Englewood, Bergen County,* 1971 *S.L.D.* 489, the Commissioner quoted from *Elowitch, supra,* as follows:

"***Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence, V.* II, *Sec.* 419, *pp.* 171-2; 27 *Am. Jur. 2d, Sec.* 162, p. 701; *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57 (*App. Div.* 1949); *Park Ridge v. Salimone,* 36 *N.J. Super.* 485 (*App. Div.* 1955), aff'd 21 *N.J.* 28 (*Sup. Ct.* 1956) Respondent, on June 10, 1965, 11 months after terminating

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> petitioner, contracted to fill the vacancy created, prior to receiving any notice that petitioner contested the propriety of its action. Under all the circumstances, respondent's action constituted a sufficient detriment, in the face of petitioner's implied acquiescence, to invoke the bar of laches.***" (at p. 492)

He concluded, therefore, that the matter was out of time and that petitioners, in *Beisswenger, supra*, were guilty of laches.

For all of the reasons, set forth above, the hearing examiner concludes that the Petition herein, filed approximately ten months after petitioner was advised that she would not be recommended for reappointment, is out of time. When asked why she waited from April 5, 1973 to January 28, 1974 to appeal to the Commissioner, she replied:

> "***I was trying to find a job because I don't usually like to sue people and I could not get one. So, that is when I decided that I was up against a brick wall – six years experience and no one wants to hire me – and I really felt strongly that I lost a job because of my maternity leave; and since I could not get a job, I felt that I would like to get my job back because I really liked working in Matawan. I thought I did a very good job and I wanted to continue.***" (Tr. II-92)

In the instant matter, the staffing of teachers was completed for the most part prior to September. The record shows that internal changes caused the school administration to disband the perceptually impaired class, previously taught by petitioner, and to place the pupils in other programs for their continued special education. (Tr. II-27-30) If petitioner prevails in her Appeal, such an administrative change in the assignment of pupils to classes would now have to be altered to such a degree that, at the very least, the Board would have to re-hire a teacher they no longer need.

The hearing examiner recommends that the Commissioner find that petitioner is guilty of laches and that the Petition of Appeal be dismissed.

* * * *

The Commissioner has reviewed the record of the herein controverted matter including the exceptions to the hearing examiner report filed by petitioner pursuant to *N.J.A.C.* 6:24-1.16. Therein, petitioner, noting that the Board's Brief does not argue the application of laches, takes exception to the recommendation of the hearing examiner that the matter be dismissed by reason of inexcusable delay.

Petitioner's assertion that consideration of laches is inappropriate must fail. The application of laches was raised by the Board as a separate defense in the Answer. Thereafter, the conference of counsel conducted prior to the hearing on April 30, 1974, delineated two clear issues, one of which was: "Is petitioner's Appeal timely?" Within this context, it would be inappropriate not to consider the timeliness of filing the Petition of Appeal regardless of whether

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or not counsel addressed themselves to the applicability of this doctrine in their memoranda of law as they were instructed to do by the hearing examiner at the close of the hearing. (Tr. III-100)

The applicability of the equitable doctrine of laches must be determined within the context of the relevant facts in each individual matter. *Bookman, supra* Herein, petitioner delayed filing her Petition of Appeal for a period of nearly ten months after her notification of non-reappointment. During only two of these months was she active in protesting the matter before the Board. Thereafter, for a period of eight months the Board, absent further protests or litigation, had no reason to believe that petitioner would continue to assert an entitlement to employment. The Board, during this period, as part of a curricular reorganization, abolished the teaching position to which petitioner had been previously assigned.

Petitioner's delay in filing was fatal. Were she to prevail, she would be entitled, *inter alia,* to lost salary for services not rendered during the five-month period from September 1973 through January 1974 in addition to that for the lengthy period thereafter consumed by litigation. The lengthy delay in filing the Petition of Appeal was occasioned solely by her own inaction. The Commissioner determines that this constitutes inexcusable delay within the context of *Park Ridge, supra.* Similarly, it is determined that her inaction worked sufficient detriment to invoke the bar of laches. *Beisswenger, supra; Marjon, supra*

The Commissioner is constrained to caution those who intend to assert their rights in proceedings under the education laws of the State, pursuant to *N.J.S.A.* 18A:6-9 *et seq.* and *N.J.A.C.* 6:24-1.1 *et seq.*, to do so with reasonable promptitude in order that the issues they raise may proceed to a just determination.

For the reasons hereinbefore set forth, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 21, 1975

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Gloria Ulozas,

Petitioner-Appellant,

v.

Board of Education of the Matawan Regional School District, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 21, 1975

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

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

November 5, 1975
Pending before Superior Court of New Jersey

Ruth Nearier, Gloria Marturano and Arlyne Schneider,

Petitioners,

v.

Board of Education of the City of Passaic, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman and Butrym (Cassel R. Ruhlman, Esq., of Counsel)

For the Respondent, Louis Marton, Jr., Esq.

Petitioners are teaching staff members employed by the Board of Education of the City of Passaic, Passaic County, hereinafter "Board," and are

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assigned to the Title I, Elementary and Secondary Education Act instructional program which is operated by the Board. Petitioners seek an adjudication that they have acquired a tenure status pursuant to *N.J.S.A.* 18A:28-5 and further seek an order which would require the Board to afford them the same fringe benefits afforded other teaching staff members in the school district not assigned to the Title I program. The Board asserts that petitioners have not acquired a tenure status in its employ, and further asserts that petitioners' claim for fringe benefits is invalid.

A hearing was conducted in this matter on October 3, 1974 at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Board filed a Memorandum of Law in support of its position. The report of the hearing examiner is as follows:

Notwithstanding the testimony of the Superintendent of Schools that no one of the three petitioners is a "teacher" in the employ of the Board (Tr. 97), each of the three petitioners possesses an appropriate certificate and was engaged by the Board to perform appropriate duties consonant with her certificate.

Individually, Petitioner Nearier possesses certification as an elementary school teacher, secondary school teacher of social studies, and secondary school teacher of English. (P-1) Petitioner Nearier also is a certified teacher of reading (P-2), and has applied for a supervisor's certificate. (Tr. 9) Petitioner Nearier was initially engaged by the Board during February 1966, as a part-time remedial reading teacher until June 30, 1966. Thereafter, she was employed from October 1, 1966 until June 30, 1967 and from September 18, 1967 to February 1, 1968, all on a part-time basis. Thereafter, Petitioner Nearier was employed full-time from February 1, 1968 to June 30, 1968, from September 16, 1968 to June 30, 1969, and from September 18, 1969 to June 30, 1970. On September 1, 1970, Petitioner Nearier testified, she was appointed head teacher and continued in that assignment until June 30, 1971 and thereafter from September 8, 1971 to June 30, 1972, from September 15, 1972 to June 30, 1973, from September 1, 1973 to June 30, 1974, and from September 1, 1974 until April 1975. (Tr. 7-9)

At this juncture the hearing examiner observes that Petitioner Nearier's employment for 1974-75, as well as that of the two other named petitioners herein, may have concluded March 31, 1975, subject, according to the Board Secretary's testimony, to the receipt of its quarterly disbursed funds for the Title I project. (Tr. 114) If funds were received, then each of petitioners' employment would be continued.

To place this dispute in its proper context, the following reproduction, in pertinent part, of Petitioner Nearier's employment contract for 1973-74, will be helpful. This contract is representative of all employment contracts between her and the Board since initial employment in February 1966: (P-5)

***

"Whereas, the Federal Government has adopted an E.S.E.A. Program, and

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substantial funds have been appropriated for the implementation of the scope and purposes of said educational project; and

"Whereas, said E.S.E.A. Program is currently considered as experimental, and temporary in nature; and may be terminated, suspended or cancelled on short notice; and the subsidies allocated thereunder may be withdrawn or eliminated in a period of national emergency; and

"Whereas, the implementation of the various phases thereof shall require the employment of teaching personnel who may assert tenure claims under the school laws of the State, which the Board desires to avoid,

"Now, therefore, in consideration of mutual promise and conditions, the parties hereto agree as follows:

"1. The Board does hereby employ said Head Teacher in the E.S.E.A. Program under control of the Board from the First day of September 1973, to the Thirtieth day of March 1974 at a salary of $1440.00 per month (to be adjusted upon settlement of the 1973-74 E.A.P. Contract), plus $90.00 Honorarium per month, payable in equal monthly installments during the term herein specified.

"2. Said Head Teacher shall commence her duties on September 1, 1973, subject to proper proofs being exhibited of a teaching certificate in full force and effect under the School Laws of the State of New Jersey, together with a certificate of physical fitness.

"3. Said Head Teacher agrees to accept employment under the E.S.E.A. Program with the understanding that said Program is temporary in nature with no assurance of continuance over a long period of time; and that the salary being paid to said employee is solely contingent on the receipt of the funds committed and allocated for the purposes expressed herein; that in the event such funds are withdrawn, terminated, or suspended during employee's term of employment, the Board reserves the right to terminate immediately said Teacher's employment without any further obligation on its part for salary or wages for any period remaining under said contract of employment.

"4. Said Head Teacher further recognizes that, due to the uncertainty of the program, all claims as to tenure status are being waived.

"5. By accepting the employment aforesaid, employee agrees to faithfully perform the duties required, and to observe and enforce the rules and regulations adopted by the Board for the government of the school system.

"6. In the absence of an abrupt termination of the program as recited in paragraph 3, either party to this contract may terminate same by giving the other 60 days notice in writing. Otherwise this agreement shall run for the term specified herein, subject to the limitations expressed."

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Petitioner Marturano's employment time with the Board as a school nurse, for which she holds a Permanent (now Standard) certificate for school nurses (P-7), is as follows: (Tr. 59-60)

1967-1968
1968-1969
1969-1970
1970-1971
1971-1972

During the subsequent years, Petitioner Marturano's employment began later than the regular opening of school and on the days indicated: (Tr. 60-61)

September 16, 1972 - June 30, 1973
September 10, 1973 - June 30, 1974
September 4, 1974 -

The hearing examiner observes that the record is not clear whether the last date (September 4, 1974) is the same date that school was regularly opened.

Petitioner Marturano's employment contract for 1970-71 (P-8) was accepted into evidence as an example of the type of employment agreements entered into between her and the Board. The hearing examiner reports that that contract is substantially the same as set forth above for Petitioner Nearier. (P-5)

In regard to Petitioner Schneider, who possesses an elementary school teacher's certificate (P-10), her employment as a remedial reading teacher began during October 1966, and continued until June 30, 1967, on a part-time basis. (Tr. 70) Thereafter, Petitioner Schneider's employment with the Board was on a full-time basis for the following periods of time:

October 1, 1967 - June 30, 1968
September 1, 1968 - June 30, 1969
September 1, 1969 - June 30, 1970
September 1, 1970 - June 30, 1971
September 8, 1971 - June 30, 1972
September 19, 1972 - June 30, 1973
September 10, 1973 - June 30, 1974
September 9, 1974 -

Petitioner Schneider's employment contract for 1973-74 (P-9) was accepted into evidence as an example of the type of employment agreements entered into between her and the Board. The hearing examiner reports that that contract is substantially the same as hereinbefore set forth for Petitioner Marturano's employment contract (P-8) for 1970-71 and Petitioner Nearier's employment contract (P-5) for 1973-74.

The Title I, ESEA program represents an effort on the part of the federal government to assist educationally deprived pupils by channeling funds through

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state departments of education, hence to local school districts for the support of special programs for identifiable "target" pupils. Each of the three named petitioners herein was employed by the Board and was assigned to these special Title I programs.

Petitioner Nearier testified that she was assigned to a parochial school by the Board as part of the Board's Title I effort. There she taught small groups of pupils, tested the pupils, met with parents for pupil conferences, met with the parochial school principal for conferences, and reported directly to the coordinator of federal projects, who is employed by the Board and is considered a regular employee of the Board. (Tr. 11-14) The coordinator of federal projects, whose salary is paid by the Board but, according to the Superintendent, is "reimbursed from Title I" (Tr. 99), enjoys all the benefits of tenure, and is a member of the New Jersey Teachers' Pension and Annuity Fund, hereinafter "TPAF." (Tr. 99)

Petitioner Nearier testified that her duties corresponded with the duties of other remedial reading teachers regularly employed and that she was required to attend teacher workshops and staff meetings in the same manner as other teachers. (Tr. 12)

In support of Petitioner Nearier's assertion in regard to her duties, a job description (P-3) for "Reading Teachers" was accepted in evidence over the objection of the Board. (Tr. 17) That job description set forth in pertinent part that reading teachers, presumably employed for Title I programs, are responsible to the coordinator of ESEA (the coordinator of federal programs) and the building principal. Furthermore, the job description identifies the reading teacher's responsibility as "***giving supplementary reading assistance to identified ESEA Title I children.***" Also, the reading teachers shall "***be fully New Jersey certified elementary teachers.***" They shall pretest identified ESEA children in their specific schools, and shall instruct these eligible and participating children in reading, vocabulary development, word attack skills and comprehension, listening skills and communication, using commercial and teacher-made materials. They shall keep complete records on each pupil's reading progress, and do all such routine record keeping as may be required by the central ESEA office. They shall posttest the pupils at least once during the year and record all data as required. They shall keep an accurate record of attendance and shall inform the central office, on forms provided, of any changes in the pupil's attendance area. They also attend all relevant ESEA in-service programs.

Petitioner Nearier's responsibilities as head teacher are set forth in the job description (P-4) for ESEA Head Teacher. The Board asserts that the job description for ESEA Head Teacher is confined to the Title I program. (Tr. 18) In any event, that job description (P-4) requires the head teacher to assist the Title I coordinator in the supervision of the reading program and of the staff. It also requires the head teacher to observe classes, give demonstration lessons, and arrange and conduct in-service workshops. In substance, the hearing examiner observes that the remainder of the job description requires the head teacher to

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perform duties generally delegated to a person in the position of head teacher. Petitioner Nearier testified that she does, in fact, perform the duties of head teacher as set forth in the job description (P-4) for head teacher. (Tr. 17-18)

Petitioner Marturano, who is employed as a school nurse, testified that she is assigned to the Title I program. (Tr. 59) She testified that she performs the same duties as other persons employed as school nurses by the Board. Petitioner Marturano testified that she completes vision and hearing tests on pupils in kindergarten and second through fifth grades. In addition, Petitioner Marturano testified, she assists in physical examinations of pupils in kindergarten through fifth grade, works with the tuberculosis testing program and weighs pupils, works with the Child Study Team on special pupil cases, and works with individual teachers. Finally, Petitioner Marturano testified, when necessary, she escorts pupils to clinics or makes arrangements with parents so that they may take their children to clinics. (Tr. 62)

Petitioner Schneider, who is employed as a remedial reading teacher assigned to the Title I program (Tr. 74), testified that her responsibilities include assessing the needs of the target pupils, screening the pupils, establishing small groups of pupils and working with the pupils, utilizing remedial reading techniques. (Tr. 74)

At this juncture, the hearing examiner points out that none of the three named petitioners herein complains of her salary, for they are all compensated according to their appropriate levels of the teachers' salary policy. (Tr. 54, 69, 75) Their joint complaints, however, go towards sick leave benefits, hospitalization/dental plan benefits, membership in the TPAF, lateness of paychecks, and Board acknowledgement of their acquisition of a tenure status.

In regard to the latter complaint that the Board does not acknowledge their tenure status, the hearing examiner points out that it is well established that a tenure status is acquired by teaching staff members who meet the precise conditions set forth in the statutes. *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962), *cert. denied* 371 *U.S.* 956, 83 *S. Ct.* 508 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E. & A.* 1941); *N.J.S.A.* 18A:25-6. It is legally immaterial whether or not an employing board of education chooses to "acknowledge" the acquisition of tenure. Moreover, the hearing examiner points out that those portions of the employment agreements (P-5, P-8, P-9) set forth above wherein each of the petitioners allegedly waived her claim to a tenure status is stipulated by the parties as having no legal effect. (Tr. 20)

In regard to petitioners' membership in the TPAF, the Board Secretary testified that its application to enroll the entire group of teaching staff members employed by the Board and assigned to the Title I program was rejected because the individual employment agreements provided that their employment was temporary. (Tr. 103) The hearing examiner points out that the Board itself, however, determined and so informed the TPAF that their employment was temporary.

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Petitioners' collective testimony (Tr. 22-29, 56, 63, 66, 76-77) reflects that their sick leave benefits are strictly limited to one day per month for each month worked, which in the hearing examiner's judgment is contrary to *N.J.S.A.* 18A:30-2 and prior holdings of the Commissioner in *Marjorie B. Hutchenson v. Board of Education of the Borough of Totowa, Passaic County,* 1971 *S.L.D.* 512 and *Anne Ida King v. Board of Education of the Borough of Woodcliff Lake, Bergen County,* 1972 *S.L.D.* 449. In the instant matter, if petitioners had been employed, as an example, for the months of September, October and November, they each would have accrued three sick days. If during November they had been ill four days, they would have received three days' sick leave and their pay would have been withheld for the fourth day. Furthermore, petitioners herein are not allowed to accumulate sick leave time from one year to the next.

In regard to hospitalization/dental benefits, while it appears that petitioners have received such benefits since December 1, 1974 (Tr. 107), until that time petitioners had been deprived of those benefits since their beginning employment.

The Board argues that the program to which petitioners are assigned is a creation of the federal government which is supported wholly by federal funds. Consequently, the Board argues that petitioners herein are not its employees in the same manner that it employs regular teaching staff members. Furthermore, the Board argues that it is restricted by federal guidelines and the New Jersey Department of Education's Title I regulations from assigning petitioners to the same kind of extra-duty work, *e.g.* monitoring corridors, bus duty, and the like, which it assigns to regular teaching staff members.

Notwithstanding the arguments of the Board, the hearing examiner finds nothing of consequence to distinguish the instant matter from the circumstances in *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266; affirmed in part, reversed in part, State Board of Education, 1973 *S.L.D.* 777. Also, see *Henry Butler et al. v. Board of Education of the City of Jersey City, Hudson County,* 1974 *S.L.D.* 890.

In both above-cited cases, petitioners were employed by the local board assigned to a federal program, paid entirely from federal funds, and denied certain benefits, among which were sick leave benefits. In both *Noorigian, supra,* and *Butler, supra,* the Commissioner determined that petitioners were regularly employed teaching staff members who performed teaching duties in the employment of the board. The Commissioner ordered that petitioners were entitled to the same fringe benefits enjoyed by other teaching staff members in the respective school districts.

The hearing examiner recommends that the Commissioner determine that the issues in the instant matter have been rendered *stare decisis* by the previous decisions in *Noorigian, supra,* and *Butler, supra,* and order that petitioners herein be treated by the Board, in all respects, as are other teaching staff members in its employ, including membership in the TPAF. Should this recommendation be accepted and adopted by the Commissioner, the hearing examiner observes that

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Petitioner Nearier would have a total accumulated credit of sick leave of eighteen and one-half days; Petitioner Schneider, thirteen and one-half days; and Petitioner Marturano, seventeen and one-half days. (P-11) Finally, the hearing examiner finds that each of the three named petitioners has satisfied the precise conditions set forth in the statute for the acquisition of a tenure status, and recommends that the Commissioner so hold. *N.J.S.A.* 18A:28-5

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with all findings and recommendations contained therein. Petitioners' employment by the Board may not be categorized as something other than "teaching staff members" as defined in the statutes (*N.J.S.A.* 18A:1-1) and their service entitles each of them to the emoluments and benefits afforded all other teaching staff members employed by the Board and to the protection of tenure. The Commissioner so holds.

The issues in this matter have been rendered *stare decisis* by prior decisions of the Commissioner in *Noorigian, supra,* and *Butler, supra.* The source of funds used to compensate teaching staff members may not be employed to set one group apart from others similarly qualified and with similar professional duties. As the Commissioner said in *Noorigian*:

> "***Any employment arrangement into which the Board enters, irrespective of the source of the funding, binds the Board and its employees to all the terms and conditions of employment as set forth by the Legislature in the school laws (*N.J.S.A.* 18A, Education).
>
> "***Once funds are made available to a local school district from any source, those funds become resources of the district receiving them, and persons employed with those funds may not be separated by category from other persons employed by the Board.***" (1972 *S.L.D.* at 270)

Accordingly, the Commissioner directs the Board to retroactively afford petitioners all the emoluments and benefits which are due them as regularly employed teaching staff members. Such emoluments comprise, but are not limited to, the sick leave benefits described by the hearing examiner, health insurance benefits and the entitlement to be enrolled in the Teachers' Pension and Annuity Fund pursuant to the statutory prescription. *N.J.S.A.* 18A:66-1 *et seq.* Even assuming, *arguendo,* that a part of petitioners' prior employment was, as the Board categorized it, of a "temporary" nature, the instant decision that petitioners are tenured employees at this juncture clearly triggers the mandate of the statute *N.J.S.A.* 18A:66-14 which provides:

> "Any person employed temporarily as a teacher and whose temporary employment resulted in permanent employment or any person employed as a substitute immediately prior to permanent employment *shall be*

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permitted to make contributions covering such service in accordance with the rules and regulations of the board of trustees and receive the same annuity and pension credits as if he had been a member during such service." (*Emphasis supplied.*)

COMMISSIONER OF EDUCATION

August 22, 1975

In the Matter of the Annual School Election Held in the Morris School District, Morris County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Warren E. Dunn, Esq.

For the Respondent, Wiley & Malehorn (Frederic J. Sirota, Esq., of Counsel)

On March 5, 1975, Mrs. Margit S. Brown addressed a letter complaint to the Attorney General of New Jersey which requested, *inter alia,* an investigation of certain alleged violations of the election law at the election conducted on March 4, 1975 in the Morris School District. The letter was referred to the Commissioner of Education since it clearly posed a controversy under the school laws, Title 18A, Education, which confer jurisdiction on the Commissioner. *N.J.S.A.* 18A:6-9

Thereafter the Commissioner appointed a representative to conduct an inquiry in the matter. Such inquiry was conducted on March 27, 1975 by the representative at the offices of the Morris County Superintendent of Schools, Morris Plains. The report of the Commissioner's representative is as follows:

The specific complaint considered herein is concerned with election campaign literature. The complaint is proffered by Mrs. Margit S. Brown, one of three candidates for seats on the Morris School District Board of Education, hereinafter "Board," in the annual school election held on March 4, 1975 in the Morris School District. She avers in her letter complaint of March 5, 1975, that campaign literature distributed prior to the election does not bear on its face a notation identifying the person or persons who financed the printing or distribution of such literature. Further, Mrs. Brown avers that one piece of literature gives the representation that it "*** is a publication of the Morris District Board of Education and has been so interpreted by voters in the Morristown area.***" (Letter of Mrs. Margit S. Brown, dated March 5, 1975)

At the hearing, the two documents which were the source of the instant

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complaint were introduced in evidence as P-1 and P-2. They may be described succinctly as follows:

Document P-1 is a 9 inch by 12 inch leaflet which bears the following notation at the top: "Morris School District Board of Education." The left one third of the document contains the instruction in bold print: "VOTE TUESDAY, MARCH 4, 3:00 PM -9:00 PM. WE NEED THEM." The document further contains narrative material describing the qualifications of Candidates Emanuel Averbach and Russell Hawkins. There is no notation contained in the document which indicates the "***name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published." *N.J.S.A.* 18A:14-97

Document P-2 is also a leaflet on 9 x 12 paper which bears the inscription, "TO ALL REGISTERED VOTERS." The written narrative of the document states that the signer endorses "***Russell Hawkins and Emanuel Averbach for the two seats that are up in this election and I also support the school budget.***" The leaflet is signed by E. Constance Montgomery but contains no information with respect to the person who paid for the document or caused it to be printed.

The statute of pertinence to the instant matter is quoted in its entirety as follows:

> "No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the *name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed* and of the name and address of the person or persons by whom the same is printed, copied or published."
>
> (*Emphasis supplied.*) (*N.J.S.A.* 18A:14-97)

Measured by such a standard it is clear that the documents P-1 and P-2 are deficient since they do not bear a statement which identifies the person who caused them to be printed or paid for them. Neither do such documents identify the person who printed, copied or published them.

At the hearing witnesses were present who admitted they had caused the documents to be printed or copied. They also testified with respect to cost.

The first witness to testify in this regard was Candidate Averbach. He stated that he had developed the document P-1 in part from material about all

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candidates distributed on the occasion of a Parent Teacher Association meeting (Tr. 20), but that he had never run for elected office before and was not familiar with the mandate of the statute, *ante*. (Tr. 19) He further testified that 2,000 copies of the leaflet had been printed by the Speedway Instant Printing Company, Elm and South Streets, Morristown, New Jersey, at a cost of $27.78 which he had paid. (See R-1, Tr. 17.)

The second witness to testify with respect to the documents was Mrs. E. Constance Montgomery. She admitted that leaflet P-2 had been composed by her and that she had caused it to be distributed "***to the registered voters in my ward to remind them of the election and where the election would be held.***" (Tr. 29) She further testified that leaflet (P-2) had been duplicated in the office of William Roberts, 20 Community Place, Morristown (Tr. 29), and that she had asked for, but never received, a bill for material or service. (Tr. 30)

On the basis of such facts and testimony, Candidate Margit S. Brown argues that the "Morris School District Board of Education" caption at the top of P-1 and the endorsements therein contained may have misled the voters "***into assuming that there were only two candidates from Morristown standing for election, and if that were the case and there were two terms to be filled, the voters could very well have considered this to be an uncontested election***." Therefore, she avers the election was "tainted" and should be set aside. (Tr. 34-35)

The Board maintains, however, that it is clear that P-1 is not a publication of the Morris School District and that the distribution of the literature cannot be held to have "tainted" the election. (Tr. 35) In any event, it avers that the documents P-1 and P-2 are "***perfectly acceptable in the framework of a school election.***" (Tr. 37)

The hearing examiner has reviewed the facts and arguments and finds that the documents P-1 and P-2 are, as alleged by Candidate Brown, insufficiently detailed to be adjudged legally proper campaign literature. Accordingly, the hearing examiner does not condone the use of such literature in the election of March 4, 1975.

The hearing examiner observes that this was not a surreptitious printing or distribution of campaign materials but, instead, a series of two actions freely and completely admitted at the hearing. There was no testimony that the vote of even one voter was influenced, altered, or changed by the documents P-1 and P-2. In such circumstances the hearing examiner finds that a censure of the actions is in order, but he finds no reason to set the election aside or to further prosecute the violations.

This completes the report of the hearing examiner.

* * * *

The Commissioner has read the report of his representative and notices

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that no exceptions were filed thereto pursuant to *N.J.A.C.* 6:24-1.16. The Commissioner, therefore, adopts the report of the hearing examiner as his own.

It is clear that the precise conditions set forth in *N.J.S.A.* 18A:14-97 were not followed in that "***the name and address of the person or persons by whom the cost of the printing copying, or publishing***" the specified election materials were not printed thereon.

Such statutory violations cannot be condoned; therefore, the Commissioner directs this Board and all others to inform future Board candidates and their supporters, insofar as practicable, to be cognizant of the school election laws and to follow them faithfully.

The Commissioner cannot find, however, that the election law violations were so serious as to cause the election to be set aside. In this regard the courts have spoken clearly:

> "***The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.***" (*In re Wene,* 26 *N.J. Super.* 363, affirmed 13 *N.J.* 185) (at p. 383)

Therefore, absent a showing that the will of the people was thwarted, the Commissioner affirms the results of the election. Accordingly, the complaint is dismissed.

COMMISSIONER OF EDUCATION

August 22, 1975

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**In the Matter of the Tenure Hearing of Virginia Caputo,
School District of the City of Clifton, Passaic County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Sam Monchak, Esq.

For the Respondent, Virginia Caputo, *Pro Se*

Three charges were certified on November 20, 1974 against Virginia Caputo, hereinafter "respondent," a tenured physical education teacher in the Clifton School System, by the Clifton Board of Education, hereinafter "Board." These charges essentially asserted that respondent refused to submit to a medical examination required by the Board as a corollary requisite to its granting of a requested medical leave of absence for the 1973-74 academic year. It is further charged that respondent, having failed to submit to the required medical examination, has likewise failed and refused to report for duty for either the 1973-74 or the 1974-75 academic years, or to request a leave of absence for the 1974-75 academic year.

Respondent, whose defense is limited to two handwritten letters, dated February 13, 1975 (R-1), and March 7, 1975 (R-3), contends that she was both unable to comply with the Board's requirements to appear for an examination by its medical examiner, or to resume her teaching duties.

Certified letters dated December 2, 1974, and January 9, 1975 from the Division of Controversies and Disputes requiring an answer to the charges evoked no response from respondent. The Board moved on February 6, 1975 for dismissal of respondent from her teaching position. Respondent was advised of the Notice of Motion, whereupon she submitted the aforementioned letter of February 13, 1975. (R-1) Thereafter, by letter dated February 21, 1975, respondent was advised that, pursuant to *N.J.S.A.* 18A:6-16, a hearing wherein she could represent herself or be represented by counsel would be required to determine whether the charges were true in fact or of sufficient moment to warrant a reduction in salary or dismissal. A plenary hearing was conducted on May 8, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Respondent submitted a second letter in her defense (R-3), but neither appeared nor was represented at the hearing. The report of the hearing examiner is as follows:

Respondent was injured in an automobile accident in October 1971, and was again injured a second and third time in similar accidents in February 1973 and April 1973. On June 14, 1973, on recommendation of her personal physician (P-6), she applied for a one-year leave of absence (P-5), and joined her husband in Florida where she has since resided. (R-1) The Board considered this request and advised respondent as follows:

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"Please be advised that at the last regular meeting on August 22, 1973, the Board of Education, upon the recommendation of the Superintendent of Schools, granted you an illness leave of absence effective September 1, 1973, and terminating June 30, 1974, inclusive, *upon substantiation of the school medical inspector*.***" (*Emphasis supplied.*) (P-3)

Respondent was notified on August 27, 1973 by the Assistant Superintendent that she was required to submit to a physical examination by the school medical inspector and that the requested leave of absence could not be granted until the medical inspector had submitted his report. (P-12) Respondent did not comply with this requirement and was notified on September 13, 1973, that she must either resign or report for the required examination within seven days, or the Board would construe noncompliance to be the voluntary abandonment of her tenured position. (P-13)

Respondent did not report for an examination, nor did she resign. She alleges that she was not well enough to do so. She volunteered to go to a Florida doctor of the Board's choosing at the Board's expense. (R-1, R-2) There is no evidence that such an examination was agreed to by the Board. The only evidence of a physical examination in the record is that performed by her personal physician, dated July 2, 1973. (P-6)

The matter was not resolved during the 1973-74 school year and upon advice of the Superintendent (P-14) in September 1974, the Board directed its attorney to advise respondent that she had been, in effect, absent without leave during the entire 1973-74 school year. Respondent was so informed and was advised by letter of October 14, 1974 by the Board's attorney as follows:

"***I am further informed that you have not requested assignment for the 1974-75 school year and have failed to report for duty on September 3, 1974 and thereafter to date. Under the circumstances it appears that you have abandoned and terminated your aforesaid employment with the Clifton Board of Education. If this is so, will you please submit your resignation***. Unless you do so, I shall have no alternative but to advise the Board to***discharge you***. This letter is not to be construed as a charge against you and represents merely an attempt to resolve the matter amicably***." (P-15)

Respondent stated with respect to the 1974-75 school year that:

"***I had no notice to report for duty for the school year 1974-75. I was not asked for another medical leave request for 1974-75 so I did not know one was necessary since I am still not well enough for teaching.***" (R-1)

And,

"***I have failed to request a sick leave of absence for the school year 1974-75. I am still waiting for a doctor's name in St. Petersburg, Fla. whom the Clifton Board of Education has chosen to represent them

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concerning my physical disabilities. Failing to have received this information I have not been able to proceed further.***

"At this time I fail to understand why the Clifton Board of Education is so determined to relieve me of my tenure. To my knowledge my physical inability to teach is not costing them anything at this time.***" (R-3)

The hearing examiner observes that *N.J.S.A.* 18A:16-3 provides, in the matter of physical examinations of school employees, that:

"Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof***shall be borne by the board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

The hearing examiner finds that respondent sought to require the Board to choose a physician other than its medical inspector to examine her. She further was insistent that the Board pay for the examination. Such contingent requirements are contrary to the clear provisions of the law in *N.J.S.A.* 18A:16-3. It is the recommendation of the hearing examiner that the Commissioner determine that respondent failed to comply with the Board's directive to submit to a physical examination by its medical examiner, which was a corollary requirement attendant upon the Board's granting of her leave of absence for the 1973-74 academic year. Absent timely compliance therewith or with the further provisions of *N.J.S.A.* 18A:16-3, it is the further recommendation of the hearing examiner that the Commissioner determine that respondent was, in fact, absent without leave during the 1973-74 academic year.

It is the further finding of the hearing examiner that respondent neither requested a leave of absence nor reported for work for the 1974-75 academic year.

The hearing examiner finds that the three charges certified by the Board are proven to be true in fact. He recommends that the Commissioner determine that respondent has, in effect, abandoned her rights to her tenured position.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter and observes that no exceptions were filed to the report of the hearing examiner pursuant to *N.J.A.C.* 6:24-1.16. Respondent makes complaint that the Board's certification of tenure charges against her was unreasonable, since she is not being paid or otherwise causing expense to the Board. (R-3) The Commissioner does not agree.

A board of education must guard against the accrual of commitments to a greater number of teaching staff members than are needed to staff its schools.

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Respondent had failed to comply with the Board's reasonable requirements made contingent upon the granting of an extended leave for the 1973-74 academic year. Respondent, having been directed to report for duty in September 1974 or resign, did neither. Thereafter, the Board, pursuant to *N.J.S.A.* 18A:6-10 *et seq.* proceeded in proper fashion to seek a determination of the Commissioner relative to the employment status of respondent.

Respondent was offered ample opportunity to appear *pro se* or be represented by counsel at the hearing of May 8, 1975. Her defense was limited at all times to two handwritten letters. This failure to defend at a tenure hearing bears strong resemblance to *In the Matter of the Tenure Hearing of Daniel T. Carrow, School District of the City of Paterson, Passaic County,* 1974 *S.L.D.* 213 and *In the Matter of the Tenure Hearing of Mary Burns, School District of the Township of Readington, Hunterdon County,* 1974 *S.L.D.* 1307 wherein there was similar failure to defend by respondents.

The Commissioner accepts and holds for his own the finding of the hearing examiner that the charges are true in fact and determines that respondent has abandoned her tenure position. Accordingly, the Commissioner directs the Board of Education of the School District of the City of Clifton to dismiss respondent effective the first day of the 1973-74 academic year during which she neither reported for duty nor complied with the Board's requirement for submitting evidence of physical incapacity to perform her duties as a teacher.

COMMISSIONER OF EDUCATION

August 22, 1975

Scott Rosenthal,

Petitioner,

v.

Board of Education of the Greater Egg Harbor Regional High School District and Oakcrest High School, Atlantic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Cape-Atlantic Legal Services (Charles Middlesworth, Jr., Esq., of Counsel)

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

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Petitioner, a former pupil in the Oakcrest High School which is governed by the Board of Education of the Greater Egg Harbor Regional High School District, hereinafter "Board," alleges that he was improperly excluded from school and denied his constitutional right to a free public school education. He requests immediate reinstatement in school.

A hearing was held in this matter on December 6, 1974, and February 11, 1975 at the office of the Gloucester County Superintendent of Schools, Sewall, before a hearing examiner appointed by the Commissioner of Education. Several exhibits were admitted in evidence and Briefs were filed after the hearing. The report of the hearing examiner follows:

Petitioner was a ninth grade pupil in Oakcrest High School during the 1967-68 academic year and was excluded from school on or about April 1968 pursuant to *N.J.S.A.* 18A:46-1 *et seq.* Specifically, *N.J.S.A.* 18A:46-16 reads as follows:

> "A pupil may be refused admission to, or be excluded temporarily from, the schools of any district for a reasonable time pending his examination and classification pursuant to this chapter."

Although the litigants cannot agree on all the facts, the following summary presents the essential issues of material fact which are not in dispute:

1. At the time of the filing of this Petition of Appeal on February 26, 1974, petitioner was twenty years, three months of age.

2. Petitioner was diagnosed as emotionally disturbed in 1964 and required medication. (P-5)

3. Petitioner was suspended for reasons of discipline in April 1968.

4. He was diagnosed as emotionally disturbed by the Child Study Team (*N.J.S.A.* 18A:46-8) and excluded from school on June 10, 1968. (P-5)

5. His father refused home tutoring for him on December 12, 1968. (R-3)

6. Petitioner has not had any educational experience for five and one-half years, except for home instruction between October 28, 1969 and June 1970. (P-4)

7. Juvenile Court Judge Jacobs placed petitioner in the Menlo Park Diagnostic Center in June 1969. Judge Jacobs placed him on probation in August 1969, and recommended home instruction and residential placement. (P-5)

8. The Board contacted six schools on petitioner's behalf in January

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1970. For various reasons, none was acceptable to petitioner or the Board. (P-5)

9. Petitioner refused further psychiatric examination in July 1970. (P-5)

10. Petitioner contacted the Commissioner of Education, Department of Controversies and Disputes, on January 26, 1971 to seek procedural advice for filing a formal Petition of Appeal with the Commissioner. (Attachment to petitioner's Supplemental Brief)

11. Cape-Atlantic Legal Services contacted the Board for information on petitioner's behalf on January 27, 1971.

12. This Appeal was filed on February 26, 1974, three years later.

In the judgment of the hearing examiner, petitioner is guilty of laches. Assuming, *arguendo*, that his complaint has merit, in that the Board did relatively nothing to continue his education from the time of his exclusion in 1968, the summary, *ante*, shows that he contemplated legal action three years ago in 1971. However, for reasons not explained he did not file his Petition of Appeal until February 1974. *Harenberg v. Board of Education of the City of Newark et al.*, 1960-61 *S.L.D.* 142

In *Barbara Witchel v. Peter Cannici and Board of Education of the City of Passaic, Passaic County*, 1967 *S.L.D.* 1, affirmed State Board of Education, 1967 *S.L.D.* 3, the Commissioner commented as follows:

> "***The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances to determine whether there has been unreasonable and inexcusable delay which would bar action.***" (at p. 3)

In *Harenberg, supra*, the Commissioner stated that he

> "***has established no specific period of time after which an appeal is barred. Thus in *Gleason v. Bayonne Board of Education*, 1938 *S.L.D.* 138, nine months' delay by a dismissed mechanic was laches; *Carpenter v. Hackensack Board of Education*, 1938 *S.L.D.* 593, six months' delay by dismissed teacher held laches; *Aeschbach v. Secaucus Board of Education*, 1938 *S.L.D.* 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; *Wall v. Jersey City Board of Education*, 1938 *S.L.D.* 614 at 618, eleven months' delay of protest by teacher held laches; *Gilling v. Hillside Board of Education*, 1950-51 *S.L.D.* 61, nine months' delay by re-assigned janitor was laches.***"
> (at pp. 144-145)

In *Flammia v. Maller*, 66 *N.J. Super.* 440 (*App. Div.* 1961), the Court said at page 453:

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"***The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands, 19 *Am. Jur., Equity*, § 492, p. 340 (1939). It is the equitable counterpart of statutes of limitation. 'The adjudicated cases proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' *Galliher v. Cadwell*, 145 *U.S.* 368, 372, 12 *S. Ct.* 873, 36 *L.Ed.* 738 (1891).

"We had occasion to discuss the doctrine of laches in *Auciello v. Stauffer*, 58 *N.J. Super.* 522, 529 (*App. Div.* 1959), where we quoted from *Bookman v. R.J. Reynolds Tobacco Co.*, 138 *N.J. Eq.* 312, 406 (*Ch.* 1946):

> 'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies.***'

"Laches can be a defense only where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. *Mitchell v. Alfred Hofmann, Inc.*, 48 *N.J. Super.* 396, 403 (*App. Div.* 1958), certification denied 26 *N.J.* 303 (1958).***"

In *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County*, 1967 *S.L.D.* 78, affirmed by State Board of Education 86, the Commissioner in considering the question of laches wrote:

"***Justice Heher said in the case of *Marjon v. Altman*, 120 *N.J.L.* 16, at page 18:

> 'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. ***Taylor v. Bayonne*, 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners*, 72 *Id.* 131; *Drill v. Bowden*, 4 *N.J. Misc.* 326; *Oliver v. New Jersey State Highway Commissioner*, 9 *Id.* 186; *McMichael v. South Amboy*, 14 *Id.* 183.'***" (at p. 85)

Although there is no prior decision in this State setting forth the equitable defense of laches regarding the termination of a pupil's right to attend school, in the hearing examiner's judgment such a defense is appropriate and proper in this instance. Here we have a continuing problem regarding a pupil's right to attend

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school and the Board's obligation to provide him with a free public education. Even if petitioner's complaint is true, and not conceding that it is, a time must eventually come when the Board is no longer obliged to educate him. In the instant matter, petitioner knew in 1971 (see summary, *ante*), when he was seventeen years of age, that the Board would not comply with his request for the type of educational program he expected for himself; however, he took no action through the Commissioner even after he had inquired about such action. (See attachment to Supplemental Brief.)

This delay of three years, standing alone, is sufficient to render the matter out of time. During the hiatus of that three years, petitioner reached his age of majority; however, he still took no action until he was more than twenty years old.

Petitioner has also passed the age where the statutes require that he be given a free public school education. *N.J.S.A.* 18A:38-1 reads as follows:

> "Public schools shall be free to the following persons over five and under 20 years of age:
>
> "(a) Any person domiciled within the school district***."

For the above-mentioned reasons the Petition of Appeal should be dismissed. This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and reviewed the record and the exceptions filed by counsel for petitioner.

Petitioner asserts that his delay in filing the Petition of Appeal was not three years, as reported by the hearing examiner, but, rather, "a little more than one year." Petitioner's reasoning is that the period of time between the effective date of the law establishing the age of eighteen as the age of adulthood, January 1, 1973, and the date on which he filed his Petition of Appeal on February 26, 1974, is the only time frame in which the equitable defense of laches could apply. (Petitioner's Exceptions) Nevertheless, the record reveals that he was twenty years, three months of age at that time, and there is no statutory mandate that a free public school education be provided to persons over twenty years of age. *N.J.S.A.* 18A:38-1 Therefore, even if the time is tolled as explained by petitioner, his Appeal is untimely.

Petitioner asserts also, that he "is willing to submit to an independent psychiatric evaluation as a precondition to further education***." (Petitioner's Exceptions, at p. 3) However, he has steadfastly refused to be examined by the Board's Child Study Team including the Board's appointed psychiatrist. (Tr. I-68, 71, 72, 76-78; Tr. II-27-30) The record reveals, also, that the Board made many attempts to provide a continued educational program for petitioner, and in each instance the Board's proposal was not effectuated because either the institution was not an approved one, or petitioner or his parents would not

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cooperate nor accept the Board's off of a substitute educational setting. (P-5; Tr. I-120-126)

The Commissioner determines, therefore, that the delay of a little more than a year, is sufficient to invoke the equitable defense of laches. For this reason and those shown on the record demonstrating petitioner's refusal to cooperate with school officials who were proposing alternate methods to continue his education, the Commissioner adopts the report of the hearing examiner as his own.

Because of the special nature of this case, however, the Commissioner directs the Board to again offer petitioner an opportunity to submit to a complete evaluation by its Child Study Team, including the Board's appointed psychiatrist or psychological examiner. *N.J.S.A.* 18A:46-11 If the offer is accepted and petitioner is examined and classified pursuant to the appropriate statutes, *N.J.S.A.* 18A:46-1 *et seq.*, then the Board is further directed to provide for petitioner a program of studies, either in day school, evening school, or by home instruction which would enable him to complete his education through the twelfth grade.

With the exception of the directive contained herein, the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

August 22, 1975

Herbert Berlin,

Petitioner,

v.

Board of Education of South Plainfield, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld, (Sidney Birnbaum, Esq., of Counsel)

For the Respondent, Wilentz, Goldman & Spitzer (Robert J. Cirafesi, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the School District of South Plainfield, hereinafter "Board," was employed for three

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academic years and not reemployed for the fourth. Petitioner prays for reinstatement together with any back pay to which he is entitled on the grounds that the Board's action concerning his non-reemployment was procedurally and statutorily defective in that proper written notice was not given him by the Board.

A hearing was conducted in the office of the Mercer County Superintendent of Schools, Trenton, on September 27, 1974 before a hearing examiner appointed by the Commissioner of Education. Admitted in evidence were a Statement of Facts, the Superintendent's Affidavit, and several exhibits. Briefs were submitted prior to and subsequent to the hearing, which was limited to the testimony of the Superintendent of Schools. Petitioner died in an automobile accident prior to the hearing; however, this matter is continued on behalf of his beneficiaries. The report of the hearing examiner follows:

The stipulation of facts in this matter is summarized as follows:

1. Petitioner was employed for three consecutive academic years and not reemployed for a fourth. (1970-71, 1971-72, 1972-73)

2. Petitioner received a letter from the Superintendent of Schools dated April 9, 1973, stating that his employment would not be continued for the 1973-74 academic year.

3. On April 18, 1973, petitioner received a contract form for employment in the 1973-74 academic year.

4. Petitioner signed and returned the contract on May 17, 1973, and delivered a written notice accepting employment for the 1973-74 academic year.

5. Petitioner thereafter received a letter from the Superintendent dated May 22, 1973, regarding the aforementioned written notice.

Petitioner alleges specifically that:

1. The Board did not decide prior to April 30, 1973, not to renew his contract, as required by earlier decisions of the Commissioner.

2. Assuming, *arguendo,* that it did decide prior to April 30, written notice of that decision as required by *N.J.S.A.* 18A:27-10 was not given to petitioner thereafter in timely sequence.

The record shows that the Superintendent mailed the following notice to petitioner dated April 9, 1973:

"In accordance with the terms of the Agreement between the South Plainfield Education Association and the South Plainfield Board of Education, Article XIV, Section A (2), and previous notification by your

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department supervisor and school building principal, your employment will not be continued into the 1973-74 school year." (Exhibit A)

The Superintendent testified that this notice was sent to petitioner after the Superintendent conferred with the Board informally, and was directed to give petitioner written notice of his non-reemployment. (Tr. 7, 8, 16, 20, 25, 28) The Board gave him this instruction after he recommended non-reemployment based on evaluations by petitioner's immediate supervisor, and his own evaluation of petitioner's performance. The Superintendent then directed a secretary in his office to remove petitioner's name from a list of teachers' names to be approved by the Board in public session for contractual employment in 1973-74. (Superintendent's Affidavit) Petitioner's name was removed from the list and the Board subsequently approved the modified list of teachers to be offered contracts pursuant to *N.J.S.A.* 18A:27-1 which reads as follows:

"No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him."

However, a clerical error was made because of the absence of the secretary usually in charge of checking and distributing contract forms to be signed by teachers; therefore, petitioner was erroneously given a contract form even though his name did not appear on the list of teachers' names approved by the Board. (Affidavit of Marjorie D. Prusek, Exhibit H) Although petitioner had no knowledge of the events said to be clerical error, he admitted that portion of the affidavit which expresses transactions between himself and the secretary. (Counsel's letter dated February 21, 1974) Nevertheless, he obviously determined that the Superintendent's letter dated April 9, 1973, was not a proper non-reemployment notice, because he signed the contract form and returned it with a letter accepting employment for the coming school year.

The pertinent statutes read as follows:

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all

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within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

This is yet another Petition of Appeal in a series of similar Petitions requiring a Commissioner's determination on the precise meaning of the statutes. Among them are: *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *and Bolger and Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975), affirmed State Board of Education May 7, 1975. In *Burgin,* the Commissioner determined that written notice pursuant to statute can be

"***given by any designated school administrator or board secretary, *after the board has made its decision* [not to renew the contract] *in public or private* [session] ***." (*Emphasis in text.*) (1974 *S.L.D.* at 400)

In the judgment of the Commissioner the requirements of the statutes (*N.J.S.A.* 18A:27-10 *et seq.*) are met when local boards of education decide in public session or executive conference session that reemployment will not be offered to certain teaching staff members and thereafter directs the school administrator, or board secretary, to give notification to such teaching staff members in writing of this determination on or before April 30.

In the instant matter, the determination made by the Board did not deprive petitioner of any rights or any protection afforded by the school laws.

Petitioner does not attack the recommendations of his immediate supervisors, nor that of the Superintendent of Schools; rather, his attack is on the technical actions of the Board in regard to his reemployment and the credibility of the Superintendent's testimony. He argues that the Board must take a formal action not to reemploy him. This argument cannot be sustained. See *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7; dismissed State Board of Education 1968 *S.L.D.* 11; aff'd Superior Court, Appellate Division 1969 *S.L.D.* 202. See also *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974).

As stated in *Bolger and Feller, supra,* the primary purpose of the statutes requiring written notice to teachers by April 30 is to provide them with timely

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notice that they are not going to be reemployed so that they may seek employment elsewhere. In the instant matter, petitioner clearly knew on April 9, 1973, that he would not be reemployed. (Exhibit A) His reliance on alleged technical inaccuracies which he claims render that notice defective, is insufficient to prove that the Board's action was not proper in every respect. Nor does his attack on the credibility of the Superintendent's testimony sustain his burden of proof that the Board did not, in fact, decide on the status of his employment.

On the other hand, the record shows that the Board did in fact decide that petitioner would not be reemployed, according to the Superintendent's testimony. He stated that petitioner's name was removed from a list of teachers' names who were approved for reemployment, and that petitioner's contract was, in fact, issued by clerical error.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the instant matter including the exceptions filed to the report of the hearing examiner pursuant to *N.J.A.C.* 6:24-1.16. Petitioner states therein that the notice of nonrenewal given to him was a unilateral determination by the Superintendent rather than a legal determination which only the Board could make. The Commissioner does not agree. An examination of the record gives no reason to doubt the credibility of the Superintendent's testimony that he was directed by the Board to give such notice to petitioner. The absence of official minutes of the private session of the Board is insufficient reason to conclude that the Board failed to make a proper determination. While the record of such an informal meeting is a valuable adjunct to refreshing the memory of those who have participated therein and such procedure should be encouraged, there is no legal requirement that it be made or preserved.

Petitioner argues in the exceptions that the ruling of the Commissioner in *Bolger and Feller, supra,* was not followed. Therein the Commissioner advised that, when a Board's determination is made relative to who shall be offered reemployment, there be inscribed in the minutes of a special or regular meeting prior to April 30 that such a determination has been made. In the instant matter this advisory had been made. The advisory opinion in *Bolger, supra,* was characterized by the Commissioner himself as a *strong recommendation* and was prospective and *in no way a retrospective ruling* as incorrectly stated by petitioner in his exceptions. The *Bolger and Feller* decision was issued on February 27, 1975, many months subsequent to the filing of the within Petition and the events that precipitated it.

The unfortunate clerical error of a Board employee, issuing petitioner a contract, is not dispositive. In *Agnes D. Galop v. Board of Education of the Township of Hanover, Morris County,* 1975 *S.L.D.* 358 (decided May 16, 1975) an error of a Board employee resulted in an official act of the Board establishing a higher salary for Galop than that provided by the Board's salary guide. It was

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determined, therein, that this official act of the Board must be honored by the Board, absent a threat to the thorough and efficient operation of the school district. Nor did the Board in this instance establish with petitioner an unwritten, but nonetheless binding, contract as was found to exist in *Eleanor Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County,* 1974 *S.L.D.* 706. See also *Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1972 *S.L.D.* 638.

Herein, however, the employee's error resulted in no official act of the Board, nor was a contract executed and signed by the Board Secretary or any member of the Board. Absent such official action, the careless error of the Board's employee may not stand in the place of a determination which is statutorily required to be made by the Board alone.

The Commissioner determines that the Board in legal fashion decided petitioner would not be offered employment for the 1973-74 school year. Thereafter petitioner, in timely fashion, was properly notified pursuant to *N.J.S.A.* 18A:27-10 *et seq.* Accordingly, the within Petition, being without merit, is dismissed.

COMMISSIONER OF EDUCATION

August 22, 1975

Herbert Berlin,

Petitioner-Appellant,

v.

Board of Education of South Plainfield, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 22, 1975

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent-Appellee, Robert J. Cirafesi, Esq.

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

December 3, 1975

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John J. Caffrey, Jr., individually and as President of Citizens for Washington School; Barbara E. Szem; Geraldine Silverman; Rev. Joseph Herring; John Dalton; Valerie Givens; John J. Caffrey, Sr., and Kathleen M. Scully,

Petitioners,

v.

Board of Education of the Township of Millburn, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Edward Kucharski, Esq.

For the Respondent, McCarter and English (Steven B. Hoskins, Esq., of Counsel)

Petitioners are citizens resident in Millburn and members of Citizens for Washington School. They protest a December 16, 1974 resolution of the Board of Education of the Township of Millburn, hereinafter "Board," wherein it was determined to close the Board's Washington Elementary School, lease the building to the State Department of Education, and study the possible future utilization of this school building as part of a future junior high school complex. (R-5) They seek an order of the Commissioner of Education preventing the Board from closing the School, from reassigning pupils of the school to other elementary schools, and from leasing or otherwise using the buildings as other than a Millburn elementary school.

The Board asserts that its action of December 16, 1974, was a sound exercise in discretion and in no way illegal or improper, and that the Petition should be dismissed. In support of this assertion the Board cites *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E. & A.* 1947). (Tr. I-27)

The Petition herein was filed with the Commissioner on February 10, 1975, and respondent's Answer was filed on March 18, 1975. Petitioners moved before the Superior Court of New Jersey, Chancery Division, Essex County, that the Court assume jurisdiction on grounds that a possible conflict of interest existed because of the negotiations by the State Department of Education, hereinafter "Department," to lease the Washington School for an educational program for deaf and hearing impaired children. The Court declined to accept jurisdiction and directed that the Commissioner proceed to a timely determination. Thereafter, petitioners appealed to the Commissioner on April 15, 1975, asking that he disqualify himself because of conflict of interest and that he direct the Board not to enter into a lease contract with the Department, *pendente lite.* The Commissioner declined to disqualify himself from rendering a determination pursuant to *N.J.S.A.* 18A:6-19 *et seq.*, stating that no conflict of

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interest existed which would prevent either the Commissioner or those who serve him in the Division of Controversies and Disputes from exercising fair and impartial judgment and determination. He did, however, direct that until a determination was made, no leasing contract should be executed between the Department and the Board. (Commissioner's Letter of April 23, 1975)

A hearing in the instant matter was conducted on May 5 and 6, 1975 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board operated seven neighborhood elementary schools during the school year 1974-75 and, in addition, a high school and a junior high school. It leased to the Department its Millburn Avenue school which was operated as a special school serving hearing handicapped children from the northern portion of the State. The age of the Board's seven operating elementary school buildings ranges from seven to sixty-one years. Of these schools, the Washington School, built in 1968, is the most recently constructed. It is this fact that prompts petitioners' primary charge that the Board's decision to close the Washington School was *ultra vires,* arbitrary, capricious, an abuse of its discretionary power, and otherwise improper. Petitioners do not challenge the Board's authority to close a school in the face of a recognized decline of elementary pupil enrollment (K-6) from a peak of 2,205 in 1966 to 1,829 in March 1975. (R-2) Rather, they challenge the decision to close the Washington School instead of one of the Board's older elementary schools. In particular, they assert that it would be more reasonable to close the South Mountain School which was built in 1935 and serves an overlapping districting area for pupil assignment. This school is located approximately seven-tenths of one mile east of the Washington School. (P-45; Tr. II-31)

The March 31, 1975 enrollment in the Board's elementary schools and the year of each school's construction is as follows:

School	Enrollment	Constructed
Deerfield School	275	1962
Glenwood School	419	1939
Hartshorne School	285	1958
Short Hills School	312	1914
South Mountain School	169	1935
Washington School	118	1968
Wyoming School	251	1920

The primary charge of reference, *ante,* is segmented in the Petition of Appeal into five component parts which are identifiable as separate charges. Such charges will now be considered seriatim by the hearing examiner.

CHARGE NO. 1

Petitioners allege that the Board's decision to close its newest and most commodious elementary school, the Washington School, rather than the South

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Mountain School, was arbitrary, capricious, and an abuse of the Board's discretionary power which threatens the quality of its educational program.

The Washington School with a pupil enrollment of 118 in March 1975 consists of thirteen classrooms totaling approximately 12,880 square feet as compared to the South Mountain School's enrollment of 169 in eleven classrooms totaling approximately 7,887 square feet. (R-3; P-38) Ancillary facilities at the Washington School approximate 12,481 square feet as compared to 9,898 square feet at the South Mountain School. (P-38) Facilities available at the Washington School that are not separately provided at the South Mountain School are an audiovisual room, a separate librarian's workroom, an office duplicating room, and lavatories in classrooms for grades one through four. (Tr. I-94) Classrooms at the Washington School have, on the average, 272 square feet more floor space than that provided at the South Mountain School. (P-38) Enrollment in the Washington School has declined forty-two percent from 204 in September 1970 to 118 in March 1975, as compared to a lesser decline of thirty-one percent at the South Mountain School, from 247 in September 1970 to 169 in March 1975. Anticipated kindergarten enrollment in the area served by the Washington School for September 1975 is 15 as compared to 36 for the area served by the South Mountain School. (R-3)

Petitioners argue that the Washington School with its larger classrooms presents greater opportunity for open classroom instruction and the development of other flexible and modern programs of education. (Tr. I-44) Witnesses called by petitioners stated that they believe it is unreasonable to close the district's newest and best-equipped elementary school. (Tr. II-56, 84-85, 96-97) They further argue that the Board's decision on December 16, 1974 to close the Washington School was made without proper consideration of all the relevant facts.

The Superintendent testified that he had recommended to the Board that it close the Washington School. He testified that he based his recommendation on a belief that the school's declining enrollment, currently the lowest in the district, would not justify a teacher for each grade in the 1975-76 school year and that the combination of grades under a single teacher would decrease its educational viability. (Tr. II-113-114) He further testified that he believes his recommendation was a reasonable one based on extensive discussions with his administrative staff. (Tr. II-116) In this regard, he stated that the classrooms of the South Mountain School are similar in size to all other elementary schools in the district except the Washington School. (Tr. II-128-129) He further testified that a teacher presently teaching in the Washington School would not be compelled by reason of classroom size to modify educational techniques or program if reassigned to the South Mountain School. (Tr. II-130-131) This testimony was corroborated by the testimony of the former principal of the Washington School who had participated in the administrative discussions relative to the problems of under-utilization of the Board's elementary school buildings.

The hearing examiner has considered and weighed the testimony,

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documentary evidence and arguments relative to Charge No. 1. He concludes that the Washington School is more modern and commodious than any of the other elementary schools in the district. He finds no reason, however, to conclude that the educational programs and opportunities available to pupils of the district would be reduced by the proposed closing of the Washington School and the redistricting of its pupils. Nor is there any conclusive showing of covertness, arbitrariness, or abuse of discretion on the part of the Board relative to its consideration of the choice of which school to close. It is clear that the Board's administrators studied the matter and that the Superintendent forthrightly recommended to the Board that the Washington School be closed. This was based on his belief that it would further the educational program of the elementary school pupils and that the Washington School was the only elementary school that could become a part of a future junior high school complex to possibly replace the Board's older junior high school. (P-46) The forthright testimony of a member of the Board convinces the hearing examiner that her reasons for voting to close the Washington School were based upon a belief that the enrollment in the school had fallen below a desirable level to guarantee sufficient teacher-pupil and pupil-pupil interaction within a single grade in the school. (Tr. I-128) It is also clear that she believed that austerity and economy demanded a consolidation, and that she accepted the recommendations of the Superintendent after having discussed the matter in previous Board sessions over a period approximating two years. (Tr. I-125, 128-130) It is additionally clear that she believed the Washington School could be utilized as a possible future part of a junior high school complex. Such findings do not support, in the judgment of the hearing examiner, a conclusion that the Board acted without reasonable factual information or discussion relative to its educational program. Accordingly, the hearing examiner recommends that the Commissioner determine that Charge No. 1 is without merit.

CHARGE NO. 2

Petitioners allege that the Board's decision to close the Washington School is faulty by reason of the fact that the operational costs of the South Mountain School exceed those of the Washington School.

The hearing examiner finds it to be true that the operating costs of the Washington School are indeed less than those of the South Mountain School. This finding is grounded on the Board's projected operating costs set forth in its 1975-76 budget. Those for the South Mountain School are projected at $46,562 as compared to $17,121 for the newer Washington School. (Tr. I-121; Tr. II-5) To this differential must be added approximately $5,000 for increased costs of transporting approximately twenty-seven additional pupils within the district to the Glenwood School where they would be reassigned if the Washington School were closed. (Tr. II-13) In the event that the Board elected to close the South Mountain School, all pupils now assigned there would be accommodated at the Washington School. (Tr. I-124; Tr. II-14)

The hearing examiner finds no relevance with respect to overall costs between a choice of lease of the Washington School or another elementary school facility vacated by the Board. The Board, believing that its Millburn

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Avenue School is no longer fit for use, has determined not to renew its lease on this building which was used in 1974-75 by the Department for its program for hearing handicapped pupils. (Tr. II-34) Since the Department expresses no preference as to which school it desires to lease, it may be safely assumed that the rental fee will be approximately the same regardless of which facility is leased for this purpose. (Tr. II-35)

The hearing examiner leaves to the Commissioner to determine whether the increased operational and transportation costs of the South Mountain School are of such moment as to support a finding of arbitrariness or abuse of discretion on the part of the Board.

CHARGE NO. 3

Petitioners assert that the Board, having submitted a referendum which was passed by the voters for the issuance of bonds to build the Washington School, may not legally during the lifetime of those bonds divert the use of its school to a purpose other than that for which it was built.

This was argued as a legal matter in a separate action, *Silverman et al. v. Board of Education of the Township of Millburn,* Docket No. L-31899-74, New Jersey Superior Court, Law Division, Essex County, May 14, 1975. The decision of the Court was that the Board is not restricted from diverting its schoolhouse to alternate uses during the lifetime of the bonds. The Court recognized that not all of the bonded indebtedness of that issue was incurred for purposes of building the Washington School. (P-44) The Court stated that:

> "***The voters of Millburn have elected the Board of Education to formulate and execute educational policies for Millburn Township. The members of the Board are responsible for the efficient operation of the school system. If the Board were so limited in its discretion as to prevent it from making the best use of the physical assets of the school district, the voters would ultimately be the ones to suffer. Here, the Board has determined that the Washington School is not needed as an elementary school.*** When the circumstances upon which a referendum is based have so changed, the Board must be able to act, albeit in a reasonable manner, in a way consistent with the public interest.***" (at pp. 7-8)

> "***This is not a case where a facility was built with funds from a bond issue for school purposes and then the use changed to a remote use. Rather the change present here is still an educational use consistent with the purposes for which the school was built. *Shuster v. Board of Education of the Township of Hardwick,* 17 *N.J. Super.* 357 (*App. Div.* 1952)***" (at p. 8)

And,

> "***Further, the Board's action is not taken in bad faith. The bonds were requested and authorized for a needed purpose. This purpose was fulfilled with the construction and operation for 7 years of the Washington School. Changed circumstances dictate the change of use.***" (at pp. 8-9)

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In the context of this authoritative dicta, the hearing examiner recommends that the Commissioner concur in the determination that the Board is not legally restrained from alternate designated use of its schoolhouse during the lifetime of the bonded indebtedness thereon.

CHARGE NO. 4

Petitioners allege that the Board's action in resolving on December 16, 1974 to study the utilization of the Washington School as a junior high school was "tainted" with misinformation and was in violation of *N.J.A.C.* 6:22-5.1 *et seq.*

The hearing examiner finds no evidence that the Board was bound by *N.J.A.C.* 6:22-5.1 *et seq.* when it set in motion a study of the possible utilization of the Washington School as part of a future junior high school complex. These regulations of the State Board of Education do not require that a Board submit preliminary plans, worksheets, schematic or working drawings when it merely initiates a study of alternate possible utilization of a site it already owns. There is not a shred of evidence that the Board has determined to convert the Washington School to a junior high school. Since this is so, the Board was not in violation of *N.J.A.C.* 6:22-5.1 *et seq.* (Tr. I-88)

Petitioners complain that the Washington School site contains only 3.4 acres (P-45), whereas *N.J.A.C.* 6:22-5.2 specifies that a junior high school for 900 pupils have a twenty-nine acre site. (Tr. II-39) A clear reading of this regulation, however, reveals that it is merely "***suggested that there be provided a minimum of 20 acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollment.***"

It is found that the Board owns five acres of contiguous undeveloped land and anticipates joint usage of athletic fields at the adjacent high school if the Washington School becomes a junior high school. (Tr. II-49, 132) It is also contemplated that a portion of the contiguous acreage owned by the Commonwealth Water Company could be acquired. (Tr. I-131; Tr. II-132) The site of the present junior high school has 12.2 acres. (Tr. II-50) No school in the district meets the recommended acreage set forth in the State Board regulations. (Tr. I-92)

Petitioners additionally assert that the Washington School site is poorly drained in violation of *N.J.A.C.* 6:22-5.4. (Tr. I-28, 33, 39-40) There is convincing evidence that water in minimum amounts does stand at times on portions of the school site. (P-35; P-36; P-66) However, the former principal of the Washington School testified that since certain corrective measures had been taken he had experienced no problem either in the school or on the playground, which he personally supervised daily during the lunch period from September 1974 through February 1975. (Tr. I-153-154; Tr. II-108)

The hearing examiner has considered the testimony and documentary evidence relative to Charge No. 4. He finds that the drainage problem at the Washington School site is presently minimal. No findings relative to the possible

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use or acquisition of contiguous acreage can be made, absent engineering studies relative to their projected use.

It is clear, however, that at one juncture in April 1973, the Board had received from its architect a feasibility study which stated that:

> "***The existing building [Washington School] could serve as an academic wing of a three-year junior high school with central facilities, shops, *** built as an addition, thus forming a junior-senior high school campus.***" (Tr. II-37)

Absent a clear showing that the Board was in violation of *N.J.A.C.* 6:22-5.1 *et seq.* or that its resolution of December 16, 1974, was based on misinformation, the hearing examiner recommends that the Commissioner determine that Charge No. 4 has not been proven by petitioners to be true in fact.

CHARGE NO. 5

Petitioners allege that the Board's controverted resolution of December 16, 1974, if allowed to stand, would bind future boards and is, therefore, an abuse of the Board's discretionary power.

The hearing examiner has reviewed and carefully weighed the evidence pertinent to this charge. He finds that the Board's resolution would close the Washington School to Millburn pupils for the 1975-76 school year and until the Board or a successor board of education would determine to reopen it again as a school. The execution of a one-year lease would not, however, prevent its future use by a Millburn Board of Education as a school for Millburn pupils.

The controverted resolution (R-5) in no way committed the Board or a future board to convert the Washington School to a junior high school. It merely set in motion the events that have since led to establishment of a citizens task force to study the matter. (Tr. I-72) No contract has been let. No commitment has been consummated that is binding on the present Board or any future board.

Accordingly, the hearing examiner recommends that the Commissioner determine that Charge No. 5 is without merit.

In summary, the hearing examiner recommends that the Commissioner determine that Charges Nos. 1, 3, 4 and 5 have not been proven to be true in fact and are without merit. The Commissioner is further called upon to determine within the context of the findings relative to Charge No. 2 whether the Board's action was an abuse of discretion. Finally, the Commissioner is called upon to determine whether the Board's action, as shown by the complete record herein, was unreasonable, capricious, arbitrary, illegal, or otherwise improper.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the report of the hearing examiner and the exceptions and replies thereto filed by petitioners and the Board. The Board takes no exception to the report but requests an expedited decision by the Commissioner. Petitioners' exceptions are lengthy and are supplemented by a letter dated August 13, 1975, containing a number of allegations concerned with actions of the Board and the Commissioner's office.

In essence the principal argument herein, as the hearing examiner correctly summarized it, is not concerned with the Board's authority to close a school in the context of declining pupil enrollment but instead with the decision of the Board to close a particular building – the Washington School – rather than an older facility. (See also opening and closing arguments of counsel.) (Tr. I-2 *et seq.* and Tr. II-143 *et seq.*) In petitioners' argument, the hearing examiner's report contains "irrelevant details," fails to recognize the "major issues" in the instant matter, is inconsistent with a recent decision of the Commissioner in *Mrs. John Engle et al. v. Board of Education of the Township of Cranford, Union County,* 1974 *S.L.D.* 785, aff'd State Board of Education March 5, 1975, and is biased in favor of local boards of education because the hearing examiner himself was a "local board member." (See Petitioners' Exceptions to Hearing Examiner's Report, at pp. 2-4.)

The Commissioner has reviewed all such arguments and the record in this matter and states that he finds no evidence of such bias herein. The hearing examiner has never been a member of a local board, as alleged, but has been and is an educator of long teaching and administrative experience as are all hearing examiners of the Commissioner, although the Commissioner would find no fault in such membership *per se* even if the allegation were true in fact. An educational expertise and varied experience are required of all those who assist with the multitude of complex controversies presented to the Commissioner for adjudication and in the instant controversy.

Further, the Commissioner opines that petitioners' lengthy and detailed rebuttal to the hearing examiner's report – which rebuttal is concerned in greater part with the merits of the choice that the Board made in this instance – provides no basis for a substitution of discretion by the Commissioner for the discretion that the Board exercised in its decision of December 16, 1974 to halt operation, at least in the immediate future, of the Washington School. On that occasion a majority of the whole Board, acting on the advice of its Superintendent of Schools and subsequent to a period of what was clearly lengthy review and public discussion, approved its resolution to halt such operation. That decision of the Board remains unaltered to the present day and is pursuant to the Board's authority to govern and manage its schools. *N.J.S.A.* 18A:11-1 The principal reasons on which the decision was founded remain viable. These principal reasons, as set forth by the Superintendent, are that the Washington School's pupil population had declined in 1974 to a total population which was the smallest in the district and thus could most easily be transferred – and that, in the long view, it was thought the Washington School might most easily be converted to a junior high school. (See Tr. II-110 *et seq.*)

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In opposition to such reasons petitioners' proofs herein were, in effect, that there were other reasons which carried greater weight; *i.e.* the Washington School was the newest one in the district, and an "excellent facility," the Washington School could be operated more economically than the one to which Washington area pupils were henceforth to be assigned, etc. The Commissioner finds such proofs are not without merit. The Board's wisdom is, indeed, a proper subject for discussion.

In a controversy such as this, however, it is axiomatic that the members of local boards of education are responsible for the wisdom of their actions to the people who elect them and not to the Commissioner of Education. As the Commissioner recited the law as a frame of reference in *Cecelia Barnes et al. v. Board of Education of the City of Jersey City, Hudson County,* 1961-62 *S.L.D.* 122, 125, aff'd State Board of Education, 1963 *S.L.D.* 240;

> "***as long as***a board of education***acts within the authority conferred on***it by law the courts are without power to, or will not, interfere with, control, or review*** its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed." 78 *C.J.S.* 920
>
> "In absence of clear abuse of the discretionary power of the Board, the Commissioner will not interfere. It was held in *Boult v. Board of Education of Passaic,* 136 *N.J.L.* 521 (*E.&A.* 1948), concerning the authority of the Commissioner and State Board of Education under *R.S.* 18:3-14 and 15:
>
> > 'Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board.'
>
> "The wisdom and effectiveness of a board of education's administrative decisions is a matter for the constituent citizenry to determine.
>
> > 'It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing legislation that evinces 'bad faith.' To which the answer is – first, that the power so to intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly, that the redress of the betrayed constituent is in his own hands, to be sought at the polls and not in the courts.' *Moore v. Haddonfield,* 62 *N.J.L.* 386, 391 (*E.&A.* 1898)
>
> > '***I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. That is their responsibility to those whom they govern. Courts cannot compel

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> governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly.' *Peter's Garage, Inc. v. Burlington,* 121 *N.J.L.* 523, 527 (*Sup. Ct.* 1939)***" (at p. 125)

(See also *S.J. Marcewicz et al. v. Board of Education of the Pascack Valley Regional High School District, Bergen County,* 1972 *S.L.D.* 619.)

Thus, the test is whether or not the Board in the instant matter acted "within its authority," and in "good faith" in the exercise of its discretion. It is not a test at this juncture of a balance of reasons by the Commissioner to determine if he would have reached a decision different from the one the Board reached on December 16, 1974. (R-5)

The Commissioner has considered the facts, *sub judice,* in this parameter of law and determines that the Board did properly act within its authority in its decision to close the Washington School for the 1975-76 school year. There was reason for the action as set forth, *ante.* There is no reason in the transcript or record of this hearing for a substitution by the Commissioner of his discretion for that of the Board. Accordingly, the Petition of Appeal is dismissed.

There remains the letter of reference, *ante,* dated August 13, 1975 from petitioners to the Commissioner wherein new allegations are made against the Board and against officials of the State Department of Education. This letter alleges that:

1. Contrary to prior direction of the Commissioner (contained in a letter of April 23, 1975, prohibiting further leasing agreements between the State Department of Education and the Board until such time as the instant matter had been adjudicated) a lease agreement was entered into between the State Department of Education and the Board;

2. All educational equipment had been removed from the Washington School this summer and at least 60 days would be required to return it;

3. On Tuesday, August 12, 1975, members of the Millburn Board had met with Mr. Fred Combs, Assistant Commissioner of Education, Division of Controversies and Disputes, and had on that occasion discussed the instant litigation with him.

Petitioners requested an "immediate reply" to their letter and an investigation.

Such reply was forwarded to petitioners by Joseph Zach, Acting Assistant Commissioner of Education, Division of Controversies and Disputes on August 19, 1975. In his reply Mr. Zach stated that the Division had no knowledge with respect to the allegations and said that Mr. Combs could not, as alleged, have

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met with members of the Board on August 12, 1975 since he had been on terminal vacation for all of July and August.

The Commissioner confirms this latter statement and further states that the retirement of Mr. Combs, following terminal vacation, is effective in September 1975. The Commissioner further confirms by knowledge and belief that no other member of the Division of Controversies and Disputes has met with members of the Board.

It is true, as alleged by petitioners, that a lease agreement between the State Department of Education and the Board was entered into in June 1975 for rental of the Board's Millburn Avenue School on a month to month tenancy beginning July 1, 1975. However, the Commissioner observes that such agreement was a continuation of a previous agreement for rental of this facility for use of handicapped pupils and he finds there is no violation of the spirit of his directive of April 23, 1975 in this regard.

Finally, for the record, the Commissioner holds there is no substance in a contention by petitioners that the Commissioner or any hearing officer of the Division of Controversies and Disputes are barred by conflict of interest from hearing and considering the complaints set forth by petitioners in this Petition of Appeal. The Secretary of the Board testified that the Board had asked the "***State Department of Education to rent Washington School.***" (Tr. I-34) He further testified that the State Department of Education had agreed late in the fall of 1974 to "***sign a lease***for***any of the schools in Millburn***" (Tr. I-35) which the Board might make available and that there was no "preference" in this regard. The Commissioner finds, from his own investigation in this matter, that this has been, and is, the position of responsible officials in the State Department of Education, and he finds no reason in such circumstances to bar the instant matter as a controversy under the school laws, subject to adjudication by the Commissioner. *N.J.S.A.* 18A:6-9

Accordingly, the adjudication has gone forward. Petitioners have had full opportunity to present their case. The decision of the Commissioner on the merits of the Petition of Appeal has been set forth.

COMMISSIONER OF EDUCATION

August 25, 1975

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Edward Collins,

Petitioner,

v.

Board of Education of the North Hudson Jointure Commission, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Scipio L. Africano, Esq.

Petitioner, a nontenured teaching staff member initially employed for the 1973-74 academic year by the Board of Education of the North Hudson Jointure Commission, Hudson County, hereinafter "Board," avers that he is entitled to reemployment for the 1974-75 academic year because the Board failed to comply with the provisions of *N.J.S.A.* 18A:27-10. The Board denies the allegations and asserts that its actions regarding the non-reemployment of petitioner was, in all respects, proper and legal.

A hearing was conducted in this matter on November 26, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Thereafter the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

Petitioner was employed by the Board for the 1973-74 academic year as a teacher of special education. He avers that contrary to the provisions of *N.J.S.A.* 18A:27-10 he was not notified by the Board that he would not be reemployed for the 1974-75 school year. Consequently, petitioner addressed a letter (P-4) to the Board, which is dated received on May 16, 1974, by which he accepted the Board's alleged offer of employment.

The applicable statute, *N.J.S.A.* 18A:27-10, reads as follows:

"On or before April 30 in each year, every board of education in the State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

> "a. A written offer of a contract for employment for the next succeeding year *** or
>
> "b. A written notice that such employment will not be offered."

Additionally, the statute *N.J.S.A.* 18A:27-12 requires a nontenured

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teaching staff member to notify the board in writing on or before June 1 in each school year whether or not he/she accepts the board's offer of employment.

The factual pattern in this dispute is clear. Petitioner had done his practice teaching in the Board's schools. The regular teacher, to whom petitioner was assigned, had applied for and was granted a year's leave of absence. Petitioner was employed to teach her class (Tr. 64), although petitioner testified that he could not recall whether he was informed that his employment would last for one year, or until the regular teacher returned from her leave of absence. (Tr. 72-73) In any event, by letter dated January 31, 1974, the administrative principal advised petitioner of the following:

> "As we have previously discussed, you were hired to teach in Miss Gaughran's class for the school year 1973-74 since she had applied for and was granted a one year leave of absence.
>
> "I recently spoke with Miss Gaughran and she has verbally informed me that she has every intention of returning in September. You would be well advised to actively seek employment for September of 1974." (P-2)

The administrative principal testified that he was told by the Board President to notify petitioner he would not be reemployed for 1974-75 because the teacher on leave, whose position petitioner was allegedly filling, was returning. (Tr. 61)

The Board President testified that at a conference meeting of the Board on January 21, 1974, it was determined that petitioner would not be reemployed for the subsequent school year and he was authorized to direct the administrative principal to so notify petitioner. (Tr. 35, 37, 61)

Thereafter, on April 8, 1974, the administrative principal addressed the following letter to petitioner:

> "***Your Union Representative spoke with me today concerning my letter to you on January 31, 1974.
>
> "[He] explained that you spoke to him shortly after you received the letter and that you were confused as to its meaning.
>
> "I spoke with you shortly after I mailed the letter and before you received it and explained that unless I received information to the contrary, you would not be employed by the Jointure Commission in September 1974.
>
> "Any confusion you had at the time of receipt of my letter should have been brought to my attention immediately.
>
> "Please contact me if you have any further questions." (P-3)

The Board President testified that the administrative principal was directed

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to send the above letter (P-3) to petitioner as an official document to inform him of his non-reemployment. (Tr. 38, 54) The Board President admits that the Board did not take any official action at any public Board meeting in regard to the non-reemployment of petitioner. (Tr. 30) Furthermore, in an affidavit (C-1) made part of the record herein, the Board President affirms the fact that conference meetings occurred and petitioner's non-reemployment for 1974-75 was discussed as hereinbefore set forth.

The hearing examiner finds, on the basis of the testimony and evidence herein, that the Board did meet in private session on two occasions, discussed petitioner's employment status, and determined to direct the administrative principal to inform petitioner he would not be reemployed, all within the April 30 deadline.

The issue, therefore, for the Commissioner to determine is whether such determination of non-reemployment may be made at a conference meeting of the Board.

In this regard, the Commissioner has heretofore held that the best interest of pupils, the teaching staff members, the entire school system, and the community at large requires that discussion of staff personnel by boards of education not be held in public. *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 (decided May 6, 1975) Furthermore, in *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 the Commissioner held that "***written notice [of non-reemployment may] be given by any designated school administrator or board secretary, *after the board has made its decision in public or private* and has directed him/her to do so.***" (at p. 400) See also *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975); *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975).

Clearly, then, such determinations of non-reemployment of nontenured teaching staff members may be made in conference meetings. Consequently, having found no basis for the Commissioner to intervene herein, the hearing examiner recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter and observes that neither party filed objections or exceptions to the report of the hearing examiner.

The Commissioner adopts the findings and conclusions of law as set forth

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by the hearing examiner in his report. Accordingly, having found no basis upon which the Commissioner should intervene, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 26, 1975

Arthur L. Page,

Petitioner,

v.

Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, Merlino & Andrew (Robert B. Rottkamp, Jr., Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the City of Trenton, hereinafter "Board," alleged in a Petition of Appeal filed in August 1973 that the Board had illegally abolished his position of employment and aborted his entitlement to continue in it. Thereafter, in a Decision on Motion for Summary Judgment dated December 27, 1973, the Commissioner of Education determined that such purported abolishment was not in "good faith" and he restored petitioner to "***a position which embraces administrative duties of the kind previously performed by him***." *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County,* 1973 *S.L.D.* 710 The Commissioner, however, made no specific determination with respect to the tenured status of petitioner beyond the end of the 1973-74 school year. Subsequently, the Board appealed the Commissioner's decision to the State Board of Education and petitioner cross-appealed with a request for a determination of his specific tenured status. On May 1, 1974, the State Board affirmed the Commissioner's Decision on Motion but remanded the matter to the Commissioner "***for a full hearing solely on the question of whether petitioner had acquired tenure in any position other than that of teacher, and if so, what position." (*Arthur L. Page, supra,* 1974 *S.L.D.* 1416)

In response to the remand petitioner filed an Amended Petition of Appeal on September 25, 1974, and the Board responded on October 16, 1974.

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Thereafter, a hearing was conducted on December 12, 1974, and continued on February 20, 1974 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. Subsequent to the hearing the Board filed a Memorandum of Law on March 21, 1975. Petitioner's Memorandum of Law was filed on April 2, 1975. The report of the hearing examiner is as follows:

The principal narrow issue to be determined in the instant matter by the Commissioner at this juncture is concerned with the specific tenured entitlement of petitioner as an employee of the Board. It is stipulated that he is tenured as a teacher because of his years of service in the employ of the Board in the period 1957-68. There remains for consideration the positions he held and the duties he performed in the employ of the Board in the period 1968-73 and to the present day. Petitioner claims such duties have earned for him a tenured entitlement to a position as Assistant Superintendent of Schools or, in the alternative, as an administrator and/or principal. (See Memorandum of Petitioner, at p. 6.) The Board denies petitioner's claim to tenure in a position other than that of teacher. It grounds such denial in the fact that petitioner's service in the period 1968-73 was in positions not specifically referred to in the tenure statutes *N.J.S.A.* 18A:28-5 *et seq.* This service will now be examined.

By action of the Board on September 10, 1968, petitioner was transferred from his tenured teaching position to the position of Model Cities Coordinator. (Tr. I-5) Such transfer was retroactive to the date of September 1, 1968, and petitioner continued in such position until January 4, 1971 – a period of approximately two years, four months. (Tr. I-5) On January 4, 1971, however, petitioner began service in a new position as an Assistant to the Assistant Superintendent for Personnel (Tr. I-5), and continued in this position without interruption until the position was purportedly abolished by Board action, as noted *ante,* on August 14, 1973. Thus, this latter period of service approximated two years, seven months. When added to the work petitioner performed as Model Cities Coordinator his total service from September 1, 1968 to August 14, 1973, comprised a period of four years, eleven months. The question for determination is principally concerned with this period.

Petitioner testified at length with respect to the duties he performed as Model Cities Coordinator and as Assistant to the Assistant Superintendent for personnel. He stated that as Model Cities Coordinator he had reported directly to the Superintendent of Trenton Schools and that the "***job duties involved more or less soliciting funds for educational programs.***" (Tr. I-98) He testified further with respect to many of the duties he had performed in that assignment:

1. He helped Trenton community groups set up guidelines for various educational programs. (*i.e.* a kindergarten through grade three reading program, bilingual program, guidance program, etc. (Tr. I-98)

2. He supervised approximately 100 personnel employed in the program. (Tr. I-99, 127)

3. He attended administrative staff meetings. (Tr. I-126)

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4. He interviewed candidates for positions in the Model Cities program. (Tr. II-150)

5. He made recommendations with respect to the hiring and firing of Model Cities personnel. (Tr. I-128)

6. He solicited funds for programs from the Federal government. (Tr. II-149)

7. He helped set up a job description with respect to a guidance position. (Tr. I-132)

8. He worked in the negotiation of contracts. (Tr. I-135; Tr. II-153)

9. He conducted educational meetings. (Tr. I-136)

10. He helped develop early childhood programs. (Tr. I-127)

Such testimony was not refuted at the hearing. It is noted here that the Model Cities program of reference herein was not precisely defined with respect to goals, scope, or purpose at the hearing. However, it appears from petitioner's testimony that the program was an effort of the Federal government to generally improve urban life through a variety of activities of an educational and/or recreational nature. The program in Trenton was apparently not directed by the Trenton school district or by the Board but by a committee of citizens which worked with the schools, and with petitioner in a liaison capacity, in a joint cooperative effort. (See Tr. I-127-131.) Petitioner also testified that he held a Principal's certificate, which was issued to him in August 1969, while he worked with Model Cities. (Tr. I-100) (Note: It is a matter of record that petitioner received a School Administrator's certificate in February 1973. See P-2 admitted in evidence at the prior hearing of October 25, 1973.)

Petitioner's duties in the subsequent period January 4, 1971 forward to the date of August 14, 1973, must now be examined. During that period, as Assistant to the Assistant Superintendent for Personnel, petitioner testified he reported directly to the Assistant Superintendent for assignment of duties.(Tr. II-153, 156-158, 171-172, 175-177) In his words "*** I assisted the Assistant Superintendent in all [his] duties." (Tr. I-104-105) The "duties" of reference were said by petitioner to include:

(a) recruitment of teachers (Tr. I-104)

(b) a determination of personnel needs (Tr. I-104)

(c) work in negotiations with groups of employees (Tr. I-104)

(d) the orientation of new teaching staff members (Tr. I-104)

(e) performance of evaluative work with certification problems (Tr. I-104)

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(f) work with substitutes. (Tr. I-104)

However, petitioner also testified that during the period July 1972–August 1973 he performed such duties not only as Assistant to the Assistant Superintendent for Personnel but also, in effect, as Assistant Superintendent for Personnel. (Tr. I-104-105) Such service, petitioner testified, was occasioned by the absence of the Assistant Superintendent for Personnel on sick leave. (Tr. I-105)

The Assistant Superintendent for Personnel testified with respect to the nature of petitioner's duties in the Model Cities program and as his assistant. His testimony was, in general, a corroboration of petitioner's recital of duties which is summarized, *ante*. (See Tr. II-179-189 *et seq.*) Specifically, he indicated that petitioner as his Assistant had:

(a) interviewed candidates for employment (Tr. II-182)

(b) worked on details involved with certification (Tr. II-182)

(c) recommended candidates for employment (Tr. II-182)

(d) performed certain limited data gathering with respect to negotiations. (Tr. II-190)

Such duties were consistent with the job description of Assistant to the Assistant Superintendent for Personnel. (P-2) This job description dated January 30, 1970, indicated that a "Principal's certificate" was a qualification required of applicants, together with "Administrative experience."

Such facts and testimony are, petitioner avers, conclusive proof that for a period of four years, eleven months he performed administrative duties in the employ of the Board which entitle him to a tenured status additional to that of a teacher. In support of this avowal, he cites the statutory authority *N.J.S.A.* 18A:28-5 and the decisions of the Court and the Commissioner in *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (E. & A. 1941) and *Boeshore v. Board of Education of North Bergen,* 1974 *S.L.D.* 805. Petitioner further avers that he is entitled to be made whole by the award of counsel fees and "out-of-pocket" expenses plus unspecified "salary adjustments" for the period August 14, 1973 to the present date while the present litigation has been in progress. (Petitioner's Memorandum of Law, at p. 7) He cites *N.J.S.A.* 18A:16-6 in support of this argument.

The Board, on the other hand, avers petitioner has earned no tenured entitlement except that of teacher and it asserts the following reasons:

"1. Petitioner did not serve in an applicable category for the required time necessary to achieve a tenured status.

"2. Tenure is not possible in the category 'Assistant to the Assistant Superintendent of Personnel.'

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"3. Petitioner's position as 'Model Cities Coordinator' is not an acknowledged administrative position, and in fact, is not administrative in nature." (Memorandum of the Board, at p. 4)

Thus, in the Board's view, the "positions" in which petitioner served for the period 1968-73 are not "*bona fide* administrative positions" in which tenure entitlement may be secured. In support of this view, the Board cites *Boeshore, supra; Ahrensfield, supra; Michael J. Keane v. Board of Education of the Flemington-Raritan Regional School District,* 1970 *S.L.D.* 162; *Ann A. Quinlan v. Board of Education of the Town of North Bergen,* 1959-60 *S.L.D.* 113. Further, the Board avers that petitioner is not entitled to the counsel fees he requests. It also maintains that his "***reliance upon *N.J.S.A.* 18A:16-6 is totally unfounded***" as the basis for such a claim. (Board's Memorandum, at p. 12)

The hearing examiner has reviewed such arguments in the context of the applicable statutes, and decisions of the Commissioner and the courts. The arguments, concisely stated, are concerned with whether or not in the period 1968-73 petitioner performed administrative duties and, if he did, whether or not they may be categorized in so definitive a fashion as to confer a tenured status. The Board's argument, in essence, is that the duties were performed in positions set apart from positions where tenured protection might accrue and that the duties petitioner performed in the Model Cities program were not in any event administrative in nature. Thus, if given effect, the Board's argument is that for four years, eleven months, petitioner's service conferred no entitlement beyond that of a teacher.

The hearing examiner does not agree. He concludes instead that the service, in each of its component parts, is most closely analogous to that of a school principal. As Director of the Model Cities program, petitioner helped develop and establish programs of instruction. He supervised a limited number of employees. He assisted with recruitment. As Assistant to the Assistant Superintendent for Personnel his duties were those of a central school office, but his authority was clearly delegated to him by the Assistant Superintendent and subject to that official's supervisory control. Such control was not relinquished in any important respect even when the Assistant Superintendent was ill. (See Tr. II-172, 183, 194, 212.)

A primary deduction from all of this review of duties is that at no time in the period of four years, eleven months considered, *sub judice,* was petitioner responsible for *district-wide* functions – either directly on his own authority or indirectly with the strong recommending authority of an Assistant Superintendent of Schools. By his own admission his primary duties in the period 1971-73 were to "assist" the Assistant Superintendent. (See Tr. I-104-105.) His title during that period was, thus, aptly descriptive of what he did. As an Assistant to the Assistant Superintendent his function was not essentially different from that of a school principal.

While finding that his duties were most closely related to those of a school

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principal during the period of four years, eleven months, a question remains; namely, does the performance of such duties analogous to those of a principal confer a tenured status as principal upon petitioner? In this regard, too, the hearing examiner finds for petitioner.

The rules of the State Board of Education clearly provide that local boards of education are mandated to assign recognized titles to positions held by properly certified teaching staff members. *N.J.A.C.* 6.11-3.6 is directly at point.

> "(a) School districts are urged to assign to personnel, titles which are recognized in these regulations.
>
> "(b) If use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools, in advance of the appointment, on the basis of which determination may be made of the appropriate certificate for the position."

In the instant matter, the Board listed a principal's certificate as a qualification for the position Assistant to the Assistant Superintendent for Personnel. (P-2) From 1969 forward petitioner held the certificate. The listing of the qualification by the Board and the holding by petitioner are not without significance with regard to the finding, *ante*. Petitioner performed duties analogous to those of a principal. He is entitled to the tenured protection the statutes afford.

The statute *N.J.S.A.* 18A:28-6 sets forth the entitlement pertinent herein.

> "Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> > "(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
> >
> > "(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
> >
> > "(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former

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position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

In *Boeshore, supra,* the board of education also attempted to use an assigned title as reason to justify an argument that there was no tenured entitlement. In considering the matter the Commissioner said:

> "In the application of these statutory and case law principles to the instant matter, it is clear that petitioner served for a period of approximately ten years as a school administrator with the encompassing duties required of an assistant superintendent of schools. Although the Board did not so designate the position and characterizes all of petitioner's service therein as clerical rather than administrative, the facts in the record before the Commissioner fail to support the Board's position. The Commissioner cannot condone this designation of a *bona fide* administrative position by an unappropriate title, which would result in relegating petitioner's service to an amorphous limbo." (at pp. 816-817)

The finding herein is similar; petitioner's service of four years, eleven months is categorized by the hearing examiner as that of a school principal and clearly entitles him from the date of acquisition of his certificate to the tenured protection which the statute affords. *N.J.S.A.* 18A:28-6

There remains the claim to counsel fees and costs. However, the hearing examiner knows of no authority vested in the Commissioner to award such fees and opines that the referenced statute *N.J.S.A.* 18A:16-6, on which petitioner relies, provides no foundation for the claim. The statute in its entirety is applicable to civil actions brought against teaching staff members and is designated to save them harmless from financial loss as the result of performance of duty. It provides:

> "Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses."

Further, the Commissioner has stated on prior occasion that he finds no authority for such awards. *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192; *John S. Romanowski v. Board of Education of the City of Jersey City, Hudson County,* 1966 *S.L.D.* 219

In summation the hearing examiner finds that petitioner performed duties

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for the Board in the period September 1, 1968 to August 14, 1973, which may be categorized as those of a school principal and that such performance has earned for him a tenured entitlement to such a position in addition to his tenure as teacher. He recommends that petitioner be awarded salary payment retroactive to August 14, 1973, commensurate with such finding to the extent that such payment has been withheld.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the brief reply pertinent thereto filed by petitioner. The Commissioner concurs, however, in all respects with the report.

Accordingly, the Commissioner determines that petitioner has achieved a tenured status as a school principal in the Board's employ and may not be removed from such position except in the manner outlined in the statutes (*N.J.S.A.* 18A:28-1 *et seq.*) and rules of the State Board of Education (*N.J.A.C.* 6). The Commissioner directs the Board to compensate petitioner commensurate with such finding on a retroactive basis to August 14, 1973.

A further claim of petitioner for an award of counsel fees and costs cannot, however, be granted. As the Commissioner said in *Celina G. David, supra,*

> "***claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute.***" (*R.S.* 18:5-49.1) [Now *N.J.S.A.* 18A:6-20] (at p. 195)

COMMISSIONER OF EDUCATION

August 26, 1975

~~Pending~~ before State Board of Education 1976 SLD 1158

aff'd

Dismissed Superior Court Docket No. A-1859-75 Appellate Division June 8, 1976 not printed in SLD

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**In the Matter of the Tenure Hearing of Lorraine Sondey,
School District of the Borough of Wallington, Bergen County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Joseph A. Banas, Jr., Esq.

For the Respondent, Walter J. Tencza, Esq.

Written charges of inefficiency, conduct unbecoming a teacher, insubordination, and corporal punishment were certified to the Commissioner of Education against Lorraine Sondey, hereinafter "respondent," by the Board of Education of the School District of the Borough of Wallington, hereinafter "Board," on April 24, 1973. Respondent was suspended without pay on April 3, 1973. The complainant Board certified that the charges would be sufficient, if true in fact, to warrant respondent's dismissal or a reduction in salary pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

Thirteen days of hearings were held between July 31, 1973, and January 22, 1974 in the offices of the Bergen County Superintendent of Schools, Wood-Ridge, and the Union County Superintendent of Schools, Westfield. Numerous exhibits were accepted in evidence, and Briefs were filed after the hearings. This matter was thereafter delayed by the litigants who attempted settlement without the necessity of a determination by the Commissioner. Those attempts failed. The report of the hearing examiner follows:

The Superintendent of Schools filed written charges of inefficiency with respondent on January 15, 1973 (P-2), pursuant to *N.J.S.A.* 18A:6-12 which reads 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 charge 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."

On April 3, 1973, respondent was suspended from her teaching position without pay. The Board then passed a resolution on April 24, 1973 (P-1), certifying the charges of inefficiency, and other charges, specifically, unbecoming conduct, insubordination, and corporal punishment, to the Commissioner.

Ninety days are given by statute as the minimum time in which to improve deficiencies when a teacher is charged with inefficiency pursuant to *N.J.S.A.* 18A:6-12. The hearing examiner observes that only seventy-eight days elapsed

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between January 15, 1973, when respondent received the written charges of inefficiency, and April 3, 1973, when she was suspended without pay. See *In the Matter of the Tenure Hearing of Robert M. Wagner, School District of the Township of Millburn, Essex County,* 1972 *S.L.D.* 650. Nevertheless, the Board filed those charges of inefficiency with the Commissioner, as well as other specific and detailed charges, some of which occurred prior to respondent's being notified in writing about her deficiencies.

The Superintendent's written charges of inefficiency to respondent dated January 15, 1973, are reproduced, in part, as follows:

> "Please be informed that as a result of our three meetings (Dec. 21, 1972, Jan. 4, and Jan. 8, 1973) concerning the professional complaints listed in Mr. Agresta's December 18, 1972 memorandum to you, I have taken the following action:
>
> "Pursuant to New Jersey Statute 18A:6-12 I am placing you on a probationary basis for 90 days. It is hoped that during this time you will have the opportunity to correct any inefficiencies.
>
> "Listed below are the complaints and my remarks which I hope you will consider in order to remove the problem:
>
> "1. Leaving your class unattended on 172 occasions.
>
> ***
>
> "2. Nine (9) instances of tardiness.
>
> ***
>
> "3. The reporting of 251 discipline cases as of December 15, 1972.
>
> ***
>
> "4. On classroom visits, on numerous occasions, the Principal found your classes uncontrolled and learning activities disorderly.
>
> ***
>
> "5. The abnormally large number of students who have dropped your Spanish classes.
>
> ***
>
> "6. The incident on December 14, 1972 wherein you claimed physical harassment by a student was followed by a conference with the parent. You were accused of not cooperating with the parent.
>
> ***
>
> "7. Conferences between you and the Principal have produced no visible change in attitude.
>
> ***
>
> "8. On December 4, 1972 you found need to see the Vice-Principal 18 times during a classroom period.
>
> ***
>
> "If there is need for explanation or further discussion, please notify my office. I would like to emphasize this statement: The administrators are

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always ready and willing to assist you in any problems. Only the fullest cooperation between all concerned will result in the elimination of problems and allow each of us to do a better job in meeting the needs of the youth of our community."

The Board then certified twenty additional charges against petitioner, some of which occurred prior to the charges of inefficiency and some of which overlapped that ninety-day period of time beginning January 15, 1973.

These twenty charges, in addition to the charges of inefficiency, will be discussed individually or in related groups.

CHARGE ONE

"Prior to April 17, 1972, the said Lorraine Sondey did leave her class unattended and unsupervised on many occasions. On April 17, 1972 and April 21, 1972, the High School Principal issued memoranda to said teacher to correct this deficiency forthwith. Contrary to good teaching procedure, policy and the High School Principal's direction, said teacher, from the period of September 6, 1972 to April 3, 1973 left her class unattended approximately 218 times."

The vice-principal testified that he had been assigned by the principal to check on respondent and to keep a record because she had left her classroom unattended on numerous occasions. (Tr. V-27-44) This testimony was confirmed by the principal's testimony. (Tr. IV-71) The vice-principal testified specificially that he observed respondent leave her class unattended approximately two hundred times and when she left her classroom "***she was in my room *** out in the hall *** [or] in the main office." (Tr. V-28) He testified further that he checked her room on these occasions by escorting her back or going to her room when she returned. (Tr. V-29)

On April 11, 1972, the principal sent respondent the following memorandum:

"I have noticed that you have a tendency to leave your classroom, particularly to either escort student-discipline, or to come down and obtain one of the administrative staff to come up to your room.

"I ask your cooperation in keeping to your room. Too many things could happen." (P-11)

On April 21, 1972, the principal sent respondent another memorandum (P-12), reminding her of his previous memorandum (P-11), and stating that he had observed her leave her classroom three times on April 20, 1972. Respondent tore up this memorandum and the vice-principal testified that he saw her throw it in the wastebasket. He retrieved the torn memorandum. (P-13; Tr. V-25-27, 29-32)

The record shows that the greatest number of these alleged absences from

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class were caused by respondent escorting pupils to the office for disciplinary infractions or going to the office for help when she was having problems in her classroom which was located within fifteen to twenty feet of the vice-principal's office. In the previous academic year, respondent's classroom was located on the third floor, one floor above the office. It was moved closer to the office because of the many pupil discipline problems she had. A teacher witness called by respondent testified that one class of pupils, a seven-two group, was more troublesome to her and to respondent than other groups because of their hyperactivity; however, she saw respondent leave her class unattended on several occasions to go to the office for help. The witness could not recall any occasion when respondent asked her to keep an eye on her class while she went to the office. (Tr. X-111-114, 122), and testified further that she had never left her class to go to the office with any pupil from that seven-two group. (Tr. X-114)

Respondent does not deny leaving her classroom unattended on many occasions; however, she testified that she left only to get help when she was having discipline problems. Sometimes she left the class to escort a pupil to the office and sometimes she went to the office with a discipline slip. (Tr. X-1-24) She could not recall the number of times she left and said she was "***not a judge of numbers." (Tr. X-12) Elsewhere she testified about her alleged absences from class saying, "I wouldn't say. I couldn't say. I don't *** recall." (Tr. X-12) She denies ever leaving her class to go to the teachers' room. (Tr. X-11)

Respondent's answers were general denials as to the great number of absences with which she is charged. When asked specifically how many times she left her classes unattended, she testified that "I wish I had some timing device at the time to keep a record. I didn't." (Tr. X-47) She made other general denials of the two hundred eighteen absences as charged. The testimony by the vice-principal is admitted by respondent, except for the number of times she left her classes. Her own witness testified that she had observed respondent leave her classes unattended. There was no testimony educed to refute the testimony of the vice-principal who was charged with keeping a record of respondent's activities.

Respondent admitted also that, despite the proximity of her class to the vice-principal's office, she could not see into her room from his office when she went there because it was around a corner. She admitted further that she could not make observations of her pupils left in the classroom. (Tr. X-25-27)

In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township, Union County, 1973 *S.L.D.* 464, affirmed State Board of Education 1974 *S.L.D.* 1437, affirmed New Jersey Superior Court, Appellate Division, January 15, 1975, the Commissioner commented as follows:

> "***Although it is impossible to spend every minute with the pupils in a classroom, it is certainly expected that teachers must exercise continuous control over their classes by their physical presence.***" (at p. 485)

The hearing examiner finds that respondent did in fact leave her classroom

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unattended and unsupervised on many occasions as charged, and that such behavior constitutes a lack of attention to her most important duties and responsibilities as a teacher.

The hearing examiner recommends that the Commissioner dismiss all charges of inefficiency since respondent was not given ninety days in which to improve pursuant to *N.J.S.A.* 18A:6-12. See also *Wagner, supra.*

CHARGES TWO, THREE and FOUR

These charges are similar and overlap in some respects; therefore, they will be summarized and discussed together.

Essentially, Charge Two states that respondent has been chronically late in arriving at school since January 1973. Charge Three states that she left the building prior to teacher dismissal time on at least three occasions since January 10, 1973, and Charge Four is unbecoming conduct and insubordination for refusing to discuss the matter or to give reasons for leaving early.

The Teachers' Daily Sign-In Sheet (P-8) and the principal's memoranda (P-9) show that respondent was late to school on several days. Respondent argues that the latenesses were not lengthy and on seven occasions amounted to one minute each. (P-8) Other latenesses were slightly longer, several being five minutes in length; one was fifteen minutes in length, and one was fifty-five minutes. On that occasion she overslept for the first time in her thirteen and one-half years' employment with the school. Other latenesses were blamed generally on poor weather and traffic conditions in the area at that time of the year. (Respondent's Brief, at pp. 7-9)

The vice-principal testified that respondent left the building early on three occasions between January 10, 1973 and February 28, 1973.

Respondent denied leaving the building early three times as charged; however, she testified that she did leave early on two occasions and was reprimanded by the principal. (Tr. IX-55-58) She testified also that she felt the school clocks were wrong and did not agree exactly with the clock in her room or the neighboring teachers' room. (Tr. IX-65)

Despite the principal's contention that respondent would not discuss with him the matter of her leaving early on one specific day, the transcript shows that he dismissed respondent from his office after he had summoned her there. He testified that he became "agitated" because she was agitated; therefore, he dismissed her.

The hearing examiner finds, therefore, that there is insufficient evidence to make a finding of unbecoming conduct or insubordination as to Charge Four, and he recommends that it be dismissed. The record does support Charges Two and Three of being late to school and leaving early.

CHARGE FIVE

"From approximately September 9, 1972 to approximately December 15,

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1972, said Lorraine Sondey did refer and send 251 disciplinary cases to the Vice Principal and/or Principal for disciplinary action. From January 15, 1973, there were 123 disciplinary cases referred to the Vice-Principal and/or Principal for disciplinary action."

Respondent does not deny sending a great number of pupils to the office for disciplinary infractions; however, she argues that most of her problems were with a specific class and with particular pupils in that class. The record does not fully support respondent's contention. At the direction of the hearing examiner, and because of the voluminous number of office referrals for pupils, all of which the Board was prepared to document, a report was compiled which gave a complete, detailed, and composite review of pupils reported by respondent and other teachers having the same pupils. (P-15)

That report shows in part that:

1. Between September 1972 and April 3, 1973, when respondent was suspended, she had sent three hundred seventy-six pupils to the office for disciplinary infractions.

2. All other teachers combined having these same pupils for the entire 1972-73 academic year sent a total of two hundred two pupils to the office for discipline.

Two teacher witnesses were called by respondent to show that a certain class (seven-two) and a few pupils therein were troublesome to all teachers; however, one of respondent's witnesses testified that the alleged discipline problem class was not a problem for her. She testified further that another class was more difficult to control, but she had no real problems with any of the pupils. (Tr. XI-63-69)

Respondent's other teacher witness gave similar testimony although she corroborated respondent's contention, in part, that the seven-two class was the most difficult to control. She testified that she had no special discipline problems with that class (Tr. X-104) and that a special detention class set up to handle discipline problems by all teachers who would supervise them on a rotating basis was disbanded because most of the problem pupils were being referred for discipline by respondent and one other teacher. (Tr. X-119-120) Corroboration of this fact is given by respondent's other witness. (Tr. XI-67-68)

The hearing examiner finds, in the testimony of respondent's own witnesses and the document (P-15), ample proof that she could not control some of her classes and that the number of disciplinary problems with her pupils was considerably greater than the number of problems experienced by any other teacher on the staff. He finds that Charge Five is true in fact.

CHARGE SIX

A summary of Charge Six is that Respondent's classes were not under her control, that her instruction was inadequate, and that the learning activity was not orderly.

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The principal testified in support of this charge that he gave respondent several memoranda offering suggestions for improvement of instruction, and specific criticisms of her classroom and extra-classroom conduct. (P-17, P-18, P-19, P-20, P-21, P-22) Other observations were made by the vice-principal which showed that respondent had difficulty with control and instruction of her classes. (P-25, P-26)

Respondent argues that the Board's proofs in this regard are based on the same problem class identified earlier, and that being "***troubled with this difficult discipline problem, [she] simply could not teach effectively without proper and adequate support from the administration.***" (Respondent's Brief, at p. 12)

The hearing examiner finds that the testimony of the principal (Tr. VI-117-156), the documents in evidence, *ante,* and the testimony of the vice-principal (Tr. VIII-7-45) adequately support this charge. Respondent's contention of inadequate administrative support for her most difficult classes is devoid of proof or other support of any kind. The hearing examiner finds that Charge Six is true in fact.

CHARGE SEVEN

This charge concerns the refusal of pupils to take Spanish if respondent were to be the teacher and the large number of pupils who dropped the course because of respondent.

The nature of the charge is such that respondent is precluded from making a strong affirmative defense. She states that, although some pupils dropped her course, many others liked her class and finished her courses.

The Board, on the other hand, offered testimony by the principal, vice-principal, and guidance director to support its charge. Admittedly, this testimony is hearsay; however, it represents the factual situation concerning the placement of pupils in classes that must be faced by all school administrators. The guidance counselors, in particular, have the responsibility of interviewing pupils, reviewing their records with them, and guiding them into courses which meet their educational needs and requirements. Considering this description, the testimony of the guidance director is proper and relevant in the judgment of the hearing examiner. The guidance director testified as follows:

> "***As Guidance Director, I am concerned with the scheduling of youngsters to classes, the overseeing of their scholastic achievements and their relationships in the classroom situation, as far as academics are concerned.***" (Tr. III-35)

Also,

> "***Enrollment in the Spanish classes averages about 40. Last year, however, at the beginning of the year the attrition was quite high. By the end of the first marking period we had already lost at least 12 youngsters

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out of the Spanish I class. The Spanish III class, in which we could only enroll two youngsters because the others chose – their own decision – not to take the course, that course had already been dissolved by the end of the first marking period.

"Some of the youngsters needed at least two years of the Spanish, so the Spanish II class, of course, was – those figures did not change too severely after the opening of school. It was the Spanish I class and the Spanish III class where the attrition is greater – the percent of attrition was higher.***" (Tr. III-38)

She testified further about pupils and parents who had come to her concerning respondent's Spanish classes as follows:

***

"Q. Now, in the course of your duties, have you come in contact with students and parents pertaining to the Spanish classes?

"A. Yes, I have.

"Q. And can you tell us what that was or what your contact was and how many occasions, and so forth?

"A. There were repeated instances of youngsters being upset – upset primarily because of the fact that they felt they had elected a course which was a required course to them – they needed it in order to get somewhere else along the line in their educational plans – they felt that they could not follow the method of instruction in the classroom; they felt, in many cases, that they were wasting their time; and many cases they felt that there was a certain degree of unfairness within the classroom.

"In general, both the parents – the students who did come in to complain or to request a transfer out of the class; and the parents also felt that the Spanish classes were a waste of time and their youngsters were not receiving a fair education in the particular language.***" (Tr. III-39)

The guidance director testified, also, that respondent was the only Spanish teacher employed by the Board and that nineteen of forty pupils had dropped out of her Spanish I class prior to April 3, 1973, when she was suspended.

There were no more dropouts after April. She stated further that she had requests from pupils for reinstatement in Spanish classes after April and that the carry-over from the end of that school year to September 1973, when respondent was no longer teaching, of pupils electing Spanish II, was one hundred percent. (Tr. III-49-73)

In the hearing examiner's judgment, the statistics alone, given by the

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guidance director, are sufficient to show an abnormally high dropout rate among respondent's Spanish class pupils, including her testimony that only two pupils elected to enroll for the Spanish III course.

The hearing examiner finds, therefore, that the guidance director's testimony is sufficient to support Charge Seven. The hearing examiner concludes that Charge Seven is true in fact.

CHARGE EIGHT

Charge Eight is that Respondent struck five different pupils between December 14, 1972, and April 3, 1973. They are reproduced individually as follows:

(a) "On or about December 14, 1972, 'R.M.' "

R.M. testified that he and several other male classmates had dropped a Spanish class taught by respondent and that he enrolled instead in a French class. (Tr. I-32-34) He testified further that he visited respondent's class frequently to see her during the three-minute break between classes. He testified also that he didn't like her, but she was different outside of class than in the classroom. R.M. testified that respondent had asked him to leave her room on several occasions where he had gone "[t]o talk to her." (Tr. I-27-30, 37-38) He testified that on one occasion he visited her class with one of his friends and put his hand on her shoulder and she slapped him five or seven times. He stated that he tried to back away and told her to stop. (Tr. I-26-30)

Respondent admits hitting R.M. but only after he repeatedly tapped or put his hand on her shoulder while they were standing with a group of pupils near her classroom door. (Tr. IX-79-87) The principal testified that respondent had said that she felt threatened by R.M. (Tr. I-99)

The record shows that R.M. was over six feet in height and athletic. Respondent is slightly over five feet tall and possibly one hundred ten pounds, which information is relevant in terms of the findings of the hearing examiner. In the hearing examiner's judgment, after observing R.M.'s mannerisms and hearing his testimony concerning his reasons for frequent visits to respondent's class after having dropped out, R.M. was indeed harassing respondent, who was too naive to understand what he was doing. On the particular day in question, he was tapping her shoulder while he stood with a group of pupils and quickly withdrawing his hand so she would not know who was doing it. She struck him because she was aggravated and frustrated. There is no corroboration of his being slapped five or seven times.

While there is no valid reason for striking any pupil, this situation is more akin to self-defense and should not be considered physical punishment of a pupil, nor corporal punishment. The hearing examiner recommends that Sub-Charge 8(a) be dismissed.

(b) "On or about February 27, 1973 'R.P.' "

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R.P. testified that on one occasion the entire class was fooling around and joking and respondent approached him, pulled him by the arm, and hit him on the arm. (Tr. II-107)

Respondent denies ever hitting R.P.; however, she recalls a spat in which he was involved with a female pupil, A.B., at which time she physically separated them.

There is no corroboration of R.P.'s testimony and the hearing examiner finds no basis in fact for his story. He stated he was taking notes at his desk when the incident occurred. To be struck by a teacher, without provocation, under such conditions, is unbelievable. The hearing examiner recommends that Sub-Charge 8(b) be dismissed.

(c) "On or about March 8, 1973, 'L.J.' "

L.J. testified that respondent asked her to change her seat in a study hall and that she refused, whereupon respondent took her by the arm and led her to a different seat. She was talking to a friend (Tr. IX-88), which was given as the reason for changing her seat, and testified further that she said, "***Why should I sit here, 'cause I didn't do nothing wrong.***" (Tr. V-8) She testified also that she continued to complain to respondent who then poked her in the cheek with a finger and that it hurt "a little." (Tr. V-5, 8-9)

Respondent admits taking L.J. by the arm and leading her to a different seat; however, she denies poking her cheek or striking her. (Tr. IX-88-90)

There is no corroboration of this charge by other pupils and statements made by L.J. to the school administrators are insufficient to reach a conclusion that respondent "poked" L.J. in the cheek with her finger. The hearing examiner cannot find sufficient evidence herein to support the charge of corporal punishment; therefore, he recommends that Sub-Charge 8(c) be dismissed.

Sub-Charge 8(d) was withdrawn by the Board.

(e) "On or about April 3, 1973, 'M.B.R.' "

M.B.R. testified that respondent slapped her in the face several times as she was leaving her classroom at the end of the period. Her exact testimony is reproduced, in part, as follows:

> "***She was standing near the doorway as I was walking out and *she thought, I suppose that I was going to hit her, when I was waving. She must have thought I was going to hit her.* And she started waving her *** hands in my face and said don't you hit me. Don't you wave your hand in my face like that. She was waving her hand in my face. She grabbed my arm and said that we were going to the office and talk it over. She hit me across the face three times.***" (Tr. I-58-59) (*Emphasis added.*)

M.B.R. admits that in waving to respondent at the conclusion of the class,

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her hand was about a foot from respondent's face. Earlier she had denied waving her hand in front of respondent's face. (Tr. I-68, 86)

Respondent admits hitting M.B.R. spontaneously, after M.B.R. had touched respondent's face with her hand. (Tr. IX-95-97)

A pupil witness called to corroborate M.B.R.'s testimony testified that M.B.R. had in fact "brushed against" respondent as she tried to pass her in a crowded hallway. (Tr. II-80-81)

The weight of the credible evidence leads to the conclusion that respondent did in fact strike M.B.R., but only after being "brushed" or touched on her face by M.B.R. The hearing examiner finds insufficient evidence to support a charge of corporal punishment and recommends that Sub-Charge 8(e) be dismissed.

A general summary of the Sub-Charges under Charge Eight is that none has been found sufficient to support any charge of corporal punishment. The testimony of the pupils, the administrators and respondent herself shows quite clearly that there was a serious breakdown of control in respondent's classes leading to a lack of respect for the teacher and a general disregard of her instructions. In this atmosphere, deliberate harassment of respondent by pupils led to the incidents delineated in Charge Eight. Although the hearing examiner recommends that Charge Eight be dismissed, the evidence is sufficient to show that respondent had lost control of her classes, and many of her pupils had lost respect for her as a teacher.

CHARGE NINE

Sub-Charge 9(a) states that a pupil was sent to the office for disciplinary reasons because of a note he had written in class.

The vice-principal testified that the note sent to him by respondent, which was hand-carried by the offending pupil, was a blank piece of paper. (P-7; Tr. II-59-60)

Respondent testified that she never sent the pupil to the office with a blank piece of paper; however, she recalls having a continuing problem with him and sending him to the office on many occasions. (Tr. IX-108-115)

The hearing examiner observes that the pupil involved in this charge is the same pupil who gave corroborating testimony for the Board about the slapping incidents in Sub-Charges 8(a) and (e). It may also be observed that, even assuming respondent had sent this pupil to the office with a note, there was ample opportunity for him to destroy the note and substitute a blank piece of paper. The credible evidence is insufficient to support Sub-Charge 9(a), therefore the hearing examiner recommends that it be dismissed.

Sub-Charge 9(b) states that respondent refused to discuss the slapping incident of R.M. (Sub-Charge 8(a), *ante*) with R.M.'s mother at a parental conference on the day following the incident.

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R.M.'s mother testified that she was concerned about the possibility that her son might have struck a teacher and she wanted to discuss the matter; however, respondent considered the matter closed and said she wanted to "forget about it." (Tr. I-56)

The principal testified that respondent, without having a representative there on her behalf, neither admitted nor denied to R.M.'s mother that she struck R.M.

It has been shown that respondent did in fact strike R.M. (Sub-Charge 8(a)). Although the hearing examiner recommends the dismissal of Sub-Charges 8(a) and 9(a), *ante,* he supports a finding of unbecoming conduct of respondent as to Sub-Charge 9(b). Teachers have a responsibility and a duty to discuss problem pupils with their parents when they are requested to do so. If respondent indeed was threatened by R.M., she had an excellent opportunity to discuss this situation with his mother who might have been helpful. A teacher with thirteen years' experience should understand that such conferences are routine, widely accepted, and common practices among educators.

The hearing examiner recommends, therefore, that the Commissioner determine that the hearing examiner's findings of fact are sufficient to support Sub-Charge 9(b) of conduct unbecoming a teacher.

CHARGE TEN

This charge alleges that respondent was not cooperative in discussing a pupil's progress and problems in school with his parents. The pupil is "L.H."

The vice-principal testified that the conference was not very productive and that respondent refused to give details to the parents about L.H. Respondent did talk about how poorly L.H. was doing in class. (Tr. III-112-115) In any event, the vice-principal was not satisfied with the conduct of respondent during the conference, nor was he satisfied with its results.

Respondent denies being uncooperative and asserts that she answered specific questions posed by the parents concerning L.H.'s academic deficiencies and his behavior. (Tr. III-37-38)

The hearing examiner finds that there is insufficient proof to conclude that respondent was uncooperative as charged; therefore, he recommends that Charge Ten be dismissed.

CHARGE ELEVEN

This charge states that at a scheduled conference between respondent, a mother, a pupil and the vice-principal, respondent began to sing "do, re, mi, fa, sol, la, ti, do" when asked about specific problems she was having with a pupil, "E.S."

Corroboration of this charge was given in the testimony of E.S. (Tr. II-4)

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and the vice-principal. (Tr. II-17-18) E.S.'s mother was ill and did not attend the hearing to testify. (Tr. II-15-16)

The vice-principal testified that respondent sang the scale several times and also said to E.S.'s mother in a singing fashion that: "If parents don't have respect for teachers how do you expect children to have respect for teachers." After this dialogue, according to the vice-principal, E.S. and her mother began to cry. He asked respondent to leave his office until mother and daughter were composed. (Tr. II-18-19)

Respondent denied singing the musical scale at the conference and stated that E.S.'s mother began a "tirade" against her. However, she testified later that she "***did say do-re-me, I could have." (Tr. XII-39) And later she admitted repeating the entire scale. She denied singing a sentence about parents having respect for teachers. (Tr. XII-39-41)

The hearing examiner finds in the testimony of E.S., the vice-principal, and respondent, sufficient credible evidence that respondent did in fact sing the musical scale at the conference called to discuss E.S.'s behavior. Such a display is conduct unbecoming a teacher. If the parent or the pupil exhibited a lack of respect for her at the conference, she should have excused herself. The hearing examiner finds that this charge is true in fact.

CHARGE TWELVE

Charge Twelve has four subcharges, (a), (b), (c), and (d). Sub-Charges (b) and (d) have been dropped by the Board and the hearing examiner recommends that they be dismissed.

Sub-Charge 12(a) is that on or about February 1, 1973, respondent said, Does baby have to go to the bathroom?" to a pupil, "J.K."

Sub-Charge 12(c) is that respondent called "E.S.," the same pupil involved in Charge Eleven, an "orangutan."

Sub-Charge 12(a) is supported only by hearsay testimony of J.S. who testified earlier as to Sub-Charge 8(a). Respondent denies the charge. J.K. did not testify, therefore the hearing examiner finds insufficient evidence to support this charge and recommends that it be dismissed.

Sub-Charge 12(c) is supported by the testimony of E.S. who testified that after the name-calling incident she said to respondent "***[you] don't have any right to call me a name like that***" whereupon respondent sent her to the vice-principal's office where she reported the incident. (Tr. II-11)

The vice-principal testified that E.S. did in fact report the name-calling incident to him. (Tr. II-22) The principal testified that he asked respondent whether or not she had called E.S. a name, but she neither admitted nor denied the name-calling. (Tr. II-43-45)

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Respondent denies calling E.S. an "orangutan"; however, she testified that she had many problems with her concerning discipline and had to refer her to the office on many occasions. (Tr. XII-41-42, 44)

In the hearing examiner's judgment, the testimony of E.S. is credible and sufficient to find that respondent did call her an "orangutan." E.S. admitted that she had problems with respondent and wanted to get out of her class. Her testimony was straightforward and believable, particularly considering the fact that after the incident she was sent to the vice-principal's office for protesting the name-calling. (Tr. II-19) The hearing examiner finds that this incident is true in fact and that it is conduct unbecoming a teacher.

CHARGE THIRTEEN

This charge is that respondent and/or pupils were squirting shaving cream in her classroom.

The charge is not clear. Neither is the testimony of the vice-principal who testified that he went to her room after a pupil reported the incident to him. He testified that he found an empty can of shaving cream in the wastebasket but otherwise there was nothing noticed out of the ordinary in the classroom. He testified further that respondent did not give him a satisfactory answer about the alleged incident. (Tr. III-116-122)

The hearing examiner recommends that Charge Thirteen be dismissed.

CHARGE FOURTEEN

This is a charge of conduct unbecoming a teacher because respondent allegedly told the guidance director to "get out of my class," and "don't you strike me." (Petition of Appeal)

The testimony is conflicting and inconclusive. The guidance director testified that a pupil came to her office in tears complaining that he had been "thrown out" of respondent's classroom again. He went to her because the vice-principal was unavailable at the time. This pupil had been sent out of respondent's classroom quite often, according to the testimony. The guidance director went to respondent's classroom with the ejected pupil because, she averred, she heard loud noises and she wanted to see what she could do to help the pupil. When she arrived, she said did not see any teacher in the room so she began to admonish the class for its behavior towards the ejected pupil. At this point, respondent appeared from the back or side of the classroom and asked her to leave since this was a matter that did not concern the guidance director. The guidance director testified that respondent approached her and she put up her hand. Respondent allegedly said, "Don't you strike me." (Tr. III-53-55)

Respondent admits sending the pupil out of her classroom with a discipline slip. She testified that he was often troublesome and that problems he had with other classmates were created by him. She admits asking the guidance director to leave her classroom, but she denies that the director raised her hand, nor did she, respondent, say, "Don't you strike me." (Tr. XII-53-56)

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The hearing examiner finds the evidence insufficient to support the charge, therefore he recommends that Charge Fourteen be dismissed.

CHARGE FIFTEEN

This charge was abandoned by the Board. The hearing examiner recommends, therefore, that it be dismissed.

CHARGE SIXTEEN

This is a charge of inefficiency in that respondent lost her list of department grades required for placement on pupil report cards. The reconstruction of those grades by the vice-principal and the other teachers involved, allegedly caused considerable extra work for them. Respondent found the grades after they had been reconstructed and stated that the extra work did not take an inordinate amount of time.

The hearing examiner finds that the evidence is insufficient to make any finding adverse to respondent in regard to this charge, therefore it should be dismissed.

CHARGES SEVENTEEN, EIGHTEEN, and NINETEEN

These are charges of conduct unbecoming a teacher which will be discussed together because they are similar. Respondent allegedly said to the vice-principal, "I don't want you interfering in any of my situations" when he asked her about a disturbance near a water fountain near her classroom door. (Charge Seventeen) Charge Eighteen alleges that respondent refused to reenter her classroom and close her door when requested to do so by the vice-principal, and Charge Nineteen alleges further that respondent accused the vice-principal of not doing his job and charged that no one had tried to help her. These comments were allegedly made in a loud tone of voice, in front of pupils and other teachers.

The vice-principal and the principal testified as to the accuracy of the charges. (Tr. IV-35-60) The incidents occurred on January 5, 1973, January 16, 1973, and March 16, 1973.

Respondent does not deny any of the specific incidents on the dates as given but she denies using the particular language embodied in the charges. Regarding Charge Seventeen, she testified that she didn't recall using those words. (Tr. XII-66-67) In Charge Eighteen she testified that she didn't "***remember any requests by the vice-principal to close [her] door," and "Yes, I do know that I was not requested [to do so] by the vice principal." (Tr. XII-67-68)

Regarding Charge Nineteen, respondent testified that she recalled the incident. She did not know, however, whether the conversation between the administrators and her, which occurred in the hallway between classes, was overheard by pupils and other teachers. (Tr. XII-68-70) Respondent's recollection is that she had a disciplinary problem with two boys and that she

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was dissatisfied with the manner in which it was handled by the vice-principal. She admitted being upset and saying to the vice-principal, "Well, what are you going to do about getting them to stay for detention?" She denied speaking in a loud voice. (Tr. XII-70-75)

She then encountered the principal in the hallway, related this incident to him, and asked what he was going to do about it. She admits that she "was upset" and that she did not "know how loud [she] was." She testified also that "I may have been speaking in a loud voice, I don't recall the nature of the voice." (Tr. XII-75)

The hearing examiner observes from the testimony of respondent herself that there is sufficient evidence to support Charges Seventeen, Eighteen, and Nineteen. In the hearing examiner's judgment, they do not prove insubordination by respondent, nor do they represent conduct unbecoming a teacher. Rather, they show respondent's complete frustration in her relationship with pupils she could not control and her inability to get the school administrators to control them for her in a manner which she believed would solve her disciplinary problems. The hearing examiner finds that Charges Seventeen, Eighteen, and Nineteen are true in fact, pursuant to that portion of *N.J.S.A.* 18A:6-10 which provides for "other just cause."

CHARGE TWENTY

Charge Twenty was abandoned by the Board. (Tr. XII-77) The hearing examiner recommends that it be dismissed.

A summary of the hearing examiner's findings for each charge is:

1. That the charges of inefficiency be dismissed,

2. That Charges One, Two, Three, Five, Six, Seven, Nine(b), Eleven, Twelve (c), Seventeen, Eighteen, and Nineteen are true in fact,

3. That Charges Four, Eight (a, b, c, e), Nine (a), Ten, Twelve (a), Thirteen, Fourteen, and Sixteen be dismissed.

4. Charges Eight (d), Twelve (b), (d), Fifteen and Twenty were abandoned by the Board.

The charges found to be true in fact by the hearing examiner include: (1) leaving her classroom unattended and unsupervised on more than two hundred occasions between September 6, 1972, and April 3, 1973; (2) being late to school and leaving early on several occasions; (3) losing control of her classes so that she had to refer hundreds of pupils to the office for disciplinary infractions which she could no longer handle; (4) inability to continue to offer an adequate instructional program for her pupils; (5) the refusal of pupils to enroll in her classes and the extraordinarily high dropout rate of pupils who were enrolled; (6) conduct unbecoming a teacher by singing the musical scale during a parent conference and refusing to discuss a pupil incident with his mother; (7) calling a

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pupil a derogatory name; and, (8) the incidents described in Charges Seventeen, Eighteen and Nineteen.

The hearing examiner finds in the charges represented by him to be true in fact, sufficient reason, in the aggregate, to reach the conclusion that respondent has lost her effectiveness with her pupils, colleagues, and supervisors to such a degree that she can no longer teach effectively in the School District of the Borough of Wallington.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and considered the findings contained therein. It is noted that no exceptions to the report have been filed. The question that remains for determination is whether or not respondent, by her own actions, has forfeited the protection which tenure affords to teaching staff members who have otherwise complied with the statutory prescription *N.J.S.A.* 18A:28.

A similar question was considered by the Court with respect to a school principal 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) and the Court said:

> "***An inefficient and incapable principal may do great injury to both pupils and teachers. When the charges of such conduct have been clearly proved, the removal should be easy and prompt. *Devault v. Mayor of Camden,* 48 *N.J.L.* 433***" (at p. 370)

> "***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.***" (at p. 371)

In the context of such dicta, applicable to principals but also to all other teaching staff members, the findings set forth herein comprise a series of "many incidents" which demonstrate respondent's "unfitness to hold a post." The Commissioner so holds.

Accordingly, the Commissioner determines that respondent should be dismissed from employment with the School District of the Borough of Wallington as of the date of her suspension by the Board on April 3, 1973.

COMMISSIONER OF EDUCATION

September 2, 1975

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Sallie Gorny,

Petitioner,

v.

Board of Education of the City of Northfield, David Lloyd, Principal, and Douglas Hotchkiss, Superintendent of Schools, Atlantic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Perskie and Callinan (John F. Callinan, Esq., of Counsel)

For the Respondents, Gibson, Previti & Todd (L. Anthony Gibson, Esq., of Counsel)

Petitioner, a nontenure teacher employed by the Board of Education of the City of Northfield, hereinafter "Board," was not offered a contract of employment for the 1973-74 academic year. She alleges that the Board based its action on certain statements she made, and thus deprived her of rights guaranteed by the Federal and State Constitutions. Petitioner also alleges that the Board failed to follow its own policy for evaluating her performance, and thus deprived her of due process of law. The Board denies that petitioner's failure to be reemployed was based solely on statements she made or that she was denied due process of law.

A hearing in this matter was conducted on May 14, 1974 in the office of the Gloucester County Superintendent of Schools, Sewell, before a hearing examiner appointed by the Commissioner of Education. Numerous exhibits were received in evidence at the hearing, and Briefs were subsequently filed. The report of the hearing examiner follows:

Petitioner, a sixth grade science teacher, was employed by the Board for the two academic years 1971-72 and 1972-73, but was not reemployed for a third year, 1973-74. (Tr. 8-10; R-1) The Superintendent of Schools notified her by letter dated April 19, 1973, that she would not be issued a third contract. (R-2) She was thereafter notified by letter from the Board Secretary-Business Manager, dated April 26, 1973, that the Board had acted and determined that she would not be issued a contract for the 1973-74 school year. (R-3) Petitioner wrote a letter to the Board regarding her non-reemployment and later conferred with the Board President. Thereafter, she requested that the Board reconsider its determination not to reemploy her and attended a regular Board meeting to explain why she thought she should be reemployed for the 1973-74 academic year. The Board did reconsider her request at the regular meeting held May 24, 1973, but did not change its earlier determination. (Tr. 57-58; R-4)

Petitioner alleges specifically (1) that she has been denied a property right

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to expectancy of continued employment; (2) that she has been denied her constitutional right to freedom of speech; (3) that the Board's determination not to reemploy her was an arbitrary decision; (4) that she is a victim of religious discrimination; (5) that she has been denied due process by the refusal of the Board to give her a statement of reasons or a hearing; and (6) that the Board did not follow its own policy regarding the evaluation of nontenure teachers. (Petitioner's Brief, at pp. 3, 15, 19, 22, 24)

The Board's policy regarding "Evaluation of Instruction" reads as follows:

"POLICY: All staff members will be evaluated with respect to their ability to perform the duties assigned to them.

"The primary purpose of evaluation is to improve the effectiveness of the individual practitioner. A secondary purpose is to provide a basis for the granting of tenure, for the granting of or withholding of an increment, or for the dismissal of incompetent or incapacitated staff members.

"RULES AND REGULATIONS:

"1. Evaluation should be constructive to aid in the development of professional competency.

"2. All staff members shall be advised of the performance criteria and traits to be judged before the evaluation process begins.

"3. Frequency of evaluation

"a. Each professional staff member under tenure shall be formally evaluated at least once each school year by a qualified evaluator and shall submit at least one self-evaluation each school year for inclusion in his personnel folder.

"b. Non-tenure staff members shall be formally evaluated at least twice during each school year and will submit at least two self-evaluations for inclusion in their personnel folders.

"c. Staff members who are experiencing difficulties in fulfilling their duties will be evaluated frequently to help them overcome their problems.

"4. Every visitation shall be followed by a conference between the teacher and evaluator as soon as the supervisor can draw together his thoughts, observations and suggestions.

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"Suggestions or recommendations for improvement should be specific and in sufficient detail to enable the teacher to implement them.

"5. Until the teacher has seen a copy of the evaluation, has had a conference with the supervisor in relation to the evaluation, and has signed the copy, no written evaluation may be included in his personnel folder.

"6. Evaluation is a team effort. All qualified personnel will participate in the program as a means of improving instruction through the continued professional growth of our staff.***" (Exhibit A)

Petitioner was observed by her principal and by the Superintendendent on several occasions when she was teaching classes during the 1971-72 school year. Two written evaluations of her teaching were made by the principal (P-2, dated September 21, 1971 and P-1, dated October 29, 1971), and one written evaluation was made by the Superintendent on April 28, 1972. (P-3) In February of that school year, petitioner submitted a self-evaluation (P-5), and on an identical administrative form, titled "Evaluation Record," the principal made his cumulative evaluation and placed it in her personnel file. (P-4, P-13) The evaluation record form contains thirty-five paragraphs which are used to appraise many phases of a teacher's performance and the conduct of his/her classes. Beneath each paragraph is a scale which reads "0 1 2 3 4." The lowest possible grade is 1; 0 means that those particular items described in the paragraph were not observed nor recorded. (Tr. 107)

Petitioner's first evaluation by the principal (September 21, 1971) was generally favorable although it contained constructive criticism of her performance. He criticized petitioner's "shrill" voice, suggested "modulation," and made other specific suggestions. (P-2) The second evaluation was made by the principal on October 29, 1971, and dealt entirely with the quality of petitioner's voice. He stated in that written evaluation that her voice was "too strident," that she should not "shout" or "yell" above the noise of the class, and that her voice was naturally "high-pitched." He stated also that her voice was disturbing to other classes. (P-1) The principal made no further written evaluation of petitioner during that academic year. The Superintendent's evaluation that first year was generally favorable. (P-3) The "Evaluation Record" filled out by the principal was also favorable and petitioner received a rating of 2.6 out of a possible 4.

The evaluation record (P-4) completed by the principal is allegedly a duplicate of P-13, and the documents are identical except for the comment made on the last page. That comment from P-4 reads as follows:

"2. Other remarks

"has created enthusiasm for the subject by her ability to vary her teaching techniques-modulation of strident voice *has* occurred – has some problem

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with discipline but makes good effort to handle them herself and seeks help from co-workers and administrators" (*Emphasis supplied.*)

Evaluation record P-13 differs by stating that "modulation of strident voice *has not* occurred." (*Emphasis supplied.*)

The principal explained that the documents were written out entirely by hand and that the "original" contained the wording "has not occurred." the hearing examiner observes that P-4, containing the wording "has occurred," also contained the arithmetical calculation made by the principal from which he arrived at petitioner's composite rating of 2.6; however, the principal explained further that the documents (P-4, P-13) were not proofread and obviously contained an error. (Tr. 108-110)

Nevertheless, the principal recommended that petitioner be reemployed for a second year, and she was subsequently awarded a contract (R-1) and served for the 1972-73 academic year.

During petitioner's second year of employment, 1972-73, she was evaluated four times. An evaluation record form was again completed by the principal and placed in her personnel file. (P-8) Two of the written evaluations were made by the principal (P-6, P-7) and two were made by the Superintendent. (P-9, P-10) The evaluations contained several criticisms and suggestions for improvement, and petitioner's cumulative evaluation record again approximated a 2.6 rating. Petitioner was observed also by a professor from Glassboro State College. His evaluation was generally favorable. (P-11) The record does not show that the college professor's evaluation, made for the purpose of an academic course petitioner was taking, was ever used by the Board to rate petitioner.

Petitioner testified that she never had a complete evaluation as required by Board policy, *ante,* because she never had a conference with any administrator following the classroom observations of her teaching. She testified that she did not sign any of the written evaluations that were later included in her file. Petitioner testified further that she had not seen two of the documents (P-4, P-8) which were included in her file until the day of the hearing in this matter. (Tr. 11-14, 28, 33, 73-77) She concludes, therefore, that the evaluations were informal and incomplete and should not have been included in her personnel file.

This testimony is not refuted by the Board; however, the Board considered her written evaluations to be formal evaluations, even though they were not signed by petitioner and no conferences were held following the observations.

The hearing examiner finds that the Board has met the statutory requirements of *N.J.S.A.* 18A:27-10, 11 by giving petitioner proper notice of non-reemployment prior to April 30, 1973. (R-2, R-3, R-5) *Ronald Elliot Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 Further, the Board honored her request to appear before them for

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reconsideration of their determination that she not be reemployed. Petitioner attended the public meeting of the Board on May 8, 1973 to explain why she should be reemployed. She asserts that at no time was she given reasons for her non-reemployment. (Petitioner's Reply Brief, at pp. 1-2)

Petitioner admits that she had received the enumerated written evaluations and had tried to improve where suggestions for improvement were indicated, but testified that she was never otherwise informed by the principal nor the Superintendent that her performance was poor and that she would not be recommended for reemployment. (Tr. 128-131)

The principal testified that she had improved in some respects (Tr. 112; P-16), and that she was an "adequate or average teacher" but "less than ***outstanding." (Tr. 163-164) The Superintendent testified that the Board could get a "better" teacher. (Tr. 168) The principal included two cumulative evaluations in her personnel file which petitioner testified she had never seen. (Tr. 28, 33-34, P-4 [P-13], P-8) The last of these cumulative evaluations was made by the principal on January 22, 1973, and the "remarks" on the last page of that evaluation are reproduced in full as follows:

> "Mrs. Gorny is an average teacher. I find it very difficult to work with her. Her personality is quite unusual – her mannerisms odd. Her discipline has improved this year but most of it seems due to the classes rather than any change in her methods. She is not afraid of work and is flexible in that group work and individual experiments do take place regularly in her classroom. Her strident voice and grating mannerisms have not improved in two years." (P-8)

The principal testified that he did not verbally inform petitioner that she might not be recommended for reemployment. (Tr. 128-129) She was simply notified by letter from the Superintendent and the Board Secretary. (R-2, R-3)

Petitioner alleges that she was denied reemployment also because she exercised her constitutional right to freedom of speech. She bases this allegation on the following incidences:

(a) While being observed by her principal on March 13, 1973, she allegedly made a remark to her class, to wit: "get off your rear end." She was criticized for using this kind of language by the principal in his written evaluation of that classroom observation. (P-7)

(b) Petitioner testified that the principal had called her to his office after parents questioned him at a PTA meeting about an alleged lack of microscopes available for use in her classes. She testified that he told her not to tell pupils that the school had a shortage of microscopes because, in fact, there was a sufficient number. Pupils were asked by petitioner to bring microscopes from home to use in their experiments, and when the principal was approached about the alleged shortage by the PTA, he allegedly told petitioner the shortage did not exist and that the information sent home through the pupils was embarrassing.

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(Tr. 52-53) She testified further that the principal held a teachers' meeting and said he did not want teachers to tell their pupils there was a shortage of equipment and materials, and if there were any shortages, it was the fault of the teachers who did the ordering. (Tr. 53-54)

The principal does not deny discussing with petitioner the incident arising from the PTA meeting regarding the microscopes. However, he denies discussing the subject with his staff at a teachers' meeting. (Tr. 116-119)

The Board President testified that the Board discussed the phrase allegedly used by petitioner ("get off your rear end") but that it was not a major subject of their discussion. The Board President could not recall any discussion of the microscope incident. (Tr. 135-137) The principal testified that he broached the language "rear end" used by the teacher at the Board meeting referred to, *ante,* which was also attended by the Superintendent. (Tr. 171-174) According to the principal, this incident was a minor part of the Board's discussion. (Tr. 163)

Petitioner testified that when she asked the Superintendent for reasons for her non-reemployment, he told her that the only reason he knew of was the "off-handed" way she had with the pupils. (Tr. 57) The Superintendent testified that he relied heavily on the principal's recommendation when making his recommendation to the Board; however, he testified that he also relied on his own observations, which were reinforced by those of the principal. (Tr. 139, 149-150)

The hearing examiner finds that the principal was sufficiently concerned about the manner in which petitioner expressed herself regarding the phrase "rear end," so that he admonished her in his written evaluation, discussed the incident with the Superintendent, and brought the subject up for Board consideration. (Tr. 135-137, 172-173) He was also sufficiently concerned about the microscope incident to bring it to the attention of petitioner, although there is no conclusive evidence that it was discussed by the Board. The hearing examiner determines that it is fair to infer that the principal was displeased with petitioner because of these incidents, and they were, at least in part, the reasons for his recommendation not to reemploy petitioner. The principal testified that her voice was not the reason for her nonrenewal. (Tr. 178)

Petitioner's avowal that she was denied the right to free speech must also be considered. In this regard, the hearing examiner observes that she was not critical of the Board, the school administrators, or anyone else. She simply asked her pupils in one instance to bring microscopes from home for use in the class. When he found out, the principal asked her not to do that and stated that the school had adequate microscopes. She admitted that she had not checked to see if the equipment was adequate, but relied on information from other teachers who told her there were not enough microscopes. (Tr. 82) In the other instance, she testified that she used a phrase "rear end" in the following context:

> "***I was having a discussion about mental illness and its drug abuse, and trying to bring a correlation between the two, and I was using it as an

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example of someone who may be very depressed and using drugs to try to get out of their depression instead of getting off their rear ends and doing something constructive, and those – that's the way I used those words. I didn't direct it to any child.***" (Tr. 50)

Her expression using the phrase "rear end" cannot be considered proper as a teaching technique in any context. The principal testified that she admonished a pupil who was not paying attention and who was lethargic by saying, "Why don't you get off your rear end?" In this respect the testimony of the principal contradicts petitioner's testimony.

The hearing examiner finds that petitioner's aforementioned expressions were in part responsible for her nonrenewal. Petitioner has no constitutionally guaranteed right to use such language when teaching elementary school pupils.

Finally, petitioner alleges that she is a victim of religious discrimination because she is Jewish. She bases that allegation on the fact that four nontenure teachers who are Jewish were not reemployed for the 1973-74 school year. There were no proofs to support this allegation, and the Board denies that her religious or ethnic background had any part in its determination not to reemploy her. The hearing examiner finds no facts to support petitioner's allegation of religious discrimination, nor has petitioner developed a *prima facie* case to support her allegation; therefore, he recommends that this allegation be dismissed.

There is no statutory requirement nor administrative rule which requires evaluation of teachers. Sound educational philosophy and common sense dictate that observation and evaluation of teachers should occur regularly to insure proper instruction of pupils, which instruction is the primary aim of education. In the instant matter, the Board had a sound philosophy and policy for improving instruction (P-12) which was not totally followed by its administrators. (See Respondent's Brief, at pp. 8-9.) Petitioner never had a conference with her principal nor her Superintendent following an observation for the purpose of discussing that observation as a further means of improving instruction. (P-12) The Superintendent testified that the primary purpose of evaluation was to improve instruction. (Tr. 189)

The school principal testified that the policy (P-12) was not totally followed for any of the teachers as evidenced by the fact that none of them signed their evaluations. He testified further that the teachers were called in at the end of the year to sign the previous year's evaluations; therefore, the policy was applied retroactively to them, but not to petitioner since she was not offered a renewal contract. (Tr. 131)

The Board policy called for more frequent evaluations for teachers experiencing "difficulties in fulfilling their duties*** to help them overcome their problems." (P-12) More frequent evaluations did not occur, nor is there evidence that the administrators assisted petitioner in overcoming her "problems" in any way except to give her written evaluations of their observations.

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In the context of the above findings, the salient issues posed in this matter for the Commissioner's determination are these:

1. Was the Board's determination not to reemploy petitioner based upon proscribed reasons.

2. Does the Board's failure to either (a) provide petitioner with reasons for her non-reemployment, or (b) fully comply with its evaluation policy, constitute good and sufficient reason to reinstate petitioner as a teacher.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto filed by petitioner.

In the judgment of the Commissioner, the record does not provide convincing proof that petitioner's failure to receive reemployment for the 1973-74 academic year was grounded upon proscribed religious discrimination or a denial of her constitutional right to freedom of speech. The record is likewise insufficient of proof that the Board's determination not to reemploy petitioner was made arbitrarily. On the contrary, the Board had the benefit of the written evaluations of petitioner's performance, and the advice and professional judgment of both the principal and Superintendent, which were based upon their respective total impressions of petitioner's overall function as a teaching staff member. The Commissioner finds, therefore, that the Board's determination, based upon these necessary and proper factors, was not arbitrary. See *Ronnie Abramson v. Board of Education of the Township of Colts Neck,* 1975 *S.L.D.* 418.

In regard to petitioner's free speech issue, the Commissioner is constrained to observe that the expression used by petitioner in her classroom is totally improper, and the principal was correct in admonishing her not to resort to such offensive slang while teaching elementary school children.

Petitioner's reliance upon the decision of the New Jersey Supreme Court in *Mary Donaldson v. Board of Education of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974), as grounds for her assertion that she was entitled to a statement of reasons for her failure to be reemployed by the Board, in accordance with the Board's written notification dated April 26, 1973 (R-3), is misplaced. The decision of the Court in *Donaldson, supra,* was issued June 10, 1974, stating that nontenured teaching staff members who did not secure reemployment must be provided, if they so request, a written statement of reasons by the local board of education. In two subsequent decisions, the Superior Court, Appellate Division, ruled upon the question whether *Donaldson* was to be applied retroactively or prospectively. See *Joan Sherman v. Malcolm Connor, Acting Superintendent of Schools of the Borough of Spotswood, and Board of Education of Spotswood,* Docket No. A-2122-73, New Jersey Superior

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Court, Appellate Division, January 28, 1975, and *Nicholas Karamessinis v. Board of Education of the City of Wildwood,* Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975. In both *Sherman* and *Karamessinis* the Court held that the clear language of the *Donaldson* decision indicated only a prospective application of the principle enunciated. Accordingly, the Commissioner holds that petitioner in this case was not entitled to either a written statement of reasons or an informal appearance before the Board, after she received notice that she would not be reemployed for the 1973-74 academic year.

In her Brief, petitioner cites *Perry v. Sindermann,* 408 *U.S.* 593, 92 *S.Ct.* 2694, 33 *L.Ed.2d* 570 (1972) as the basis for her claim to an "expectancy" of reemployment, amounting to a "property" interest. The plaintiff in *Perry* was employed as a junior college teacher for four years under a series of one-year contracts. There was no formal tenure system in that Texas junior college. In May 1969, his contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. During the 1968-69 academic year, Sindermann had been involved in controversy with the administration of the junior college. He was elected president of the Texas Junior College Teachers Association, testified before committees of the Texas Legislature and became involved in public disagreements with the policies of the Junior College Board of Regents.

Sindermann alleged that his freedom of speech guaranteed under the First Amendment and his right to a hearing and due process under the Fourteenth Amendment were violated by the Junior College Board's refusal to reemploy him because of his public criticism of the policies of the college administration.

The Supreme Court pointed out that a lack of either a tenure right or contractual right to reemployment is irrelevant to a free speech claim. The Court reaffirmed its two previous holdings that nonrenewal of a nontenured public school teacher's one-year employment contract may not be predicated on the exercise of First or Fourteenth Amendment rights. *Shelton v. Tucker,* 364 *U.S.* 479, 485-486, 81 *S.Ct.* 247, 250-251, 5 *L.Ed.2d* 231 (1960); *Keyishian v. Board of Regents,* 385 *U.S.* 589, 605-606, 87 *St.Ct.* 675, 684-685, 17 *L.Ed.2d* 629 (1967) The Court in *Perry, supra,* held that Sindermann was entitled to an opportunity to prove the legitimacy of his claim to an expectancy of continued employment because of the junior college's policy which, he claimed, bestowed a *de jure* tenure. The policy reads as follows:

> "***'*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.'***" (92 *S.Ct.* at 2699)

The Court pointed out that:

> "***Proof of such a property interest would not, of course, entitle him to

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reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.***" (92 *S.Ct.* at 2700)

The Court did not review Sindermann's First Amendment free speech argument because the District Court foreclosed any opportunity to make this showing when it granted summary judgment against Sindermann and for the Board.

The Court also pointed out that:

"***[T]he respondent here [Sindermann] has yet to show, that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth,* [*Board of Regents v. Roth,* 408 *U.S.* 564, 92 *S.Ct.* 2701 (1972)] the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property.***" (92 *S.Ct.* at 2698)

The Court affirmed the judgment of the Court of Appeals remanding the case to the District Court, in order to give Sindermann an opportunity to prove the legitimacy of his claim that the college's policy, *ante,* entitled him to an expectancy of continued employment.

In the instant matter, petitioner also cites *Board of Regents v. Roth,* 408 *U.S.* 564, 92 *S.Ct.* 2701, 33 *L.Ed.2d* 548 (1972) as grounds for her claim to procedural due process. In *Roth* the respondent was employed as assistant professor of political science at Wisconsin State University, Oshkosh, for the fixed term of one academic year, 1968-69. He was subsequently informed that he would not be reemployed for the next academic year. Roth had no tenure rights to continued employment, since Wisconsin statutory law required a State University teacher to have four years of continuous employment in order to acquire a tenure status. In the case of nontenured teachers, the decision whether to reemploy is left to the unfettered discretion of University officials, and no reason for non-reemployment and need be given, nor is any review or appeal process provided.

Roth attacked the University's failure to reemploy him on the grounds that the true reason for the determination was to punish him for certain statements critical of the University, in violation of his right to freedom of speech. Also, Roth claimed that the failure to give him any reason for non-reemployment and a hearing violated his due process rights. The District Court granted summary judgment for Respondent Roth on the procedural issue and ordered the University to provide him with reasons and a hearing. The Court of Appeals affirmed with one judge dissenting. The only issue before the Supreme Court was whether Roth had a constitutional right to a statement of reasons and a hearing on the University's decision not to reemploy him for another year. The Court held that he did not.

In its opinion in *Roth, supra,* the Court reviewed its prior decisions

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defining the terms liberty and property as used in the Fourteenth Amendment. The Court stated that, although "liberty" is broadly construed:

> "***It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.***" (92 *S.Ct.* at 2708)

The Court held with respect to Roth's argument of deprivation of property that:

> "***To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.***
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.***" (92 *S.Ct.* at 2709)

The Court observed that Roth's "property" interest in employment at Wisconsin State University, Oshkosh, was created and defined by the terms of his appointment which was secured only to June 30, 1969. The Court pointed out the important fact that the terms of his appointment:

> "***specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.
>
> "Thus the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.***
>
> "We must conclude that *** respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment.***" (*Emphasis in text.*) (92 *S. Ct.* at 2709-10)

In *Donaldson, supra,* the New Jersey Supreme Court pointed out that, as a matter of Federal law, the Federal courts have placed various restraints on local boards of education. For instance, a local board may not refuse to reemploy a teacher because of his membership in a labor union or his exercise of constitutional rights. Citing *Pickering v. Board of Education,* 391 *U.S.* 563, 88

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S.Ct. 1731, 20 *L.Ed.2d* 811 (1968) and *Perry v. Sindermann, supra,* the Court stated that:

> "***for present purposes we may assume (see *Board of Regents v. Roth,* 408 *U.S.* 564, 92 *S.Ct.* 2701, 33 *L.Ed.2d* 548 (1972)) that if he is not a tenured teacher he ordinarily has no federal constitutional right to a statement of reasons***." (65 *N.J.* at 242)

The Court's determination of *Donaldson* was "***disposed of on grounds which are wholly State in nature.***" (at page 243).

In the judgment of the Commissioner, absent a specific allegation that a nontenured teaching staff member was not reemployed for constitutionally impermissible reasons, the holding of the New Jersey Supreme Court in *Donaldson, supra,* disposes of the argument that *Roth, supra,* and *Sindermann, supra,* may be applied to the New Jersey statutory plan for the employment of nontenured teaching staff members.

In the instant matter, therefore, petitioner, as a nontenured teacher, could have no property interest or expectancy of reemployment in the school district under New Jersey school law.

The last issue raised by petitioner is that the Board's failure to fully comply with its evaluation policy entitles her to reinstatement. It is not necessary to recite all of the facts concerning this issue, which are adequately detailed in the hearing examiner's report.

The Board's policy (Exhibit A) states that the purposes of evaluation are twofold: namely, to improve the teacher's effectiveness, and to provide a basis for the granting or withholding of salary increments, tenure and reemployment, or dismissal. The Commissioner agrees with the totality of this policy and finds it to be sound, well-planned, and salutary. The overarching purpose of the long-standing educational practice of supervision of instruction, which includes evaluation, is the improvement of the quality of instruction received by the pupils enrolled in the public schools. One of the most significant of all factors which comprises a thorough and efficient system of education is a well-trained, scholarly, and highly competent faculty, described in the school law as teaching staff members. In the judgment of the Commissioner, the overall competence and effectiveness of the faculty, in any local school district, is a primary factor, more so than the schoolhouse, the library, and all other instructional materials and equipment, which directly and positively correlates with the quality of the educational program received by the pupils. Indeed, since the very inception of the institution known as the free public schools, or common schools as they were originally called, professional practitioners of the art of teaching have recognized that the system cannot function without the services of competent teachers, principals, and other educational specialists. This sound educational principle has, over the years, been cited with approval by the courts of this State. See *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944); *Kopera v. West Orange Board of Education,*

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60 *N.J. Super.* 288 (*App. Div.* 1960).

Although adequate scholarship of teachers is without question a vital component for competent and effective instruction, it is not the sole factor. Brilliant scholars have been known to be poor teachers. Teaching is an art, not a science. The successful teacher is one who is not only a competent scholar, but possesses a keen desire to teach, and acquires through training and experience a great variety of methods, skills, understanding of the learning process, and effective means of motivation. The teaching process is complex. Indeed, whole libraries are devoted to the subject. It is not unusual then to find that beginning teachers, even those who are excellent scholars, experience much difficulty in achieving effectiveness during their first several years in the classroom setting. Some never are able to reach a satisfactory level of competence, and others only after much trial and error and a long period of experience. For these reasons systems of supervision and ~~elevation~~ evaluation evolved as a means of improving the performance of teachers and, most importantly, to provide the best possible instructional program for the children entrusted to the care of the public schools.

The Commissioner has observed that many problems have been created, with extensive litigation, as the result of evaluation programs conducted in an excessively charitable manner, whereby beginning teachers have not had the benefit of candid and complete constructive criticisms of their deficiencies and shortcomings. When evaluations fail to enlighten the beginning teacher regarding his/her deficiencies and provide no suggestions for improvement, the teacher is mistakenly led to believe that his/her services and performance are at least adequate. Subsequently, when reemployment is not offered, the teaching staff member is at a loss to understand the reasons.

In this case, petitioner was supervised and evaluated, but the reports of the evaluations were not discussed with her as provided by the Board's policy, nor were they all given to her as was also required. The record before the Commissioner shows that petitioner never received copies of several of the evaluations and that no conference followed the evaluations. Balanced against these imperfections is the evidence that the evaluations of petitioner's performance were not made in bad faith, and that the final recommendations of both the principal and Superintendent were based upon their respective total impressions of petitioner's overall performance as a teacher. As was previously stated, the Commissioner holds that the Board's determination, based upon such proper factors, was not arbitrary nor unreasonable.

The Commissioner must point out that he does not approve of the lack of complete adherence to the policy of instructional supervision disclosed in this instance, even though he cannot hold that such deviations, considered in light of all the factual circumstances, resulted in an unfair or unreasonable final determination by the Board, not to reemploy petitioner. *Abramson, supra.*

The Commissioner is constrained to issue a caveat to this Board, as well as other local boards of education in this State, that they are required to make adequate provisions for the supervision of instruction, including a policy and

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administrative personnel to perform this function. The Commissioner will not designate one uniform policy for all the schools of the State, because circumstances peculiar to each school district require a broad area for the exercise of discretion.

It is essential, however, that there be a plan developed by each board for the supervision of instruction, including informal and formal evaluations as an ongoing program, particularly for nontenured teaching staff members. The Commissioner takes notice that the Legislature has recently enacted *c.* 132, *L.* 1975, effective July 1, 1975, which is clearly intended to serve the purpose of strengthening the supervision process, thereby assisting the improvement of instruction received by children in the public schools. This addition to the school law reads in its entirety as follows:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during each semester, provided that the number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.
>
> "Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.
>
> "The provisions of this act shall be carried out pursuant to rules established by the State Board of Education.
>
> "This act shall take effect July 1 next following enactment."

The Board is further directed to comply with its existing policy for supervision of instruction and evaluation of teaching staff members.

For the reasons hereinbefore stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 4, 1975

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**In the Matter of the Tenure Hearing of Victor J. Puzio,
School District of the Borough of Wallington, Bergen County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Joseph A. Banas, Jr., Esq.

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the Borough of Wallington, hereinafter "Board," has certified a series of four charges against respondent, a tenured custodian in its employ. The Board avers that such charges, if found true in fact, warrant either a dismissal of respondent from his position or a reduction in his salary. Respondent denies the allegations and advances a Motion for dismissal of the charges in which it is argued that the certification was defective.

A hearing in the matter was conducted on March 11, 1975 by a hearing examiner appointed by the Commissioner of Education at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The report of the hearing examiner is as follows:

Petitioner has performed janitorial duties in the Board's employ for a period of more than eighteen years. He is 58 years of age, married, and has children of his own. (Tr. 79) Prior to the date of September 25, 1974, his record as an employee of the Board was unmarred by complaint. (Tr. 112)

On that date, at approximately 8 a.m., an incident occurred in the hallway of the Wallington High School which resulted in a complaint to the Board and the proffering of the instant charges. Such charges may be considered as an entity for purposes of this report since they are all grounded in the same incident. The charges are recited as follows:

CHARGE 1

"On information and belief and a complaint instituted by a female student and her parents that on September 25, 1974, at the Wallington High School, said Victor Puzio, being then and there a custodian employed by the Board of Education of the Borough of Wallington, in the County of Bergen, did invite and solicit a female student of said High School, under the age of 16 years, to suffer and permit diverse and indecent acts against said student."

CHARGE 2

"On information and belief and a complaint instituted by a female student and her parents that on September 25, 1974, at the Wallington High School, said Victor Puzio, being then and there a custodian employed by the Board of Education of the Borough of Wallington, in the County of

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Bergen, did obstruct, molest and interfere with a female student of Wallington High School, under the age of 16 years."

CHARGE 3

"On information and belief and a complaint instituted by a female student and her parents that on September 25, 1974, at the Wallington High School, said Victor Puzio, being then and there a custodian employed by the Board of Education of the Borough of Wallington, in the County of Bergen, did invite and attempt to lure the aforesaid student into the building."

CHARGE 4

"On information and belief and a complaint instituted by the female student and her parents that on September 25, 1974, at the Wallington High School, said Victor Puzio, being then and there a custodian employed by the Board of Education of the Borough of Wallington, in the County of Bergen, did use lewd, lascivious, obsence (sic) and suggestive language toward a female student of Wallington High School, under the age of 16 years."

The primary evidence in support of charges consists of the testimony of the pupil, age fifteen, hereinafter identified as "P.S.," and her sister.

P.S. testified that on September 25, 1974, she and her sister had arrived at school at 7:55 a.m., approximately twenty minutes prior to the time when school doors were opened to pupils, and had sat down near a school entrance to talk. (Tr. 12) Shortly thereafter, she testified, respondent motioned her to enter the school building and she did. (Tr. 14) Then, she stated, respondent greeted her with a "Hi" or "Hello" and hugged her with one arm while the other arm was "in" her coat. (Tr. 15) She then testified that he asked her three questions and made other advances. Her testimony in this regard is recited verbatim as follows:

"Q. Tell us what happened next.

"A. He was still hugging me and he goes [said] to me 'Can I have a feel,' and he put his hand on my chest. That's when I backed off and he asked me if I had a lover and he asked me if I ever felt my lover and I said no because I am not like that and neither is he, and then I had this necklace on. It was an Italian horn.

"Q. All right. What did he do, if anything at that point?

"A. He picked my necklace up and he looked at it and then he put it back down and he started – he went like that and he started going down my shirt***." (Tr. 16)

There followed, P.S. testified, a short conversation held outside the school door immediately after she had left the building (Tr. 20) and a second

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conversation "10 or 15 minutes later." At this latter time, P.S. testified, respondent had come "*** outside the door *** looked at me and he said, 'Young lady could you please help me with the phone?'***" She testified she had not answered the query and an offer by a boy to help respondent was refused. (Tr. 20)

Cross-examination of P.S. established that on the morning in question she had worn a coat or jacket over a blouse and that the coat was zippered about halfway up. (Tr. 15) (See also Tr. 106) It was further established that the incident occurred four or five feet inside the school and that the entry was through a set of full glass doors. (Tr. 23) P.S. also testified that there was no attempt to unbutton or unzip any part of her clothing or any use of force. (Tr. 34) She stated the incident lasted between one and five minutes. (Tr. 36-47)

The sister of P.S. testified that she had seen respondent's arm around P.S. but that she had then looked away and saw nothing more until P.S. and respondent came out of the building. (Tr. 44) Her testimony with respect to the request of respondent for "help" with a telephone call was essentially a corroboration of the testimony of P.S., *ante*, and such testimony was further corroborated by the testimony of the boy who did offer such assistance. (Tr. 44, 50) The boy further testified that P.S. was crying when he arrived at the school. (Tr. 50)

Subsequent to the alleged incident, P.S. reported it to school officials at approximately 8:20 a.m. and to her parents on the evening of the same day. (Tr. 37) Her parents, however, filed no written complaint but complained orally with respect to respondent's alleged actions and overtures. (Tr. 61) Thereafter, respondent was transferred to duties in another school building and has continued his employment there pending a decision in the instant matter.

Respondent denies the alleged verbal overtures reported, *ante*, but he does admit to certain parts of the allegations against him. (Tr. 84-85) He admits that he motioned P.S. to enter the building so that he could examine the chain she wore with a "***metal gadget on it.***" (Tr. 84) He testified:

"A. As she walked in I says, may I see this, please, and I grabbed to reach for it and she jerked, and my hand did hit her chest. I says, what is that? She says a saber's tooth.***

"Q. ***Did you actually touch whatever she had on the necklace around her neck?

"A. Yes, I did, sir.

"Q. In doing that did your hands come in contact with any part of her body?

"A. I think I hit her chest because she ran towards me like, and my hand just glazed right through her whole chest, I guess." (Tr. 84-85)

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Subsequently, respondent testified, he put his arm around P.S. but only to usher her out of the building. (Tr. 103) He denied, however, that he had "hugged" her. (Tr. 87) He stated that he realized the necklace of reference should have been no concern of his and no subject for examination and avers he is "very sorry" that any such incident occurred. (Tr. 99)

Three residents of Wallington testified that respondent has enjoyed a "very good" reputation.

There are certain other pertinent facts which may be recited as follows with respect to the incident of September 25, 1974. When it occurred:

1. the sun was shining (Tr. 54);
2. the hallway lights were on (Tr. 70, 101);
3. teachers were almost certainly nearby in corridor rooms. (Tr. 95-96)

The hearing examiner has carefully evaluated such facts, the recited testimony, *ante*, and the demeanor and appearance of all witnesses at the hearing and sets forth the following observations and findings of fact:

1. It is clear that on September 25, 1974, respondent did in fact motion or invite P.S. into a school building and that there followed a short exchange of conversation and action marked by some physical contact between them. Respondent admits that this is so and the hearing examiner so finds.

2. A judgment with respect to what else happened on that occasion cannot be determined with certainty. The testimony of P.S. and respondent is directly at variance. In essential respects there is no corroboration of the testimony of either.

3. Nevertheless, the hearing examiner concludes that certain facts lend credence to a finding that the serious import of the charges herein has not been sustained by the creditable evidence adduced at the hearing.

Of principal importance as a foundation for this conclusion is the fact that the hearing examiner finds it difficult, almost impossible, to imagine any serious attempt by respondent to "obstruct, molest or interfere" with P.S. in the circumstance and setting which surrounded the controverted incident. As noted, the morning was a sunny one. Corridor lights were on. The door to the school was of glass and the incident occurred within a few feet of it and in full view of the sister of P.S. This sister testified she had seen respondent's arm "around" P.S. but at the time she evidently attached little importance to that fact but instead quickly looked away. (See Tr. 43.)

Further, the hearing examiner observes that P.S. is a pupil of immature appearance who on September 25, 1974, was dressed conservatively. Her appearance cannot have been provocative or deemed likely to have inspired the conversation alleged herein. The hearing examiner so finds.

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Accordingly, the incident of September 25, 1974, is held to be one of minor importance which, in the telling, gained a dimension and ramification which the hearing examiner holds are not supported by creditable factual or circumstantial evidence. The Commissioner was held that the testimony of school pupils must be taken and carefully evaluated in order that they may not be left defenseless. He has also held that such testimony must be discreetly weighted to allow for the immaturity of those who proffer it. *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188.

The hearing examiner recommends, therefore, that the instant charges be dismissed on the merits and he finds no necessity to address respondent's Motion with respect to procedural fault.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to *N.J.A.C.* 6:24-1.16.

The hearing examiner's report correctly states that the charges are not supported by the evidence. The Commissioner so holds. He, therefore, adopts the report of the hearing examiner as his own.

Absent any finding of unbecoming conduct, or of other just cause which would demand respondent's dismissal or a lesser penalty, the Commissioner hereby dismisses the tenure charges against him.

COMMISSIONER OF EDUCATION

September 4, 1975

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Peter Marshall,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Frank Piscatella, Esq.

Petitioner, a teacher under tenure, alleges that the Board of Education of the Borough of North Arlington, hereinafter "Board," has improperly denied him certain employment and remuneration rights to which he is entitled. He prays for an order from the Commissioner of Education directing the Board to reinstate him in the position of Cooperative Industrial Education Coordinator, hereinafter "C.I.E.C.," for the summer, as set forth in the Board resolution dated May 13, 1974, and to pay him according to his rights acquired by virtue of that resolution and the payroll resolution of the Board as set forth in the minutes of its regular meeting dated April 8, 1974.

The Board asserts that its actions were legal and lawful in all respects and that petitioner acquired no vested rights; therefore, he is not entitled to the remedy he seeks.

This matter is submitted for Summary Judgment by the Commissioner on Briefs and exhibits. There are no material facts in dispute.

Petitioner states that the Board is paying him at a rate of $17,040 annually in violation of its Payroll Resolution as recorded in the Board minutes dated April 8, 1974 in which his name is listed at a salary of $18,744. Petitioner alleges also that the Board illegally rescinded its resolution dated May 13, 1974 in which the Board resolved to pay him $1,704 for one month's work during July 1974.

By letter of May 15, 1974, petitioner was notified by the Superintendent as follows:

> "At its regular meeting held on May 13, 1974, the North Arlington Board of Education approved your employment for one month during the

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coming summer in order to make the necessary preparations for the C.I.E. program in the new school year.

"You will receive $1,704.00 (one-tenth of your annual salary for 1974-75) for the month's work. *This will be an extra pay for extra services amount and is not added to your basic pay.*

"You will be expected to report starting and leaving time to the Principal's Office each day." (*Emphasis added.*) (Schedule B)

The Board asserts that its offer of summer employment was based on one-tenth of its salary offer (Schedule A), *infra,* or, $1,704 as set forth in the Superintendent's letter.

Petitioner alleges, however, that the Board's payroll resolution grants him a salary of $18,744, together with its determination to pay him an additional one-tenth of his salary (which he computes at $1,874.40) for work during July 1974, which thereby entitles him to a total remuneration of $20,618.40 for the 1974-75 academic year plus the proposed work in July.

The Board denies these allegations and offers proof that petitioner signed a statement of salary offered by the Board on April 11, 1974, which reads in pertinent part as follows:

"The North Arlington Board of Education has authorized me to notify you that your salary for the 1974-75 school year will be $17,040.00"

(Signed)

(Superintendent of Schools)

***

"1. I am planning to return to my position in North Arlington next year."

(Signed)

(Petitioner, 4/11/74)

***

(Schedule A)

It should be noted that the quoted salary of $17,040 plus one-tenth of that amount which is $1,704 equals $18,744, the amount approved by the Board in its resolution recorded in the minutes referred to, *ante.*

On June 25, 1974, the Superintendent sent petitioner the following letter:

"The North Arlington Board of Education has decided not to employ a C.I.E. Coordinator for one month in the summer. Therefore, the section of the Superintendent's Agenda *** of the minutes of the Board meeting of May 13, 1974, concerning your appointment for one month during the summer of 1974 at the rate of one-tenth of your annual salary for 1974-75, is hereby rescinded.

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This action was taken at a special meeting of the Board of Education held on Monday, June 24, 1974."

(Signed)

(Superintendent of Schools)

(Exhibit A)

The Board denies, also, that petitioner accepted the offer of summer employment as he asserts in his Amended Petition of Appeal and petitioner offers no proof of his alleged acceptance. Therefore, the issues to be addressed are these:

1. What is petitioner's proper salary for the 1974-75 academic year?

2. Did the Board unlawfully rescind its resolution which offered petitioner summer employment and extra salary?

The Commissioner has previously stated that "***[a]n acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.***" *Marion Harris v. Board of Education of Pemberton Township, Burlington County,* 1939-49 *S.L.D.* 164, 166 (1938) This principle has been reaffirmed in several decisions since that time. *Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County,* 1961 *S.L.D.* 189; *James Docherty v. Board of Education of Borough of West Paterson, Passaic County,* 1967 *S.L.D.* 297; *Albert DeRenzo v. Board of Education of the City of Passaic, Passaic County,* 1973 *S.L.D.* 236; *Leonard Moore et al. v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 526

However, this matter is distinguishable from these cited cases for the reason that each of them refers to regular employment of a teaching staff member during the academic year. Academic year employment is mandated by the compulsory education statutes; however, there is no statutory mandate to operate a summer school, or to offer summer employment.

The Commissioner is constrained to make the following observations:

1. The Board offered, and petitioner accepted, his statement of salary for the 1974-75 academic year, and that offer was $17,040. (Schedule A) The Board's later resolution establishing $18,744 as petitioner's salary is clearly and obviously the sum of his actual salary offer plus one-tenth of his salary for extra summer employment.

2. Boards of education must plan ahead and try to schedule summer programs in advance when they operate summer school sessions or offer summer employment; however, if they must change their plans for any reason, they cannot be bound to spend public moneys for services not rendered.

3. The Board's rescission in the instant matter does not change or reduce

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petitioner's salary. It merely rescinds the previous offer of summer employment, but not his contractually accepted salary. (Schedule A)

The Commissioner, therefore, establishes petitioner's proper salary for the 1974-75 academic year as $17,040. There can be no question that petitioner signed his statement of salary for that amount and checked the box indicating his intent to return to the district and teach during the 1974-75 academic year. (Schedule A)

If petitioner's logic and claim for $20,618.40 is to be considered seriously, then his argument would have to conclude that the April 8, 1974 Board minutes should list his compensation for that amount, and not the $18,744 as shown. The evidence, therefore, does not support his conclusion.

In the instant matter, there is no mistake in the placement of petitioner on the salary guide as there was in *Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1972 *S.L.D.* 638 and *Docherty, supra,* nor was petitioner's salary reduced.

The Commissioner concludes, therefore, that the Board rescinded its offer of extra employment and extra compensation, and it had the statutory and discretionary authority to do so. *N.J.S.A.* 18A:11-1 reads as follows:

"The Board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. *Make, amend and repeal rules,* not inconsistent with this title or with the rules of the state board, *for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees,* subject, where applicable, to the provisions of Title 11, Civil Services, of the Revised Statutes[1]; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." (*Emphasis added.*)

[1]Section 11:1-1 *et seq.*

For all the above reasons, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 4, 1975
Pending before State Board of Education

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Katherine Manning, individually and as natural guardian of Daniel and Katherine Manning;
Mena McAllister, individually and as natural guardian of Mary Patricia and Gregory McAllister;
Maryann Vidovich, individually and as natural guardian of Mark and Daniel Vidovich;
Gwen O'Neill, individually and as natural guardian of Cheryl Doe O'Neill;
Louise Mauriello, individually and as natural guardian of Louis, Anne, Mark Joseph and Michael Mauriello;
Martha Miller, individually and as natural guardian of Jaclyn and Paul Miller,

Petitioners,

v.

Board of Education of the Township of Cedar Grove, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Annamay T. Sheppard, Attorney at Law

For the Respondent, Stickel, Kain and Stickel (Fred G. Stickel, III, Esq., of Counsel)

Petitioners, all of whom are parents of pupils attending the Cedar Grove Public Schools under the authority of the Cedar Grove Board of Education, hereinafter "Board," allege that school lunch policies promulgated by the Board invidiously discriminate against them as female parents, and arbitrarily and capriciously discriminate against their children. Petitioners now seek relief from such alleged improper policies. The Board denies the allegations and asserts that its policies controverted herein have been applied to all pupils and parents in a fair and judicious manner.

On September 8, 1973, petitioners were granted a temporary restraint against the Board, issued by the New Jersey Superior Court, Chancery Division, Essex County, Honorable Melvin P. Antell, J.S.C. presiding. That restraint, however, was dissolved by Judge Antell on September 21, 1973, when he denied Petitioner Vidovich's Motion for Interlocutory Relief. (C-2) Thereafter, on January 7, 1974, petitioners opened the instant matter before the Commissioner of Education. On February 1, 1974, Petitioner Vidovich and the Board signed a Stipulation of Dismissal (C-1) of the same matter then pending before the Court.

Subsequently, petitioners filed a Motion for Interim Relief before the Commissioner on April 22, 1974. The parties filed Briefs in support of their respective positions on the Motion, and leave was granted the parties to present oral argument in support thereof on May 7, 1974. (See Tr. I.) The referral of the

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record to the Commissioner on petitioners' Motion was held in abeyance pending the completion of the testimony and submission of documentary evidence herein.

Hearings were conducted in this matter on May 23, 28, 30, and June 24, 1974 at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed letter memoranda in support of their respective positions. The report of the hearing examiner is as follows:

Petitioners seek to have the Board allow elementary pupils to bring their own lunches to school and remain in school during the luncheon recess. Presently, the Board's policy in regard to pupils remaining for the luncheon recess is as described by the Superintendent in his affidavit filed and made part of the Board's Brief in Opposition to Petitioners' Motion for Interim Relief.

The Superintendent, who has been employed in various capacities by the Board since 1950, testified that approximately ten years ago the Board adopted a neighborhood concept for its four elementary schools, hereinafter identified as the North End School, the South End School, the Ridge Road School, and the Leonard R. Parks School. The Superintendent explained that the Board's purpose in adopting this concept was to have its elementary pupils assigned to the school closest to their homes and within walking distance. As a result, the Board determined that all its elementary pupils should go home for lunch. The Superintendent stated that that practice has continued until the present time and is consistent with the Board's present day lunch policy by which all elementary pupils, with few exceptions, go home during the luncheon recess.

The exceptions to this policy, the Superintendent explained, are as follows:

1. On March 1, 1960, the Board adopted a policy (R-12) which provided that pupils residing more than one mile from the school they attended would be permitted to remain in school during the luncheon recess. By virtue of the same policy the Board reaffirmed its determination that all other pupils would go home for lunch. The Superintendent explained that this policy applies to the Leonard R. Parks School where approximately fifty pupils, who reside more than one mile from the school, remain for lunch. It appears that no pupils assigned to the other three schools live more than one mile from their respective schools and no pupils remain during the luncheon recess.

The Superintendent testified that the Board employs two aides to supervise the pupils who remain in the Leonard R. Parks School for lunch. Lunch-time aides are neither employed for nor assigned by the Board to the other three schools.

2. The second exception to the Board's policy that all pupils return home for lunch is in regard to pupils involved in the band, orchestra, and chorus activities in each of the four schools who may, on the specific day scheduled for rehearsal, bring lunch and remain for the luncheon recess. This is so, the

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Superintendent explained, because rehearsals for those activities are always conducted during the luncheon recess. The pupils who are involved eat their lunch and rehearse under the direction of the music teacher.

3. The third exception to the Board's lunch policy concerns pupils who require a program of special education. The Superintendent explained that the Cedar Grove School District is part of a special education regional system whereby pupils from other districts are transported to and from Cedar Grove for special education. No transportation is provided during the luncheon recess for these pupils, some of whom live miles away, and they are allowed to remain for lunch.

4. The fourth exception provides for "emergency" as defined in the Board's policy adopted June 15, 1971. (J-1) This policy provides, *inter alia,* as follows:

***

"The following criteria will constitute such an emergency:

"1. Physical incapacitation, such as a broken limb which would make travel difficult or hazardous and where the Board does not provide transportation

"2. A health problem whereby a physician recommends that travel at noon would be detrimental to the student

"3. Death in the immediate family, an accident, or unexpected illness whereby arrangements for supervision could not be made

"4. Principals may also grant permission to remain at school for emergency purposes when, in their judgment, a parent's request is emergent and not covered above. This shall be reported in writing to the Superintendent.***"

Petitioners collectively allege, albeit for different specific reasons, that the Board's policy and exceptions, recited *ante,* is on its face and through its implementation discriminatory and improper. At this juncture, the hearing examiner will recite each petitioner's specific reasons which constitute the collective allegations hereinbefore set forth. It is noted here that Petitioner Mauriello has since withdrawn. (Tr. II-5)

Petitioner Manning testified that she, her husband, and their children moved to Cedar Grove during September 1967 and live on Mountain Avenue, a county road, which is heavily traveled, heavily wooded, and sparsely settled. Petitioner Manning testified that the road consists of two lanes with no shoulder nor sidewalks. (Tr. II-132) Petitioner Manning testified that her home is approximately seven-tenths of one mile from North End School, which two of her four children attend (Tr. III-41), and in her judgment the route which her two children travel during clear weather constitutes a hazardous route. (Tr.

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II-132) During inclement weather she drives them to and from school. (Tr. II-134) Petitioner Manning's other two children are of preschool age. (Tr. III-41)

Petitioner Manning testified that when her oldest child began attending school for a full day, in September 1970, she was granted temporary permission for him to remain for lunch (Tr. II-131, 135, 146), conditioned upon her making arrangements for him to have lunch either at home or some other place. Apparently this temporary permission was extended by the Board for the entire 1970-71 academic year, as evidenced by a letter (P-12) sent to Petitioner Manning the following year by the Superintendent and reproduced here in part:

> "At the conference meeting on October 6 the Board of Education again *** permitted [petitioner's son] to remain at school [for lunch] for the month of September [1971]. Mindful of the fact that you have not given up in your efforts to make satisfactory arrangements, they [the Board] will permit [petitioner's son] to eat lunch at school for one additional month.***"

Petitioner Manning testified that, in an effort to reduce the hazards along Mountain Avenue, the route her children walked to and from school, she contacted the Essex County Road Department which informed her by letter (P-9) that it had no plans to improve Mountain Avenue. (Tr. II-139) Previously she had also contacted the Cedar Grove governing body during 1969 and again in 1971 to seek assistance in getting safety improvements on Mountain Avenue. These efforts proved fruitless. (Tr. II-139)

In regard to Petitioner Manning's effort to secure safety improvements for Mountain Avenue, the Board, on behalf of Petitioner Manning, sent the following letter (P-11) to the governing body on November 8, 1971, which is reproduced in part as follows:

> "At a recent conference between the members of the [B]oard and council the subjects of sidewalks and safety were discussed.***
>
> "Mr. and Mrs. Manning of 57 Mountain Avenue have discussed with the [B]oard members the difficulties which they encountered in getting their children safely to and from the North End School. The Manning family has four children, the oldest a second grade student, the youngest less than a year old. The two school age children (one being in second grade and the other in Kindergarten) have different dismissal times. The difference in dismissal times and the fact that Mrs. Manning has two preschool age children makes it almost impossible for her to get the children safely to and from school.
>
> "The street on which the Mannings reside is a county highway, heavily used, narrow, winding, and with a severe grade. There are no sidewalks.***
>
> "Would you kindly forward this information to the members of the council for their consideration."

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The Board likewise sought a solution to this problem by suggesting to the New Jersey School Boards Association (J-6) that its sponsor legislation which would allow local boards of education to transport selected pupils who traverse what would be considered hazardous routes, and who live less than the required distance for current State aid reimbursement.

It appears that the temporary permission for Petitioner Manning's child to remain in school for lunch had again been extended, on a month-to-month basis, for the 1971-1972 academic year, and was likewise granted at the beginning of the 1972-73 academic year as outlined in the following letter (P-13) sent to Petitioner Manning by the Board President on August 18, 1972:

> "The Board of Education has been requested by some parents to permit their children to eat lunch in school on the basis of the extremely serious and hazardous traffic conditions their children must face in walking to and from school. As you know, the Board has in the past granted permission under the provisions of our current school board policy on Emergency In-School Lunch; however, permission has been granted on a temporary basis pending a solution to the problem.
>
> "The Board has studied and discussed this matter at length and will consider plans to revise its policy on Emergency In-School Lunch to include the option of remaining in school for lunch for these students who must face extremely serious and hazardous traffic conditions. The Board will consider this action at the next public meeting on September 19, 1972. In the interim, since our meeting follows the opening of school, we extend permission for your children to remain in school for lunch.
>
> "We sincerely hope this action will serve to alleviate many of your concerns regarding our mutual interests in student and citizen safety in Cedar Grove." (P-13)

While the minutes of the September 19, 1972 Board meeting referred to above are not part of the record herein, the hearing examiner observes that the minutes (P-18) of a meeting conducted on October 17, 1972, reflect that the Board determined not to change its existing lunch policy and that:

> "***parents who felt the route which their children had to take in going to and from school had unusual hazards should inform the building principal in writing of the conditions involved. Consideration would then be given to permitting the child to bring a bag lunch and remain at school during the lunch hour.***" (P-18)

With Petitioner Manning's temporary permission apparently continuing on a month-to-month basis during the 1971-72 academic year, the following letter (J-3) was addressed to her on January 14, 1972 by the Superintendent:

> "Each month since your meeting with members of the Board of Education, the Board has reviewed your request to have your son remain

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at school for lunch. Realizing your desire to make other more suitable, permanent arrangements, the Board has been extending on a month to month basis the privilege of allowing your son to remain at school during the noon period.

"Board members have sought the advice and counsel of others in an attempt to assist you. The installation of walkways has also been discussed with members of the Township Council. To date no resolution has been reached.

"Since many months have now passed, I have been asked to write this letter to inquire about what alternate arrangements you have explored and what your plans are for resolution to your son's need for lunch arrangements. An early reply would be appreciated by the Board."

Having received no reply from Petitioner Manning, the Superintendent, in a letter dated February 11, 1972, requested her to respond in regard to her "***plans for the resolution to your son's need for lunch arrangements***by February 18, 1972***." (J-4)

Although not part of the record herein, Petitioner Manning must have written the Board on February 17, 1972, for the following letter (J-5) was written by the Superintendent on March 15, 1972, reproduced here in full:

"The members of the Cedar Grove Board of Education have asked me to acknowledge receipt of your letter of February 17, 1972. They also wanted me to convey to you their continued concern for the safety of all the children in our school system.

"Because of their concern, the Board met with you in conference on September 21, 1972, at which time you presented your problem concerning your son's access to and from school. A special arrangement was worked out whereby your son has been extended the privilege of eating in school on a month to month basis since that meeting. This was done to afford you a reasonable time to find a solution. As I pointed out in my letter of January 14, the Board has also attempted to assist you in finding a solution.

"Your call for a 'decision' has caused the Board to wonder if its efforts in your behalf have led you to the conclusion that access to and from school is the responsibility of the Board of Education. They wish to clarify at this time that access to and from school is the responsibility of each parent and not that of the Board of Education.

"Since you have not yet found a solution to your problem, although six months have now passed, the Board has agreed to extend the special school lunch arrangement only for the remainder of this school year. This will give you considerably more time prior to the start of the next school year to resolve your problem."

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It appears that the temporary permission for her son to remain in school for lunch lasted not only until June 1972, but continued into the academic year 1972-73 and was expanded to include her second child who now attended the North End School full time. On October 10, 1972, the Superintendent addressed the following letter (J-7) to Petitioner Manning:

> "The members of the Cedar Grove Board of Education asked that I write to inform you that until further notice [petitioner's daughter] who is in first grade, and [petitioner's son] who is in third grade, may bring a bag lunch to school and remain under the supervision of the aide who also supervises the students in the special education class."

The temporary permission for both children apparently continued during the 1972-73 academic year and on March 21, 1973, the Superintendent sent the following letter (J-8) to Petitioner Manning:

> "Quite a few months ago I wrote a letter to you indicating that the Board of Education had granted temporary exception to established policy concerning lunch and would permit your children to eat at school until further notice. Recognizing that you previously had some difficulties in working out a suitable arrangement, the Board has now asked that I write to you to ascertain what progress you have made in working out a solution to getting your children to and from school. They would appreciate a reply by the end of March."

Finally, on April 27, 1973, the Board Secretary informed Petitioner Manning by letter (P-14) of the following:

> "In the absence of Mr. Bechtold, the Board of Education has asked that I respond to your letter of April 13 and convey their thoughts regarding an exception to the Elementary In-School Lunch Policy.
>
> "The Board has spent a considerable amount of time and effort in studying and reviewing your request for permission for your child to remain in school for lunch. Over the past many months a temporary exception to Board policy has been made in permitting your child to remain in school for the lunch period. In the Board's opinion, they have provided you ample time to find an alternate plan. You must realize the responsibility for getting your children to and from school rests with you, the parents.
>
> "The members of the Board have asked me to advise you that while your children may continue to remain in school for lunch during the remainder of this school year, they will not be permitted to do so beginning in September 1973."

At the beginning of the 1973-74 academic year, the principal of North End School sent the following letter (J-9) after, it appears, Petitioner Manning sent her children to school with their lunches:

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"Please be advised that current Board of Education policy does not permit children to remain in school for the lunch period except when duly authorized as outlined in Board of Education Policy EMERGENCY IN-SCHOOL LUNCH, adopted 6/15/71, [J-1, *ante*] or without Board approval relating to unusually hazardous conditions, excepting those who live over a mile from school, or those who participate in the music program on the appointed days, or those who are students in the special education classes, or those who remain for any other duly authorized reason.

"This letter will serve to inform you that in the event your children again violate these rules and regulations it will be necessary to invoke suspension at the end of that school day.

"The Board is sincerely concerned that no child be confronted with a situation which is deleterious to his educational program; however, students who do not follow rules of the school system must face disciplinary action. It is incumbent upon you, as the parent, to see that your child is not placed in any position in which irreparable harm may result."

The next day, September 6, 1973, Petitioner Manning again sent her children to school with their lunches. The principal, in a letter (J-10) of the same date, informed Petitioner Manning that:

"***should continued attendance at school for lunch take place, we will be forced to proceed with the suspension procedure as outlined in the letter sent to you on September 5, 1973.***"

On September 7, 1973, the following letter (J-11) was sent by the principal to Petitioner Manning:

"This letter will serve to inform you that in the event your child again violates the rules and regulations of the Board of Education pertaining to the school lunch program, it will be necessary to invoke suspension at the end of that school day.

"The Board is sincerely concerned that no child be confronted with a situation which is deleterious to his educational program; however, students who do not follow rules of the school system must face disciplinary action. It is incumbent upon you, as the parent, to see that your child is not placed in any position in which irreparable harm may result."

Finally, on September 10, 1973, the principal informed Petitioner Manning of the following: (J-12)

"Since you have chosen to let your children continue to disregard school rules and regulations of Board of Education policy regarding school lunch

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procedures, please be advised that your children [petitioner's son and daughter] have been suspended from school on this date.

"Your children will be readmitted to class following a successful conference and the assurance that compliance to rules and regulations will be met. This conference can be scheduled immediately.***"

A conference between the Board and Petitioner Manning was conducted on September 17, 1973 (R-3) in which the Board encouraged her to follow the rules of the school, bring her children back to school, and find an alternate solution other than having her children remain during the luncheon recess.

Thereafter, several other letters (J-13, J-14, J-15, P-9, P-10) were exchanged between the parties regarding the lunch policy and hazardous route between the home and school.

The hearing examiner observes that the principal's action in suspending Petitioner Manning's two children is a classic example of differing opinions between adults, herein concerning the school lunch policy, which result in a lack of concern for the children involved. The hearing examiner is aware of the obvious difficulties which this situation created both for the school and the parents; however, for either party to the dispute to look to the pupils as vehicles for its resolution is anathema to the very goals of the educational process. On the other hand, for Petitioner Manning to deliberately place her children in a situation directly contrary to the established policy of the Board was equally fraught with danger as was the children's suspension from school, which had no foundation in law.

In regard to Petitioner Vidovich, she testified that because she is divorced she must work to support herself and her two children who attend North End School. Furthermore, because her place of employment is some distance from her home she cannot return at lunchtime to be with her children. Consequently, Petitioner Vidovich employs a neighbor to be with her children at lunchtime because her request (P-1) to school authorities to have her children remain for the luncheon recess was denied. (P-2) Petitioner Vidovich, who lives less than one mile from school, was allowed on various occasions to have her children remain for lunch when one child has a broken leg (Tr. II-20) and after one had had a tonsillectomy. (Tr. II-58) Petitioner Vidovich was also informed (J-2) that if she sent her children to school with lunch they would be suspended.

Petitioner McAllister's complaint against the Board's policy is that because of extraordinary medical expenses for one of her three children, she must work and cannot be home when her children return to eat lunch. Furtherfore, Petitioner McAllister testified that her situation is a continuing emergency and that she simply cannot afford to employ anyone to watch her children. (Tr. II-109, 129)

Petitioner O'Neill testified that she is a co-owner of a music store which has a branch store in Montville. She testified that because her daughter may not remain at school for lunch she must frequently drive home from her Montville

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store to be with her daughter for lunch. This action, Petitioner O'Neill testified, extends her working day because she is still required to do the tasks she normally would do if she did not have to leave.

Petitioner Miller, in support of her complaint against the policy of the Board, testified that because she has to be home with her children at lunchtime, she is not able to attend law school during the day and must attend evenings. She claims that the Board is improperly discriminating against her.

It is observed by the hearing examiner that a pilot lunch program (R-13, R-14) was operated by the Board for grades one, two, and three during 1970-71 and that a report (P-4) of that effort was submitted to the Board by the Superintendent. It is also observed that a special question (R-11) was presented to the voters at the February 1971 annual school election to raise $17,500 to support a lunch program for grades one to eight. The voters defeated that proposal and the pilot program ended in June 1971.

Thereafter, several parents proposed a program to the Superintendent and to the Board which would have parents volunteer to come into the school during the lunch hour to supervise the pupils who would remain for lunch. This suggestion was never accepted by the Board.

Petitioners allege that, in each instance, the denial by the Board of permission for their children to remain for the luncheon recess constitutes a violation of *N.J.S.A.* 18A:33-1 which, *inter alia,* requires:

> "Each school district shall provide, for all children who reside in the district*** suitable educational facilities including proper school buildings and furniture and equipment, convenience of access thereto***."

Petitioner Manning alleges that her children do not have "convenience of access thereto," while in the other instances hereinbefore set forth, it is alleged that the children's statutory right to full advantage of the school program in a healthy atmosphere is being violated. (Tr. I-7)

Secondly, petitioners collectively allege that the Board's policy, *ante,* visits upon each of them economic hardships which contradict the essence of a free and mobile society. Petitioners assert that, by virtue of this policy, the Board arbitrarily discriminates against certain persons by creating economic barriers, thereby effectively closing the community to female parents who must work. (Tr. I-7-8)

Finally, petitioners allege that the policy controverted herein violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Paragraph 5 of the New Jersey Constitution because it arbitrarily discriminates against the female petitioners who must work to support their families and who find alternative adult, lunch hour supervision for their children unavailable or prohibitively expensive, or who seek to pursue professional goals but cannot because they are required to be home with their children at lunchtime.

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The hearing examiner does not find a violation of *N.J.S.A.* 18A:33-1 as argued herein. It has previously been determined that boards of education are not authorized by law to provide for the safety of children in reaching school except where pupils live "remote from the schoolhouse." *Read et al. v. Board of Education of the Township of Roxbury,* 1938 *S.L.D.* 763 (1927); *Concerned Parents of Howell Township School Children v. Board of Education of the Township of Howell, Monmouth County,* 1972 *S.L.D.* 600; *Trossman et al. v. Board of Education of the Borough of Highland Park, Middlesex County,* 1969 *S.L.D.* 61

In regard to petitioners' allegations that the Board's lunch-time policy constitutes a violation of *N.J.S.A.* 18A:33-1 because their children were denied the full advantage of the school program, the hearing examiner knows of no requirement that local boards of education must provide an opportunity for pupils to remain in school for lunch. However, boards of education are granted authority at *N.J.S.A.* 18A:11-1 to "***make, amend and repeal rules***for its own government***."

While there is no finding that the Board in this instance violated any statutory law, a review of the implementation of its lunch-time policy by its school administrators, particularly in respect to Petitioner Manning's children, from September 1970 through June 1973, discloses sufficient flexibility in that policy which, if employed in the severe instances of Petitioner Manning and Petitioner McAllister, would have avoided costly and time-consuming litigation.

The hearing examiner, although not called upon to do so, finds as an ancillary fact that the situations in which Petitioners Manning and McAllister find themselves are severe. Their circumstances were brought about by the vagaries of fate or failure as opposed to the unfortunate, though in the hearing examiner's view not severe, circumstance in which Petitioners Vidovich, O'Neill, and Miller find themselves.

In summary, the hearing examiner finds no legal basis upon which to recommend that the Commissioner grant the relief requested. The hearing examiner does recommend, however, that the Commissioner find upon the basis of past practice that the Board's lunch-time policy controverted herein is sufficiently flexible to allow the children of Petitioners Manning and McAllister to be included therein. This recommendation is not intended to require the Board to institute a total bag lunch program for the entire school community. To the contrary, the recommendation is limited to the two specific petitioners, Manning and McAllister, and is based upon an ancillary finding of fact.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by the Board pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner cannot accept that portion of the hearing examiner's

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report which would permit the children of Petitioners Manning and McAllister to make use of the Board's lunch program.

The hearing examiner stated quite clearly that the board of education has the authority to "***make, amend and repeal rules***for its own government***." *N.J.S.A.* 18A:11-1 He stated, also, that there is no finding that the Board violated any statute, nor is there any violation of a State Board of Education rule. The Commissioner concurs in that specific finding and so holds.

Likewise, petitioners' arguments of (1) sex discrimination and (2) violation of constitutional rights have not been supported by the evidence. As stated correctly by the hearing examiner, there is no requirement that local boards of education must provide an opportunity for pupils to remain in school for lunch. This Board did establish a lunch policy, however, and the record shows that that policy was applied fairly to all pupils in the district.

The Commissioner finds, therefore, that this matter is practically identical to the matter of *Louis and Helene Chiriaco et al. v. Board of Education of Hawthorne and John B. Ingemi, Superintendent of Schools, Passaic County,* 1974 *S.L.D.* 551. In that decision the Commissioner stated that:

> "***The matter of the formulation of policy for its luncheon program is clearly a management prerogative of the Board. *N.J.S.A.* 18A:11-1 While the Commissioner is vested with quasi-judicial powers to hear and decide disputes and controversies that arise under the school laws (*N.J.S.A.* 18A:6-9), such powers are not without limits. As has been said before:
>
> > '***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***' *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1947)***" (at p. 555)

The Commissioner determines, therefore, that the Board in the instant matter has acted within its discretionary and statutory authority.

Absent any finding that would modify the Board's lunch policy, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 11, 1975

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In the Matter of the Health Careers Institute Division of the Institute of Business Technology for Renewal of its Certificate of Approval, Morris County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Schenck, Price, Smith & King (Gary C. Algeier, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General of New Jersey (Susan P. Gifis, Attorney at Law, of Counsel)

The Health Careers Institute Division of the Institute of Business Technology, Morris Plains, hereinafter "petitioner," appeals from an Order of the Commissioner of Education dated January 17, 1975, denying the renewal of petitioner's certificate of approval to continue to operate a private vocational school pursuant to *N.J.S.A.* 18A:69-1 *et seq.* and *N.J.A.C.* 6:46-4.1 *et seq.* This same Order granted conditional approval to continue to provide an educational program limited strictly to those pupils and classes in attendance immediately prior to January 1, 1975, pending a formal hearing in the matter, if requested.

A hearing was requested and was conducted by a hearing examiner appointed by the Commissioner on February 3 and 4, 1975 and April 7, 1975 at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

The aforementioned Order was grounded on an affidavit (R-26) of the Director of Private Trade and Technical Schools of the Division of Vocational Education, hereinafter "Director." In this affidavit (R-26) he charges violations of the rules of the State Board of Education which are hereinafter set forth with the findings of fact and recommendations of the hearing examiner. Certain of these charges of violations are grouped and considered *in pari materia.*

CHARGE NO. 1

> "[C]hanges in items which were elements or conditions of the original approval without Department approval, in violation of *N.J.A.C.* 6:46-4.15(d)***."

N.J.A.C. 6:46-4.15(d) requires that

> "A change in any item that was an element or condition of the original approval or of a subsequent change must be approved by the Department of Education prior to any announcement of the change by the school."

The Director charges that petitioner, without request for approval and without authorization or approval of the Department of Education, exceeded

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the approved enrollment and the approved number of sections of the Medical Laboratory Technicians course, hereinafter "MLT."

Approval was granted by the Director for this course on April 18, 1973, specifying the total laboratory (shop) capacity of the school for the course to be twenty pupils. (R-4) No number was inserted on the approval notice in the blank provided for the school capacity for lecture. No particular significance may reasonably be attached to this omission, however, since the laboratory facilities were approved for a total of twenty MLT pupils in the entire school. (R-4) Pupils were enrolled in this course as follows: (R-7)

Class	Beginning	Date	Number
MLT-1	September	1973	7
MLT-2	January	1974	7
MLT-3	April	1974	7
MLT-4	July	1974	5
MLT-5	September	1974	–

The total number of months scheduled for this course was eleven. It is found that enrollment during the summer months was twenty-six on August 22, 1974, thereby exceeding the maximum of twenty for which the school was approved. (Tr. II-115)

MLT-1 was approved in writing by the Director in April 1973. (R-4) Petitioner verbally requested and was granted approval by the Director for MLT-2 in December 1973. (Tr. II-33) No evidence exists that approval was either sought by petitioner or given by the Director at any time for MLT-3, MLT-4, or MLT-5. The existence of these additional classes first became known to the Director as the result of visits to the school on August 26, 1974 and September 5 and 6, 1974. (Tr. II-44-45; R-3) Thereafter, the Director, on September 19, 1974, advised the school that it was not in compliance with the State Board regulations because of this and other violations. (R-3) At that time the Director withdrew approval for the MLT course but granted petitioner the right to continue instruction of those persons enrolled in MLT-2 which had been previously approved. (Tr. II-98, 147) He further directed that total refunds be made to those enrolled in MLT-3, 4, and 5 for which approval had not been granted, and that those classes be discontinued. (R-3)

Petitioner alleges that it was the understanding of the school authorities that the limitation of twenty pupils applied only to those scheduled in the laboratory at one time, not to the entire enrollment in MLT and that it was their understanding that additional classes could be started as long as the subject matter remained the same. (Tr. I-134) Petitioner further argues that the informal, verbal approval of MLT-2 by the Director gave rise to petitioner's belief that the additional classes could be established without formal written application or approval.

Respondent asserts that, to the contrary, formal application was required

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for each additional class of MLT and that *N.J.A.C.* 6:46-4.15(d) was, thereby, flagrantly violated. In this regard the Director testified that:

> "***If they had notified this Department that they were adding a section, this would have been the subject of a discussion, investigation, checking of facilities, instructional staff, and how they could handle three groups in the limited facility available.***" (Tr. III-25)

The hearing examiner has considered and carefully weighed the documentary evidence and testimony relative to Charge No. 1 and finds that petitioner did violate the terms of the original agreement by exceeding both total enrollment and the number of classes approved by that agreement without notification to or approval from the Director.

CHARGE NO. 2

> "[F]ailure to refund money to students as agreed, in violation of *N.J.A.C.* 6:46-4.10 (d)9."

The hearing examiner finds that petitioner complied with the Director's order to discontinue MLT-3, 4, and 5, and thereafter refunded, at least in part, the tuition paid by those enrolled in these courses. Some who were enrolled were allowed cash refunds and others were allowed a credit for tuition paid if they chose to transfer to another course offered by the school. (Tr. II-102) The Director and petitioner were unable to agree upon the precise amount of refunds due each pupil. (Tr. I-55; Tr. II-112-13, 115; Tr. III-73) Therefore, the parties agreed to refer the matter of the refunds to the Division of Consumer Affairs of the Office of Consumer Protection. (Tr. I-48; Tr. II-118) It is observed that MLT-5 was scheduled to begin classes at the time of the Director's order to discontinue MLT-3 and 4. (Tr. I-56) Although there was some dialogue as to whether MLT-5 could continue, it was, in fact, discontinued in October 1974 and refunds or transfer options provided to those enrolled therein. (Tr. I-56-57, 61, 63, 65)

It is recommended that the Commissioner determine, in view of the parties' voluntary referral of the matter to another State agency that the Commissioner leave to the Division of Consumer Affairs the resolution of the precise amounts of tuition due the individuals formerly enrolled in MLT-3, 4, and 5.

CHARGE NO. 3

> "[E]nrollment of students in an unapproved class, in violation of *N.J.A.C.* 6:46-4.6(a)."

This regulation provides that a private vocational school may offer to the public only courses approved by the Department of Education. Approval was withdrawn from the MLT-3 and 4 classes on September 19, 1974, the date orientation was held for MLT-5. Thereafter, following a period of uncertainty and the previously described dialogue with officials at the Department of Education, petitioner cancelled MLT-5 after two weeks of classes and began the

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process of working out refunds and/or option transfers on October 11, 1974. (Tr. I-64)

The hearing examiner finds that petitioner, with full knowledge that approval had been withdrawn from MLT by the Director, began on September 30, 1974, and continued to offer for two weeks thereafter an unapproved course to those enrolled in MLT-5.

CHARGE NO. 4

"[U]se of an enrollment agreement referring to MLT-5, a course which was no longer approved, and failure to void this agreement and to substitute for it an agreement referring to the course to which MLT-5 students were transferred, in violation of *N.J.A.C.* 6:46-4.8."

The Director, herein, makes complaint that the original enrollment agreements signed by pupils enrolled in MLT-5 were not voided when the course was terminated. (Tr. II-113) No evidence was produced at the hearing that the MLT-5 enrollment agreements were in fact voided. Rather, it is found that those enrolled in MLT-5 were presented with a two page document which briefly outlined the options of withdrawal with refund, transfer to alternate courses in the Health Careers Institute with tuition credit and/or partial refund. (R-19) A perusal of this document shows that it sought to obtain from those enrolled a release of liability, claims, and damages against the Institute. It is further revealed that this document, being used in the enrollment of certain students in alternate courses, does not comport with *N.J.A.C.* 6:46-4.8 in that it fails to give such required data as length of course, program of instruction, tuition and other costs, scheduled hours of instruction, dates of start and completion of program, and the school policy regarding termination of the program. It is further found that the use of this alternate enrollment document was not presented to the Director for approval or approved by the Director or other State Department official (Tr. II-115) in violation of *N.J.A.C.* 6:46-4.8 and *N.J.A.C.* 6:46-4.15(d).

CHARGES NOS. 5 AND 6

"Employment of unqualified instructors in violation of *N.J.A.C.* 6:46-4.4(b)1"

"[F]ailure to return to the Department certificates issued to instructor who had resigned, in violation of *N.J.A.C.* 6:46-4.15(b)."

The Director testified that his visits to the Institute in August 1974, having been prompted by certain student and parent complaints regarding the conduct of the school, revealed to him that, of five instructors teaching MLT during July and August 1974, only one was known to be certified by the Department of Education. (Tr. II-46) He further stated that three other non-certificated persons were known to have taught for periods of from one to three days. (R-26) Application forms for the above-named instructors bear dates of application to the Institute between July 17, 1974 and July 30, 1974, but were not forwarded to the Department of Education until after the August visit of the Director. (R-25)

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The Director testified that he learned that several instructors had left the Institute and that these persons had replaced them. (Tr. II-47) He further testified that he inquired why the certificates of the previous instructors had not been returned and why he had not been notified of this turnover of teaching personnel. (Tr. II-125-126) The Director stated that he did not recall any certificates having been returned during the entire three-year life of the school for instructors who were terminated. (Tr. II-124)

Petitioner testified that the failure to turn in certificates of teachers who were no longer employed was a mere oversight. (Tr. I-106) In any event, when notified to do so, petitioner did return nine certificates of former instructors in September 1974. (R-9; Tr. I-105; Tr. II-53)

The hearing examiner observes that *N.J.A.C.* 6:46-4.15(b) requires that "******Upon termination*** of employment, the school shall return the certificate to the Department of Education.***" (*Emphasis supplied.*) Therefore, petitioner knew, or should have known, that it was incumbent upon the school administration to do so. Accordingly, it is found that petitioner was in violation of this regulation of the State Board.

The hearing examiner has considered the documentary evidence and the testimony relative to the charge that petitioner employed unqualified instructors in violation of *N.J.A.C.* 6:46-4.4(b)1. He finds the evidence insufficient to conclude that unqualified instructors were employed by petitioners. It is clear, however, that for periods of up to two months certain aforementioned instructors were neither certificated by the Department of Education nor had petitioner applied for certificates for these persons during this period. Petitioner alleges that unexpected turnover and the compiling of necessary verification data on these persons necessitated the delay of several weeks in making such application. (Petitioner's Summation, at p. 16) The hearing examiner leaves to the Commissioner to determine the weight of such procedural delay as occurred in applying for certification.

CHARGE NO. 7

"Failure to maintain complete student records, in violation of *N.J.A.C.* 6:46-4.11(d)."

The Director testified that on his visits to the school in August 1974, he found that the student folders maintained in the office of the Institute contained "***either partial or no record of progress or grades***" for students in MLT-1 and MLT-2 who had been in attendance for eleven and six months respectively. (Tr. II-56) He further stated that he found "*** no records there on which I could base a judgment as to whether a student was progressing satisfactorily.***" (Tr. II-60)

Petitioner, while admitting that the school's student record folders did not contain the information desired by the Director, asserts that this information was maintained at the Institute in the grade books of individual teachers. Petitioner testified that, since the August visits of the Director, the requested

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information has thereafter been recorded regularly in the student personal record folders. (Tr. I-110-113; Tr. II-24)

The hearing examiner observes that *N.J.A.C.* 6:46-4.11(d) requires that student records be held by the school for at least five years, and that a permanent record card be maintained indefinitely showing the course attended and the date of completion or withdrawal. The school was reasonably subject to criticism by the Director for failing to keep such data as grades and attendance in a central location where he could review them pursuant to *N.J.A.C.* 6:46-4.11(a)4, especially in view of the turnover of teaching personnel. There is, however, insufficient evidence to conclude that such information was not available at various places in the school. Accordingly, it is found that there is no substantial violation of *N.J.A.C.* 6:46-4.11(d) as charged.

CHARGES NOS. 8 AND 9

"Failure to release a student who cannot benefit from the course, in violation of *N.J.A.C.* 6:46-4.12(e)."

"Failure to reject applicants who cannot benefit from the course, in violation of *N.J.A.C.* 6:46-4.12(d)."

The records of the Institute show that three students were absent during seventy-two school days from April 8, 1974 to July 31, 1974, a total of 19, 22, and 31 days respectively, and that the same three students were either late or left early during the same period 7, 16, and 10 times respectively. (Tr. II-24-26; R-26) The Director asserts that the school failed to take action to drop these students from its rosters pursuant to its enrollment agreement which provides for such action. (R-10) He further stated that MLT, being one of the highest academic level programs offered by private trade and technical schools, could not be mastered by a student so frequently absent. (Tr. II-61)

Petitioner asserts that there were extenuating circumstances in the form of hospitalization, medical problems, and excused absences experienced by three students. (Tr. I-117-120) In any event, these three students were among those in MLT-3, which class was discontinued by the Order of the Commissioner, *ante.*

The hearing examiner finds that there were extenuating circumstances, as petitioner claims, but that these absences of twenty-six percent to forty-three percent of the scheduled time for the course were, in any event, so excessive as to prohibit the students from materially benefiting from the course. Petitioner did not act to terminate these students. Accordingly, it is found that petitioner was in violation of *N.J.A.C.* 6:46-4. 12(e) which requires that a student "***shall not be retained***when it becomes evident***that said student cannot master the subject matter and materially benefit therefrom.***"

The Director stated that, at the time the Health Careers Institute was approved, it was mutually agreed that a prerequisite raw score of 47, or above, on the Otis-Lennon Test would be required for admission to the school. His

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inspection of the records revealed that four students had been admitted with scores of 34, 38, 40, and 42 respectively. (R-26)

Petitioner admits that four students were admitted with Otis-Lennon scores below 47, but asserts that, since some students do not "test well," they were admitted on a showing of high motivation (Tr. I-121, 126), previous college or other studies (Tr. I-124-125), or previously recorded IQ scores. (Tr. I-125) Petitioner further revealed that one of these four students had in fact withdrawn without attending classes. (Tr. I-125)

Petitioner denies that an agreement did exist between petitioner and the Director that no student would be admitted to an MLT class with an Otis-Lennon score below 47, which score is approximately the equivalent of an IQ of 100. (Tr. I-121)

Absent documentary evidence or conclusive testimony that there existed a verbal understanding that such a minimum score on the Otis-Lennon was an absolute criterion for admission, the hearing examiner is unable to conclude that Charge No. 9 has been proven to be true in fact or that there was violation of *N.J.A.C.* 6:46-4.12 (d) which requires that "[s]tudents must be accepted on the basis of their ability to comprehend the subject matter and to benefit from the course or program of instruction."

CHARGE NO. 10

"[F]ailure to bring its bulletin into compliance with *N.J.A.C.* 6:46-4.10 by June 30, 1974"

This charge relates to a revised regulation of the State Board adopted on March 7, 1973, requiring, *inter alia,* that information such as schedule of tuition and fees, policies, regulations, faculty, governing body, calendar, entrance requirements, grading system, refunds, facilities, course outlines, and diplomas be set forth in the school bulletin to be made available to each prospective pupil prior to enrollment. This regulation was called to the attention of the directors of private vocational schools on March 23, 1973 (R-12) and again on August 13, 1973 by letter of the Director wherein it was stated that compliance therewith would be required for use with all pupils to be enrolled after June 30, 1974, and that such bulletins must be submitted for approval to the Director. (R-11)

Petitioner admits that a bulletin was not submitted to the Director for approval until October 1, 1974 (Tr. I-76), and that it was returned a month later for revisions (Tr. I-77) to be resubmitted on or before December 2, 1974. (R-21) This revision was resubmitted early in December 1974. The date of submission is claimed by petitioner to be December 2 (Tr. I-83), whereas respondent asserts that the submission was on December 4, 1974. (P-2) Insufficient evidence makes it impossible to determine with certainty the precise date. In any event, the timeliness of submission was but one of a number of charges of continued noncompliance set forth in P-2.

The hearing examiner has considered and weighed the documentary

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evidence and the testimony relative to Charge No. 10. It is found that petitioner was on two occasions alerted to the rule of the State Board relative to both the required contents and the use of the school bulletin on and after July 1, 1974. (R-11; R-12) Having failed to either revise or receive approval thereof prior to that date, petitioner thereafter was in noncompliance with *N.J.A.C.* 6:46-4.10. Accordingly, the hearing examiner finds Charge No. 10 has been proven to be true in fact.

This concludes a recitation of the findings of the hearing examiner relative to the ten charges of violations set forth in the affidavit of the Director. (R-26) However, a recitation of further events must be considered for a full understanding of the controverted matter.

When the Director ordered that MLT-3, 4, and 5 be discontinued and full refunds provided to those enrolled, petitioner requested that the Director's superior, the Acting Director of the Bureau of Area Vocational and Technical Schools, hereinafter "Acting Director," "***come in as a neutral party with a fresh outlook on the problem.***" (Tr. I-66) The Acting Director testified that he did so, and that after visiting the Health Careers Institute and examining its records and data, he determined that it was "***grossly out of compliance***" (Tr. III-54) and that the findings of the Director were substantiated. (Tr. III-55) The Acting Director testified that it is his function to:

> "***insure an orderly business fashion of proprietary schools, and also insure the lay people of New Jersey that become involved in taking courses in these schools, are offered the best possible programs.***" (Tr. III-53)

The Acting Director, after conferring with petitioner on two separate occasions, October 29 and November 7, 1974, established a time schedule for bringing all items of discrepancy into compliance. (Tr. III-56; R-21) One principal item of noncompliance was that the Health Careers Institute Bulletin used for enrolling students in June 1974 and September 1974 had not been revised to reflect accurately the time schedules of students, schedule of fees, approved courses, and other pertinent matters. The Director had previously called for such a revised bulletin and one had been submitted to him on October 7, 1974, which he had returned as unsatisfactory with suggested changes on November 7, 1974. (Tr. III-8; R-14) The Acting Director required that a revised bulletin be submitted by petitioner for approval by December 2, 1974. It was in fact received in the early days of December by the Assistant Director and returned with a letter dated December 9, 1974, which stated, *inter alia,* that:

> "***The bulletin submitted is not acceptable, since it does not reflect the conditions existing at the time of the enrollment of the current students.
>
> "***This does not meet the agreed upon date for submission.
>
> "***[T]he financial statement requested*** has not been submitted.***" (P-2)

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This letter additionally advised petitioner of continued noncompliance with reference to enrollment agreements, refunds, internship programs, student record folders, and financial statements. (P-2) Finally the letter stated:

> "***In view of your failure to meet the conditions that were agreed upon, you are hereby notified to suspend all activity relating to the recruiting and enrollment of new students for any courses offered by the Health Careers Institute of the Institute of Business Technology. Effective with the receipt of this letter." (P-2)

An application for renewal of the Certificate of Approval (R-22) had been mailed to petitioner on November 26, 1974. This document was returnable on or before January 10, 1975 (Tr. III-82), but was in fact received on January 31, 1975 in incomplete form. (Tr. III-83) Certain items which were incomplete included evidence of a fire department and health department inspection for the current year. (Tr. III-84) Prior to the receipt of this application, petitioner was notified by letter dated January 30, 1975, that the Department of Education considered the school closed as of January 31, 1975, because of failure to submit an application for renewal by the due date of January 10, 1975. (Tr. III-84) No extension of the deadline of January 10, 1975, was requested by petitioner for submitting the application for renewal of the certificate. (Tr. III-87) The Director of Private Business and Correspondence Schools, whose responsibility it is to process such applications, testified that:

> "***[I]t was my understanding, perhaps, this time they did not even want to request approval, because the school had no business school enrollments, to my knowledge, since July of '74, therefore they technically had no business school***." (Tr. III-87)

The Institute of Business Technology, which is the parent organization of the subsidiary Health Careers Institute, had not, in fact, had any students enrolled in business courses since July 1974. (Tr. III-99) It is the denial of the certificate to conduct classes as reflected in the Commissioner's Order of January 17, 1975, which gave rise to this hearing wherein petitioner seeks to show why its certificate to conduct classes should be renewed.

Petitioner alleges that the school was misled by the Director's casual handling of the approval of MLT-2 into believing that formal application for MLT-3 and 4 was unnecessary. (Petitioner's Summation, at p. 6; Tr. III-88) Petitioner asserts that the Director's order to terminate those classes and refund all moneys "***virtually stripped the school of any financial solidarity, making it almost impossible to continue the operation of the school***." (Petitioner's Summation, at p. 8) Petitioner argues that the charges against the Health Careers Institute are "***of an extremely technical, rather than a substantive nature***." (Petitioner's Summation, at p. 12) It is further argued that the submission of the bulletin two days late was insufficient reason to refuse to consider it further and that the matter was magnified out of proportion in order to create an impression of contempt of the regulations. (Petitioner's Summation, at pp. 15-16)

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In this regard, the hearing examiner finds that the controverted bulletin revision deadline of July 1, 1974, was made known to the Directors of all private vocational schools on both March 23, 1973 and August 13, 1973. (R-11; R-12) It must, therefore, be concluded that submission of the revised bulletin was not merely two days late but that petitioner on December 2, 1974, had in fact been out of compliance with *N.J.A.C.* 6:46-4.8 for a period in excess of five months.

Petitioner states that the violations charged are not concerned with the quality of education but are "***so technical and minor that they should not even be considered as grounds for non-renewal.***" (Petitioner's Summation, at p. 21) Petitioner asserts that the quality of the education students received in MLT was convincingly expressed by those four students called as witnesses who did in fact state that they found their training fully acceptable. (Tr. I-15-33) Petitioner asserts that good faith efforts were made by the school to comply with the requirements of the State and that, for that reason, the school should be allowed to continue its program of education. Therefore, petitioner prays that the Commissioner's Order to Show Cause should be dismissed. See also in this regard petitioner's Rebuttal Summation, at pages one through seven.

Respondent argues, conversely, that the regulations of the State Board must in all cases be adhered to by proprietary schools and be strictly enforced by agents of the Department of Education. It is further argued that those agents, by numerous gratuitous reminders, made unusual efforts to cooperate in assisting petitioner to come into compliance. Respondent further asserts that petitioner has flagrantly violated the Commissioner's Order of January 17, 1975 by enrolling additional students as evidence of further noncompliance.

Finally, respondent asserts that approval, without compliance, would set a dangerous precedent by allowing a private institution to usurp the role that the Department of Education is required, by statute, to perform.

The hearing examiner has studied and carefully considered and weighed the documentary evidence, the testimony of witnesses at the hearing and the Briefs of the respective parties in the light of the regulations of the State Board. He finds no evidence of arbitrary or dictatorial action on the part of the Director, the Assistant Director, or other agents of the Department of Education. Rather, there emerges a pattern of restrictive control only after numerous attempts had been made to assist petitioner in achieving compliance with State Board regulations. Witness the words of the Director on September 19, 1974, wherein he stated:

> "*[I]t is hoped that through your cooperation, these violations and items of noncompliance can be rectified.* Should this not be done, with the greatest reluctance, this Department will be forced to institute the procedure leading to the revocation of the Certificate of Approval of the Health Careers Institute." (*Emphasis supplied.*) (R-3)

Witness further the words of the Acting Director on November 13, 1974, wherein he stated:

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"***Hopefully, all deficiencies will be corrected as per the above mutually agreed upon criteria. However, failure to abide by the above established dates and failure to rectify all items currently not in compliance***will result in the failure to renew your approval***." (*Emphasis supplied.*)
(R-21)

The hearing examiner finds that these statements were indeed stern admonitions, but that the requirements attendant thereon were neither unreasonable nor impossible to perform within the time periods set forth. It is further evident that the Director, as late as November 11, 1974, recommended approval of formation of an additional class to train Assistant Medical Laboratory Technicians. (P-3) Such action does not support a charge of arbitrary or dictatorial motivation.

In regard to respondent's charge that petitioner violated the Commissioner's Order to cease to enroll additional pupils subsequent to January 17, 1975, it is found that petitioner on the advice of counsel in March 1975 did enroll an additional three students to classes that were already in operation. (Tr. III-116-117) It also appears that at least twelve additional students were enrolled in an eight month Assistant Medical Laboratory Technician class on or about January 25, 1975 at approximately the time of the receipt of the Commissioner's Order. There is no documentary evidence that approval for this class to begin was granted by anyone in the Department of Education. (Tr. III-108-113)

In consideration of the above findings of fact, the hearing examiner recommends that the Commissioner determine that petitioner in respect to Charges Nos. 1, 3, 4, 6, 8 and 10 was in substantial noncompliance with the regulations of the State Board. It is further recommended that the Commissioner determine that petitioner has failed to show sufficient cause as to why the certificate of approval of the Institute of Business Technology with its subsidiary Health Careers Institute should be renewed. Finally, the Commissioner is called upon, in the event that petitioner's certificate of approval is denied, to determine whether or not the remaining classes or pupils, if any, in the Health Careers Institute may conclude their instructional programs.

Finally, it is recommended that the Commissioner direct that petitioner neither begin further classes nor enroll additional students until and unless at some future time, conditional upon full compliance with the regulations of the State Board, petitioner's certificate of approval to conduct classes is granted.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions of pertinence thereto filed by respondent pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner adopts that portion of the hearing examiner's report

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which found that petitioners were in violation of the provisions set forth in the administrative code in Charges Nos. 1, 3, 4, 6, 8, and 10. The Commissioner accepts, also, the hearing examiner's recommendations that there is insufficient evidence to find violations of the administrative code in Charges Nos. 5, 7, and 9; therefore, they will be dismissed. There remains a question concerned with Charge No. 2.

Respondent's exception correctly asserts that petitioner was also in violation of *N.J.A.C.* 6:46-4.10(d)9. The Commissioner so holds. That matter may be resolved by now; however, the resolution of this charge does not relieve petitioner of his burden of compliance in full with the provisions of the administrative code as administered by the Division of Vocational Education in the Department of Education. Petitioner's noncompliance with this rule, pending a determination of the precise amount of a refund award by another State agency, *i.e.* the Division of Consumer Affairs, is in violation of the rule and petitioner's *agreement* to refund such moneys. (See Charge No. 2.)

The Commissioner determines, therefore, that petitioner was in violation of the rule as set forth in Charge No. 2, and that this constituted further evidence of petitioner's disregard for departmental authority over the operation of private vocational schools.

In summary, the Commissioner determines that petitioner was in violation of the State Board of Education rules in Charges Nos. 1, 2, 3, 4, 6, 8, and 10. Charges Nos. 5, 7, and 9 are dismissed.

In consideration of the hearing examiner's report, findings and recommendations in this matter, petitioner's certificate of approval shall not be renewed until such time as the Director determines that the Health Careers Institute Division of the Institute of Business Technology is in full compliance with the regulations of the State Board of Education. Any classes in session, as of this date, must be terminated forthwith, with refunds granted to pupils in accordance with the provisions of *N.J.A.C.* 6:46-4.10(d)9.

COMMISSIONER OF EDUCATION

September 11, 1975

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In the Matter of the Health Careers Institute Division of the Institute of Business Technology for Renewal of its Certificate of Approval, Morris County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 11, 1975

For the Petitioner-Appellant, Schenck, Price Smith & King (Gary C. Algeier, Esq., of Counsel)

For the Respondent-Appellee, William F. Hyland, Attorney General of New Jersey (Susan P. Gifis, Deputy Attorney General)

The Application for Stay of the decision of the Commissioner of Education is denied.

Mr. Daniel Gaby abstained
October 1, 1975
State Board Dismissed for failure to perfect Appeal, Jan. 7, 1976

Mary Alice Hancock,

Petitioner,

v.

Board of Education of the Scotch Plains-Fanwood Regional School District and Charles Ferguson, President, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mary Alice Hancock, *Pro Se*

For the Respondents, Johnstone & O'Dwyer (John F. Malone, Esq., of Counsel)

Petitioner, a resident of Scotch Plains, avers that the Board of Education of the Scotch Plains-Fanwood Regional School District, hereinafter "Board," has denied her access to all of the permanent records of her son, a sixth grade pupil in one of the district's elementary schools. She further avers that such denial,

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pursuant to a policy of the Board, is contrary to the statutory prescription (*N.J.S.A.* 18A:36-19) and the rules of the State Board of Education contained in the Administrative Code. *N.J.A.C.* 6:3-1.3 By original and amended Petition of Appeal she requests the Commissioner of Education to interpret the referenced rule to read that "all" items of information of school pupils which are contained in permanent record folders must be made available to parents and that compliance with such interpretation be "actively and uniformly enforced at all levels" in order that discriminatory treatment may be avoided. Further, petitioner avers that some pupil records have been stored in insecure places, and that such records have recently been stolen and illegally distributed. The Board originally defended its policy with respect to pupil records as a proper exercise of discretion pursuant to law, but, at this juncture, maintains that petitioner's complaints are moot since a new policy has been adopted. The Board does admit that certain records have been stolen, as alleged by petitioner, but avers that its precautions for the safeguarding of such records have been appropriate and prudent.

A hearing in this matter was conducted on December 6, 1974 by a hearing examiner appointed by the Commissioner at the office of the Union County Superintendent of Schools, Westfield. Subsequent thereto petitioner and the Board each filed original and reply Memoranda. The report of the hearing examiner is as follows:

The statute and rule of the State Board of Education which are at issue in the matter, *sub judice,* are recited in their entirety as follows:

N.J.S.A. 18A:36-19

"Public inspection of pupil records may be permitted and any other information relating to the pupils or former pupils of any school district may be furnished in accordance with rules prescribed by the state board, and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly."

N.J.A.C. 6:3-1.3 Inspection of school records

"(a) Pupil records may, in the discretion of the board of education or any officer or employee of the board designated by the board to act for it, be open to inspection by authorized representatives of the Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy; and, upon request of the Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy, information relating to pupils and former pupils may be furnished for purposes of determining their fitness for induction into the armed services of the United States.

"(b) Pupil records may be open to inspection by persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic educational research, guidance, and social service.

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"(c) Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representative of the same; provided, that after the pupil has attained the age of 21 years, the items of information shall be made available for inspection by the pupil or his authorized representative, and not to the parent or guardian.

"(d) Items of information contained in the records of a given pupil may be furnished upon request to employers and to institutions of the same or higher grade for purposes of employment and admission to educational institutions.

"(e) Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any officer or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest."

It is noted here that the rule, in particular, confers broad discretion on local boards of education in paragraph (e) to condition or temper the requirement of paragraph (c) that pupil records shall be made available for parental inspection. It is also noted that, pursuant to the authority conferred by the rule, the Board adopted in December 1972 a set of two policies with respect to pupil records.

One of these policies dealt with the release of pupil records, upon parental request, to other school districts, colleges, etc. The second policy (R-6) was concerned with the inspection of pupil records. It provided, *inter alia,* that five types of documents comprised "permanent records" and that these records might be inspected by parents, after a written request, "***in the presence of the principal, assistant principal, guidance counselor, or office of Pupil Services staff***." The "permanent record" was defined to include:

(a) Permanent record cards
(b) Test record card
(c) Personality evaluation (high school only)
(d) Health record card
(e) Attendance cards (grades 9 through 12)

It has been petitioner's contention, however, that such documents do not comprise the "whole" pupil record, and that the Board's policy and the rule *N.J.A.C.* 6:3-1.3, as narrowly and restrictively interpreted, denied her access to other pertinent, albeit subjective, material. Thus, she requests the Commissioner to direct that "all" of the material in her child's permanent record folder be made available to her, and that the rule, *ante,* be broadly construed. She also moved at the hearing for immediate, interim relief in this respect.

The Board, however, adopted on November 21, 1974, a new policy (R-1)

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with respect to pupil records which represents a major alteration of its original policy. (R-6)

This new policy is contained in an eleven-page document which was introduced at the hearing and must be construed as a major liberalization of such policy by the Board. It provides, *inter alia,* that:

> (1) Pupil records shall be identified and maintained in two major categories to include:
>
> (a) Objective factual material, *i.e.* reports of curricular achievement, test results, attendance and enrollment data, health records, etc.
>
> (b) More subjective data, *i.e.* reports of the observation of the pupil by teachers, psychological reports, educational recommendations, etc.
>
> (2) Both kinds of pupil records are to be accessible to parents. (Note: the policy also provides that the subjective data of reference is to be interpreted by certain specialized school personnel.) (R-1, at p. 3)

On the basis of this revised policy the Board moved at the hearing to dismiss that portion of petitioner's allegations concerned with access to pupil records and with discriminatory treatment of petitioner. The hearing examiner reserved judgment with respect to the Motion at that juncture and proceeded with the hearing. Subsequently, however, after review of the Board's policy (R-1), the hearing examiner addressed a letter dated December 17, 1974 to the parties and stated therein he found no reason to forward to the Commissioner a request by petitioner for interim relief since the Board's policy had, in effect, granted such request and rendered the plea moot. The hearing examiner also said in the letter:

> "***Similarly, at a later time the hearing examiner will recommend that the Commissioner grant the Board's Motion to dismiss that portion of the Petition which attacks the Board's now discarded policy with respect to access to pupil records. Petitioner now does have access to such records and, accordingly, a claim that she did not have it in the past or that the denial of access was discriminatory could have no practical result at this juncture. Even a finding of discrimination could only lead to an order by the Commissioner that petitioner be given the rights to access which have now been afforded to her and to '***all persons who have a legitimate need to know.' [R-1, at p. 1] ***"

At this juncture the hearing examiner's judgment is the same; namely, that the portion of the instant Petition addressed to the access of petitioner to pupil records be dismissed. The Board's policy (R-1) has rendered it moot. However, even assuming, *arguendo,* that it has not, the new policy of the State Board of Education with respect to pupil records which was adopted May 7, 1975, is

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directly at point and is responsive to petitioner's request. It provides further reason for a finding of mootness with respect to this plea of the instant Petition.

However, there remains herein the matter of petitioner's allegation that the Board improperly stored old pupil records and that such records were stolen and distributed throughout the Scotch Plains area. The Board admits that records were stolen. It avers, however, that it had taken prudent precautions to prevent such theft. Testimony at the hearing was that the stolen records had been distributed in the area.

A Scotch Plains police detective testified with respect to such theft. He said the theft had first come to the attention of Scotch Plains police on or about September 19, 1974. (Tr. 64) Subsequently, the detective testified, he was notified by citizens of Scotch Plains that anecdotal records had been found by them "in" their front door or mailbox. (Tr. 66) Such records he stated were "delivered to the person whose name appeared on the record." (Tr. 67)

The detective then stated that he had visited the school from which the records had been stolen and found that the windows of the school had been covered with plywood nailed in place. (Tr. 77) He found this covering to be a "reasonable and prudent" measure to prevent illegal entry to the school building. (Tr. 78)

The Assistant Superintendent of Scotch Plains-Fanwood Schools testified that the building from which the pupil records were stolen had been abandoned in April 1974, and the windows boarded up. (Tr. 108) He said, however, that many items had been left in the building (Tr. 108), and that old pupil records comprised a part of such material. (Tr. 110) He testified that, upon being apprised of a breaking and entering of the old school, he had visited it, found records scattered about, and arranged to have these records put back in boxes and transferred to the basement of the administrative offices. (Tr. 111) He stated he had then notified the police department. (Tr. 112) Further, he testified that the new administrative office, to which records were transferred, had also been broken into and equipment and other material stolen. (Tr. 114)

Petitioner's prayer for relief with respect to the storage of pupil records is that the Commissioner direct the Board to:

"1. insure proper and safe storage of records

"2. insure proper destruction of records

"3. take all possible steps to recover the pupil records which have been illegally taken

"4. report to the Commissioner their actions in response to items 1, 2 and 3, above." (Second Amendment to Petition, unp)

It appears to the hearing examiner that all four of these prayers should be granted by the Commissioner. Certain pupil records under the supervisory

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control of the Board were stored in an abandoned school which invited illegal entry, vandalism, and theft. Precautions which were taken were obviously inadequate since some records were stolen. In fact, even a second storage area to which such records were taken was similarly insecure. It appears clear, therefore, that on the facts developed at the hearing there is sufficient evidence to justify a finding that the Board has in the past clearly not insured the "security" of pupil records pursuant to the mandate of the rules of the State Board of Education adopted on May 7, 1975. *N.J.A.C.* 6:3-3.1 *et seq.*

Accordingly, the hearing examiner recommends that the Commissioner maintain jurisdiction in the matter pending receipt from the Board of an amended policy (R-1) adopted by it which will insure the future security of pupil records. Present policy does confer responsibility for such security on school principals and/or other administrators but the practical measures to insure the security, particularly of old records, are nowhere detailed. The instant recommendation is that this detail is required.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections, exceptions and replies filed thereto by the parties. Subsequent to the filing of petitioner's original objections and exceptions, a letter of objection was also filed.

Petitioner complains that the hearing examiner failed to address the totality of her complaints against the former Board policy regarding pupil records, and demands a judgment that that former policy was implemented in a discriminatory manner, particularly in her specific instance. The Commissioner opines that such a judgment, if indeed the factual pattern did manifest discriminatory treatment, would have to ignore the Board's adoption of its new policy (R-1) in regard to pupil records. This new policy is consistent with *N.J.A.C.* 6:3-1.3 *et seq.* [now *N.J.A.C.* 6:3-2.1 *et seq.*] An adjudication of the matter on the former policy would serve no useful purpose and the Commissioner so holds. Consequently, the Commissioner concurs with the hearing examiner's recommendation and hereby dismisses that portion of the instant matter which addresses access to pupil records. Such portion has been rendered moot by virtue of the Board's corrective action set forth in its new policy. (R-1)

There remains the matter of the security and maintenance of pupil records which are stored by the Board. The Board avers, in this respect, that it has taken adequate steps to insure the security of stored pupil records and argues that the standard by which such steps are measured is that of reasonableness. The Commissioner finds this argument not without some merit but cannot agree – in the context of the theft of school records – that the Board's policies have indeed been adequate.

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Accordingly, the Commissioner directs the Board of Education of the Scotch Plains-Fanwood Regional School District to prepare, adopt, and submit a written policy which will detail the practical measures to insure the security of its pupil records. In this specific regard, the Commissioner retains jurisdiction. In all other respects, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 15, 1975

In the Matter of the Tenure Hearing of Mario Mazzola, School District of the City of Garfield, Bergen County.

COMMISSIONER OF EDUCATION

ORDER

The Board of Education of the School District of the City of Garfield, hereinafter "Board," having considered charges preferred by the Superintendent of Schools against its tenured janitor, Mario Mazzola, hereinafter "respondent," pursuant to *N.J.S.A.* 18A:6-10 *et seq.;* and

The Board having determined that the charges would be sufficient, if true in fact, to warrant a reduction in salary or dismissal of respondent and having certified said charges to the Commissioner of Education on December 12, 1974, and respondent having failed to report for work since September 27, 1974; and

A copy of the charges, together with a copy of the Board's certification of charges having been served by certified mail upon respondent on December 20, 1974 by the Assistant Director of the Division of Controversies and Disputes requiring that an Answer to the charges be filed within ten days; and

Respondent having failed to file at any time an Answer or otherwise respond to the charges made against him despite repeated attempts by regular and certified mail on February 8, 1975, May 8, 1975, and August 8, 1975; and

Respondent having to this time failed to respond or defend against the charges certified against him by the Board, albeit having been given ample opportunity to do so over a period embracing eight calendar months; now therefore,

IT IS ORDERED on this 15th day of September that Respondent Mario Mazzola is dismissed from his employment as a janitor in the School District of the City of Garfield, as of the date of September 27, 1974, the date since when he has failed to report for his assigned duties with the Board. *In the Matter of the Tenure Hearing of Mary Burns, School District of the Township of Readington, Hunterdon County,* 1974 *S.L.D.* 1307

COMMISSIONER OF EDUCATION

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"C.K.F." and "B.F.," a minor,

Petitioners,

v.

Board of Education of Upper Township, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Samuel Krantz, Esq.

For the Respondent, Loveland, Hughes & Garrett (Robert F. Garrett, III, Esq., of Counsel)

C.K.F., hereinafter "petitioner," is a resident citizen of Upper Township, Cape May County. He appeals an action of the Board of Education of Upper Township, hereinafter "Board," denying payment of tuition for his son, B.F., at the Elwyn Institute, Elwyn, Pennsylvania, for the period from February 1, 1974 through December 31, 1974. Petitioner maintains that he was continuously domiciled within the district during this period and that the Board is responsible for paying tuition for B.F. The Board disclaims responsibility for these tuition payments, alleging that petitioner's previous residency in Upper Township was interrupted and that he was domiciled elsewhere during this period.

The matter comes directly before the Commissioner of Education for Summary Judgment in the form of the pleadings, Briefs, documentation entered into evidence at an oral argument on a Motion for Interim Relief, *pendente lite,* held at the Department of Education on April 25, 1975, the transcript of oral argument, *ante,* and the record below in the form of a transcript (BTr.) of the appearance provided petitioner by the Board on December 23, 1974.

An interlocutory Order of the Commissioner dated May 16, 1975, denied the *pendente lite* relief sought by petitioner. A review of the record reveals the following relevant facts:

Petitioner was domiciled in the Township of Upper, Cape May County, on July 19, 1972, when the Board gave notice that it assumed responsibility for payment of tuition costs at the Elwyn Institute for B.F. who had been classified pursuant to *N.J.S.A.* 18A:46-6 *et seq.* (P-1) Subsequently, on October 30, 1973, C.K.F. was divorced from his wife and awarded custody of B.F. who, it was directed, was to continue his education in residence at the Elwyn Institute. (P-2) The Court-approved terms of divorce ordered that the residence of C.K.F. and his former wife be sold. It is the domicile of C.K.F. thereafter which is the controverted aspect herein, it being a well-established principle of law that:

> "***[A] minor child's domicile, in the case of divorce of its parents, is that of the parent to whose custody it has been legally given; and if there

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has been no legal fixing of custody, its domicile is that of the parent with whom it lives, but if it lives with neither, it retains father's domicile.***" *Ross v. Pick,* 86 *A.2d* 463 (Court of Appeals Md. (1952)) at p. 467

Prior to the divorce, petitioner had accepted employment in Ithaca, New York, March 1973. (P-9) On February 18, 1974, the Board directed its principal to determine when C.K.F. had moved to New York State and thereafter to notify the Elwyn Institute that the Board was no longer responsible for paying for the tuition of B.F. (P-3) On February 21, 1974, the principal notified Elwyn Institute that C.K.F. was no longer a resident of the school district and that tuition payments would be discontinued effective February 1, 1974. (P-4) Petitioner contested the validity of this action, maintaining that he was still a resident of Upper Township. (P-12) Thereupon, the Board attorney, by letter, asked C.K.F. to provide supporting information regarding his residency claim. (R-1; R-2; P-8)

Petitioner by letter dated September 13, 1974, accused the Board of harassment and declined to answer those questions propounded by the Board attorney stating that he would contact him when he returned to Upper Township in December 1974. (R-3; R-5) On December 23, 1974, the Board scheduled an appearance wherein petitioner was represented by counsel. As a result of this appearance the Board determined that petitioner had reestablished domicile in Upper Township and notified Elwyn Institute that the Board would resume tuition payments for B.F. beginning January 1, 1975. (P-6) B.F. continues in residential placement at the Elwyn Institute, the Board presently paying his educational tuition and the New Jersey Division of Youth and Family Services having paid his room and board, without interruption, since his initial enrollment there in 1972. (P-7)

Petitioner claims that the Board is responsible for tuition payments from February 1 through December 31, 1974, arguing that, when he left his previous residence in March 1973, he moved to another residence in Upper Township at Route 50, Tuckahoe, and did not abandon his domicile in the school district. Petitioner states that for purposes of obtaining employment he moved temporarily to Ithaca but at no time intended to permanently change his domicile from Upper Township. He further states that since March 1974 he has been unemployed and has been traveling. (P-9) In this regard he testified that he is a free lance manager in the travel business, which on occasion requires that for a few months or longer he go to those places where employment opportunities arise. (BTr. 39)

Petitioner asserts that the Board failed to determine the domicile question, failed to provide him a hearing whereby he could state his case, and failed to take official action to terminate tuition payments on behalf of B.F. in February 1974. For these reasons petitioner characterizes the termination of tuition payments *ultra vires*. (Brief of Petitioner, at pp. 3-4) Petitioner avers that it was always his intention to maintain his domicile in Upper Township near his family and cites in this regard *Lea v. Lea*, 18 *N.J.* 1 (1955) wherein it was said by the Court that the "***fact where a man has his family is a very important and most times a controlling factor on the question of domicile.***" (at p. 11) In

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this regard petitioner cites, *inter alia,* the following: *M.A.M., as parent and natural guardian of M.M. v. Board of Education of the Black Horse Pike Regional School District, Camden County,* 1974 *S.L.D.* 845; *Collins v. Yancey,* 55 *N.J. Super.* 514 (*Law Div.* 1959); *Cromwell v. Neeld*, 15 *N.J. Super.* 296; *Lea v. Lea*, 28 *N.J. Super.* 290 (*Chan. Div.* 1953); aff'd in part, reversed in part 32 *N.J. Super.* 333 (*App. Div.* 1954)

Petitioner further argues that the Board, having once accepted the responsibility of tuition payments for B.F. at the Elwyn Institute, not only was required to notify the Division of Youth and Family Services of termination of payments, but bore the burden of proof that petitioner had indeed abandoned his domicile in Upper Township. (Brief of Petitioner, at p. 9) Petitioner asserts that the Board's failure to carry this burden was fatal and prays that the Commissioner determine that he was at all times within the controverted period domiciled in Upper Township.

Conversely, the Board argues that petitioner's domicile in Upper Township was abandoned when he moved to Ithaca, New York, in March 1973 and that for a period of twenty months including the controverted period from February through December 1974 he was no longer domiciled in the school district administered by the Board. The Board grounds this argument on those indicia of domicile considered by the Courts and the Commissioner in the following decisions: *Lea v. Lea, supra; Frank P. Hegyi v. Lorraine Tyler and the Board of Education of the Borough of Fieldsboro, Burlington County,* 1974 *S.L.D.* 1000; *Alma Beceiro v. John Anderson and Board of Education of the Township of Holmdel, Monmouth County,* 1967 *S.L.D.* 198

The Board further argues that when all indicia of domicile are considered, it must be concluded that C.K.F. was domiciled in New York from February through September of 1974, that he thereafter traveled to California and returned to Upper Township and reestablished domicile there in December 1974.

The Board, asserting that the domicile of B.F. follows that of his father, cites *Mansfield Township Board of Education v. State Board of Education,* 101 *N.J.L.* 474 (*Sup. Ct.* 1925) wherein it was said by the Court that:

> "***A child, in law, can have no residence of its own***. Its residence under School law follows that of its parent***." (at pp. 479-480)

Additionally, the Board cites *M.A.M., supra,* and *Board of Education of the Township of Little Egg Harbor v. Board of Education of the Township of Galloway et al.,* 1973 *S.L.D.* 324.

The Board argues that, although B.F., being residentially placed at Elwyn Institute, had not resided with his father in New York State, he had nevertheless acquired that domicile which his father had established, when he took employment and resided in Ithaca. (Brief of Respondent, at pp. 9-10) The Board avers that any other interpretation would compel boards of education to be

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permanently responsible for expensive tuition payments of pupils who had once been approved for institutional placement regardless of subsequent residence established by their parents or guardians. Thus the Board states that:

> "***To allow petitioner to benefit from his former residency after he severed his ties therefrom can only encourage additional unfounded tuition claims against other school boards within the State.***" (Brief of Respondent, at p. 11)

For these reasons the Board seeks affirmation by the Commissioner of the Board's determination that petitioner was not domiciled in Upper Township for the controverted period.

The Commissioner herewith proceeds to examine those indicia which may reasonably be considered concerning petitioner's domicile. Petitioner maintained the following ties with Upper Township during the period in question:

1. Maintained a checking account in Upper Township. (P-11; BTr. 32, 41)

2. Visited twice monthly in Upper Township with his other son who was in custody of his mother. (BTr. 15-16)

3. Retained his name on the voter rolls of Upper Township, although he exercised his franchise neither in Upper Township nor elsewhere since 1972. (BTr. 20)

4. Continued to receive mail in Upper Township periodically while visiting until September 1974. (BTr. 38)

5. Maintained for a portion of this period a New Jersey motor vehicle registration. (BTr. 18-19)

Petitioner alleges that he sublet a room and maintained a telephone in Upper Township during this period until September 1974 on a month-to-month basis without benefit of written lease. (BTr. 12-14, 40, 44) However, neither documentation in the form of canceled checks, written agreements or communications, nor testimony of persons who leased, subleased or visited with petitioner in such a dwelling have been introduced by petitioner. Absent such evidentiary basis, the Commissioner is unable to conclude that petitioner maintained such a residence. In any event, by petitioner's own words such an arrangement terminated in September 1974. (BTr. 14)

Petitioner established the following ties in New York State and California during this period:

1. Worked in a travel agency in Ithaca from March 1973 to March 1974. (BTr. 19)

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2. Leased a furnished apartment in Ithaca without benefit of written lease. (BTr. 15)

3. Applied for and was issued both a New York State driver's license and car registration. (BTr. 18-19)

4. Collected unemployment benefits from both New York and California during periods he was unemployed subsequent to March 1974. (BTr. 20)

5. Filed his 1973 income tax return listing Ithaca as his return address. (BTr. 20)

6. Established both checking and savings accounts in Ithaca. (BTr. 42)

In determining questions of domicile each given instance must be viewed within the context of the total factual presentation and the relevant law. Free attendance at public schools in New Jersey is guaranteed to any person who is aged five through twenty domiciled within a school district or whose parents or guardian reside temporarily within a school district or who is placed in a school district by the Bureau of Children's Services. *N.J.S.A.* 18A:38-1, 2 Similarly, those classified persons domiciled within a school district for whom education must be provided in approved residential institutions are guaranteed instruction at the expense of those school districts. *N.J.S.A.* 18A:46-13, 14

The New Jersey Supreme Court has defined 'domicile' as:

> "***the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 *Am. Jur.* 588, 590; 28 *C.J.S.* 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law.***" *Kurilla v. Roth,* 132 *N.J.L.* 213, 215 (*Sup. Ct.* 1944)

The domicile of B.F., who is a minor, is that of his father. *Ross, supra; Mansfield, supra* It is therefore essential to determine whether petitioner, who had established domicile in Upper Township previously, continued to be domiciled therein from February through December 1974.

Black's Law Dictionary 1473 (rev. 4th ed. 1968) defines "residence" as follows:

> "A factual place of abode. Living in a particular locality. Reese v. Reese, 179 Misc. 665, 40 N.Y.S. 2d 468, 472; Zimmerman v. Zimmerman, 175 Or. 585, 155 P. 2d 293, 295. It requires only bodily presence as an inhabitant of a place. In re Campbell's Guardianship, 216 Minn. 113, 11 N.W. 2d 786, 789.

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"As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place *and also an intention to make it one's domicile.* In re Riley's Will, 266 N.Y.S. 209, 148 Misc. 588. 'Residence' demands less intimate local ties than 'domicile,' but *'domicile' allows absence for indefinite period if intent to return remains.* Immigration Act 1917, § 3, 8 U.S.C.A. § 136 (e, p). Transatlantica Italiana v. Elting, C.C.A.N.Y., 74 F. 2d 732, 733. But see, Ward v. Ward, 115 W. Va. 429, 176 S.E. 708, 709; Southwestern Greyhound Lines v. Craig, 182 Okl. 610, 80 P.2d 221, 224; holding that residence and domicile are synonymous terms. 'Residence' has a meaning dependent on context and purpose of statute. In re Jones, 341 Pa. 329, 19 A.2d 280, 282. Words 'residence' and 'domicile' may have an identical or variable meaning depending on subject-matter and context of statute. Kemp v. Kemp, 16 N.Y.S. 2d 26, 34, 172 Misc. 738."

(*Emphasis supplied.*)

"Domicile" is defined therein as:

"That place where a man has his *true, fixed, and permanent home* and principal establishment, *and to which whenever he is absent he has the intention of returning.* Kurilla v. Roth, 132 N.J.L. 213, 38 A.2d 862, 864; In re Stabile, 348 Pa. 587, 36 A.2d 451, 458; Shreveport Long Leaf Lumber Co. v. Wilson, D.C. La., 38 F. Supp. 629, 631, 632. *Not for a mere special or temporary purpose,* but with the *present intention* of making a permanent home, for an unlimited or indefinite period. In re Garneau, 127 F. 677, 62 C.C.A. 403; In re Gilbert's Estate, 15 A.2d 111, 117, 118, 18 N.J. Misc. 540; In re Schultz' Estate 316, I11. App. 540, 45 N.E.2d 577, 582. Davis v. Davis, Ohio App., 57 N.E.2d 703, 704.***"

And,

"The word 'domicile' is derived from Latin 'domus' meaning *home or dwelling house,* and domicile is legal conception of 'home'. In re Schultz' Estate, 316 I11. App. 540, 45 N.E.2d 577, 582.

"The established, fixed, permanent, or ordinary dwelling-place or place of residence of a person, *as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode;* or his home, as distinguished from a place to which business or pleasure may temporarily call him. Towson v. Towson, 126 Va. 640, 102 S.E. 48, 52.***"

Also,

" 'Domicile' and 'residence,' however, are frequently distinguished, in that

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> domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. Fisher v. Jordan, C.C.A. Tex., 116 F.2d 183, 186; Minick v. Minick, 111 Fla. 469, 149 So. 483, 488; Hartzler v. Radeka, 265 Mich. 451, 251 N.W. 554. ***" (*Emphasis supplied.*) *Black's Law Dictionary* at 572

It was stated in *State v. Garford Trucking, Inc.*, 4 *N.J.* 346 (1950) that:

> "***'Domicile' and 'residence' are not convertible terms, although they are sometimes used interchangeably in legislative expressions. *The polestar in each case is the intention of the law-making authority. E.g., Brown v. Brown,* 112 *N.J. Eq.* 600 (*Ch.* 1933).***" (*Emphasis supplied.*) (at p. 353)

Such a "polestar" is provided herein by *N.J.S.A.* 18A:1-1 which states, *inter alia,* that "***'*Residence' means domicile, unless a temporary residence is indicated****." (*Emphasis supplied.*) Clearly, petitioner's principal place of residence was in Ithaca from March 1973 to March 1974. This is emphasized in that, when his employment there ended in March 1974, he chose to remain there, extending his residence to a period of at least fifteen months while collecting unemployment benefits there. Such residence is not within contemplation of "temporary" as defined by the Legislature in *N.J.S.A.* 18A:1-1. Nor were such temporary emergency situations evident as were caused by fire in *Hegyi, supra,* and by the inebriation of a spouse and mother in *M.A.M., supra,* which, being clearly distinguishable cases from the factual context herein, are not controlling.

Subsequent to his residence in New York State, petitioner traveled extensively and became a resident of California where he also collected unemployment benefits.

Petitioner alleges that he maintained another residence in Upper Township from March 1973 through September 1974. He has, however, failed to present tangible proof or testimony in support thereof. Such failure, coupled with his tacit admission that even this alleged residence was abandoned from September through December 1974, is fatal to petitioner's case. As was said in *Cyr v. Cyr,* 111 *A.2d* 735 (*Sup. Ct.,* Vermont, 1955):

> "***Intention alone cannot retain a residence, every vestige of which is gone, with no place left to which a party has a right to return.***"
>
> (at p. 737)

Petitioner's announced intention must yield to the intent which his acts and conduct clearly indicate. *McCarthy v. Philadelphia Civil Service Commission,* 339 *A.2d* 634, Commonwealth Court of Pennsylvania, 1975 Petitioner was not domiciled in Upper Township from February 1, 1974 through December 12, 1974. (BTr. 46) The Commissioner so holds. *N.J.S.A.* 18A:1-1 It is further determined that prior to notification by the Board of discontinuance of tuition payments, *ante,* petitioner was, through nescience, unaware of the domiciliary issue which so vitally affected B.F.'s education.

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Petitioner argues that the Board failed to make a proper determination prior to the February notification to Elwyn Institute to discontinue tuition payments. The Commissioner cannot agree. The Board's action directing its principal to notify petitioner of this discontinuation is indicative that a determination was made. The fact that the Board, thereafter, at petitioner's request reviewed the matter is in no way improper and, being consistent with its prior determination, is merely supportive thereof. Nor is the Commissioner aware of a responsibility of the Board to notify the Division of Youth and Family Services of discontinuation of tuition payments. While such may be a desirable adjunct, it is not incumbent upon the Board to do so. *N.J.S.A.* 18A:46-18, referring only to untrainable mentally retarded children, is inapplicable.

It remains to determine the validity of petitioner's assertion that he was entitled to a hearing prior to action by the Board terminating tuition payments for B.F. The Commissioner knows of no such requirement of law. However, in such matters fairness to all parties must be the watchword. Paramount must be the interests of B.F. who, being dependent upon residential placement to procure his education, had no control thereof. The Board's action on February 21, 1974, cutting off tuition payments retroactively to February 1, 1974, threatened both the continuity and quiet tenor of B.F.'s education. The Commissioner determines that a reasonable time of notification of termination would have been a five-week period, ending April 1, 1974. Such period would have provided petitioner opportunity to state his case before the Board or to contact the educational agency in his place of domicile to arrange for an orderly and uninterrupted transition of responsibility for B.F.'s education. It was incumbent upon petitioner that he do so within such reasonable period.

It was said in *Worden et al. v. Mercer County Board of Elections,* 61 *N.J.* 325 (1972) by Chief Justice Weintraub, concurring, that:

> "***The concept of domicil is not constant. *It is designed to assure fairness to the individual or the State or both in a given setting.* Its ingredients therefore will vary, depending upon what is just and useful in a given context.***" (*Emphasis supplied.*) (at p. 349)

So herein, the Commissioner determines that the Board is responsible for tuition payments for B.F. to the Elwyn Institute from February 1, 1974 through March 31, 1974, and for that portion of December 1974 after which petitioner again became a domiciliary of Upper Township, which period shall be determined by the Board on the basis of substantiated proof to be submitted by petitioner. Accordingly, the Board is directed to make such payments to the Elwyn Institute. To this limited extent petitioner's prayer is granted. The Board bears no responsibility for the tuition payments for the remainder of the controverted period which is in excess of eight calendar months. To this extent, petitioner's prayer is denied.

COMMISSIONER OF EDUCATION

September 15, 1975

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Board of Education of the City of Hoboken,

Petitioner,

v.

Mayor and Council of the City of Hoboken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Robert W. Taylor, Esq.

For the Respondent, Julia F. Hanrahan, Attorney at Law

Petitioner, the Board of Education of the City of Hoboken, hereinafter "Board," appeals from an action of the Mayor and Council of the City of Hoboken, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Hudson County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. Certain facts of pertinence to the matter were adduced at a hearing conducted on September 19, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. These facts, the record of the hearing, and the pleadings of the Board and Council are submitted for consideration directly to the Commissioner at this juncture. Receipt of a hearing examiner's report was waived by respective counsel at the hearing.

At the annual school election held March 11, 1975, the Board submitted to the electorate a proposal to raise $3,651,000 by local taxation for current expense and capital outlay costs of the school district in the 1975-76 school year. These expenses and costs together with a debt service requirement of $359,000 would have required a total tax levy of $4,010,000. The total levy for current expenses and capital outlay costs was rejected by the voters, however, and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Hoboken in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Hudson County Board of Taxation a total sum of $3,685,000 for current expenses, capital outlay costs, and debt service requirements of the school district for the 1975-76 school year. This total sum was a reduction of $325,000 from the amount the Board had determined was required and the Board then filed the instant Petition of Appeal.

At this juncture the Commissioner determines that this reduction may not stand alone on its merits for his consideration. The question for determination is now concerned with another, and even more serious development, pertinent to

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the Board's total revenues for the 1975-76 school year; namely, that total State aid revenue is sharply reduced from the original projection of the Board. Such reduction totals approximately $613,000 and is occasioned in large part by a recalculation of atypical aid based on audited, rather than estimated, expenses of the 1973-74 school year. The Board had estimated revenues of $664,749 from such State aid, for atypical pupils but such estimation was the result of inadvertent errors on the part of the Board. A total approximate sum of only $232,000 is due to be received by the Board from such aid in the current school year. The difference between the two figures is one of great significance and a major part of the total reduction of $613,000 from the amount initially projected as revenue from State aid funds by the Board.

In the context of such reduction in anticipated revenues the Commissioner holds that Council's reduction of $325,000 may not be sustained and need not be considered on its merits since as the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "*** The problem is one of total revenues available to meet the demands of a school system. ***." (at p. 142)

Even assuming, *arguendo*, that the merits of Council's determination should be considered at this juncture, it is clear from the testimony at the hearing that a major part of Council's reduction of the local tax levy – a sum of $200,000 – would be required to be restored in any event. This sum was determined by Council to be available to the Board in unappropriated free balances at the time of Council's certification to the Hudson County Board of Taxation. The testimony at the hearing, not refuted, was that no such balance was available to the Board on June 30, 1975.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $325,000 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that there be added to the certification of appropriations for school purposes made by Council to the Hudson County Board of Taxation, the sum of $325,000, so that the total amount of the local tax levy for the expenses of the school district for the 1975-76 school year shall be $4,010,000.

COMMISSIONER OF EDUCATION

September 22, 1975

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Durling Farms, Inc.,

Petitioner,

v.

Board of Education of the Township of Montville, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John T. Lynch, Esq.

For the Respondent, Dorsey and Fisher (John H. Dorsey, Esq., of Counsel)

Petitioner, a New Jersey corporation, appeals those actions of the Board of Education of the Township of Montville, hereinafter "Board," wherein the Board in May 1975 rejected petitioner's low bid and all other bids to supply milk to its various schools for the school year 1975-76, readvertised for bids, and thereafter awarded a contract to the then low bidder, a supplier other than petitioner. The Board contends that its actions were legal and proper.

The matter is submitted directly to the Commissioner of Education for Summary Judgment on the pleadings, stipulation of facts, and Memoranda of Law.

The relevant stipulated facts (J-1) are as follows:

1. The Board duly advertised for milk suppliers for the 1975-76 school year. (Exhibit A)

2. The Board Secretary supplied all bidders with bid specifications which in Section 1(f) required a certified check for five percent of the total amount of the bid; elsewhere, however, Section 3 of the general specifications supplied required a certified check "***in the amount of 5% of the total bid or $500.00, whichever is less***." (Exhibit B) The Board reserved the right to reject all bids in whole or in part and to waive minor defects.

3. The Board received bids on April 17, 1975 of which petitioner's was the lowest bid and was accompanied by a certified check of $500, an amount less than five percent of the total bid.

4. The next lowest bidder, whose bid was accompanied by a $2500 certified check, objected to petitioner's bid on grounds that it was not accompanied by a certified check for five percent of the total bid which the objecting bidder held to be required under the bid specifications.

5. The Board Secretary recommended rejection of all bids and

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readvertising on grounds of the discrepancy in the bid specifications. (Exhibit D) Thereupon, on May 12, 1975, the Board rejected the bids and authorized readvertisement by reason of this discrepancy. (Exhibit E)

6. The Board advertised for the rebidding and eliminated the prior discrepancy in its specifications relative to the required deposit. (Exhibit G)

7. On June 18, 1975, the Board again received bids for the same milk items, which bids revealed petitioner's bid, though lower than the previous bid, to be higher than that of the lowest bidder. (Exhibit H) The contract was awarded to the lowest bidder who had, in the first round of bids, been the second lowest bidder.

Petitioner, while recognizing that the Board reserved the right to reject all bids, argues that the discrepancy in the Board's original specifications was a minor inconsistency which should in this instance properly have been overlooked rather than result in a decision to reject all bids and readvertise. Petitioner argues that this minor discrepancy in no way threatened either the Board's assurance that petitioner would perform in accordance with the terms of the contract or that no bidder would be granted a competitive advantage over other bidders. *Township of River Vale v. R.J. Longo Construction Company,* 127 *N.J. Super.* 207 (*Law Div.* 1974) Petitioner, maintaining that the Board's right to reject bids cannot be exercised arbitrarily without good reason, cites *River Vale, supra,* wherein it was said that:

> "***[W]here the irregularity is not substantial, it may well be the duty as well as the right of the municipality to waive it.***" (at p. 222)

Petitioner asserts that:

> "***[T]o reject without reason bids which are submitted in good faith by bidders, or to bring about a rebidding of contracts where no threat to the attainment of the municipal objective or inequality between bidders is present, will only lead to the withdrawal of qualified bidders from the competitive bidding process. The inevitable result will be that only those who see an opportunity to prosper in the reduced competitive atmosphere will tolerate the governmental vacillation.***" (Brief of Petitioner, at p. 3)

Petitioner prays that the Commissioner enter an order as follows:

1. Declaring the irregularity in the original bid specifications to be immaterial and no basis for the rejection of bids.

2. Directing the Board to award the 1975-76 milk contract to petitioner in accordance with the low bid received April 17, 1975.

Conversely, the Board argues that it not only had reserved the right to reject all bids, but also was, in order to remain neutral and favor neither bidder, required to reject them because different bidders were obviously bidding on the

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basis of different specifications. (Brief of Respondent, at pp. 4-5) In support of this argument the Board cites *Cardell, Inc. v. Township of Woodbridge,* 115 *N.J. Super.* 442 (*App. Div.* 1971), a case in which repeated rejection of bids was held to be improper. Therein it was said by the Court:

> "***Suffice it to say that when a municipal governing body concludes in good faith that the purposes of the public bidding statute are being violated, it may reject all bids submitted and in its discretion order a readvertising of the contract.***" (at p. 451)

The Board asserts that any injury resulting from a revealing of prices suffered by petitioner was *de minimus* and not compensable in that the same bidders who were herein involved bid on milk supplies throughout the State and, as such, by the processes of bidding are compelled to reveal their prices. The Board, denying any charge of arbitrariness or bad faith, avers that it acted in good faith, in the public interest, and with valid reason in rejecting all bids. In this regard the Board cites *Hillside Township v. Sternin,* 25 *N.J.* 317 (1957) wherein it was said that the purpose of statutory law regarding bidding:

> "***is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good; and they should be rigidly adhered to by the courts.***" (at p. 322)

The Board entreats the Commissioner to affirm its actions, herein, as proper and to deny the relief sought by petitioner.

The Commissioner has carefully reviewed and considered the relevant facts and has weighed the arguments of law set forth in the respective memoranda of the litigating parties. He finds herein no showing that the Board or its agents acted with intent to construct its specifications with a discrepancy toward an end that it would reject bids and, by doing so, invite keener competition. Rather, the discrepancy came to light only after the opening of bids on April 17, 1975.

It was said in *Case v. Trenton,* 76 *N.J.L.* 696 (*E. & A.* 1909) that:

> "***We must consider the public policy which underlies the requirements of competitive bidding. The purpose of the statute requiring competitive bidding is that each bidder, actual or possible, shall be put upon the same footing. The municipal authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited and the proposals submitted. If one bidder is relieved from conforming to the conditions which impose some duty upon him, or lays the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions.***" (at p. 700)

In the instant matter the Board considered the dispute which arose over

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the discrepancy and determined it to be of sufficient note to invoke the rejection of bids, which rejection was provided for both in its advertisement to bidders (Exhibit A) and in the terms of its specifications as follows:

> ***
>
> "*INTERPRETATION AND APPROVAL*
>
> "A. Should any dispute arise respecting the true construction and meaning of specifications, the same shall be decided by the Board.
>
> ***
>
> "D. The Board reserves the right to:
>
> "(1) Reject any and all bids–in whole or in part.
>
> ***
>
> "(3) To waive minor defects.***" (Exhibit B)

Clearly, the Board was faced with a determination as to whether the discrepancy was a minor one, in which case it could, had it so chosen, have awarded a contract to petitioner. However, it was the judgment of the Board that its own error was not sufficiently minor to waive the defect in its specifications. Absent a show of statutory violation, collusion, arbitrariness, bad faith, favoritism, or other impropriety on the part of the Board, the Commissioner finds no reason to interpose his judgment for that of the Board. The instant matter is clearly distinguishable from *River Vale, supra,* wherein the municipality sought a declaratory judgment of the Court that it could waive a minor discrepancy from its specifications. Herein, the Board independently reached its own determination which provided the basis for its subsequent action.

Petitioner complains that the Board's action, and similar action by other boards, if allowed to continue, would discourage participation in competitive bidding. There is, however, no showing that it was intentional on the Board's part to so construct its specifications toward an improper end. Petitioner was properly notified of the rejection of bids and automatically provided with the revised specifications for rebidding. While it is true that the rebidding resulted in lower cost to the Board, it could have been otherwise as is sometimes the case in the present inflationary economic environment.

Specifications for bidding must supply all prospective bidders with a common standard for competitive bidding. *Camden Plaza Parking v. City of Camden,* 16 *N.J.* 150 (*Sup. Ct.* 1954) The Board determined that it had failed to do so, rejected the original bids, and ordered the readvertisement and rebidding. This determination is entitled to a presumption of correctness absent impropriety on the part of the Board. The Commissioner so holds. *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947); *Tolliver et al. v. Board of Education of Metuchen, Middlesex County,* 1970 *S.L.D.* 415

Accordingly, the Commissioner finds no merit in the instant Petition of

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Appeal nor any relief which may be properly granted to petitioner. The matter is dismissed.

COMMISSIONER OF EDUCATION

September 22, 1975

Mary Ann Popovich,

Petitioner,

v.

Board of Education of the Borough of Wharton, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Fullerton & Porfido (Eugene J. Porfido, Esq., of Counsel)

Petitioner, a tenured teacher of music employed by the Board of Education of the Borough of Wharton, hereinafter "Board," protests an action of the Board reducing her employment from five days per week in 1973-74 to three days per week in 1974-75 with a corresponding reduction in salary. She seeks an order from the Commissioner of Education directing the Board to restore her to full-time employment with appropriate salary and emoluments.

The Board admits that it reduced petitioner's employment and salary but denies that such reductions were in any way improper.

A hearing to determine the facts in the controverted matter was conducted at the office of the Morris County Superintendent of Schools on October 3, 1974 and November 12, 1974 by a hearing examiner appointed by the Commissioner. A Brief was submitted by respondent subsequent to the hearing. The report of the hearing examiner is as follows:

A review of those facts which are uncontroverted reveals that petitioner has been employed by the Board to teach vocal music exclusively for an uninterrupted period of sixteen years. Since 1961 she has been certified as a "teacher of music" and was prior to that time certified as a "teacher of vocal

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music." The Board employs one additional music instructor who is similarly certificated as a "teacher of music," but who has less seniority than petitioner and has taught only instrumental music for the Board. While no formal job descriptions exist for these two music positions, it is clear that neither teacher was charged with supervisory responsibility over the other.

Petitioner was paid at the sixteenth step of the M.A. scale for the school year 1973-74. The seventeenth step of this scale for 1973-74 calls for a salary of $15,780. On April 3, 1974, the Board adopted the following resolutions:

> "***that the vocal music teacher be offered a three day per week contract to teach vocal music during the 1974-75 school year***." (P-4)

> "***to amend List A to reflect Miss Mary Ann Popovich being offered a contract continuation for three days per week during the 1974-75 school year.***" (P-4)

The Superintendent by a letter dated April 4, 1974, notified petitioner of the Board's action as follows:

> "Please be advised that because of changes in the curricula as a result of the lack of candidates for the vocal music course in the middle school, and since this is the only area in which you are certificated, the Board of Education has voted***to employ you on the basis of three days per week and to extend your present contract for the school year 1974-75 accordingly.***" (P-3)

On April 8, 1974, the Board Secretary notified petitioner that her contract was being extended at a salary of $9,468, representing three-fifths of the seventeenth step on the M.A. salary guide for three days' work per week during the 1974-75 school year. (P-2) Petitioner, on April 22, 1974, accepted the extension of her contract with the following proviso:

> "This is not to be interpreted as constituting a waiver of my rights under my existing employment." (P-2)

Thereafter, petitioner filed the within Petition of Appeal before the Commissioner on May 14, 1974.

Petitioner charges that the Board's reduction of her salary was an act of bad faith, was invalid in that the Board's resolution (P-4), *ante,* failed to specify the name of petitioner, failed to abolish the vocal music program, and was inspired by personal animosity. Petitioner further asserts that the Board's action must be set aside since it has resulted in a reduction of her salary in contravention of her tenure rights.

The Board argues that its position of vocal music teacher is separate and distinct from its other positions of instrumental music teacher within the contemplation of *N.J.S.A.* 18A:28-1 *et seq.* and regulations of the State Board

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of Education set forth in *N.J.A.C.* 6:3-1.10. It argued, therefore, that petitioner's category of employment is solely that of teacher of vocal music.

The Board maintains that petitioner has seniority only in the position of vocal music teacher and has no claim upon the position of the teacher of instrumental music. In this regard, it asserts that the broadening of petitioner's certification when she was issued the "teacher of music" certificate in 1962 did not then nor later result in a concomitant broadening of her previous duties which remained thereafter those of a teacher of vocal music. Thus, the Board concludes that her seniority is limited to her category of employment as a teacher of vocal music, since she at no time was employed by the Board as a teacher of instrumental music or in any other teaching position.

The Board affirms that its right to abolish a position or reduce employment is statutorily guaranteed by statutes *N.J.S.A.* 18A:28-9 and 10 which provide that:

> *N.J.S.A.* 18A:28-9
>
> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members***."
>
> *N.J.S.A.* 18A:28-10
>
> "Dismissals resulting from any such reduction***shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

Additionally, the Board charges that petitioner, having failed to assert her seniority claim within a reasonable time, is barred from claiming any right to the position of instrumental music teacher, the only other position for which she is certificated. The Board further relies upon *Werlock v. Board of Education of the Township of Woodbridge,* 5 *N.J. Super.* 140 (*App. Div.* 1949) in stating that petitioner, having laid no claim to the position of teacher of instrumental music, is barred from reasserting any right thereto after the position was filled by the Board.

Finally, the Board denies that either the Superintendent or the Board was motivated by personal animosity or that the Board acted in bad faith by eliminating vocal music from the middle school curriculum, and reducing the time requirements for vocal music instruction. The Board states that it relied solely upon the recommendations of its Superintendent and the results of his impartially administered survey which showed "***a dismal lack of interest by the students***in that portion of the program which was discontinued.***" (Brief on Behalf of Respondent, at p. 15)

Evidence and testimony presented at the hearing reveal that the Board, in September 1974, opened a new middle school which for the first time made available to pupils home economics and wood and metal shop facilities. In preparation for scheduling pupils of grades six, seven, and eight to be housed in

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this new facility, school administrators directed pupils to confer with their parents and complete on or about April 2, 1974, a survey form indicating their choice of three of four listed electives: art, vocal music, shop, and home economics. Each offering signified was designated as available to both boys and girls. (P-5) Of 270 pupils who responded, only seven selected vocal music. (Tr. II-16)

Faced with these results, the Superintendent determined not to offer vocal music in the middle school in 1974-75. (Tr. II-17) It is clear that this determination was made unilaterally by the Superintendent and not by the Board. In this regard the Superintendent testified as follows:

> ***
>
> "Q. You testified that you would not have offered the Shop course next year if it was low on the count: isn't that so?
>
> ***
>
> "A. That's correct.
>
> [The hearing examiner]: "Let's probe that part of it. Do you mean you would not have offered Shop, or you would not have recommended to the Board that they offer Shop?
>
> [The Superintendent]: "A. I believe, sir, that I would not have offered Shop; let's put it that way.
>
> "Q. When you say 'you would not have offered' don't you really mean that you would not have recommended it since only the Board of Education makes that decision, I believe?
>
> "A. I believe my job description gives me that right.***" (Tr. II-102-103)

And,

> [The hearing examiner]: "***You stated, I believe, that your job description specifies that you, as Superintendent of the school system, are to determine the curriculum offerings, that are made in the district of Wharton; is that correct?
>
> [The Superintendent]: "Yes, sir.***" (Tr. II-112)

The hearing examiner finds no evidence that the Board passed a resolution to eliminate the course in vocal music from its previously required curricular offerings for middle school pupils. (Tr. II-60) It is further made clear by testimony of the Superintendent that the Board enacted no resolution to establish either shop or home economics as curricular electives. (Tr. II-69) There is no showing that the Board was unaware of, or opposed to, these impending curricular changes. That they were aware is indicated by their actions in providing teachers and new building facilities for shop and home economics and in reducing the amount of instruction time and salary of the vocal music teacher. The hearing examiner leaves to the Commissioner to comment, in the light of *N.J.S.A.* 18A:33-1, upon the propriety of the manner in which the above curricular changes were effectuated.

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A review of the documentation and testimony further establishes that the Board did not abolish the position of vocal music teacher. Rather, in recognition of the lack of demonstrated interest by the pupil survey, *ante*, its act was to diminish this full-time position to three-fifths of a full-time position. (Tr. I-101, 106; Tr. II-76)

Petitioner charges that the Board and its agents acted in bad faith and, being motivated by animosity, harassed and intimidated her. The hearing examiner has examined the numerous evaluation reports and has weighed the extensive testimony relative to this charge. He finds that petitioner has failed to prove that the Board or its agents harassed or intimidated her. Petitioner has been evaluated by three principals, each of whom has rated her from poor to outstanding in various facets of her work. (R-2) While some written comments are sharp and critical (R-2-8), others are encouraging and commendatory. (R-2-11) The evidence supports the conclusion that since September 1971, a much improved working relationship has existed between petitioner, her principal and the Superintendent. (Tr. II-8) Efforts to arrange for observation by petitioner at other schools and for in-service supervision by the County helping teacher appear only to have been aimed at an appropriate improvement of instruction. (Tr. I-17, 21, 38, 43)

The hearing examiner finds that the Superintendent's directive to allow pupils to select electives for 1974-75 was not an attempt on his part to eliminate vocal music from the middle school curriculum. Although he admittedly believed there would be a limited number who would elect vocal music, he participated in the planning that provided for a vocal music room in the new middle school. (Tr. II-91) He was faced with the fact that pupils could not incorporate four electives into their daily schedules. Therefore, having notified the Board of his intention, he allowed pupils to select the three in which they desired to participate. When only seven pupils in the entire middle school elected vocal music, he determined not to offer it during 1974-75 in the middle school but to continue it as a requirement in the lower grades. Thereafter, he notified petitioner of this decision (Tr. I-23) and recommended that the Board reduce petitioner's employment.

The fact that the Superintendent arranged for petitioner to observe in regular elementary classes in January 1974 does not support the conclusion that the Superintendent was seeking to eliminate either vocal music or petitioner from the school. (Tr. I-62; Tr. II-10, 34, 91) Rather, petitioner testified that the request to visit other classes was initiated by petitioner herself (Tr. I-52) and was agreed to by the Superintendent. Such an arrangement does not support a charge that petitioner was being harassed or intimidated.

In consideration of the above findings, it is recommended that the Commissioner dismiss petitioner's charge that the Board or its agents acted improperly as the result of being motivated by a desire to harass, intimidate, or otherwise force petitioner to vacate her position.

The hearing examiner finds no evidence of inordinate delay on petitioner's

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part in informing the Board of her intent to contest her reduction of employment and salary. Eight days after receipt of the contract extension she appended to her acceptance thereof a proviso that the acceptance was not to be interpreted as a waiver of her rights. (P-2) Twenty-two days thereafter and prior to the close of the school year she filed the Petition of Appeal. In recognition of such timely notification, the hearing examiner recommends that the Commissioner not bar petitioner from asserting seniority claims for failure to assert them in timely fashion.

Petitioner does not possess an elementary teacher's certificate nor has she taught as an elementary classroom teacher for the Board. That this was known to the Superintendent is shown by his testimony wherein he said:

> "***I knew her certification was limited to the job she was doing as vocal music teacher and I have known that she was certified in that position.***" (Tr. II-40)

The Superintendent further testified that he was aware of the legal requirements regarding seniority where there is a reduction in staff, but that neither he nor the Board gave consideration thereto when petitioner's employment and salary were reduced. (Tr. II-80, 86) Petitioner is fully certified to teach either vocal music or instrumental music. She served for two years in another state as a teacher of numerous types of woodwind, string, and brass instruments (Tr. I-87) but served the Wharton Board solely as a vocal teacher. Similarly, the Board's instrumental music teacher is now certified to teach both instrumental and vocal music but has taught only instrumental music and has served the Board and been certificated for a lesser period of years than has petitioner. (R-3)

The Board's action in reducing petitioner's employment was a reduction of force which the hearing examiner deems to be within the contemplation of *N.J.S.A.* 18A:28-9 which provides that:

> "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 for other good cause***."

N.J.S.A. 18A:28-10 provides that:

> "***[S]uch reduction shall***be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

N.J.S.A. 18A:28-13 provides that:

> "The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative,

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supervisory, teaching or other educational services***and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

The above-mentioned categories have been set forth in *N.J.A.C.* 6:3-1.10 included herein in pertinent part as follows:

"***(b) 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.

"(c) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

***

"(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

***

"(k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

***

"27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. *Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has been or shall be required by the State Board of Education.* However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;

"28. Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;

***

"30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.***" (*Emphasis supplied.*)

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Petitioner is the holder of a specific certificate issued by the State Board of Examiners. As the holder of a "teacher of music" certificate, she is entitled to teach the subjects of vocal music and/or instrumental music in any grade from kindergarten through twelve and has gained seniority in such position. She has been certified longer and had served for a greater number of years than the Board's teacher of instrumental music. She has greater seniority as a teacher of music than does the instrumental music teacher. Recognizing this fact, the hearing examiner concludes that petitioner is entitled to a higher seniority ranking than the teacher of instrumental music for any position or combination of positions in either vocal and/or instrumental music. In accord therewith, the hearing examiner recommends to the Commissioner that he determine that the Board's reduction of petitioner's teaching assignment was *ultra vires,* and that he direct the Board to restore her to a full-time teaching position with appropriate emoluments. *Norma Whitcraft and Cherry Hill Education Association v. Board of Education of the Township of Cherry Hill, Camden County,* 1974 *S.L.D.* 901

This concludes the report of the hearing examiner.

* * * *

The Commissioner has thoroughly reviewed the entire record of the herein controverted matter including the hearing examiner's report and the exception filed thereto by the respondent Board pursuant to *N.J.A.C.* 6:24-1.16. No exceptions were filed by petitioner.

The Board charges that petitioner failed to assert her seniority claims in timely fashion and is, therefore, barred from reinstatement by reason of the fact that the position of instrumental music teacher is filled by another employee. The hearing examiner report is explicit in this regard, however, and shows that no inordinate delay occurred. Rather, within eight days of notice of reduction of her teaching time and salary, petitioner notified the Board that she waived no rights in accepting employment for the ensuing year. Within twenty-two days she filed the instant Petition of Appeal. Accordingly, the Commissioner holds that she acted in timely fashion and is not barred from a determination in the matter.

The Board takes further exception to the hearing examiner's report wherein it was found that the decision to discontinue the vocal music offering was made unilaterally by the Superintendent. The Commissioner has thoroughly reviewed the sworn uncontroverted testimony of the Superintendent, *ante,* and determines that the finding of the hearing examiner is consistent therewith. (Tr. II-102-103, 112) The hearing examiner found no attempt at subterfuge or concealment on the part of the Superintendent in effecting such curricular changes. Nor was it found that the Board was unaware of such curricular revision. The Commissioner, however, is constrained to emphasize that such authority, whether delegated by the Board of assumed by an agent of the Board, is improper. The Commissioner so holds. *N.J.S.A.* 18A:33-1 states clearly that

> "***no course of study shall be adopted or altered except by recorded roll call majority vote of the full membership of the board of education of the district."

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The Commissioner is constrained to caution all boards of education that the decision-making functions which are required by statute to be performed by boards of education may in no way be relegated to others. *Wallace M. Nixon v. Board of Education of the City of Pleasantville,* 1938 *S.L.D.* 56

In any event, the Board's action reducing petitioner's employment to three days per week constituted a reduction of staff which is tantamount to the abolishment of a portion of its former full-time vocal music teacher position. *N.J.A.C.* 6:3-1.10(h) provides that:

> "Whenever any person's particular employment shall be abolished in a category, *he shall be given that employment in the same category to which he is entitled by seniority.* ***" (*Emphasis supplied.*)

Petitioner's category is that of teacher of music for which she is certificated. *N.J.A.C.* 6:3-1.10(k) *The burden of determining seniority rights rests squarely on the Board in such instances. N.J.S.A.* 18A:28-10 This is so, regardless of whether or not petitioner asserted her seniority rights at the time she was notified of the reduction of her work week. In fact, she has greater seniority than the Board's teacher of instrumental music who likewise is certificated as a teacher of music. Each of these teachers is certified to teach both instrumental and choral music courses. Petitioner, however, has greater seniority and is entitled to full-time employment with the Board as long as a full-time position is maintained in her category and as long as she performs acceptably those duties to which she is assigned.

Accordingly, the Commissioner directs that the Board restore petitioner forthwith to a full-time teaching position within the scope of her certification. It is further directed that the Board provide petitioner with salary and other emoluments equal to the difference between that which she received and that which she would otherwise have been provided as a full-time teacher from September 1, 1974 to the date of her reinstatement. These salary benefits and other emoluments shall be reduced by those amounts which accrued during the two-month period from March 1, 1975 through April 30, 1975 during which the litigation of the matter was delayed by failure of petitioner to submit a Brief according to the agreed-upon schedule for filing. Such benefits as ordered shall be further mitigated by the amount of petitioner's earnings in alternate employment, if any, during the periods from September 1, 1974 to February 28, 1975, and from May 1, 1975 to June 30, 1975, and from September 1, 1975 to the date of reinstatement.

COMMISSIONER OF EDUCATION

October 7, 1975

You are viewing an archived copy from the New Jersey State Library.

Virginia Bennette, Maureen Ellis and Karel Hewitt,

Petitioners,

v.

Board of Education of the Township of Hopewell, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Hartman, Schlesinger, Schlosser & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Lummis, Kleiner, Moore & Fisher (Steven Z. Kleiner, Esq., of Counsel)

Petitioners, nontenured classroom teachers employed during the 1973-74 school year by the Board of Education of the Township of Hopewell, hereinafter "Board," were notified by the Board in April 1974 that they would not be reemployed for the 1974-75 school year. On or about June 14, 1974, they requested that the Board provide them with reasons why they were not to be reemployed. This request was refused by the Board. Petitioners allege that this refusal by the Board deprives them of the entitlement to due process of law. They seek an order of the Commissioner of Education directing the Board to issue to them a statement of reasons for its decision not to offer them reemployment for the 1974-75 school year.

The Board denies that it was required to provide petitioners with a statement of reasons for nonrenewal or that its refusal to provide such a statement constitutes a denial of due process.

The matter comes directly before the Commissioner on a Motion to Dismiss filed by the Board with Memoranda of Law by the litigating parties. There are no relevant facts in dispute, and there is, thus, no necessity for a plenary hearing.

The Board's contention that petitioners are not entitled to the relief they seek is grounded on the decisions of the courts in *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) and *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975.

In its *per curiam* decision in *Sherman, supra,* the Court stated:

"***The court in *Donaldson,* in pronouncing the rule mandating giving of reasons to a terminated nontenured teacher, said:

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> 'Many boards by collective contracts under *N.J.S.A.* 34:13A-1 *et seq.*, have already agreed to furnish reasons and those which have not will, under this opinion, *hereafter* be obliged to do so. [65 *N.J.* at 248; *emphasis added*].'
>
> "We consider the foregoing as an indication that *Donaldson* be given only prospective application. To give it retrospective application so as to impose an obligation on Boards of Education as to terminations prior to *Donaldson,* which neither law, administrative policy or labor contracts imposed on them would, in our opinion, be unwise. We therefore conclude that *Donaldson* is to be applied only prospectively***." (Unp)

The Board, herein, points out that the Supreme Court of New Jersey rendered its opinion in *Donaldson, supra,* on June 10, 1974, four days prior to the request by petitioners on June 14, 1974 for a statement of reasons as to why they were not renewed by the Board. Thus, the Board contends that its refusal of July 8, 1974 to provide a statement of reasons, being based on an understanding that *Donaldson* was prospective only in its application, was legal and proper.

The Board further argues that *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 (decided May 6, 1975) is inapplicable. In *Hicks* the Commissioner ordered the Board of Education of the Township of Pemberton to provide a nontenured teacher with a statement of the reasons why she was not renewed on grounds that she had in timely fashion requested such a statement on April 9, 1974, prior to the decision rendered in *Donaldson, supra.* The Board, in the instant matter, contends that petitioners had not requested such a statement of reasons until June 14, 1974, a date subsequent to the decision in *Donaldson,* and are not entitled by law to receive a statement from the Board of its reasons for nonrenewal. (Respondent's Memorandum of Law, at p. 3)

Conversely, petitioners argue that the factual context in *Sherman, supra,* is distinguishable from the instant controverted matter in that Sherman was not in the employ of the Spotswood Board of Education when she requested a statement of reasons for nonrenewal, whereas petitioners were still in the employ of the Board when they made similar requests. (Brief on Behalf of Petitioners, unp) Petitioners argue that they, like Hicks, were serving their employing Board when the request for reasons was made. Petitioners further argue that Petitioner Ellis did make request by letter dated April 25, 1974 for reasons for her nonrenewal of contract. In this communication, set forth in its entirety below, Ms. Ellis addressed the Board as follows:

> "Yesterday, I received your letter dated April 23, 1974 informing me that I would not be offered a contract for the forthcoming school year 1974-75. I was stunned. Earlier in the year, when you were asked about the reduction of the number of second grades, I thought it was stated that I would be considered for the additional seventh grade position at the Township school. To clarify my thoughts, I called Mrs. More. In the Board

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> minutes dated January 7, 1974 on page two, paragraph two, it states. '. . . She would have first consideration for any opening that becomes available.' This information affirmed my expectations for next year. The above-mentioned letter seems to contradict your earlier decision of January. What changes, if any, have occurred concerning this position?"
>
> (Exhibit A)

Petitioners contend that this letter constituted a request on the part of Petitioner Ellis for a statement of reasons for non-reemployment which request preceded *Donaldson, supra.*

Petitioners assert that, inasmuch as they were *all* in the employ of the Board at the time of their request for reasons, they must be furnished such reasons. *Donaldson, supra* In this vein, petitioners note that a commonly accepted dictionary definition of "hereafter" is "from now on." Thus, they argue that *Donaldson* requires that *any teacher* while still in the employ of a board of education who requests a statement of reasons, as did petitioners, must be furnished a statement of reasons for non-reemployment. *Karamessinis v. Board of Education of the City of Wildwood,* Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975. For these reasons petitioners pray that the Commissioner deny the Board's Motion to Dismiss and grant Summary Judgment in their favor.

The Commissioner has carefully considered and weighed the respective arguments of law set forth by the parties in the within controverted matter. A careful review of *Hicks, supra,* reveals that Ms. Hicks' letter of request to the Board of Education of Pemberton, therein referred to as Exhibit B, was neither more nor less detailed a request for reasons for non-reemployment than that set forth in Petitioner Ellis' April 25, 1974 letter to the Board, *ante.* The Commissioner determines that Ms. Ellis did therein make timely request for reasons why her contract was not renewed within the intendment, context, and application of *Hicks, supra.* Accordingly, the Commissioner directs the Board to supply her with a statement of reasons of why the Board determined not to reemploy her and to supply such reasons within a twenty day period from the date of this decision.

It remains to determine the narrow issue of whether Petitioners Bennette and Hewitt, having made request while still in the Board's employ, but subsequent to the decision of the Court in *Donaldson, supra,* have legal entitlement to a statement of reasons as to why they were not reemployed. It is clear that the Board gave them notice in April of non-reemployment for the ensuing school year. There is no evidence that they petitioned the Board for reasons until June 14, 1974, when a period greater than six weeks had elapsed. Their request thus followed the *Donaldson* decision by four days. Nor is there evidence that they requested an appearance before the Board previous to this date.

In the opinion of the Commissioner this delay rendered their request untimely. The Board had proceeded with notification of termination to

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petitioners pursuant to *N.J.S.A.* 18A:27-10 *et seq.*, a statutory responsibility which it was required to complete by April 30. Only after the issuance of the *Donaldson* decision did petitioners request of the Board a statement of reasons. Such delay is fatal to their arguments herein. The Commissioner so holds. To hold otherwise would be contrary to the opinion of the Court in *Sherman, supra,* wherein it was stated that:

> "***To give it [Donaldson] retrospective application so as to impose an obligation on Boards of Education as to terminations prior to Donaldson, which neither law, administrative policy or labor contracts imposed on them would, in our opinion, be unwise.***" (*Emphasis supplied.*)

As was stated by the Commissioner in *Hicks, supra*:

> "***The *Donaldson* decision triggered the requirement that petitioner be given the *previously requested* statement of reasons for her non-reemployment.***" (*Emphasis supplied.*) (at p. 333)

Herein, petitioners, with the exception of Petitioner Ellis, *had not, prior to Donaldson, requested a statement of reasons.* Since this is so, the Board, while it could have chosen to provide such a statement, was not then, nor is it now, under obligation to do so. *Sherman, supra; Hicks, supra*

Accordingly, the Board's Motion to Dismiss is granted with respect to Petitioners Bennette and Hewitt. It is, however, denied with respect to Petitioner Ellis. Summary Judgment is entered on her behalf to the extent that the Board is directed to provide her a statement of reasons for non-reemployment to which she is legally entitled as hereinbefore set forth.

COMMISSIONER OF EDUCATION

October 22, 1975

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Board of Education of the Township of Little Egg Harbor,

Petitioner,

v.

Township Committee of the Township of Little Egg Harbor, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, James L. Wilson, Esq.

For the Respondent, Haines, Schuman & Butz (Thomas P. Butz, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by the filing of a verified Petition of Appeal on June 26, 1974 by the Board of Education of the Township of Little Egg Harbor, hereinafter "Board," requesting that the Commissioner, pursuant to his authority and responsibility to provide a thorough and efficient education for the children in the public schools of New Jersey, authorize a supplementary appropriation to the Board's 1973-74 current expense budget; and

An Answer to the aforesaid Petition of Appeal having been filed by the Township Committee of the Township of Little Egg Harbor, Ocean County, hereinafter "Committee"; and

The Board having submitted to the voters at the regular school election of February 13, 1974, a supplemental current expense budget proposal in the amount of $145,000, which referendum was defeated; and

The Board and the Committee having conferred relative to the Board's 1974-75 budget which was likewise defeated by the voters, and the Board and the Committee having at that time considered the defeated supplemental budget proposal and rightly determined that no provision of law exists whereby the Committee has authority to certify any portion of a defeated supplemental budget proposal; and

The Committee having reduced the Board's 1974-75 annual budget by $161,000, which reduction was appealed to the Commissioner; and

The Board having submitted to the voters at a second referendum on June 25, 1974, a second supplemental budget proposal which was likewise defeated by the voters; and

The Board and the Committee having met on September 26, 1974 with the Ocean County Superintendent of Schools to consider an appropriate and legal remedy to the over-expenditures experienced by the Board as occasioned

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by an unusually high influx of pupil enrollment necessitating, *inter alia,* the adoption of a split schedule of school operation, the employment of numerous unanticipated professional and nonprofessional personnel, and the purchase of additional supplies, equipment, and services; and

A conference of counsel having been conducted on March 24, 1975 by the Assistant Director of the Division of Controversies and Disputes, in lieu of a scheduled budget hearing; and

The parties having amicably agreed that the Board would furnish and the Committee would evaluate affidavits containing data relative to the impact on the Board's current expense line items of unusual increases of pupil enrollment during the school years 1973-74 and 1974-75; and

The Committee and the Board having passed, on July 21, 1975 and September 8, 1975, a joint resolution stating, *inter alia*:

***

"1. That the sum of $79,329.61 is the sum necessary as a supplemental operating budget of the Board of Education of the Township of Little Egg Harbor for the 1973-74 school year.

"2. That the Commissioner of Education is requested to certify such sum as a supplemental operating budget for the Board of Education for that year and to borrow such sum on the security of tax anticipation notes for such purpose.

"3. That upon such action by the Commissioner of Education, the appeal of the 1974-75 budget by the Board of Education becomes unnecessary and moot, and the Commissioner of Education is requested to dismiss the same.***"; and

The Commissioner having reviewed the aforesaid joint resolution and the Board's documentation and report of audit (P-1) relative to its expenditures for the 1973-74 and the 1974-75 school years; now therefore

The Commissioner determines that he is similarly without statutory authority to certify the total amount or any portion of a defeated emergency budget proposal. It was said in *Board of Education of the City of Newark v. City Council and the Board of School Estimate of the City of Newark, Essex County,* 1970 *S.L.D.* 197 that:

> "***While the Courts have clearly established the power of the Commissioner to hear and decide appeals from alleged excessive reductions made by municipal governing bodies of annual school budgets, he finds no such authority with respect to supplemental appropriations. The law on the question of supplemental appropriations has been clearly set forth in *Newark Teachers' Association v. Newark Board of Education,* 108 *N.J. Super.* 34 (*Law Div.* 1969).***" (at p. 201)

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The statute *N.J.S.A.* 18A:22-38, as amended by *c.* 250, *L.* 1969, § 3, effective January 7, 1970, specifically limits the procedures and timetables for determination by the Commissioner of an annual school budget defeated by the voters. Nowhere in the statutes nor in the directives of the courts is such authority conferred upon the Commissioner relative to emergency or supplemental budgets which are defeated at the polls.

Absent statutory or court authority to render a determination herein, the Commissioner denies the request set forth in the joint resolution to certify a portion of the defeated emergency appropriation and directs that the matter proceed within the framework of the defeated 1974-75 school budget in which the reduction by the Committee is of sufficient magnitude to accommodate a resolution of the matter. Mootness, therefore, does not attach to the Board's appeal of the 1974-75 budget. The request that it be dismissed is, accordingly, denied.

Entered this 22nd day of October, 1975.

COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of Peter J. Deer,
Board of Education of the Borough of Palisades Park, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Patrick J. Tansey, Esq.

For the Respondent, Gigante & Aslanian (Nicholas L. Gigante, Esq., of Counsel)

The Board of Education of the School District of Palisades Park, hereinafter "Board," has certified a series of seven charges against Peter J. Deer, hereinafter respondent, a tenured teaching staff member in the employ of the Board. These charges allege that respondent knowingly, falsely, and consistently misrepresented to the Board that he had a master's degree for purposes of gaining additional salary income and advancement of position from 1962 to the date of his suspension by the Board without pay on September 5, 1974.

Respondent admits that he accepted from the Board salary payments computed on the master's degree scale from December 1962 until the date of his suspension. He denies that such acceptance, however, was improper. Respondent

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filed, with his Answer to the Board's charges, a Counter-Petition on Appeal wherein he alleges the Board improperly and as a subterfuge attempted to eliminate the position of elementary school guidance counselor, which position was held by respondent for six years prior to June 21, 1973. He further alleges that the Board, illegally and in violation of his seniority rights as a guidance counselor, reassigned him to a teaching position for the 1973-74 school year. Finally, respondent alleges that suspension without pay, and without written charges, which was imposed by the Superintendent on August 29, 1974, was *ultra vires.*

The Board, denying any improper act on its part, asserts that the charges if found to be true in fact are of such import as to justify the reduction in salary or dismissal of respondent.

It was agreed at a conference of counsel that both actions should properly be consolidated and that the Board would proceed first by presenting its offers of proof of the tenure charges. A hearing was conducted on January 29 and 30, 1975, and on February 21, 1975 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner of Education. At the conclusion of the Board's case, respondent moved for dismissal for failure to present a *prima facie* case. (Tr. III-84-90) The hearing examiner reserved decision on the motion for the Commissioner and required that a defense be set forth by respondent. Briefs were filed by the respective parties subsequent to the hearing.

The report of the hearing examiner is as follows:

Respondent began teaching for the Board in 1960. In the previous year he had taken and failed a required comprehensive examination for a master's degree at Seton Hall University. (Tr. III-94) He alleges that he again took the examination in the spring of 1962. It is the result of that alleged second attempt, and the issuance of the master's degree which was contingent thereon, that is at the center of the controversy, *sub judice.* The hearing examiner herewith proceeds to set forth the charges certified by the Board and the findings of fact with recommendations to the Commissioner. Certain charges are grounded and considered as entities *in pari materia* in the following recital:

CHARGE NO. 1

"That Peter [J.] Deer did knowingly and consistently from 1962 to the present date misrepresent himself as to his degree status to the Palisades Park School District, to wit: that he was awarded a Master's Degree at Seton Hall University in 1962."

CHARGE NO. 2

"That Peter [J.] Deer did on many occasions use the misrepresentation that he had a Master's Degree for the purpose of gaining additional salary income and for gaining a professional advancement in the school system."

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CHARGE NO. 4

"That Peter [J.] Deer did annually since 1962 accept and sign a salary clearly stipulating placement on the Master's Guide and on this basis throughout the year knowingly accepted monies based on the misrepresentation of statement of fact."

CHARGE NO. 5

"That Peter [J.] Deer did in the year 1962, with full knowledge, accept placement on the Master's Degree scale while not having such a degree and with full knowledge had records misrepresenting his degree status filed with the local school district for such purpose."

An official transcript of respondent's credits at Seton Hall University reveals that between 1956 and 1959 he had successfully completed thirty-eight graduate credits in pupil personnel and guidance studies and that he thereafter successfully completed fourteen undergraduate elementary education credits during 1961 and 1962. (P-7) In December 1962, the Superintendent of Schools recommended to the Board that respondent be placed on the master's degree guide. (P-3) This was done. The Superintendent testified at the hearing that no persons were ever recommended by him for such placement "***without what was purported to be official documentation***." (Tr. I-48) He testified that, in regard to such documentation relative to respondent, he was unsure as to whether it was received directly from Seton Hall or from respondent himself. (Tr. I-52-53) He further testified that no teachers were compensated during his superintendency for credits beyond the bachelor's degree as being equivalent to the master's degree. This testimony is corroborated by documentary evidence (P-1) which shows that the Board's salary guides from 1962-63 through 1974-75 did not recognize graduate credits as the equivalent of the master's degree for placement on the master's degree salary scale. (P-1) Finally, the Superintendent testified that at no time during his tenure with the Board had he recommended that the Board place respondent on the master's degree guide by reason of his completion of equivalent credits. He stated, rather, that it was on the basis of documentary evidence of a master's degree that he recommended such placement. (Tr. I-51-56, 62) Such documentary evidence is, however, not available at this juncture.

A review of the Board's salary guides (P-1) reveals that the differential accorded to those with a master's degree as compared to those with only a bachelor degree has ranged from $300 in 1962-63 to as much as $1,500 in 1974-75.

Respondent was assigned as an elementary school guidance counselor in August 1967. He served in this position until June 1973 when the Board abolished the position and reassigned respondent as a classroom teacher for the school year 1973-74.

In 1967 and again in 1969 the Board raised questions with respect to respondent's possession of a master's degree. (P-5; Tr. I-106, 114, 118; Tr. II-89-90) In 1967, the Superintendent contacted his predecessor for verification

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that he had recommended respondent's placement on the master's degree scale on the basis of reliable documentation and was assured that such proof had been the basis for his recommendation. Additionally, the Superintendent had contacted the County Superintendent's office for similar verification and was assured that their records indicated that respondent had been accorded master's degree status. (P-5; R-10) In 1969 the Board met with respondent to discuss the matter. A member of the Board testified that respondent stated at that meeting that he did possess a degree. He further testified that, although a transcript or copy thereof was before the Board at the meeting indicating that respondent possessed a master's degree (Tr. I-122), the Superintendent was instructed to contact Seton Hall University to determine with certainty respondent's degree status. He did so but was advised that such information would be given only at the direction of respondent. (P-5) Thereupon, the Superintendent, at the direction of the Board, requested that respondent authorize the release of his Seton Hall transcript. This he did. (J-1; Tr. II-94; Tr. III-33)

A transcript was received by the Superintendent which had been initialed by the assistant registrar of Seton Hall University on May 1, 1969. This transcript, preserved in the records of the State Board of Examiners, is a photostated document with the exception of the handwritten date and initials of the assistant registrar and the two following lines in which the underscored material below was recorded directly by a typewriter as follows:

> "***Admitted: *January, 1956*
>
> "Status as of date of transcript: *Master of Arts in Education, School of Ed., August, 1962 Major; Personnel & Guid.****" (C-3-10)

A transcript was filed by respondent with the Board of Examiners but was declared to be unofficial when respondent applied for evaluation of his eligibility for a principal's certificate in 1972.(C-3-1) No principal's certificate was issued. When he later applied in 1973 for a social worker's certificate (C-3-3, 4, 5, 7), the Superintendent forwarded to the Board of Examiners the transcript which had been retained in respondent's personnel folder. (C-3-10) This was accepted as an official transcript, since it had been submitted by the Superintendent through the County Superintendent. (P-17; Tr. II-99)

However, in June 1974, the validity of respondent's master's degree was again questioned by the Board. The Superintendent called the State Board of Examiners and questioned whether respondent had a master's degree from Seton Hall. (C-3-12) Thereupon, an agent of the Board of Examiners contacted the Dean at Seton Hall who responded in a letter dated June 14, 1974 that:

> "***I have inquired in the Registrar's Office and in the Graduate Office as to the status of Peter J. Deer, who purportedly was awarded the M.A. degree in personnel and guidance in August, 1962.
>
> "The University records indicate that Mr. Deer failed the comprehensive examination for the M.A. degree in the Spring semester of 1959. I have not been able to find any evidence that he retook the examination and

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successfully passed or that the M.A. degree has been, in fact, awarded to him.***" (C-3-13)

Testimony by the Registrar and the Dean at the hearing corroborated the contents of this letter. The letter itself was relayed to the County Superintendent who forwarded it to the Board. (Tr. III-25; C-3-14; C-5-13) The Board met briefly with respondent on August 29, 1974. At the end of the meeting the Superintendent notified him that he would be suspended without pay and that charges would be certified against him before the Commissioner pursuant to *N.J.S.A.* 18A:25-6. (P-20) Thereupon, a meeting of respondent, agents of the Board and Seton Hall University officials, and respective counsel was held. Respondent requested the Dean to conduct a thorough investigation of his academic graduate records (Tr. II-42) to which the Dean responded in a letter to the Board, *inter alia,* as follows:

"***The records further indicate that while he was scheduled to retake the comprehensive examination during the summer session of 1959 he did not appear to take this examination. Therefore, he has not met the requirements established by the School of Education for the awarding of this [M.A.] degree." (P-15)

Respondent asserted in testimony at the hearing that he did in fact retake the comprehensive examination in 1962 (Tr. III-95), that he was notified of successful completion thereof (Tr. III-111), that he did not pay commencement fees, having previously paid them in 1959, and that he neither attended graduation nor picked up his diploma. (Tr. III-111) He characterized as harassment tactics the frequent questioning by the Board of his degree status. (Tr. III-115)

The hearing examiner has reviewed and carefully considered the voluminous documentation, as well as the three days of testimony. He finds that within the records of the Commissioner, the Board, the County Superintendent, and Seton Hall University there is not one reliable document in the form of an official transcript, letter of notification or diploma upon which to base a conclusion that respondent successfully passed the comprehensive examination or was awarded the master's degree at any time. This finding is grounded on the forthright testimony of the Registrar who stated that every official transcript of the University is made by photocopying the single existing official copy of a student's record kept in the office of the Registrar. The hearing examiner concludes that the placement of typewritten material on the photocopy of the University by person or persons unknown altered and rendered invalid and unofficial the document identified as C-3-10, which was thereafter properly rejected as an official transcript by the agents of the State Board of Examiners.

Since this is so, and absent reliable proof that respondent was ever eligible for or notified that he was the recipient of a master's degree, the hearing examiner finds that Charges Nos. 1, 2, 4 and 5 are proven to be true in fact with the single exception that no conclusive proof exists as to who altered the document C-3-10. On numerous occasions respondent represented in applications that he placed in the hands of agents of both the Board and the

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Commissioner that he possessed a master's degree. (P-13, 14, 18) He stated at various times to the Board or its agents that he held such a degree. (Tr. I-83; Tr. II-121) He signed at least seven documents which stated that his salary status was that of an employee with a master's degree. When employees make such representations, they may reasonably be expected to be able to substantiate their claims. This, however, respondent was unable to do.

CHARGE NO. 3

"That Peter J. Deer did misrepresent that he had a Master's Degree in applying for the position of an Elementary School Guidance Counselor and Vice-Principal."

CHARGE NO. 7

"In the year 1968, Peter J. Deer, sought and gained employment as an Elementary School Guidance Counselor in the Palisades Park School District and in the process alleged that he had a Master's Degree which was required for the aforesaid position."

The hearing examiner finds it abundantly clear that respondent represented that he had a master's degree when making written applications for the positions of Assistant Principal (in which he was unsuccessful) and for guidance counselor (in which he was successful). (P-13, 14) There is, however, no convincing proof that respondent was selected as a guidance counselor in 1967 on the basis of his representation that he had a master's degree. It is, therefore, concluded that Charge No. 3 is proven to be true in fact and that Charge No. 7 is true in fact only to the extent that in making application for the position respondent represented that he possessed a master's degree. It is clear that he held and continues to hold valid certification for the position of guidance counselor on the basis of having satisfactorily completed the necessary academic requirements for this certification as required by the State Board of Examiners.

CHARGE NO. 6

"That Peter J. Deer did in the spring of 1967, have the certification officer of the Bergen County Superintendent's Office *** forward an official document to the local Superintendent stating that he had a Master's Degree from Seton Hall University, when, in fact, he had full knowledge that he had no such degree."

The hearing examiner finds no conclusive proof that the document herein referred to was sent at the behest of respondent. Absent such proof, he recommends that Charge No. 6 be dismissed by the Commissioner.

The hearing examiner herewith proceeds to set forth his findings and recommendations relative to the Counter-Petition on Appeal.

Respondent, therein, alleges that the Board replaced his position as elementary school guidance counselor with that of an assistant principalship, but

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that it was a change in name only done as a subterfuge which was violative of his seniority rights.

The hearing examiner finds that the Board studied a reorganization plan for its elementary schools for an extended period (Tr. III-48; R-9) and determined to establish an assistant principalship and to require that the appointee thereto possess both a master's degree and a principal's certificate. Numerous duties previously performed by respondent were in fact incorporated in the job description. (R-12; C-4-1, 2) Some, however, such as the evaluation of teachers could properly be done only by the holder of a principal's or a supervisor's certificate, neither of which respondent either held or was eligible to receive, absent proof that he possessed a master's degree. It is clear that the person appointed to the assistant principalship was certified as a principal which certification requires the holder to possess a master's degree. On the basis of this finding and a showing that the Board did not abuse its discretionary powers, the hearing examiner recommends that the Commissioner determine this allegation to be without merit.

Respondent's second allegation is that the Board in the 1973-74 school year, in violation of his tenure rights, reassigned him to a teaching position rather than to a guidance position held by others with lesser seniority in guidance positions in the school district.

An analysis of the documentation and testimony supports the conclusion that respondent was entitled, by seniority rights, to notification and reassignment to another guidance position when in the summer of 1973 the Board abolished his position as an elementary guidance counselor. He was permanently certified in 1970 to be a counselor in grades kindergarten through twelve. Since the time he first served as a guidance counselor with the Board in 1967-68, the Board opened its high school and thereafter hired a number of guidance counselors, the latest as recently as the spring of 1972. (Tr. III-56) *N.J.A.C.* 6:3-1.10 states plainly that:

> ***
>
> "(b) 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.
>
> ***
>
> "(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority.***"

In the context of this clearly stated regulation of the State Board, the hearing examiner recommends that the Commissioner determine that respondent, being fully and properly certified for grades K through 12 as a guidance counselor who had served the Board longer as a guidance counselor

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than others on the Board's staff of guidance counselors, was entitled to reassignment to a guidance position in September 1973.

Finally, respondent asserts that his suspension without pay by the Superintendent was an *ultra vires* act in that *N.J.S.A.* 18A:25-6 authorizes a superintendent to suspend an employee, but makes no provision that he may suspend him *without pay*.

The hearing examiner observes that the Superintendent was indeed without statutory authority to suspend respondent *without pay*. However, respondent was not on salary when he was suspended late in the summer of 1974. It is further admitted that respondent himself requested that the Board delay its official action on his suspension for at least one week. (Tr. III-123-124) In any event, the Board acted to suspend respondent on September 5, 1974. (C-4-4) Thereafter, the Board acted on September 19, 1974 to certify charges against respondent to the Commissioner pursuant to *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:6-14, the latter of which provides that:

> "*Upon certification of any charge to the Commissioner*, the Board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same***." (*Emphasis supplied.*)

The hearing examiner finds in the context of this clear law that neither the Superintendent nor the Board had authority to suspend *without pay* until the certification of charges by the Board on September 19, 1974.

Respondent seeks relief as set forth in his Counter-Petition on Appeal in the form of an order from the Commissioner that the Board be directed to reinstate him to a position as a guidance counselor with lost salary and compensation for legal fees.

This concludes a recital of the pertinent findings of fact by the hearing examiner who now proceeds to set forth the principal contentions of the parties contained in the Petition of Appeal and the Counter-Petition on Appeal as set forth in their respective Briefs.

The Board asserts that, if the charges herein are determined to be true in fact, petitioner's representation of his degree status was such a breach of ordinary truth and morality as to constitute unbecoming conduct of a teaching staff member of sufficient import to warrant his dismissal. (Brief of Petitioner, at pp. 21, 24) The Board argues that his conduct, thereby, has destroyed the confidence of his employer sufficiently as to render his further service relatively useless. The Board cites *In the Matter of the Tenure Hearing of Michael A. Pitch, School District of the Borough of South Bound Brook, Somerset County*, 1974 *S.L.D.* 1176, aff'd State Board of Education April 2, 1975, wherein the Commissioner determined that a superintendent's misrepresentation of his undergraduate level credits as graduate credits constituted unbecoming conduct. Therein, having found two separate and unrelated charges against the Superintendent to be true in fact, the Commissioner determined that dismissal was warranted and stated that:

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> "***The citizens of this State, and of respondent's community, are entitled to expect a high order of professional conduct from those employees to whom young children, pupils of immature years, are entrusted. See *In The Matter of the Tenure Hearing of Thomas Williams, School District of Pascack Valley Regional High School District, Bergen County,* 1974 *S.L.D.* 820.***" (at p. 1187)

And,

> "***[A]s the State Board of Education said in *George R. Good v. Board of Education of the Township of Union, Union County,* 1938 *S.L.D.* 354 (1935):
>
> > '[The board of education] may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, a guide and pattern for the adolescent boys and girls under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call 'character' is a responsibility of our schools.' (1938 *S.L.D.* at p. 359)
>
> "The Commissioner holds that the development of 'character' is no less essential now than it was in 1935, and that such development is impaired, if not rendered impossible, when those entrusted with great responsibility are guilty of such abuse as demonstrated herein.***" (at p. 1188)

Conversely, respondent argues that the Board has failed to sustain a preponderance of the believable evidence with respect to its allegation that respondent misrepresented his academic status. In this regard he cites *Irene Smith v. Board of Education of the City of Camden, Camden County,* 1966 *S.L.D.* 107 wherein it was said by the Commissioner that:

> "***In an administrative hearing it is necessary that charges of conduct unbecoming a public employee be sustained by a preponderance of the believable evidence. *Park Ridge v. Salimone,* [36 *N.J. Super.* 485 (*App. Div.* 1955), affirmed 21 *N.J.* 28 (1956)] ***" (at p. 111)

Respondent asserts that a finding that he does not possess a master's degree (which he in no way concedes) would, however, be of negligible moment, considering that his position as a teacher and as a guidance counselor did not require that he possess this degree. Respondent maintains that any salary paid to him in addition to those which he would otherwise have received as the holder of a bachelor's degree was in recognition of his excellent work performance record. This contention is one which the hearing examiner finds to be contrary to the record herein.

Respondent avers that he lawfully applied for, was appointed to, and achieved tenure in a guidance counselor position. He claims that he was illegally denied seniority rights of transfer to another guidance position in the school

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district when the Board in the summer of 1973, as an alleged subterfuge, abolished his elementary guidance position. *N.J.S.A.* 18A:28-11 (Brief of Respondent, at p. 15) Thus, he asserts that he is entitled to reinstatement to a guidance counselor position at a salary which he would have received had he not been reassigned as a classroom teacher in September 1973. He claims entitlement to such amount, regardless of the determination of the master's degree issue by reason of his assigned duties and the fact that the Board, in at least one instance, paid another employee according to its master's degree scale when that employee did not possess a master's degree. (Brief of Respondent, at pp. 17-19) The hearing examiner finds that in one instance a teacher who possessed a bachelor's degree only was paid at the master's degree level for a period of approximately four months prior to the time he was awarded a master's degree. (Tr. III-66-68) There is, however, no evidence that the Board acted at any time to pay petitioner at a level other than that to which it believed he was entitled by reason of a degree which he had been awarded.

In summary the Commissioner is called upon, within the context of a finding that Charges Nos. 1, 2, 3, 4, and 5 are in the aggregate true in fact, to determine whether respondent was guilty of conduct unbecoming a teaching staff member. He must further determine what penalty, if any, may be exacted of petitioner. Such determination should be made within the context of respondent's favorable evaluation reports for his fourteen years of service to the Board as attested by the Superintendent who stated that these were "***generally satisfactory or very satisfactory.***" (Tr. II-128; Tr. III-42)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto pursuant to *N.J.A.C.* 6:24-1.16.

The record adequately supports the findings of the hearing examiner in Charges Nos. 1, 2, 3, 4, 5 and 7 in that respondent knowingly, falsely, and consistently misrepresented to the Board that he had a master's degree for the purposes of gaining additional salary income and advancement of position, from 1962 to the date of his suspension on September 5, 1974. Not one shred of evidence of attaining a master's degree was produced by respondent, and the Commissioner finds his testimony incredible that he was notified of successful completion of the Seton Hall University comprehensive master's degree examination but he never picked up his diploma. (Tr. III-111)

In Charges Nos. 3 and 7, the Commissioner notices that a master's degree is not a requirement for a position as a guidance counselor. Nor is such a degree a requirement for a guidance counselor's certificate. Nevertheless, respondent did, in fact, assert on several occasions that he held a master's degree, thereby assuring for himself advanced placement on the Board's salary guide.

Although the hearing examiner made no finding as to the genesis of the typewritten, underscored material on respondent's transcript (C-3-10), asserting

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that he held a master's degree, the record clearly shows that that transcript was disclaimed as an official transcript by University officials.

The Commissioner dismisses Charge No. 6 as recommended by the hearing examiner.

The Commissioner has ruled against teaching staff members on previous occasions when he determined that they had misrepresented their academic attainments for the purpose of gaining additional salary or position. Such findings have resulted in a determination that the teaching staff member has exhibited conduct unbecoming a teacher. Such is the matter herein. Respondent has exhibited conduct unbecoming a teacher in Charges Nos. 1, 2, 3, 4, 5 and 7. The Commissioner determines, therefore, that respondent shall be dismissed as of the date of the certification of charges to the Commissioner by the Board on September 19, 1974. He must be paid, therefore, up to the date of the certification of the charges to the Commissioner. See *Pitch, supra; Good, supra; In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County,* 1971 *S.L.D.* 566, 573, affirmed State Board of Education 1973 *S.L.D.* 773, affirmed New Jersey Superior Court, Appellate Division, 1973 *S.L.D.* 773.

The Commissioner has frequently spoken on the import of personal example that is incumbent upon all New Jersey public school teachers and is constrained to repeat his previous statement *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, wherein he said:

> "*** [T]eachers *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.***" (at p. 321)

Similarly, it was 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 deliberately and willfully *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at pp. 98-99)

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Having determined, therefore, that respondent has forfeited his tenure entitlement by reason of his conduct which is unbecoming a teaching staff member, the Commissioner further determines it unnecessary to comment on his claims of seniority in positions in the school district.

Accordingly, the Commissioner orders respondent's dismissal effective September 19, 1974, the date of the certification of charges to the Commissioner by the Board.

COMMISSIONER OF EDUCATION

October 22, 1975

**In the Matter of the Tenure Hearing of Michael A. Pitch,
School District of the Borough of South Bound Brook, Somerset County.**

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 10, 1974

For the Respondent-Appellant, McCarter and English, Esqs. (Steven B. Hoskins, Esq., of Counsel)

For the Petitioner-Appellee, Rosenhouse, Cutler and Zuckerman (Elaine W. Ballai, Attorney at Law)

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

April 2, 1975

Pending before Superior Court of New Jersey

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**In the Matter of the Tenure Hearing of Michael A. Pitch,
School District of the Borough of South Bound Brook, Somerset County.**

COMMISSIONER OF EDUCATION

DECISION ON REMAND

For the Petitioner, Rosenhouse, Cutler & Zuckerman (Elaine W. Ballai, Attorney at Law, of Counsel)

For the Respondent, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

This matter, having been decided by the Commissioner of Education on December 10, 1974, affirmed State Board of Education April 2, 1975, and appealed to the Appellate Division of the Superior Court of New Jersey, comes again before the Commissioner in the form of a limited remand granted to Appellant-Respondent Pitch, hereinafter "respondent," to "***supplement the record by producing oral testimony before the State Commissioner of Education on the issue concerning the meaning of 'MA + 30.'***" Docket No. A-2671-74, Motion No. M-2699-74 New Jersey Superior Court, Appellate Division (September 11, 1975). A hearing for the purpose of affording opportunity to respondent and to the Board of Education of the Borough of South Bound Brook, hereinafter "Board," to present additional testimony was conducted on October 8, 1975 at the offices of the Hunterdon County Superintendent of Schools, Flemington. The hearing examiner appointed by the Commissioner sets forth his findings to supplement the previous hearing examiner report as follows:

The Board elicited testimony from Pearl K. Moss, an elementary teacher in its employ for the past eighteen years, who stated that she began teaching for the Board in 1957 with a Bachelor of Arts degree and a provisional certificate in elementary education. (Tr. VI-10-11) She testified that she thereafter completed a total of twenty-two undergraduate level elementary education credits and had been permanently certified as an elementary school teacher when the Board negotiated and adopted a bachelor's degree plus 15 credits salary scale for the first time in 1971-72. (R-R-3) She testified that she had submitted transcripts to the Superintendent in verification of having completed these postgraduate credits (Tr. VI-12) but had not applied for placement on the bachelor's degree plus 15 credits scale as it was her understanding that to qualify for placement thereon required "***not just extra under-graduate but rather graduate credits.***" (Tr. VI-15)

Documentary evidence from the Board's personnel records was entered revealing that respondent had on at least two separate occasions in 1972 and in 1973 required that Ms. Moss complete and submit to him a duplicated form whereon she was asked to indicate her professional degree and credit status. (R-R-1; R-R-2) Thereon, Ms. Moss checked Bachelor's Degree and added these words: "Bachelor's plus 22, but not Master's level." (R-R-1) This form, used in 1973, instructed the person completing it to submit a transcript to respondent in the event of a change in status. (R-R-1) Ms. Moss testified that her salary to date

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has reflected no increase corresponding to provisions of the bachelor's degree plus 15 credits salary scale. (Tr. VI-14, 20)

Similar testimony was elicited from William Singer, an elementary teacher in the Board's employ for eleven years, who had graduated with a baccalaureate degree in business administration and, while teaching for the Board on a provisional certificate, completed thirty postgraduate, undergraduate level, education credits required for permanent certification. (Tr. VI-28) He stated that he had not applied for placement on the bachelor's degree plus 15 credits salary scale because he knew from having served for several years on the teachers' negotiating team at negotiation sessions, all of which were moderated by respondent, that "***we couldn't apply these under-graduate courses for a higher guide.***" (Tr. VI-29) He stated that he had never been paid on the bachelor's degree plus 15 credits salary scale although he had completed similar forms relative to his degree and credit status as had Ms. Moss, *ante,* and had submitted transcripts to the Superintendent to qualify for one-time stipends paid by the Board for credits successfully completed. (Tr. VI-30)

The Board's present Superintendent was called as a witness to introduce a duplicated form from the Board's personnel files whereon Priscilla Utne had indicated that her degree status was "Bachelor's Plus 15," in September 1973 by reason of completion of twenty-one *graduate* credits. (R-R-4) Ms. Utne's 1972 transcripts, previously entered into evidence (Tr. V-87; P-23), show in addition to numerous undergraduate level courses completed during or since 1969, eight graduate level courses, designated by course numbers in the five hundred series, with assigned credits in excess of the required number for placement on the bachelor's plus 15 credits salary scale. The present Superintendent testified that during the 1973-74 school year Ms. Utne was paid at the bachelor's plus 15 credits salary scale level. It must be concluded, therefore, that respondent, the then Superintendent, evaluated Ms. Utne's professional status and recommended to the Board that she be placed on the bachelor's plus 15 guide. This conclusion is borne out by a review of the testimony of respondent at the previous hearing relative to Ms. Utne's transcript. (Tr. V-112-113)

Additional testimony was elicited by the Board from yet another elementary teacher, Eleanor Fox, who had previously testified. (Tr. II-94-113; Tr. VI-38-53) She, having likewise been hired with a baccalaureate degree and a provisional certificate, thereafter completed twenty-eight undergraduate level education courses in satisfaction of certification requirements. (Tr. VI-39) Her opinion that such undergraduate level credits were inadmissible for placement on the bachelor's degree plus 15 credits or the master's plus 30 credits scales is sufficiently set forth in the previous hearing examiner report and needs no further description at this juncture.

The hearing examiner has reviewed and carefully weighed the testimony of witnesses thus far reported and finds that during the period while respondent was Superintendent, there were a number of persons on his teaching staff who, like respondent, had graduated from college with baccalaureate degrees in studies other than teaching. For purposes of certification they, like respondent,

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thereafter completed, on a postgraduate basis, additional undergraduate level credits in education for purposes of certification. When the Board and the Robert Morris Education Association negotiated for 1971-72 an intermediate bachelor's plus 15 credits scale, they neither applied for nor were placed on that scale, although the fact of their having successfully completed such credits had been duly reported to respondent at his own request, *ante.*

It is equally evident that Priscilla Utne, who likewise took undergraduate credits for certification purposes, as well as graduate credits in excess of the fifteen required for the bachelor's plus 15 credits scale, was placed on the bachelor's plus 15 credits salary scale at respondent's recommendation *by reason of her graduate level credits.*

The hearing examiner finds no evidence that supports a conclusion that it was either the policy or the practice of the Board or the intent of the negotiating parties to accord placement on the bachelor's plus 15 credits scale or the master's plus 30 credits scale to persons who had completed only undergraduate level credits. Rather, it is found that the facts herein support the conclusion that it was the practice to accord such placement only to those who presented evidence of successful completion of the required number of graduate level courses.

At this juncture the hearing examiner proceeds to set forth succinctly the testimony of expert witnesses called by respondent to testify of their understanding of the meaning of "MA+30":

The Associate Dean for Academic Affairs of the Graduate School of Education, Rutgers University, testified that he is frequently questioned as to whether certain course credits satisfy the requirements of a salary guide. (Tr. VI-98) He stated that "graduate level courses" is a phrase universally recognized among academicians as those at the 500 or 600 level, or equivalent, but that:

> "***Every university that I know of in the United States allows a certain number of undergraduate courses taken for graduate credit to count toward a graduate degree.***" (Tr. VI-100)

He emphasized that such undergraduate courses, to be admissible in a graduate program, *must be taken for graduate credits.* He further stated that:

> "***[P]eople I believe quite generally assume that graduate credits means graduate-level courses where it sometimes means undergraduate courses taken for graduate credit.***" (Tr. VI-101)

He testified that, in his opinion,

> "***[T]here is no commonly accepted definition of Master's Degree plus 30 ***. This has to be a judgment.*** [T]his would simply alert me to ask further questions to find out what the meaning of the term was as they were *** using them.***" (Tr. VI-106-107)

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When asked how he would advise an inquirant seeking information as to the applicability of courses on a salary guide, the Associate Dean stated that:

> "***Salary guides vary so in this State and the things that School Boards count toward salary guide are so various in my experience that I would have no idea and would give no advice whatsoever with respect to that.***" (Tr. VI-117)

The Associate Dean testified that he had advised respondent in the spring of 1972 that his undergraduate level courses taken for teacher certification were not transferrable to Rutgers as meeting the requirement of a doctoral program. (Tr. VI-114-115)

The Superintendent of Schools of Somerville who had previously served elsewhere as a superintendent, as Assistant Executive Director for the New Jersey Association of School Administrators, and as a coadjutant professor in the field of school finance stated that it is his opinion that:

> "***MA-plus 30 *** means Master's Degree plus 30 credits *** beyond that. This could be undergraduates.***" (Tr. VI-122)

He testified that in both his past and present experience the school districts he has served have headed intermediate columns on their salary guides with the term "Graduate Credits" but have allowed certain approved undergraduate level courses and in-service courses to be counted as credits toward placement for those intermediate scales. (Tr. VI-123, 142, 151)

He testified further that certain undergraduate level courses taken for certification or for upgrading of staff were on occasion allowed for a lower intermediate level (BA+15) but not for a higher (MA+30) placement, and that this, when challenged, was upheld in an arbitration award. (Tr. VI-148) He stated that in other instances credits had been allowed for one teacher and not for another, depending on the applicability to the teaching assignments of the teachers. (Tr. VI-131) He testified further that it is his experience that some school districts have detailed written policies stating what such intermediate scales mean, and that others do not. (Tr. VI-127)

The third and final expert witness called by respondent has prior experience as a superintendent of schools and has for the past seven years served boards of education, cities and municipalities as a table negotiator. (Tr. VI-184) He stated that he believes that MA+30 has no commonly accepted definition but

> "***rests to a considerable degree on that which has been negotiated and/or agreed between the Boards of Education or interpreted by administrative personnel in the absence of those things.***" (Tr. VI-184)

He testified that it is his experience that practices among boards of education vary widely as to the admissibility of undergraduate level course credits for placement on salary guides, but that as a superintendent he allowed

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such credits on *any* intermediate scale. (Tr. VI-187) He testified that he deems it proper for a superintendent to negotiate with any prospective employee the matter of applicability of that person's credits on the salary guide, even if the end result is that two persons with the same credits are treated differently for salary purposes. (Tr. VI-203) In reference to the meaning of MA+30 he stated that:

> "***It is either a product of negotiations or a product of School Board Policy or a product of Administrative interpretation in the absence of any of those.***" (Tr. VI-194)

Finally, he testified that, in his opinion, a board need only be concerned with salary scales when hiring teachers, and that in hiring an administrator it is strictly a matter of individual negotiations between the prospective contracting parties. (Tr. VI-199)

The first of two expert witnesses called by the Board was Acting Director of the Bureau of Teacher Education and Academic Credentials, State Department of Education. He stated that in this capacity he is called upon to interpret the admissibility of course credits for certification purposes, but not for placement on salary guides. (Tr. VI-74) He further testified that the word "post-graduate" in no way identified whether a course is at the graduate or undergraduate level. (Tr. VI-81) He testified that to him MA+30 means:

> "***The Master's and 30 additional graduate credits which do not necessarily have to lead to a PhD.***" (Tr. VI-84)

The second and final expert witness called by the Board has for the past fifteen years served as a New Jersey Education Association Field Representative. He testified that in this capacity he has served local associations in 130 school districts in this State. He stated that intermediate scales such as B.S.+15 and MA+30 were largely nonexistent in the early 1960's, but are found in approximately one half of the salary guides now extant. He testified that of those districts in which he serves which have intermediate guides:

> "***One-half of those districts have some kind of program that is very ornate and highly articulated for a method of utilizing other kinds of credits.***"
>
> "***For example *** in Millburn they insist that teachers as a requirement take three-course-credits each three years. The course credits may be in a graduate program related to the program that they teach in school or it may be one of the in-service programs that they *** give on campus.***" (Tr. VI-166-167)

He stated that in the remaining twenty-five percent of the schools which do not have articulated definitions for intermediate scales:

> "***The MA plus 30 viewed by itself is a Master's Degree plus 30 graduate credits. (Tr. VI-169)

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When asked whether he believed that a special exception could be made for one person and not for another, he said:

> "***The simple answer to that is no. ***[T]he superintendents are very highly involved with an equity formula so that if you do it for Dorothy then you have to do it for Jane***." (Tr. VI-170)

He stated that some districts have different standards than other districts for the intermediate columns and that:

> "***I have never in the 13 or 15 years gotten into discussion with any Board of Education or any negotiating committee about all the terms that were defined and split here. A graduate course is a graduate course.***" (Tr. VI-175)

And,

> "***[W]here there is no policy, there is no program for granting of any other kinds of credits below graduate***. In order to make an exception you have to have a policy to make it by.***" (Tr. VI-177)

The hearing examiner has carefully reviewed, considered, and balanced the frequently conflicting testimony of expert witnesses regarding the meaning of MA+30. It is found that divergent practices exist in the school districts of the State as to the kinds of credits which are accepted for placement on such an intermediate scale as MA+30.

In the instant matter, the testimony of witnesses Moss, Singer, and Fox is clear that teaching staff members affected by the Board's salary policy plainly understood that only graduate level credits were admissible for placement on the Board's intermediate bachelor's degree plus 15 credits and master's plus 30 credits salary scales. It is further evident that they, at respondent's request, submitted to him transcripts and statements that each possessed a bachelor's degree plus at least fifteen undergraduate level credits. Nevertheless, they were not placed on the bachelor's plus 15 credits scale.

By contrast, Priscilla Utne, having presented evidence of successful completion of both post-baccalaureate undergraduate level credits and post-baccalaureate graduate level credits, *was* placed on the Board's bachelor's degree plus 15 credits salary scale by reason of her graduate level credits bearing identifying numbers in the five hundred series. See R-R-4 and P-23.

Since this information was available to respondent and subject to his recommendation to the Board, it may be logically concluded that he had the same understanding that only graduate level credits were admissible on the Board's intermediate bachelor's plus 15 credits and master's plus 30 credits salary scales.

In summary of these supplemental findings, the hearing examiner finds no facts which separately or collectively cause him to change the prior finding that

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respondent misrepresented to the Board his academic credentials and caused untimely delay of four years in providing the Board with an official transcript thereof.

This being so, the hearing examiner reaffirms the prior finding that Charge No. 1 is proven to be true in fact.

This concludes the supplemental report of findings of the hearing examiner.

* * * *

The Commissioner has thoroughly reviewed the testimony of witnesses called by the litigating parties on October 8, 1975 to supplement the record relative to the meaning of "MA+30" as directed by the New Jersey Superior Court, Appellate Division, on September 11, 1975. He has further reviewed and carefully weighed the additional documentary evidence received on October 8, 1975, the supplemental findings set forth in the hearing examiner report and the exceptions thereto filed by Appellant-Respondent Pitch pursuant to *N.J.A.C.* 6:24-1.16. No exceptions were filed by the Board.

Respondent argues in his exceptions that the testimony of four teaching staff members, called to testify of their understandings of what credits were admissible for placement on the Board's bachelor's plus 15 credits and master's plus 30 credits salary scales, should be stricken. Respondent grounds this contention on the fact that no notice was given prior to October 8, 1975, that these witnesses would be called on that date to testify. Respondent further argues that there is no connection between the qualifications for placement on the two aforementioned salary scales.

Respondent's request that this testimony be stricken is denied. Judge Halpern's directive to supplement the record contained no limitation restricting the testimony to that of persons from without the district, such as those called as expert witnesses by respondent. The Board likewise called expert witnesses but also called four witnesses from its teaching staff to testify of their understanding of what credits were admissible for placement on the Board's salary scales in the South Bound Brook School District.

Their testimony sheds light on the meaning of "MA+30" in the School District of South Bound Brook which the Commissioner considers of prime import in the within dispute. The record of the hearing of October 8, 1975, reveals that respondent objected to their testimony being admitted. Respondent further stated that this admittance by the hearing examiner might necessitate the calling of additional witnesses on his behalf. Thereupon, respondent was assured by the hearing examiner that such opportunity would be provided. (Tr. III-7) However, there is no showing that a formal request to call such additional witnesses was made by respondent or that it was denied by the hearing examiner. Testimony of the Board's witnesses, being relevant to the controverted matter, is evidential. The Commissioner so holds.

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The Commissioner takes note of respondent's objection to the use of the phrase "intermediate level" with respect to the MA+30 salary scale in the Board's salary guide. In that no higher scale of salaries exists in the South Bound Brook guide, the exception has merit. MA+30 will not hereafter be referred to as an intermediate guide, herein.

The remaining supplemental findings of the hearing examiner are valid and the Commissioner accepts and holds them for his own.

The prior decision of the Commissioner on December 10, 1974 in the herein controverted matter stated that respondent

> "***knew or should have known that the salary criterion 'Master's plus 30 credits' required that the specified credits were to be only *graduate credits in the commonly understood meaning of the term.* A contention to the contrary strains credulity since there had been professional discussion of the subject***." (*Emphasis supplied.*) (1974 *S.L.D.* at p. 1187)

A review of the supplementary evidence herein confirms that respondent was indeed aware that only graduate level credits were admissible for placement on the BA+15 scale in the South Bound Brook School District. He was himself responsible for and did in fact review the transcripts and statements of academic standing submitted to him by his subordinates. Had undergraduate level credits been admissible for placement on the BA+15 scale, it stands to reason that those who had earned them would have requested or demanded that they receive the additional benefits which the salary scale provided.

The record, however, is barren of evidence that any such request or demands were made by them. Conversely, Ms. Utne, when she had earned fifteen graduate level credits *in addition to fifteen undergraduate level credits* sought placement and was in fact placed on the BA+15 salary scale by the Board upon the recommendation of respondent.

The records of other teachers were submitted to respondent showing that they had fifteen or more undergraduate level credits beyond the bachelor's degree. Respondent made no similar recommendation that they also be placed on the BA+15 salary scale.

Respondent argues that, in any event, the BA+15 salary scale neither is connected to nor controls the MA+30 salary scale. The Commissioner cannot conceive that it was the intent of the negotiating parties herein to disallow undergraduate level course credits for placement on the BA+15 scale and, in less stringent manner, allow them for placement on the more advanced MA+30 scale. Such an assumption strains credulity beyond belief.

The Commissioner is well aware that divergence exists among the policies of the many hundreds of school districts in this State relative to which credits are admissible for placement on their various salary scales and guides. *John McAllen, Jr. v. Board of Education of the Borough of North Arlington, Bergen*

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County, 1975 *S.L.D.* 90 (decided February 24, 1975), affirmed State Board of Education June 4, 1975; *William J. Convery v. Perth Amboy Board of Education et al., Middlesex County,* 1974 *S.L.D.* 312 As was revealed at the hearing of October 8, *ante,* many of these policies are highly articulated, defining precisely those kinds of credits which are admissible. Such articulation is both appropriate and wise and is encouraged by the Commissioner as a means of obviating misunderstandings and costly litigation.

No such articulation, herein, has been expressed in the written negotiated agreements for which the Board and the teachers' association were jointly responsible. It is clear, however, that an understanding existed between the Board and its teaching staff members that only graduate level credits were admissible for placement on the BA+15 and the MA+30 guides of the salary scale. In certain instances in which no written terms of agreement are articulated, it is appropriate to examine the prevailing practice, which, in the absence of a written delineation, may reasonably be held to control. Such a matter was addressed by the Commissioner in *Eleanor Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County,* 1974 *S.L.D.* 706. Therein, in the absence of a written contract, it was determined that an offer of employment and acceptance thereof by the Board and Cossaboon created a *de facto* contract with such terms as generally prevailed in the school district relative to termination clauses, certification and dates of employment.

Respondent, contending that no unwritten understanding may control, cites, *inter alia, Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Franklin, Sussex County,* 1971 *S.L.D.* 120. Therein, the Commissioner held that, in order for a board to withhold an increment shown in its salary guide, it must have in its written salary guide policy a precise statement of the conditions under which such an increment could be withheld. This holding of the Commissioner in *Van Etten,* however, was nullified by the *per curiam* opinion of the Court in *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. A-261-73, New Jersey Superior Court, Appellate Division, June 21, 1974; *cert. den.* 66 *N.J.* 313 (1974). Therein the Court found "***no basis, statutory or otherwise, for the Commissioner's limiting construction and [held] this contention to be without merit.***" Thus was struck down a series of cases predicated upon the erroneous assumption that only by incorporating an enabling written statement into a salary guide policy could an increment be withheld by a board of education. For a history of pertinent cases consult *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449 and *Elsie Seybt v. Board of Education of the Borough of Hawthorne, Passaic County,* 1975 *S.L.D.* 593.

The Commissioner holds, herein, that the prevailing policy, although unwritten, may not be ignored by respondent or by those who must determine the within dispute. To so hold would be grossly inequitable to those who, possessing similar undergraduate level credits as those possessed by respondent, were, by respondent himself, denied placement on a higher salary scale.

In any event, those who sit in review must not lose sight of the central

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thrust of Charge No. 1, which was that respondent "***misrepresented his credentials and academic credits for salary purposes." The finding of the hearing examiner was that respondent informed the Board on more than one occasion that he possessed a master's degree plus thirty graduate credits. (Tr. II-18, 26, 46, 48, 131, 139, 157; P-5) Respondent, to this day, has not completed a master's degree plus thirty graduate level credits. Respondent's contention that any credits completed after the awarding of a baccalaureate degree are properly termed graduate credits is completely without merit. Were such a holding to prevail, it would evoke a state of confusion in numerous school districts which would then be called upon to apply such determination to their existing salary guides. No basis exists in the college and university sector for such a holding. It would, additionally, be inconsistent with respondent's actions relative to his subordinates, Utne, Fox, Moss and Singer.

The Commissioner in rendering his decision of December 10, 1974, did so in consideration of the factual context which prevailed in the School District of South Bound Brook. "Graduate credit" has a commonly understood meaning in South Bound Brook and throughout the State. This meaning is in no way altered by the fact that on various salary scales and guides, in articulated or unarticulated fashion, the several school districts of this State apply varying criteria to the admissibility of graduate, undergraduate and other credits. In the instant matter, as in all such controversies, it is the criteria which pertained to the local Board's negotiated agreement and policy which must control.

Respondent represented that he possessed a master's degree plus thirty graduate credits. Relying on this representation, the Board computed his salary at a ratio based on the MA+30 guide contingent upon his presenting proof of his academic standing. In spite of numerous reminders (Tr. II-26, 135, 137, 149; Tr. IV-101), respondent failed to supply official transcripts from 1969 until October 19, 1973. Such delay is inexcusable and served only to aggravate and obfuscate the controversy.

Respondent, as charged, misrepresented his credentials and academic credits to the Board. The Commissioner, for the aforestated reasons, reaffirms his prior determination that this misrepresentation must be characterized as conduct unbecoming a school administrator.

COMMISSIONER OF EDUCATION

November 25, 1975

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"J.W.," by his guardians *ad litem*,

Petitioner,

v.

Board of Education of the Town of Hammonton and Domenick M. Garofalo, Superintendent, Atlantic County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education by Mark S. Kancher, Esq., counsel for petitioner, through the filing of a Petition of Appeal on July 2, 1975, and the filing of a formal Answer on August 6, 1975 by the Board of Education of the Town of Hammonton, hereinafter "Board," Samuel A. Donio, Esq., counsel for the Board; and

It appearing that the Board in fact conditionally expelled petitioner from its schools for the possession and use of marijuana (R-8), effective June 12, 1975 until January 8, 1976; and

It appearing that petitioner appeared in New Jersey Superior Court, Chancery Division, Atlantic County, before the Honorable Vincent Haneman on September 12, 1975, to seek an Order which would require the Board to accept him back into school pending a final disposition on the merits of the instant Petition of Appeal before the Commissioner, and Judge Haneman directed petitioner to follow administrative remedies by presenting his Motion for Interim Relief before the Commissioner; and

It appearing thereafter that petitioner filed a Notice of Motion for Interim Relief with supporting Brief before the Commissioner on September 16, 1975, which was joined on that same date by the Board's Brief in Opposition thereto; and oral argument on petitioner's Motion having been heard on September 19, 1975 before a representative of the Commissioner; and

It appearing that petitioner alleges deprivation of certain constitutional rights by the Board with respect to the conduct of his preliminary hearing and formal expulsion hearing, and relies on the following court decisions in support of his position, *R.R. v. Board of Education of the Shore Regional High School District,* 109 *N.J. Super.* 337, 343 (*Chan. Div.* 1970); *Robinson v. Cahill,* 62 *N.J.* 473 (1973); *In re Gault,* 387 *U.S.* 1 (1967); *Miranda v. Arizona,* 384 *U.S.* 436 (1966); petitioner avers that the Commissioner has the power to provide *pendente lite* relief where a clear showing is made that constitutional rights have been denied, *M.W. v. Board of Education of the Freehold Regional High School District,* 1975 *S.L.D.* 120; and

It appearing that the Board denies petitioner's allegations and avers that its determination to conditionally expel petitioner is a proper and legal exercise of

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its authority pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, and further that it meticulously met the requirements of due process with respect to the preliminary and formal expulsion hearings afforded petitioner, and in support of its contention that *pendente lite* relief should be denied by the Commissioner it relies on the following decisions of the courts and the Commissioner: *R.R. v. Shore Regional High School District, supra; Tibbs v. Board of Education of the Township of Franklin,* 114 *N.J. Super.* 287 (*App. Div.* 1971), aff'd 59 *N.J.* 506 (1971); *M.W. v. Board of Education of the Freehold Regional High School District,* supra; and the Commissioner having reviewed the arguments of the parties and their respective interests and having considered the criteria set forth by the courts for the exercise of *pendente lite* restraint in *United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) wherein the Court cited *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47, 48 (*D.D.C.* 1951) as follows:

> "***Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***"

is constrained to state that the action taken by the Board is entitled to a presumption of correctness and its decision will not be overturned unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

In the instant matter petitioner has failed to provide any convincing reason why the Board should be restrained pending a decision on the merits of the pleadings; therefore,

IT IS ORDERED that petitioner's request for interim relief, *pendente lite,* is denied; and

IT IS FURTHER ORDERED that the instant matter proceed as expeditiously as possible to a final determination.

Ordered this 3rd day of October 1975.

COMMISSIONER OF EDUCATION

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"J.W.," by his guardians *ad litem*,

Petitioners,

v.

Board of Education of the Town of Hammonton and Domenick M. Garofalo, Superintendent, Atlantic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Mark S. Kancher, Esq., of Counsel

For the Respondents, Samuel A. Donio, Esq., of Counsel

Petitioners, the guardians of "J.W.," a pupil enrolled in the tenth grade of the Hammonton Junior-Senior High School, allege that his expulsion from school attendance by the Hammonton Board of Education, hereinafter "Board," is improperly severe and constitutionally defective. The Board denies the allegations set forth herein and avers that its expulsion action against J.W. is proper and legal in every respect.

By agreement of the parties, the matter is submitted for Summary Judgment by the Commissioner of Education on the pleadings, affidavits, exhibits and Briefs filed in support of their respective positions.

Subsequent to the joining of the pleadings herein, petitioners moved before New Jersey Superior Court, Chancery Division, Atlantic County, for interlocutory relief pending a determination on the merits by the Commissioner. In declining to rule on that application, the Honorable Vincent Haneman, J.S.C., directed petitioners to follow administrative remedies by seeking such relief from the Commissioner. Petitioners did move before the Commissioner for interim relief, which was denied on October 3, 1975. (See *"J.W." by his guardians ad litem v. Board of Education of the Town of Hammonton, and Dominick M. Garofalo, Superintendent, Atlantic County,* 1975 *S.L.D.* 774, decided on Motion, October 3, 1975.)

On May 13, 1975, J.W. was suspended (R-3:A-7) from school attendance by the principal and subsequent to a hearing afforded him by the Board on June 12, 1975, he was expelled from school until January 8, 1976, for possession and consumption of marijuana on school property. (R-8)

At this juncture, a recital of the facts which led to the expulsion action by the Board is in order.

The uncontroverted statement (R-3: A-1) of the high school physical education teacher, hereinafter "teacher," is that on May 12, 1975, J.W. and three other pupils were observed by the teacher in an unauthorized outside area

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on the school grounds. The teacher, knowing that classes had begun, questioned the four pupils in regard to their presence outside the school building. The pupil's responses to the teacher's questions were not satisfactory; consequently, the teacher escorted the pupils to the principal's office for "***being late to class***." (R-3: A-1) The pupils, after being assigned detention by the principal as discipline for being late to class, were then sent to their scheduled classes. (R-1, at p. 17)

When the teacher returned to his own class, he was informed by one of his pupils that he, the pupil, had smelled marijuana smoke at the time the teacher had originally stopped the four pupils. Thereafter, the pupil and the teacher went to that area, searched the ground and discovered what was purported to be a partially burned marijuana cigarette. The teacher states that he then took the cigarette to the assistant principal's office, and also informed the assistant principal that "***several other students in my class smelled marijuana smoke at the time I had stopped the four students." (R-3: A-1) While the teacher's statement reflects that he returned to the assistant principal's office, the Board's Brief reflects that the teacher "***returned to the Principal's office with the partially smoked marijuana cigarette and related to the Principal and the Assistant Principal***what had occurred and what he had found.***" (Board's Brief, at p. 2) The record reflects that subsequent to the teacher informing either the assistant principal or the principal, or both administrators simultaneously, both administrators jointly re-questioned the four pupils with respect to the discovered marijuana cigarette and the report of the teacher that his pupils had smelled marijuana smoke. (R-1, at p. 19)

The principal testified at the expulsion hearing on June 2, 1975, that he and the assistant principal together questioned the pupils individually. The principal also testified that a detective from the Hammonton Police Force, who happened to be in the school building on another matter, agreed to the principal's request to be present in the office and observe the questioning of the four pupils. (R-1, at p. 19)

Thereafter, the principal testified at the June 2, 1975 expulsion hearing that the result of the questioning of the four pupils in the presence of the detective resulted in each of the pupils admitting to cutting class, but denying any knowledge of possession or consumption of marijuana. The principal then testified that J.W. "***later admitted to his [J.W.'s] knowledge that there was marijuana and that the other three boys were smoking it, [but] that he had nothing to do with it.***" (R-1, at p. 19)

The Commissioner observes that this limited admission of J.W. is set forth in his signed statement (R-3: A-2) which was taken on May 12, 1975 in the presence of the principal, the assistant principal, and the Hammonton Police detective. (R-1, at p. 20) That statement provides as follows:

> "11:30 A.M. I'm cutting class typing and saw the boys [the other three pupils] coming. They stopped and pulled out of pocket joint [a marijuana cigarette], and lit it up. [The teacher] came. [A pupil] lit it up and passed

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> it to [another pupil] and then to [the third pupil] and [the teacher] came out and we walked away. [The teacher] came and took us down to office."

Upon receipt of this statement from J.W., the principal testified that he and the assistant principal, in the presence of the detective, questioned the other three pupils again. (R-1, at p. 20) One of the three pupils, E.M., admitted that one of the pupils did have a marijuana cigarette and that someone had, in fact, lighted it. However, E.M. did not know which of the pupils had it, or which of the pupils lighted it. (R-1, at p. 20) The other two pupils, A.Z. and D.L., remained silent. The Commissioner also observes that the principal testified that after E.M. acknowledged the existence of a marijuana cigarette and acknowledged that someone lighted it, he later "retracted this, denying everything***". (R-1, at p. 20)

Thereafter, the principal testified that he searched A.Z.'s locker in the presence of the pupil, a custodian, the assistant principal, and the detective. That search resulted in the discovery of a "***partially burned marijuana cigarette***." (R-1, at p. 20) The principal testified that A.Z. admitted that the cigarette contained marijuana and that A.Z. admitted ownership of the cigarette. (R-1, at p. 21) This partially burned cigarette, as well as the cigarette discovered by the teacher and the pupil in the unauthorized area, *ante,* were turned over to the detective to be sent to the New Jersey State Police Laboratory for analysis. That analysis (R-3: A-3), which was received two days later on May 14, 1975, proved to be positive for the existence of "0.18 grams of Cannabis sativa L. (marijuana)." (R-3: A-3)

It appears that on the basis of the State Police analysis of the cigarettes, (R-3: A-3) and on the fact that the teacher's pupils had smelled marijuana smoke, *ante,* and on the retracted admission of E.M. that someone had lighted a marijuana cigarette, *ante,* the principal suspended the three pupils, A.Z., E.M., and D.L., from school attendance, in addition to filing a juvenile complaint with the detective for processing before the Atlantic County Juvenile Court. (R-1, at p. 22)

The principal explained that J.W. was not suspended on May 12, 1975 with the other three pupils because "***of E.M.'s statement that [J.W.] had not been part of this incident, together with [J.W.'s] denial of being an active participant in this situation.***" (R-1, at p. 23) When E.M.'s mother became aware of his suspension, she and E.M. requested a meeting with the principal and the assistant principal which was granted on May 13, 1975. (R-1, at p. 24) During this meeting, E.M. gave the following statement:

> "I was walking the hall to get smoke in the boys room. I was walking past the cafe[teria], [J.W.], [D.L.], [A.Z.], ask me to smoke a jay [joint] with them. I went with them. We're smoking by the gym. [D.L.] had the jay on him. [W]e all have some of it. The gym teacher came out and we drop it and walk away and [the teacher] saw us and call us to the office. [A.Z.], [D.L.], me had lunch. J.W. was go outside (sic) to smoke the jay then go back to class." (R-3: A-5)

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The principal and the assistant principal in the presence of the detective questioned J.W. once again in light of E.M.'s statement, *ante*. The principal testified (R-1, at p. 24) that J.W. admitted his participation in the entire incident and gave the following statement on May 13, 1975.

> "I came from the cafe[teria] walked to the locker started to walk to the cafe[teria] and seen [A.Z.] He asked me if I had any papers and I said no. He asked [E.M.] if he had any papers and he said that he had them in his locker. He got them and met [D.L.] in front of cafe[teria] too. We all walked out the gym door and walked around the gym into the cove [the unauthorized area reported, *ante*]. [E.M.] gave the papers to [A.Z.] and [D.L.] pulled out the grass and [A.Z.] started rolling it and gave it to [E.M.] and lit it. He passed it around to [D.L.] me [J.W.] and [A.Z.] Then [the teacher] walked out and we walked away. [The teacher] called us and took us down to the office." (R-3: A-6)

Thereafter, the principal testified J.W. was suspended (R-3: A-7) from school attendance and that a juvenile complaint was filed against him with the Hammonton Police Department. At this juncture, the Commissioner observes that the principal's suspension letter (R-3: A-7) to petitioners stated that J.W. was suspended "***until the next regular Board of Education meeting which is Thursday, May 22, 1975.***" However, another letter dated May 19, 1975, sent to petitioners by the principal advised the following:

> "***[J.W.] is to remain suspended from school until the formal hearing before the Board of Education is held on June 2, 1975.***" (R-10)

J.W.'s guardians (petitioners herein) were notified by letter dated May 16, 1975 from the Superintendent of Schools that an expulsion hearing was set for June 2, 1975 to determine whether J.W. should be expelled from school for the following charge:

> "***In that on the 12th day of May, 1975 [J.W.] did on school property and during school hours possess and consume a controlled dangerous substance, to wit: marijuana, in concert with and in the presence of [E.M.], [A.Z.], and [D.L.].***" (R-3: A-8)

The Superintendent's letter also advised petitioners of J.W.'s right to be represented by counsel, to cross-examine any witnesses to be called against J.W. and J.W.'s right to subpoena witnesses on his own behalf. Furthermore, the Superintendent advised petitioners that the teacher, the principal and the assistant principal were to be called as witnesses against J.W.

During the hearing on June 2, 1975, petitioners were asked by the Board President to verify their understanding of the contents of that letter. It is observed that petitioners received the letter, understood the contents, and that they also determined to appear at the hearing without counsel. (R-1, at p. 6)

During the hearing the principal testified with respect to the facts of the matter as already hereinbefore set forth. (R-1, at pp. 15-49) Petitioners declined

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the opportunity for cross-examination of the principal's testimony. (R-1, at p. 48) The teacher who originally had questioned the pupils for being in an unauthorized outside area also testified. (R-1, at pp. 51-58) Petitioners declined the opportunity to cross-examine the teacher. (R-1, at p. 57) The assistant principal was available so that petitioners might cross-examine him with respect to his knowledge of the matter. Petitioners declined that opportunity. (R-1, at p. 58)

In affidavits filed with the Board's Brief, the Superintendent, the principal, and the assistant principal all testify that at the conclusion of the hearing for J.W. on June 2, 1975, they individually recommend to the Board that J.W. be expelled from continued school attendance until the conclusion of the 1975-76 academic year. Thereafter, the recommendation continues, J.W. should be allowed to make application to the Board for reinstatement.

The Commissioner observes that while the Assistant Superintendent had no role in the matter herein, he, too, filed an affidavit joining in the recommendations by the administration.

At its regularly scheduled meeting of June 12, 1975, the Board adopted a resolution (R-8A) by which it found J.W. "guilty" of the charge that he possessed and consumed marijuana on May 12, 1975. Thereafter, a resolution (R-8B) by which J.W. would be expelled from continued school attendance until the conclusion of the 1975-76 academic year at which time he could apply for readmission was presented but not adopted by the Board. Finally, the Board adopted a resolution (R-8C) by which J.W. was expelled from school attendance until January 8, 1976 at which time he might make application for readmission. Consequently, J.W. has been suspended from school since May 13, 1975, and shall continue on suspension until January 8, 1976. Petitioners were notified of this action on June 13, 1975 by letter (R-11) from the Superintendent.

The minutes (R-8) of the regular meeting of the Board on June 12, 1975, reflect that the Board, prior to adopting its resolution (R-8C) with respect to J.W., had considered Child Study Team Reports (R-3: A-15; R-4C) on J.W. which had been prepared on May 30, 1975. (See R-8D.) The minutes also reflect that the Board had not until that time considered two later reports (R-4A; R-4B) prepared on J.W. and dated June 10, 1975.

The transcript (R-1) of the hearing conducted by the Board also reflects that it considered J.W.'s prior school attendance/discipline record (R-1, at pp. 33-36; R-3: A-14) before adopting its resolution (R-8C) to expel him until January 8, 1976.

In their Brief, petitioners argue that the punishment meted by the Board was excessive in light of the offense committed. Petitioners argue that a simple violation of school rules or codes of conduct is not sufficient to deprive J.W. of his constitutional right to a free public school education. They assert that the pupil, to be so deprived, must be an immediate danger to the physical safety of other pupils in the school. To be "bad," petitioners assert, is simply not enough. Petitioners rely on *R.R. v. Board of Education of the Shore Regional High*

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School District, 109 *N.J. Super.* 337 (*Chan. Div.* 1970) in support of their argument that, for a pupil to be deprived of public school attendance pursuant to the Board's statutory authority, *N.J.S.A.* 18A:37-2 requires that the pupil commit an offense which materially and substantially interferes with the operation of the total school. Petitioners argue that even if J.W. admits to the offense charged, the amount of marijuana confiscated, 0.18 grams, is not sufficient to warrant such a harsh penalty. Petitioners assert that no evidence was presented which showed that the incident herein caused any pupil in the Hammonton Schools to believe that the use of marijuana was condoned by the school authorities. Hence, they argue that there is no proof that J.W. caused any harm to anyone. In alleging that the Board's penalty is tantamount to cruel and unusual punishment, petitioners cite 33 *A.L.R.* 3rd 335 (1970); *State v. Smith,* 58 *N.J.* 202 (1971); *In re Gault,* 387 *U.S.* 1 (1967).

Finally, petitioners cite the Board's own policy (R-6) with respect to drugs or marijuana on school grounds which was adopted April 12, 1973. This policy acknowledges that there is a drug problem in the elementary and secondary schools of Hammonton and, in an effort to eradicate that problem, provides that "***any student having possession of illegal drugs or marijuana in school will give Administration just cause for his immediate expulsion.***" (R-6) While the Commissioner observes that only the Board may expel a pupil, petitioners assert that it is the implementation of this policy which has caused the allegedly unjust penalty to J.W.

With respect to the severity of the penalty, the Commissioner holds that the use of marijuana or any drug abuse is a serious menace to the health and well-being of the pupils enrolled in the public schools of this State. Boards of education have the serious responsibility of providing for a thorough and efficient public school system for all pupils in an atmosphere free of the evils created by the use of drugs.

The possession and use of illicit drugs by pupils in our public schools must be dealt with swiftly in order to prevent their introduction to other pupils particularly those of younger years. *E.E. v. Board of Education of the Township of Ocean, Monmouth County,* 1971 *S.L.D.* 97; *W.G. v. Board of Education of the Township of Ocean, Monmouth County,* 1974 *S.L.D.* 780 The Commissioner observes in this instance that the school is organized as a junior-senior high school which enrolls pupils in grades seven through twelve.

The Commissioner is constrained to observe that this is not the first incident in which J.W. was involved in the possession of marijuana. J.W.'s school attendance/discipline record (R-3: A-14) shows that on April 3, 1973, he was involved with the possession of marijuana on school grounds. In fact, the principal testified at the hearing on June 2, 1975, that it was the incident of April 3, 1973, in which J.W. was involved that led to the Board adopting its policy (R-6) on April 12, 1973, with respect to pupils possessing illegal drugs or marijuana. Furthermore, this Board policy is clearly set forth in the Student Handbook (C-1) which is distributed to all pupils. (R-1, at p. 28) J.W. stated at the hearing on June 2, 1975, that he did not read the Student Handbook. (R-1, at p. 68)

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The Commissioner finds that the fundamental fact herein is that the Board exercised its own discretion to impose a penalty which it regards as a deterrent against future use of drugs on school property. Such discretion may be exercised by the Board pursuant to its statutory authority for the government and management of its schools. *N.J.S.A.* 18A:11-1 Given all the facts of this matter, the Commissioner determines that the penalty imposed upon J.W. by the Board for the offense committed is not excessively harsh nor is such a penalty unreasonable.

In regard to the hearing itself, petitioners argue that the Board considered hearsay and irrelevant testimony which is not properly admissible. The Commissioner has reviewed the transcript (R-1) of the hearing held June 2, 1975, and finds that while a certain amount of hearsay and irrelevant testimony was set forth, the fact remains that there was sufficient credible testimony and proper evidence to substantiate the Board's finding that J.W. did, in fact, commit the offense charged. The standard of proof in administrative hearings before a board of education or the Commissioner is not the same as that necessary in criminal proceedings. The quantum of proof here is whether the preponderance of believable evidence is sufficient to establish the truth of the charge; it is not to establish guilt beyond a reasonable doubt. *Victor W. DeBellis v. Board of Education of the City of Orange, Essex County,* 1960-61 *S.L.D.* 148

Finally, petitioners complain that the evidence used by the Board at the hearing on June 2, 1975 that J.W. did, in fact, participate in the incident of May 12, 1975, were his statements (R-3: A-2; R-3; A-6) taken on May 12 and May 13, 1975, respectively, in the presence of the Hammonton Police detective. Petitioners complain that he was not given "miranda" warnings (*Miranda v. Arizona,* 384 *U.S.* 436 (1964)) to remain silent nor were his guardians notified that an interrogation was to occur. The Commissioner is not swayed by this argument for there is no requirement in administrative, statutory nor case law which requires a miranda warning to be given to pupils who are alleged to have violated school rules. *N.J.S.A.* 18A *et seq.; N.J.A.C.* 6 *et seq.; R.R. v. Board of Education of the Shore Regional High School District, supra; Goss v. Lopez,* 415 *U.S.* 565 (1975) The Commissioner does question the wisdom of school authorities to request the presence of the police detective during the preliminary hearings afforded J.W.

Accordingly, the Commissioner finds no fatal defect with respect to J.W.'s rights to due process as afforded him by the school administrators or at the hearing before the Board.

The Commissioner observes that J.W.'s final grades (C-3) for the academic year 1974-75 reflect successful completion of all subjects except American Nations II. It is further noticed that the Superintendent states (C-2) that upon J.W.'s return to school on January 8, 1976, he will be considered an eleventh grade pupil and, if the program of studies provided by the school is successfully completed, he will be allowed to graduate with his classmates. The Superintendent also recommends that upon J.W.'s reinstatement to school, he be provided counseling by the Child Study Team regarding abstinence from the use of marijuana.

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The Commissioner is constrained to repeat that the possession or use by pupils in a schoolhouse or on school grounds of marijuana or any other controlled dangerous substance described in the law may not be condoned. It is the considered judgment of the Commissioner that to leave such conduct unpunished would only create a school atmosphere which would encourage younger pupils and more pupils to experiment with controlled dangerous substances. Local boards of education must deal with such problems in a manner which will discourage violations of the law.

In the instant matter, having examined all of the facts and circumstances, the Commissioner holds that the Board must immediately provide adequate home instruction for J.W. until the end of his expulsion period and reinstatement on January 8, 1976. This procedure will better enable J.W. to successfully complete the 1975-76 academic year, while preserving the reasonable exclusion penalty imposed by the Board for his most serious offense.

Insofar as the relief requested by petitioners is denied, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 25, 1975

"P.N.," by his parents,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Mollozzi and Conti (David V. Conti, Esq., of Counsel)

For the Respondent, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

Petitioner, on behalf of his son, hereinafter, "P.N.," a pupil in the twelfth grade of the Thomas Jefferson High School operated by the Board of Education of the City of Elizabeth, Union County, hereinafter "Board," alleges that the Board has improperly discriminated against P.N. by its refusal to allow him to participate on its interscholastic soccer team. The Board denies the allegation and avers that its determination to exclude P.N. from the soccer team is, in all respects, proper. Because of the exigency of the matter (the regular soccer season began September 19, 1975, and will conclude on or about November 3,

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1975) petitioner filed a Motion for Interim Relief before the Commissioner of Education which is opposed by the Board.

Oral argument on the Motion was heard on October 1, 1975 at the State Department of Education, Trenton, by a representative of the Commissioner. The matter is now before the Commissioner for adjudication.

The following essential facts are not in dispute:

P.N. wishes to play on the soccer team. When he was four years of age, P.N. had a kidney surgically removed. Dr. Michael Spirito, since retired from active practice, performed the operation.

On August 27, 1975, the Board's medical inspector, sent the following letter to the Superintendent of Schools:

> "I presented the case of [P.N.] to three Urologists. One, [Dr.] Anthony Spirito, had seen [P.N.]. All three came up with the same answer. They would allow him to participate in all sports except contact sports, inasmuch as an injury to [P.N.'s] one kidney would be serious or possibly fatal.
>
> "I agree with the three Urologists. I therefore cannot give my consent to allow [P.N.] to compete in any contact sport (football, soccer, wrestling)." (C-1)

That determination by the medical inspector was adhered to by the Superintendent and subsequently by the Board. The Commissioner observes, however, that while the letter of the medical inspector is dated August 27, 1975, P.N. was allowed to participate in training for soccer until about September 19, 1975, while the parties herein attempted a resolution. Petitioner represents that P.N. was not finally informed he could not participate on the soccer team until the afternoon of the first regularly scheduled contest.

P.N. participated in football and wrestling during his tenth grade year. He also achieved first place in a physical fitness program conducted at the school by the United States Marine Corps. While in the eleventh grade, P.N. was granted permission (R-4) by the medical inspector to play soccer and he did so. It is not clear from the record what occurred between the 1974-75 academic year and the present 1975-76 academic year which would cause the medical inspector to change his opinion.

It does appear, though not factually founded, that during January 1975, some question arose as to the blood pressure rate of P.N. The question of his blood pressure rate is set forth in a memorandum (R-8) dated April 17, 1975, prepared by the school nurse.

It also appears that at that time, P.N. wanted to participate in track and field. P.N.'s physician submitted a memorandum (R-3A) dated March 17, 1975,

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advising that P.N. might participate in track. On the same date, Dr. Anthony Spirito, Chief of Urology at the Alexian Brothers Hospital, referred to earlier in the medical inspector's letter (C-1) of August 27, 1975, submitted a memorandum (R-3) advising that P.N. should not participate in any contact sport.

On April 8, 1975, the medical inspector submitted the following memorandum with respect to P.N.'s participation in track and field:

> "This is to certify that [P.N.] may participate in track except in polevault and distance running of one mile or more competitive." (R-6)

Thereafter, on April 19, 1975, the medical inspector submitted the following memorandum (R-7) to the Superintendent:

> "[P.N.], as you know, only has one kidney. We received a note from his family doctor, Dr. Belkoff (Osteopath). We also received a note from Dr. Anthony Spirito, Chief of Urology, Alexian Brothers Hospital. He stated that [P.N.] should not participate in contact sports.
>
> "Should [P.N.] be injured while competing in Pole Vaulting both I and the Board of Education would be liable.
>
> "If he can get a note from Dr. Anthony Spirito approving of [P.N.'s] competing in Pole Vaulting or any other track event, I'll be glad to go along with it." (R-7)

On May 28, 1975, Dr. Michael Spirito, the surgeon who had removed P.N.'s kidney and who is also the brother of Dr. Anthony Spirito, submitted a note (P-1) advising that P.N. may participate in contact sports.

The next memorandum of record with respect to P.N.'s participation in contact sports, specifically soccer, is the medical examiner's letter (C-1), *ante*, in which he withholds his approval for P.N. to play soccer.

Petitioner argues that the medical inspector's judgment that P.N. should not play soccer is based solely on the fact that P.N. has only one kidney. Petitioner contends, that such reliance is evidence of improper discrimination against P.N., particularly in light of the fact that the same medical inspector approved his participation, after a physical examination, in soccer during the 1974-75 academic year. In support of his argument that the medical inspector, the Superintendent, and the Board, improperly discriminated against P.N., petitioner points out that the medical inspector did not subject P.N. to a physical examination prior to determining that he would not be permitted to play soccer. This, petitioner asserts, contravenes *N.J.A.C.* 6:29-6.4.

The Board avers that if it allowed P.N. to participate on the soccer team, contrary to its own medical inspector's advice, and should an injury occur to P.N.'s remaining kidney, it would be in a most untenable position. In support of this view, the Board produced a letter (R-9) from the President of its pupil

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accident/injury insurance carrier in which the President states that any injury to P.N.'s remaining kidney is not covered by the terms of the existing policy.

The Board explains that during P.N.'s prior participation in football, wrestling, and soccer, P.N. was extremely fortunate in that no injury occurred to his remaining kidney.

The issue to be decided herein is whether the exclusion of P.N. from the interscholastic soccer team is a reasonable exercise of the Board's discretion.

In the first instance, the Commissioner observes that the medical inspector's judgment not to approve P.N.'s participation in soccer is based on the fact that P.N. has only one kidney. This medical judgment is opposed by P.N.'s family physician and the surgeon who removed the one kidney when P.N. was four years of age. The medical inspector appears to have consulted with three urologists, one of whom had seen P.N., who agree with the position taken by the medical inspector. Obviously, the conflicting positions of the physicians with respect to whether the Board and its agents acted improperly by precluding P.N. from soccer participation can only be reconciled subsequent to a plenary hearing.

The Commissioner is aware of the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint. In *United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) the Court cited *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47, 48 (*D.D.C.* 1951) as follows:

> "***Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***"

In the judgment of the Commissioner, the interests of the pupil, his parents and the community at large are best served by permitting the Board to exercise its legal discretion in adhering to the advice of its own medical inspector, absent a clear showing that the medical inspector's determination was arbitrary or discriminatory. Petitioner has failed to make such a clear showing.

The Commissioner is constrained to state that the action taken by the Board is entitled to the presumption of correctness, and the Commissioner will not overturn its decision unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

While the Commissioner is cognizant that a hearing on the merits and a subsequent determination thereon might not be concluded in sufficient time for P.N. to participate during this soccer season, he is aware that other

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interscholastic contact sports will be played during this academic year. Therefore, a plenary hearing will be set down at the request of petitioner.

In the instant matter, the Commissioner finds and determines that no sufficient grounds have been presented to support the application for a restraining order against the Board. Accordingly, the Motion for *pendente lite* relief is denied.

COMMISSIONER OF EDUCATION

October 22, 1975

In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel)

For the Respondent, Karl R. Meyertons, Esq.

In February 1969 the Board of Education of the Borough of South River, hereinafter "South River Board," made application to the Commissioner of Education for a severance of the sending-receiving relationship existing between it and the Board of Education of the Borough of Spotswood hereinafter "Spotswood Board." Thereafter, in a decision of December 14, 1970, the Commissioner directed that the relationship be terminated "***in whole or in part as of September 1, 1974.***" *In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County,* 1970 *S.L.D.* 428, 432, aff'd State Board of Education 1972 *S.L.D.* 290. There followed a series of meetings and conferences concerned with the matter of a possible alteration of the specified termination date and on or about January 18, 1974, the parties approved resolutions wherein they jointly agreed to the following schedule of a phased severance:

	Attendance Pupils from Spotswood	
Year	**South River High School Grades**	**Spotswood High School Grades**
1974-75	9-10-11-12	–
1975-76	11-12	9-10
1976-77	12	9-10-11
1977-78		9-10-11-12

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This schedule depended for its implementation on the completion by September 1975 of a new Spotswood High School; however, the school was not completed in time. Thus, the schedule was not implemented in the 1975-76 academic year and a question arose with respect to a new schedule of severance appropriate for the 1976-77 academic year. On the one hand Spotswood avers that the original schedule for the 1976-77 academic year should be continued in effect. South River maintains that the schedule of severance set forth for the 1975-76 academic year should now be moved forward intact to the 1976-77 academic year.

Thus, in essence, the dispute is concerned only with the attendance of eleventh grade pupils in the 1976-77 academic year. The dispute is submitted for summary decision by the Commissioner on a submission of certain statistical data and on Briefs.

The Commissioner has reviewed the entire record in this lengthy and complicated dispute and determines that equity demands a judgment in favor of the Spotswood Board at this juncture. Although prior decisions in the matter were adverse to the Spotswood Board, that Board and the citizens of Spotswood have moved with expedition to implement them. The delay in school construction schedules may not be used to penalize Spotswood for a severance originally requested by the South River Board and opposed by the Spotswood Board. The Commissioner so holds. Further, the Commissioner holds that a decision to the contrary would be unnecessarily harsh with respect to the eleventh grade pupils of Spotswood who have been led to believe, and have been expecting, that they would be transferred to their own high school in the 1976-77 school year.

Accordingly, the Commissioner directs the Spotswood Board and the South River Board to implement the schedule of severance as originally agreed and recited, *ante*, with respect to the 1976-77 and 1977-78 academic years so that in the 1976-77 academic year all Spotswood pupils, except those in twelfth grade, shall be enrolled in the Spotswood High School and at the end of that year the sending-receiving relationship between the Spotswood Board and the South River Board shall end.

COMMISSIONER OF EDUCATION

November 26, 1975

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"E.M.," a minor by his natural guardian, Rene Madison and "A.Z.," a minor by his natural guardians, Alfred J. Zara and Delores A. Zara,

Petitioners,

v.

Board of Education of the Town of Hammonton, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education, Edward G. Goldstein, Esq., counsel for petitioners, through the filing of a Petition of Appeal on August 18, 1975, and the filing of a formal Answer on September 9, 1975 by the Hammonton Board of Education, hereinafter "Board," Samuel A. Donio, Esq.; and

It appearing that the Board in fact conditionally expelled petitioners from its schools for the possession and use of marijuana (R-8), effective June 12, 1975 until January 8, 1976; and

It appearing that petitioners appeared in New Jersey Superior Court, Chancery Division, Atlantic County, before the Honorable Vincent Haneman on September 12, 1975 to seek an Order which would require the Board to accept them back into school or, in the alternative, provide petitioners with suitable home instruction pending a final disposition of the instant Petition of Appeal before the Commissioner, and Judge Haneman having directed petitioners to follow administrative remedies by presenting their Motion for Interim Relief before the Commissioner; and

It appearing thereafter that petitioners filed a Notice of Motion for Interim Relief with supporting Brief before the Commissioner on September 16, 1975, which was joined on that same date by the Board's Brief in Opposition thereto, and oral argument on petitioners' Motion having been heard on September 19, 1975 before a representative of the Commissioner by Mark S. Kancher, Esq., with the consent and in the absence of Edward G. Goldstein, Esq.; and

It appearing that petitioners allege deprivation of certain constitutional rights by the Board with respect to the conduct of their preliminary and formal expulsion hearings and rely upon the following school law decisions in support of their position: *"M.W." v. Board of Education of Freehold Regional High School District,* 1975 *S.L.D.* 120 (decided February 26, 1975); *"W.G." v. Board of Education of the Township of Ocean,* 1974 *S.L.D.* 780; and

It appearing that the Board denies petitioners' allegations and avers that its determination to conditionally expel petitioners is a proper and legal exercise of

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its authority pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, and further that it meticulously met the requirements of due process with respect to the preliminary and formal expulsion hearings afforded to petitioners and in support of its contention that *pendente lite* relief should be denied by the Commissioner, it relies on the following decisions of the courts and the Commissioner: *"R.R." v. Shore Regional High School District,* 109 *N.J. Super.* 337 (*Chan. Div.* 1970); *Tibbs v. Board of Education of the Township of Franklin,* 114 *N.J. Super.* 287 (*App. Div.* 1971), aff'd 59 *N.J.* 506 (1971); *"M.W." v. Board of Education of the Freehold Regional High School District, supra; "W.G." v. Board of Education of the Township of Ocean, supra; "M.C." v. Board of Education of the City of Trenton,* 1973 *S.L.D.* 254; *"W.S." v. Board of Education of East Windsor Regional School District,* 1973 *S.L.D.* 341; and

The Commissioner, having reviewed and considered the arguments of the parties and their respective interests, and having considered the criteria set forth by the courts for the exercise of *pendente lite* restraint in *United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) wherein the Court cited *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47, 48 (*D.D.C.* 1951) as follows:

> "***Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***"

is constrained to state that the action taken by the Board is entitled to a presumption of correctness and its decision will not be overturned unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

In the instant matter petitioners have failed to provide any convincing reason why the Board should be restrained pending a decision on the merits of the pleadings; therefore,

IT IS ORDERED that petitioners' request for interim relief, *pendente lite,* is denied; and

IT IS FURTHER ORDERED that the instant matter proceed as expeditiously as possible to a final determination.

Ordered this 9th day of October, 1975.

COMMISSIONER OF EDUCATION

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"E.M.," a minor by his natural guardian, R.M. and "A.Z.," a minor by his natural guardians, A.Z. and D.Z.,

Petitioners,

v.

Board of Education of the Town of Hammonton, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Edward G. Goldstein, Esq., of Counsel

For the Respondent, Samuel A. Donio, Esq., of Counsel

Petitioners, parents of E.M. and A.Z. who are pupils enrolled in the tenth grade of the Hammonton Junior-Senior High School, allege that the expulsion of their children from school attendance by the Hammonton Board of Education, hereinafter "Board," is improperly severe and constitutionally defective. The Board denies the allegations and avers that its expulsion action against E.M. and A.Z. was proper and legal in every respect.

The matter is being submitted for adjudication by the Commissioner of Education on the pleadings, affidavits and exhibits filed by the parties in support of their respective positions.

Subsequent to the joining of the pleadings herein, petitioners moved before the New Jersey Superior Court, Chancery Division, Atlantic County, for interlocutory relief pending a determination on the merits by the Commissioner. In declining to rule on that application, the Honorable Vincent Haneman, J.S.C., directed petitioners to follow administrative remedies by seeking relief from the Commissioner. Petitioners did move before the Commissioner for interim relief, which was denied on October 9, 1975. (See *"E.M." and "A.Z." v. Board of Education of the Town of Hammonton, Atlantic County,* 1975 *S.L.D.* 789 (decided on Motion, October 9, 1975).)

The Board alleges that E.M. and A.Z. did, in fact, on May 12, 1975, possess and consume a quantity of marijuana which charge was the subject of an expulsion hearing afforded E.M. and A.Z. on June 2, 1975. (C-1) (Petition of Appeal, paras. 2, 7) As a result of that hearing, E.M. and A.Z. were expelled from school until January 8, 1976. The Commissioner observes that the factual pattern with respect to the allegations set forth in this case is identical to that in *"J.W." v. Board of Education of the Town of Hammonton et al.,* 1975 *S.L.D.* 774 (decided November 25, 1975). Therein, J.W. was one of four pupils whom the Board determined possessed and consumed 0.18 gram of marijuana on school property during the school day. Of the three other pupils involved in the incident described in *J.W. v. Hammonton,* E.M. and A.Z., children of petitioners in the instant matter, were two of the three so involved. The fourth pupil, D.L.,

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has since withdrawn from the Hammonton Public Schools. J.W. also argued that the punishment of expulsion until January 8, 1976, was too severe for the infraction of Board policy (C-6, at pp. 117-118) as well as asserting that his constitutional rights were violated.

However, with respect to the matter of *J.W., supra,* the Commissioner held that:

> "***the fundamental fact herein is that the Board exercised its own discretion to impose a penalty which it regards as a deterrent against future use of drugs on school property. Such discretion may be exercised by the Board pursuant to its statutory authority for the government and management of its schools.***" (at p. 782)

Notwithstanding the affidavit (C-2) of E.M.'s mother that she was allowed to attend her son's expulsion hearing of June 2, 1975 without benefit of counsel, the Commissioner, as in *J.W., supra,* has reviewed the transcript of the Board's expulsion hearing (C-3) and he determines that the testimony shows that neither E.M. nor A.Z. were deprived of any rights to due process to which they may have been entitled with respect to legal representation. (C-3, at pp. 8-11)

Moreover, with respect to E.M. and A.Z.'s allegations that their expulsion from school attendance until January 8, 1976, is too severe a penalty for the infraction committed, the Commissioner holds in this instance, as he did in *J.W., supra,* that:

> "***the possession or use by pupils in a schoolhouse or on school grounds of marijuana or any other controlled dangerous substance described in the law may not be condoned. It is the considered judgment of the Commissioner that to leave such conduct unpunished would only create a school atmosphere which would encourage younger pupils and more pupils to experiment with controlled dangerous substances. Local boards of education must deal with such problems in a manner which will discourage violations of the law.***" (at p. 783)

The Commissioner finds and determines that the holdings set forth above with respect to J.W. are similarly applicable to the instant matter.

Finally, the Commissioner has reviewed the academic-discipline records of E.M. and A.Z. (C-7, C-8) in addition to the statements submitted by the Superintendent of Schools setting forth their projected programs of studies upon readmission to school in January 8, 1976. (C-4, C-5) In the Commissioner's judgment, the educational prescription set forth therein represents a reasonable and systematic approach which will afford E.M. and A.Z. an opportunity to complete their academic requirements without the necessity of their attending high school for a fifth consecutive academic year.

In the instant matter, having examined all of the facts and circumstances, the Commissioner holds that the Board must immediately provide adequate home instruction for E.M. and A.Z. until the end of the expulsion period and

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reinstatement on January 8, 1976. This procedure will better enable E.M. and A.Z. to successfully complete the 1975-76 academic year, while preserving the reasonable exclusion penalty imposed by the Board for their most serious offenses.

Insofar as the relief requested by petitioners is denied, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 12, 1975

Board of Education of the Township of Wayne,

Petitioner,

v.

Municipal Council of the Township of Wayne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

For the Respondent, Breur & Breur (G. Thomas Breur, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Passaic County Board of Taxation a lesser amount of appropriations for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were submitted in the form of written testimony, and a hearing was conducted on July 31, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the voters of the school district rejected the Board's proposal to raise by public taxation $14,095,000 for current expenses and $550,000 for capital outlay of the school district for the 1975-76 school year. The proposed budget was then delivered to Council, pursuant to statute, for the determination of the amounts of appropriation for school purposes to be certified to the County Board of Taxation. Subsequently, Council certified the amounts to be raised by public taxation as shown below:

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	Board's Proposal	Council's Certification	Reduction
Current Expense	$14,095,000	$13,408,000	$687,000
Capital Outlay	550,000	520,000	30,000
Totals	$14,645,000	$13,928,000	$717,000

The Board contends that a reduction in the amount of $717,000 will provide insufficient funds to conduct a thorough and efficient program of education as mandated by the Constitution of the State of New Jersey. It labels the reductions by Council as arbitrary and capricious and requests that the Commissioner restore the full amount of the reductions to its budgeted accounts. Conversely, Council asserts that its reductions are reasonable economies in no way threatening a viable program of education and prays that they be sustained by the Commissioner.

The hearing examiner finds no evidence of arbitrariness or other impropriety on the part of Council in seeking economies in the Board's budget. Council's recommended line item reductions in current expense totaling $687,000 and the recommended reduction in capital outlay of $30,000 are itemized as follows:

CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110D	Election Sals.	$ 2,000	$ 1,000	$ 1,000
J110F	Supt. Office Sals.	111,450	97,836	13,614
J110I	Bus. Adm. Off. Sals.	102,000	79,787	22,213
J110J	Bldg. &Gr. Adm. Sals.	33,150	27,850	5,300
J110L	Pers. Off. Sals.	41,450	–0–	41,450
J120A	Accountant Fees	12,000	11,000	1,000
J120B	Legal Fees	20,000	17,000	3,000
J130D	Election Exps.	4,325	3,600	725
J130F-1	Supt. Off. Travel	1,500	1,000	500
J130F-3	Supt. Off. Supls.	8,200	6,000	2,200
J130I-1	Bus. Adm. Travel	1,000	700	300
J130I-2	Bus. Adm. Off. Supls.	10,550	8,000	2,550
J130I-3	Postage	14,500	13,500	1,000
J130J	Bldgs. & Gr. Supls.	1,625	1,250	375
J130L-1	Pers. Off. Exp.	3,400	2,000	1,400
J130M	Prtg. & Pub.	3,500	1,000	2,500
J130N-1	Books and Subs.	800	600	200
J130N-5	Adm. Misc. Exps.	2,000	1,000	1,000
J212	Instr. Supvr. Sals.	360,000	338,000	22,000
J213.1A	Tchrs. Sals.	7,361,300	7,296,200	65,100
J213.1B	Spec. Sals.	663,600	652,600	11,000
J214B	Guidance Sals.	390,500	333,500	57,000
J214D	Curr. Dev. Sals.	9,000	6,500	2,500

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J215C-3	Secy. & Cl. Sub. Sals.	5,000	–0–	5,000
J215D	Work Exper. Sals.	8,000	7,040	960
J216B	Caf. Aides Sals.	55,900	29,200	26,700
J220	Textbooks	118,500	90,300	28,200
J230A	Lib. Books	66,550	42,600	23,950
J230C-1	A-V Mats.	55,200	53,000	2,200
J230E	Other Lib. Exp.	12,000	8,000	4,000
J230P	Central Lib. Exp.	7,100	6,000	1,100
J240	Teaching Supls.	319,850	271,850	48,000
J250A	Misc. Off. Supls.	21,150	18,050	3,100
J250B-1	Instr. Travel	17,700	10,000	7,700
J250B-2	Sec'y Travel	500	–0–	500
J250C-1	Graduation Exp.	10,500	9,200	1,300
J250C-4	Consultants Serv.	4,400	–0–	4,400
J250C-8	Equip. Rental	40,900	39,075	1,825
J420A	Health Serv. Supls.	7,300	6,700	600
J510	Trans. Sals.	300,500	286,500	14,000
J520A-1	Trans. Exp. Reg.	47,500	46,500	1,000
J535	Vehicle Repl.	97,250	34,750	62,500
J540	Insurance Trans.	25,000	24,000	1,000
J550A-D	Oper.& Maint. Trans.	107,900	92,900	15,000
J550E	Garage Oper.	8,500	7,500	1,000
J630	Heat	324,400	308,400	16,000
J650A	Supplies	60,150	55,150	5,000
J660D	Miscellaneous	1,000	500	500
J710	Maint. Sals.	216,000	205,900	10,100
J720A	Grounds Exp.	35,000	32,000	3,000
J730A,B,C	Repl.& New Equip.	116,600	72,062	44,538
J820B	Employee Ins.	570,540	479,540	91,000
J870	Tuition	190,500	185,600	4,900
	TOTALS	$12,009,240	$11,322,240	$687,000
CAPITAL OUTLAY:				
L1240C	Instr. Equip.	84,500	54,500	30,000
	GRAND TOTALS	$12,093,740	$11,376,740	$717,000

The hearing examiner has carefully considered each of these line item reductions in the light of the evidence adduced at the hearing and the written testimony of the parties. The hearing examiner herewith sets forth and thereafter summarizes in Chart III, below, his recommendations concerning certain major reductions proposed by Council:

CURRENT EXPENSE:

J110F Superintendent's Office, Salaries *Reduction $13,614*

Council seeks to eliminate the expenditure of $4,000 for public relations consultants and the position of secretarial pool coordinator at an additional savings of $9,614.

The Board asserts the need for the continued employment of the

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secretarial pool coordinator in view of the reduction of two secretarial personnel within past years. The Board further maintains that its public relations program would be severely weakened were the proposed elimination of consultant fees to be effected.

The hearing examiner finds that the Board has within recent years eliminated two secretarial personnel in this sector and that the remaining work load necessitates retention of those positions presently maintained. However, in view of the public's desire for economies in the operation of its schools, and absent a preponderance of proof that the public relations consultants are essential to the efficient operation of the schools, the hearing examiner recommends that Council's recommended reduction for public relations consultant fees be sustained. Accordingly, it is recommended that the reduction be sustained in the amount of $4,000 and that $9,614 be restored to this line item.

J110I Business Administration Office, Salaries *Reduction $22,213*

Council seeks to eliminate the position of the assistant business administrator and one clerk in this sector. The Board cites a recommendation by its auditor dated July 15, 1975, that the position of the assistant business administrator be filled in the interest of efficiency and savings that might be effected thereby.

The hearing examiner finds the Board's arguments convincing that these positions are in fact necessary to the continued efficient fiscal operation of this school district with its annual expenditures approximating $21,000,000. The Board's Business Administrator is employed at $17,500, whereas the salary for this position is listed at $22,000. Therein a $4,500 savings may be effected. Accordingly, the hearing examiner recommends that $17,713 be restored and that a reduction in this line item be sustained in the amount of $4,500.

J110L Personnel Office, Salaries *Reduction $41,450*

Council reasons that the recent trends to oversupply of teaching and other candidates obviates the necessity of maintaining a personnel office. It seeks the elimination of the entire line item which includes a personnel director, a secretary to the director and a personnel records clerk who has recently assumed the prior duties of an applications clerk.

The Board asserts that recruitment is but a small part of the duties of these personnel and that the imperative need for this department is the efficient maintenance of personnel records for its 1,400 employees.

The hearing examiner has thoroughly reviewed the detailed job description of the controverted positions. The essential functions performed within this department could conceivably be incorporated into an altered form of administrative organization, but they may not be eliminated. The determination of administrative organization is a proper function of the Board, absent a showing of frivolity, and entitled to a presumption of correctness. *Boult and*

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Harris v. Passaic, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948) The Board's arguments are persuasive and convincing that the positions are essential to continued efficient operation of the school system. Therefore, it is recommended that $41,450 be restored to this line item.

J212 Instructional Supervisors, Salaries *Reduction $22,000*

Council seeks the elimination of one position from the Board's two directors of guidance and its one director of career education.

The Board asserts that it has need for one director of guidance in each of its two high schools and points out that each additionally assumes a counseling load. The Board further argues that its career education director is essential to serve those pupils who enter the work force or the armed services upon graduation.

The Board's arguments are persuasive as to why these three directors in the area of pupil guidance should not be reduced to two. The recent award of $187,000 to the Board for a three-year project in career education provides additional reason to retain these three positions. It is, consequently, recommended that $22,000 be restored to this line item.

J213.1A Teachers, Salaries *Reduction $65,100*

Council alleges that duplications and computational errors by the Board and retirements of teachers who were replaced at lesser salaries justify the proposed reduction.

The Board points out that salary increments and adjustments have been negotiated at an average increased cost per continuing teacher of 5.94 percent which increases require a figure greater than that budgeted for this line item.

Salaries paid to teachers in 1974-75 totaled $7,116,925.72. (P-8) It was testified by the Assistant Superintendent that the budgeted figure for 1974-75 in this line item provided for only the 2.3 percent increments as called for by the 1974-75 salary schedule and made no provision for salary adjustments resulting from negotiations. (Tr. 101) He stated that the strategy of the Board in negotiating was not to "***tip their hand as far as negotiations is concerned.***" (Tr. 102, 106) See also Tr. 20, 22, 25, 98. He testified that the amounts for the remaining adjustments would have to be made available from other line items in the Board's budget on a priority basis. (Tr. 106)

The hearing examiner concludes from the extensive testimony and Briefs of counsel relative to this item that the Board for reasons of strategy made provision for *scheduled increments only* in line item J213.1A and elsewhere in its budget made provision for salary adjustments.

It is also found that no decrease in classroom teaching personnel is projected by the Board, even though a projected 476 pupil enrollment decrease was anticipated in September 1975 as compared to September 1974. (P-1, green)

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The hearing examiner recommends that by reason of this substantial reduction of pupil enrollment alone the Commissioner determine that the proposed reduction of $65,100, which figure would represent a reduction of no more than seven classroom teachers, should be sustained.

J214B Guidance, Salaries *Reduction $57,000*

Council avers that decreasing enrollment in each of the three junior high schools warrants the elimination of three guidance counselors.

The Board contends that its high ratio of counselors to pupils in its junior high schools, exceeding one to three hundred, and a small decrease in anticipated junior high school enrollment from 2,835 to 2,756 provide no realistic basis for such a proposed reduction.

The hearing examiner finds that the elimination of one counselor from each junior high school would establish a ratio of one counselor to five hundred pupils. This ratio would be contrary to the goal of providing a thorough and efficient education. It is recommended, therefore, that the full amount of $57,000 be restored to this line item.

J216B Cafeteria Aides, Salaries *Reduction $26,700*

Council suggests that those aides supervising the school lunchrooms be paid from the operating free balance which has accrued in past years from the Board's Food Service Fund. The Board contends that such use would be fiscally irresponsible and imprudent, in that the reserves are earmarked for equipment replacement and should be used for this purpose in keeping with the guidelines of the Food Services Bureau of the State Department of Education.

The hearing examiner has studied the testimony (Tr. 110-118) and documentation and finds that the Board has established a preponderance of evidence that past years' accumulations earmarked for equipment replacement in its cafeterias are a prudent means of avoiding unduly large expenditures in this sector in any one year. The hearing examiner finds compelling the Board's arguments that these fund accumulations should not be jeopardized by utilizing them during the current year to employ aides. Accordingly, it is recommended that the full amount of the reduction be restored to this line item.

J220 Textbooks *Reduction $28,200*

Council recommends austerity in this sector of the budget by extending use of textbooks for an additional year. The Board computed its needs on the basis of 11,400 enrolled pupils.

The actual expenditure in this line item in 1974-75 was limited to approximately $76,000 (P-8), which figure resulted from budget reductions necessitated in that year. (Tr. 119) The hearing examiner, having balanced both the reduced enrollment of pupils and the spiraling inflation in textbook costs, recommends that $15,000 be restored to this important line item and that $13,200 of Council's reduction be sustained.

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J230A Library Books *Reduction $23,950*

Council recommends similar austerity here and recommends the precise amount of $42,600 as budgeted in 1974-75. The Board's goal is to purchase sufficient books to provide twenty volumes per pupil.

The hearing examiner observes that the Board's projected expenditures from budgeted funds for library books was approximately $41,300 in 1974-75. It proposes a 61.1 percent increase for this purpose in 1975-76. The hearing examiner recommends that in consideration of the Board's multi-text curriculum emphasis and the inflationary costs of library books, approximately a thirty percent increase be provided in this line item for the purchase of library books. Accordingly, it is recommended that the Commissioner restore $11,100 to this line item and sustain the reduction in the amount of $12,850.

J240 Teaching Supplies *Reduction $48,000*

Council alleges that sizeable supplies are available from the 1974-75 school year and cites the reduction in pupils as further evidence that a reduction of fifteen percent may be effected in this sector of the budget.

The Board denies that any sizeable inventory of supplies is on hand from 1974-75 in any of its sixteen schools. The Board further states that $33,000 was reduced from this line item in 1974-75 to balance its overexpended energy account thus reducing its normal purchases and inventory of supplies.

A review of 1974-75 expenditures for supplies reveals that $241,488 was, as a result of fiscal requirements elsewhere in the budget, expended by the Board from its original budget of $275,000. In consideration of an approximate four percent decrease in enrollment and an inflationary increase in cost of supplies approximating seventeen percent, the hearing examiner recommends that a thirteen percent increase or $310,750 be provided over the Board's 1974-75 originally budgeted amount for supplies. Accordingly, it is recommended that the reduction be sustained in the amount of $9,100 and that $38,900 be restored to this line item.

J535 Vehicle Replacement *Reduction $62,500*

Council asserts that replacements of new vehicles should be limited to one school bus and three minibuses. The Board argues that maintaining a fleet of thirty-one buses requires replacement of at least four buses per year at $12,500 per bus.

The Board's vehicle replacement schedule calls for four replacements in 1975-76. In addition the Board has assumed responsibility for a double route to Passaic County Vocational School necessitating one additional school bus. (Tr. 128)

In keeping with the Board's minimal, desirable, and safety-oriented schedule of vehicle replacement, and in further recognition of the Board's need for one additional vehicle for the extra routes, the hearing examiner recommends that $62,500 be provided for the purchase of five new buses.

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Therefore, it is recommended that the reduction be sustained in the amount of $34,750 and that $27,750 be restored to this line item.

J730A,B,C Replacement and New Equipment *Reduction $44,538*

Council avers that $72,062 is an adequate expenditure for new and replacement equipment in consideration of prevailing economic conditions and that such expenditures will in no way lower the quality of instruction in the Wayne School System.

The Board asserts that Council has failed to identify the equipment which should be eliminated from the Board's proposed expenditures and that this line item has consistently been reduced in the past by drastic budget reductions and, when necessary, to offset over-expenditures for such needs as energy. The Board states that its proposed expenditures are solely in the area of replacement equipment rather than additional equipment.

The hearing examiner observes that the Board's proposed expenditure of $116,600 is a 77.2 percent increase over the Board's budget of $65,800 in 1974-75. The burden of proof of need rests on the Board, which has failed to substantiate by testimony or documentation the *essentiality* of this large percentage increase in replacement equipment. The amount allocated by Council in its determination allows for a 9.5 percent increase above the budgeted amount for 1974-75 which amount was not totally expended. In recognition of these facts, the hearing examiner recommends that the reduction be sustained in full.

J820B Employee Insurance *Reduction $91,000*

Council contends that economies may be effected as the result of more realistic health insurance rate computation and reduction of enrollment figures.

The Board cites increased costs in the form of a notification of substantial rate increase approximating 24.3 percent, as well as increases in premiums to provide additional benefits in the form of prescription drug coverage. The Board further states that, with increased health coverage, it anticipates increased enrollment from employees who have previously elected not to be enrolled in the Board's plan.

The Business Administrator testified at the hearing that current enrollment will necessitate an expenditure of $555,000 for health insurance. (Tr. 138) The Board has budgeted $570,540. The hearing examiner recommends that provision should be made for a moderate increase in enrollment when employees consider the improved benefits of the Board's plan. In consideration thereof, and in further consideration of the previous recommendations for staff reduction, it is recommended that the Commissioner restore $81,000 to this line item and that the reduction be sustained in the amount of $10,000.

CAPITAL OUTLAY:

L1240C Equipment for Instruction *Reduction $30,000*

Council seeks to reduce from $84,500 to $54,500 the amount provided

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for instructional equipment. Neither Council nor the Board in their documentary submissions or elsewhere address themselves to the reasons why this reduction was made or the reasons why it should be restored. Since the burden of proof rests upon the Board and, absent a showing of the essential need for $84,500, the hearing examiner recommends that the reduction be sustained in the full amount of $30,000.

The hearing examiner, having similarly examined the record before him, with respect to the remaining lesser amounts of reductions deemed appropriate by Council, sets forth in chart form the following additional recommendations to the Commissioner:

CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110D	Election Sals.	$ 1,000	$ 750	$ 250
J110J	Bldgs.& Gd. Adm. Sals.	5,300	5,300	–0–
J120A	Accountant Fees	1,000	1,000	–0–
J120B	Legal Fees	3,000	1,000	2,000
J130D	Election Exps.	725	400	325
J130F-1	Supt. Off. Travel	500	–0–	500
J130F-3	Supt. Off. Supls.	2,200	1,000	1,200
J130I-1	Bus. Adm. Travel	300	–0–	300
J130I-2	Bus. Adm. Off. Supls.	2,550	1,000	1,550
J130I-3	Postage	1,000	500	500
J130J	Bldgs.& Gr. Supls.	375	250	125
J130L-1	Pers. Off. Exp.	1,400	800	600
J130M	Prtg. & Pub.	2,500	–0–	2,500
J130N-1	Books and Subs.	200	–0–	200
J130N-5	Adm. Misc. Exps.	1,000	500	500
J213.1B	Spec. Sals.	11,000	11,000	–0–
J214D	Curr. Dev. Sals.	2,500	–0–	2,500
J215C-3	Secy. & Cl. Sub. Sals.	5,000	5,000	–0–
J215D	Work Exper. Sals.	960	960	–0–
J230C-1	A-V Mats.	2,200	–0–	2,200
J230E	Other Lib. Exp.	4,000	1,000	3,000
J230P	Central Lib. Exp.	1,100	500	600
J250A	Misc. Off. Supls.	3,100	–0–	3,100
J250B-1	Instr. Travel	7,700	2,500	5,200
J250B-2	Sec'y Travel	500	250	250
J250C-1	Grad. Exp.	1,300	300	1,000
J250C-4	Consultants Serv.	4,400	3,100	1,300
J250C-8	Equip. Rental	1,825	–0–	1,825
J420A	Health Serv. Supls.	600	–0–	600
J510	Trans. Sals.	14,000	14,000	–0–
J520A-1	Trans. Exp. Reg.	1,000	–0–	1,000
J540	Insurance Trans.	1,000	1,000	–0–
J550A-D	Oper.& Maint. Trans.	15,000	9,000	6,000

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J550E	Garage Oper.	1,000	1,000	–0–
J630	Heat	16,000	9,000	7,000
J650A	Oper. Supls.	5,000	–0–	5,000
J660D	Miscellaneous	500	500	–0–
J710	Maint. Sals.	10,100	10,100	–0–
J720A	Grounds Exp.	3,000	3,000	–0–
J870	Tuition	4,900	4,900	–0–
	SUBTOTALS	$140,735	$89,610	$51,125

CHART III

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110F	Supt. Off. Sals.	$ 13,614	$ 9,614	$ 4,000
J110I	Bus. Adm. Off. Sals.	22,213	17,713	4,500
J110L	Pers. Off. Sals.	41,450	41,450	–0–
J212	Instr. Supvr. Sals.	22,000	22,000	–0–
J213.1A	Teachers Sals.	65,100	–0–	65,100
J214B	Guidance Sals.	57,000	57,000	–0–
J216B	Caf. Aides Sals.	26,700	26,700	–0–
J220	Textbooks	28,200	15,000	13,200
J230A	Library Books	23,950	11,100	12,850
J240	Teaching Supls.	48,000	38,900	9,100
J535	Vehicle Repl.	62,500	27,750	34,750
J730A,B,C	Repl. & New Equip.	44,538	–0–	44,538
J820B	Employee Ins.	91,000	81,000	10,000
	SUBTOTALS	$546,265	$348,227	$198,038
	CHART II SUBTOTALS	140,735	89,610	51,125
CAPITAL OUTLAY:				
L1240C	Instr. Equip.	$ 30,000	–0–	$ 30,000
	TOTALS	$717,000	$437,837	$279,163

In summary the hearing examiner recommends that the Commissioner restore to the Board's operating budget $437,837 for current expenses and sustain Council's reduction in this account totaling $279,163. It is further recommended that Council's reduction in the Board's capital outlay account be sustained in the total amount of $30,000.

The hearing examiner observes that the Board's June 30, 1975 unaudited A4-1 report to the Commissioner shows a balance in the current expense account of $202,837. This amount being less than one percent of the Board's annual budget for current expenses, it is recommended that the Commissioner make no reduction in this amount available to the Board to meet such exigencies as may arise in the operation of its schools.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the record, the findings and recommendations set forth in the report of the hearing examiner, and the exceptions thereto filed by Council pursuant to *N.J.A.C.* 6:24-1.16. It is noted that no exceptions were filed by the Board.

Council takes exception to the fact that the hearing examiner chose to report in chart form his recommendations on forty of Council's proposed economies totaling $140,735 rather than setting forth *seriatim* his reasons for making such recommendations in paragraph form as he did for the remaining larger proposed reductions totaling $546,265. The hearing examiner's procedure is consistent with that which was stated by the Commissioner in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139 wherein it is said:

> "*** There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures.***"
>
> (at p. 142)

In the instant matter, the hearing examiner has affirmed that he carefully examined the record concerning *all* of the proposed reductions. The Commissioner has similarly reviewed the record and finds that the recommendations of the hearing examiner conform to the requirement of maintaining a thorough and efficient program of education in Wayne. Therefore, the Commissioner accepts those recommendations set forth in chart form by the hearing examiner and holds them for his own. *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1970 *S.L.D.* 257

Council takes further exception to the hearing examiner's procedural ruling that the consideration of line item reductions in the controverted matter be limited to those in which Council delineated specific economies. Specifically, Council asserts that those line items other than J213.1A from which the Board expects to utilize funds for teachers' salary increases in excess of 2.3 percent should be identified and declared to be in contest by the hearing examiner.

The Commissioner holds otherwise. In such matters it is required that the municipal governing body clearly delineate all of those line items of a board's budget in which it is believed economies may be effected without threatening the thoroughness and efficiency mandated by the New Jersey Constitution. This requirement was stated clearly by the New Jersey Supreme Court in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) as follows:

> "*** Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. *That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools.* Here, as in the original preparation of the budget, elements of discretion play a proper

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part. The governing body may, of course, seek to effect savings which will not impair the educational process. *But its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.* Where its action entails a significant *aggregate reduction* in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. *Cf. Davis* [Administrative Law] § 16.05.***" (*Emphasis supplied.*) (48 *N.J.* at 105-106)

In the instant matter Council failed to delineate in timely fashion those additional line items which it now believes should be reduced. Council's argument that such responsibility may properly be assumed by the hearing examiner is inconsistent with the directive of the Court. *East Brunswick, supra*

The Commissioner determines that the certification of appropriations for current expense purposes is insufficient by the amount of $437,837 to maintain a thorough and efficient system of public schools in the district. However, no further certification is required for capital outlay purposes. It is directed, therefore, that there be added to the prior certification of appropriations for current expenses made by Council to the Passaic County Board of Taxation, the sum of $437,837, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $13,845,837.

COMMISSIONER OF EDUCATION

December 15, 1975
Pending before State Board of Education

You are viewing an archived copy from the New Jersey State Library.

Frederick J. Procopio, Jr.,

Petitioner,

v.

Board of Education of the City of Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Wodlinger & Kell (E. Dennis Kell, Esq., of Counsel)

For the Respondent, George M. James (Bruce Gorman, Esq., of Counsel)

This matter having been opened before the Commissioner of Education on May 19, 1975 by the filing of a Verified Petition of Appeal by Frederick J. Procopio, Jr., hereinafter "petitioner," relative to the legality of a determination of the Board of Education of the City of Wildwood, Cape May County, hereinafter "Board," which determination, in effect, terminates petitioner's employment as Superintendent of Schools as of June 30, 1975; and

An Answer to the Verified Petition of Appeal having been filed with the Commissioner on June 9, 1975; and

A Motion for Temporary Restraint with accompanying supporting Brief having been filed by petitioner on May 19, 1975, seeking to restrain the Board from terminating petitioner's services as Superintendent, *pendente lite;* and

A Brief in opposition to the aforesaid Motion having been filed on June 9, 1975; and

Oral argument having been heard on the matter at the State Department of Education, Trenton, on June 9, 1975 by a hearing examiner appointed by the Commissioner; and

The arguments of counsel for petitioner with supporting affidavits and documentary evidence having been heard and otherwise considered wherein it is asserted that irreparable harm will result both to petitioner and to the public educational system and processes in the school district of the City of Wildwood in the absence of temporary restraints, E. Dennis Kell, Esq., appearing on behalf of petitioner; and

The arguments of counsel for the Board with supporting affidavits and documentary evidence having been heard and otherwise considered wherein it is contended that no irreparable harm will result if such temporary restraint is denied and wherein it is further contended that the imposition of temporary restraints could of itself cause irreparable harm to the educative processes in the school district, Bruce Gorman, Esq., appearing on behalf of the Board; and

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There being no showing that due process rights of petitioner have been violated; and

The Commissioner having examined and carefully weighed and considered the arguments of the contending parties; and

The Commissioner having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath,* 96 *F. Supp.* 47-48 (*D.D.C.* 1951); and

The Commissioner having balanced the interests of the pupils, their parents, and the community at large against the interests of petitioner and having determined that no permanent irreparable harm will result by permitting the Board to proceed during litigation in such manner as it has determined to be in the public interest and which action is entitled to a presumption of correctness (*Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965,aff'd 46 *N.J.* 581 (1966)); therefore,

IT IS ORDERED that petitioner's request for interim relief, *pendente lite,* is denied; and

IT IS FURTHER ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 25th day of June 1975.

COMMISSIONER OF EDUCATION

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Frederick J. Procopio, Jr.,

Petitioner,

v.

Board of Education of the City of Wildwood, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wodlinger & Kell (E. Dennis Kell, Esq., of Counsel)

For the Respondent, George M. James (Bruce M. Gorman, Esq., of Counsel)

Petitioner served as Superintendent of Schools for the Board of Education of the City of Wildwood, hereinafter "Board," from March 1, 1973 to June 30, 1975, and protests an April 16, 1975 action of the Board which denied him continued employment beyond June 30, 1975. Petitioner alleges that prior actions of the Board conferred upon him a binding contractual relationship with the Board for continued employment as Superintendent. He seeks an order from the Commissioner of Education directing the Board to restore him to his position with lost salary and attendant emoluments.

The Board denies that it was contractually or otherwise legally bound by any previous action to continue to employ petitioner. The Board asserts that petitioner's previous contract expired by its own terms, that the Board's determination not to reemploy petitioner was legal, proper, and entitled to a presumption of correctness, and that petitioner has no legal entitlement to the relief which he seeks.

On June 9, 1975, a hearing examiner appointed by the Commissioner conducted oral argument on petitioner's Motion for Interim Relief, *pendente lite,* at the State Department of Education, Trenton. An Order of the Commissioner dated June 25, 1975, denied interim relief on grounds that no permanent irreparable harm would result if the Board were permitted to proceed during litigation in the manner it had determined to be in the public interest.

The matter comes before the Commissioner at this juncture on a Motion advanced by the Board to dismiss the Petition. Both parties have filed Briefs and the submission for Decision on the Motion was completed by the introduction of certain documentary evidence at the oral argument. The factual allegations contained in the Petition of Appeal, but not the conclusions therein, are conceded by the Board to be true and the Motion may be considered in the context of this concession. (See Board's Brief, at p. 1.)

The pertinent facts of this matter are recited as follows:

Petitioner entered into a contract with the Board on January 29, 1973 for

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an appointment to serve a period of twenty-eight months from March 1, 1973 to June 30, 1975, as the Board's Superintendent of Schools. (J-3)

On February 18, 1974, petitioner was provided a letter signed by the Board President and Board Secretary fixing his 1974-75 salary and advising him that:

> "***The Board also acknowledges that all rights, privileges and fringe benefits extended to administrators as stated in Board of Education and Wildwood Administrative Association agreement are applicable to you.
>
> "The Board of Education further agrees to inform you by December 15, 1974 and no later than January 1, 1975 as to whether your contract *** will be renewed for the school year 1975-76." (J-5)

The 1974-75 negotiated agreement between the Board and the Wildwood Administrative and Student Personnel Services Association provides, *inter alia,* that:

> "***C. Administrators shall be notified of their contract and salary status for the ensuing year not later than March 15 and will return this notification to the Board no later than April 1.
>
> "D. Non-tenure administrators' contracts shall contain provisions by which either the administrator or the Board may terminate the contract on sixty (60) days notice***." (J-8, at p. 10)

On December 19, 1974, petitioner was informed by the Board Secretary in writing that a motion advanced on the previous evening was approved. The motion read:

> "Moved *** that the Superintendent be issued a contract effective July 1, 1975 to June 30, 1978, at a salary to be determined at a later date.***" (J-6)

In February 1975 the prior Board directed its negotiating committee to meet with petitioner. This meeting was held on March 6, 1975, and a contract was submitted to be ratified by the Board on March 19, 1975. On March 11, 1975, however, three new members and two incumbent members had been elected to the Board and the ratification of the Superintendent's contract was tabled on March 19. Thereafter, the legality of the proposed three-year contract was questioned by certain members of the Board and petitioner was asked by the Board to renegotiate certain terms of the proposed contract. Petitioner was reluctant to reopen negotiations but on April 10 agreed to do so. However, when asked to renegotiate the three-year term of the contract, he refused. On April 16, the Board by a 6-3 vote rescinded the motion of December 18, 1974, *ante,* and further resolved *not* to reappoint petitioner for the ensuing school year (J-2) and notified petitioner in writing on April 25, 1975 of this decision. (J-10) Thereupon, petitioner filed the instant Petition of Appeal on May 19, 1975.

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The litigants argue in their Briefs ten principal points advanced by the Board in support of its Motion to Dismiss as follows:

Point I – The Board's decision not to reemploy petitioner was within its statutory discretionary authority and is entitled to a presumption of correctness.

Point II – The facts as alleged by petitioner and admitted by the Board for purposes of this Motion are not indicative of bad faith, arbitrary or otherwise improper action on the part of the Board.

Point III – The prior Board's December 18, 1974 action did not create a legally binding employment contract with petitioner.

Point IV – The prior Board's offer of employment to petitioner on December 18, 1974, is void as against public policy.

Point V – The Board complied with the provisions of its negotiated agreement with the Wildwood Administrative and Student Personnel Services Association.

Point VI – Even if, *arguendo*, the provisions of the negotiated agreement were violated, petitioner is not entitled to reemployment.

Point VII – Petitioner himself violated provisions of the negotiated agreement.

Point VIII – A legally valid employment contract may not be inferred from the prior Board's action of December 18, 1974, or from any violation of the negotiated agreement.

Point IX – The issue of petitioner's employment is moot by reason of notice of termination dated July 16, 1975, pursuant to the sixty-day termination clause of the negotiated agreement, Article VII, paragraph D.

Point X – Petitioner has no status to represent other administrators, the students, or others within the Wildwood public schools.

Six additional points of argument are set forth in petitioner's Brief in opposition to the Motion to Dismiss as follows:

Points I and II – The Board's Motion to Dismiss must be viewed as a motion for summary judgment which must be granted only when no material fact is in dispute and with much caution.

Point III – Material facts are in dispute requiring that the Motion be denied.

Point IV – There is no provision for the granting of such a motion in *N.J.A.C.* 6:24-1.1 *et seq.*

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Point V – None of the Board's arguments are dispositive of the action as a matter of law.

Point VI – Petitioner intends to elicit testimony to prove that it was the intent of the prior Board to grant early tenure to petitioner on December 18, 1974 within the context of *Clifford L. Rall v. Board of Education of the City of Bayonne et al., Hudson County,* 54 *N.J.* 373.

Petitioner now avers that the Motion should be dismissed and grounds such avowal on these reasons and on his rebuttal to the Board's ten points of argument. He maintains that a plenary hearing is required.

The Commissioner has carefully reviewed those relevant facts which are uncontroverted herein, the documentary records of the parties entered into evidence at the aforementioned oral argument, and the arguments of law fully set forth by the parties in their Briefs.

The Board on December 18, 1974, resolved to grant a second multi-year offer of employment to petitioner. The most crucial issue is whether such offer of continued employment by the previous Board was legal and binding on the successor Board. In *Edwin Holroyd et al. v. Board of Education of Audubon et al., Camden County,* 1971 *S.L.D.* 214, the identical issue was addressed wherein the Audubon Board on January 12, 1970, prior to the expiration of its superintendent's multi-year contract, aborted a provision of its contract which extended to June 30, 1971, and entered into a second contract of three years' duration. *Holroyd,* at pp. 215-216

The Commissioner, commenting on the propriety of this action, stated:

"*** [If] this dispute were to be resolved solely on the basis of what the Audubon Board of Education meant to do or accomplished at its meeting of January 12, 1970, *** this matter would have to be resolved in favor of the Superintendent. The action of the Board on that evening was firm and decisive, and such an action by a board would usually carry with it a presumption of finalty, despite the second thoughts which evidently occurred to some members of the Board, subsequent to that meeting.***

"However, the legal questions raised by petitioners are not to be solved by such a finding. *The basic and fundamental question is whether the Board could legally take such an action at all – an action that discarded an important clause of a continuing contract and removed from the discretion of a succeeding Board a power that it ought to have. The Commissioner holds that the Board of Education in office in January 1970 had no such power and that its action with regard to the contract, sub judice, was an unlawful usurpation of power and ultra vires.* (*Emphasis ours.*)

"This finding is grounded on the statement of law enunciated most clearly and succinctly in *Henry S. Cummings v. Board of Education of Pompton Lakes, Passaic County and William F. Brown,* 1966 *S.L.D.* 155. The factual situation in that case was similar in most respects to the instant

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matter except that in the action herein the Board proposed to abort a continuing contract as of a future date and replace it with a new and different document, whereas in *Cummings, supra,* the Board reached beyond its own term of jurisdiction in an attempt to add a new contract to the completed term of an old one. The practical effect, in both instances, was, and is, to remove from a succeeding Board a power it ought to have, a power to determine at appropriate times whom its employees shall be. The appropriate time in the instant matter was dictated by the terms of the first contract as of April 30, 1971, and the Commissioner holds that commitment was an important facet of the contractual agreement reached by the parties at the time of the initial employment of the Superintendent of Schools and ought not be breached by a unilateral act of intervention.

"In *Cummings, supra,* following a review of the legislative history of the laws pertinent to the employment of a superintendent of schools, the Commissioner said at p. 158:

> '***Applying the law to the facts in this case, the Commissioner finds no fault with the action of the 1963 Board which entered into an agreement with the Superintendent for initial employment for a period of three years less one day. Such an agreement was within the scope of the Board's authority under *R.S.* 18:7-70 even though its terms extended beyond the life of the initially employing Board and became binding on its successors. With the normal passage of time the contract would expire in June 1966 and the Board in office at that time *** would be empowered to decide whether to continue the Superintendent's employment ***. In this case, however, the 1965 *Board intervened* in June 1965 to 'extend' the agreement *** for an additional three-year period. This action, petitioner contends, was invalid and the Commissioner agrees.
>
> 'There was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board. *There was no vacancy* to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Bownes v. Meehan,* 45 *N.J.L.* 189 (*Sup. Ct.* 1883); *Fitch v. Smith,* 57 *N.J.L.* 526 (*Sup. Ct.* 1895); *Dickinson v. Jersey City et al.,* 68 *N.J.L.* 99 (*Sup. Ct.* 1902)***.' (*Emphasis supplied.*)***"
>
> (at pp. 219-220)

Similarly it was reiterated by the Commissioner in *Edmond M. Kiamie v. Board of Education of the Township of Cranford, Union County,* 1974 *S.L.D.* 218 that:

> "***[L]ocal boards of education may utilize the provisions of *N.J.S.A.* 18A:17-15 and proffer a multiple-year employment contract to a new Superintendent, only when there is a vacancy in that position, and at no other time. *** [A] local board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can

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bind its successors only in those ways and to the extent expressly provided by statute. *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E.&A.* 1935); *Evans v. Gloucester City Board of Education,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E.&A.* 1936)***" (at pp. 223-224)

The instant matter is directly parallel to that of *Holroyd, supra; Cummings, supra;* and *Kiamie, supra,* with respect to the prior Board's action of December 18, 1974. That Board had no legal authority at any time to bind its successor board by initiating a second multi-year contract for the employment of its Superintendent with or without written terms of salary or other benefits. The December 18, 1974 resolution was *ultra vires.* The Commissioner so holds. Nor could the Board require that notice of reemployment be given prior to the seating of its successor board. *Holroyd; Cummings* See also *Charles H. Knipple v. Board of Education of the Township of Egg Harbor, Atlantic County,* 1971 *S.L.D.* 210.

No documentary evidence has been introduced in the form of Board minutes to substantiate petitioner's further claim that it was the intention of the Board on December 18, 1974 to grant early tenure within the context of *Rall, supra*: The granting of early tenure to a superintendent may be accomplished only after a policy is established by a board of education to reduce the time required for tenure generally for superintendents in that district. It was said in *Knipple, supra,* that:

"***In the matter of *Clifford L. Rall v. the Board of Education of the City of Bayonne, Hudson County, New Jersey, and the State Board of Education, State of New Jersey,* 54 *N.J.* 373, the Board of Education adopted a resolution granting tenure to its Superintendent of Schools after 6-1/2 months of service and the Supreme Court said:

'***Therefore we hold that the (Board's) resolution shortened the period for acquisition of tenure for superintendents of schools generally***.' (at p. 337)

"This language is significant in the instant matter, however, since the Board did not adopt any such resolution. Nor is any evidence to be found in the Board's minutes or the "Agreement" with petitioner that it was the intent of the Board to grant tenure with its contract offered on May 11, 1967. Absent any specific provision made by the Board to deliberately shorten the time to be served by its Superintendent before the acquisition of tenure, the governing statute is, therefore, *N.J.S.A.* 18A:28-5***.

"The Commissioner finds and determines, therefore, that petitioner has not served the time required by the statute (*N.J.S.A.* 18A:28-5(a) *** to acquire tenure, and that the Board did not shorten the period of time required for the accrual of tenure by the Superintendent of Schools. Consequently, no such benefits may be conferred upon petitioner.***" (at p. 213)

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Absent evidence that policy was established by the Board to shorten tenure requirements generally for superintendents in the district, and absent specific language in the Board's minutes showing the clear intent of the Board to grant early tenure to petitioner on December 18, 1974, petitioner's claim to early tenure must fall. *Rall, supra,* does not support petitioner's claims.

It remains to determine whether actions of the successor Board established for petitioner an entitlement to reemployment. It is clear that the Board sought but failed to renegotiate certain terms of a possible successor contract with petitioner. No meeting of the minds or written or verbal contract resulted from this negotiation session, whereupon the Board voted not to reemploy petitioner and notified him by letter of this fact on April 25, 1975. This notice was in full compliance with the requirements of *N.J.S.A.* 18A:27-10 *et seq.*

Petitioner argues, however, that the notification was not in compliance with requirements of the negotiated agreement which specified that:

> "***Administrators shall be notified of their contract and salary status for the ensuing year not later than March 15***." (J-8, at p. 10)

The Board's failure to notify petitioner more explicitly by March 15, 1975, assuming, *arguendo,* that such notice was intended by the negotiating parties, would not mandate that petitioner be reemployed. Violation of such a provision in a negotiated agreement does not rise to a level that can supersede the statutory discretionary authority conferred upon education boards by *N.J.S.A.* 18A:11-1 which provides, *inter alia,* that:

> "The board shall
>
> "a. ***
>
> "b. ***
>
> "c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government *** *and for the employment, regulation of conduct and discharge of its employees****." (*Emphasis supplied.*)

A similar argument to that of petitioner was previously addressed by the Commissioner in *Teamsters Local 102, International Brotherhood of Teamsters et al. v. Board of Education of the City of Linden, Union County,* 1974 *S.L.D.* 1314 that:

> "***When the Legislature of New Jersey enacted *Chapter* 303, *P.L.* 1968 providing for negotiations between public employers and employees of terms and conditions of employment, it did not repeal those provisions in the education laws which relate to rights of local boards of education and to individual contractual relationships. Rather, the Legislature provided in *N.J.S.A.* 34:13A-8.1 specifically that:
>
> 'Nothing in this act shall be construed to annul, or modify, or to

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> preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, *nor shall any provision hereof annul or modify any statute or statutes of this State.'* (*Emphasis supplied.*)***"
>
> (at p. 1353)

Similarly, the Commissioner stated in *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261 that:

> "****[A] board may not adopt a rule or policy which would in effect either amend a statute or deny the board's authority conferred by statute.***" (*Emphasis supplied.*) (at p. 263)

This precise reasoning was reiterated by the Commissioner in *Nancy Weller v. Board of Education of the Borough of Verona, Essex County,* 1973 *S.L.D.* 513, as follows:

> "***[B]oards of education must, of course, negotiate with their employees all of those salary and other benefits of direct or indirect compensation in return for their services or employment. However, such negotiations, which are required, cannot be held to abrogate those rights and duties given to local boards by the Education statutes. (Title 18A) The rights of employer and employee are mutually exclusive, and to view them accordingly is to view the body of statutory law contained in the Education statutes and in the New Jersey Employer-Employee Relations Act as a 'unitary and harmonious whole.'***" (at p. 524)

And,

> "***[T]he negotiation privilege may not intrude on clear statutory authority or render it a nullity.***" (at p. 523)

This precise view was similarly stated by the Supreme Court of New Jersey in *Lullo v. International Association of Fire Fighters,* 55 *N.J.* 409 (1970). Therein it was said:

> "***It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee.*** And undoubtedly they were conscious also that *public agencies,* departments, etc., *cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects.****" (*Emphasis supplied.*)
>
> (at p. 440)

See also *Board of Education of the Town of Newton v. Newton Teachers' Association, Sussex County,* 1970 *S.L.D.* 444; *John Gilliam v. Board of Education of the Toms River Regional School District, Ocean County,* 1974

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S.L.D. 540, remanded by State Board of Education March 5, 1975, Decision on Remand May 1, 1975; *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education, Essex County,* 1968 *S.L.D.* 225, affirmed State Board of Education, April 2, 1969, affirmed 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970); *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246.

In the light of such clear law, petitioner's argument that he is entitled to a successor contract by reason of the Board's violation of the negotiated agreement must fail.

Petitioner further argues that the Commissioner is without authority to dismiss the Petition without conducting a hearing to establish all the facts. This argument is without merit. The Commissioner and those who serve with him in the Division of Controversies and Disputes are required to conduct a hearing only when relevant disputed facts are sufficiently important to materially affect a determination. Such is not the case in this instance, nor is the Board barred from advancing its Motion to Dismiss by reason of those agreements reached at a conference of counsel relative to briefing and the setting of a date for a hearing. It is elementary that judgment on such a Motion shall be granted with caution and then only when no genuine issue of material fact is in doubt. *Gorrin v. Higgins,* 73 *N.J. Super.* 243 (*Chan. Div.* 1962)

The Commissioner has frequently been called upon to consider such a Motion to Dismiss. On certain occasions, having with caution determined that no relevant facts were in dispute and that the matter was ripe for determination as a matter of law, judgment has been rendered in accordance with Rule 2:8-2, New Jersey Practice, Court Rules Annotated, 1971. See *William R. Gibson v. Board of Education of the Borough of Collingswood et al., Camden County,* 1970 *S.L.D.* 117, affirmed State Board of Education, 1970 *S.L.D.* 117, affirmed New Jersey Superior Court, Appellate Division, 1972 *S.L.D.* 672, *cert. den.*, New Jersey Supreme Court, 1972 S.L.D. 672; *D. Diana Ramo v. Board of Education of the Borough of Hopatcong, Sussex County,* 1972 *S.L.D.* 469; *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County,* 1972 *S.L.D.* 5; *"K.K.," by her parents v. Board of Education of the Town of Westfield, Union County,* 1973 *S.L.D.* 30, aff'd State Board of Education 34, aff'd Docket No. A-1125-73, New Jersey Superior Court, Appellate Division, February 13, 1975; *Frances Licato v. Patrick J. Crilley et al.,* 1973 *S.L.D.* 361; *John Cervase v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 701.

Respondent's Motion to Dismiss, herein, is proper and merits a determination. The Commissioner so holds.

Petitioner rebuts the Board's argument that its decision not to reemploy petitioner is entitled to a presumption of correctness by stating that the Board's resolution passed on April 16, 1975, in paragraphs six and twelve (J-2) was in serious error with relationship to the length of petitioner's first contract and to the time sequence of the actions of the preceding Board. Petitioner holds that such serious errors allowed to remain uncorrected provide adequate rebuttal to

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the Board's argument that its determination is entitled to a presumption of correctness.

The Commissioner concludes from a careful reading of the Board's minutes of April 16, 1975, (J-2) that this controverted fifteen paragraph resolution introduced by the vice-president was moved and seconded but never voted upon. Rather, two shorter substitute motions, *ante,* were adopted. (J-2) Since these are not fraught with similar errors, as those in the vice-president's motion, the Commissioner finds no merit in petitioner's argument with respect to the presumption of correctness that may reasonably attach to the Board's action on April 16.

Petitioner cites *Eleanor Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County,* 1974 *S.L.D.* 706 in support of his claims to employment and lost salary. That case is clearly distinguishable, however, from the instant matter. It was determined that Cossaboon had been offered and had accepted a contract, the terms of which were acceptable to both contracting parties. In this instance, however, no such accord was ever achieved, and there was no finalization of a binding contract.

The Board set forth its reasons for not reemploying petitioner in a letter dated April 25, 1975, as follows:

> "***1. Your unwillingness to accept direction from the Board.
>
> "2. Your unsatisfactory relationship with Board as a whole and with members thereof.
>
> "3. Your insensitivity to the problems and needs of the teaching staff and other supportive personnel, and your unsatisfactory relations with the staff, which have resulted in unsatisfactory staff morale.***" (J-10)

The Board further asserts that, even were it unable to prove these reasons, as petitioner implies, it is not required to prove them. The Board avers that its reasons are not subject to question, absent total frivolity. In this regard the Board states that *Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236 (1974) held that the giving of reasons was primarily for the enlightenment and self-correction of a nonrenewed teaching staff member. *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 (decided May 6, 1975) In this regard the Board argues that:

> "***[T]he reasons must be taken at face value. To rule otherwise would be a serious step forward from *Donaldson,* a step which would significantly impair the ability of school boards throughout the state to exercise their authority to hire and discharge.*** If the Commissioner requires boards of education to prove reasons for discharging non-tenured personnel, it will amount to a vesting of tenure rights prior to attainment of tenure.***" (Brief of Respondent, at p. 8)

The Board's argument is cogent. The Board was not legally obligated to

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reemploy petitioner by any action which the previous board had, through nescience or otherwise, taken. It, in fact, determined *not* to reemploy him. This determination was made pursuant to its statutory authority. *N.J.S.A.* 18A:27-1 When it did so, it provided petitioner with a statement of reasons pursuant to *Donaldson, supra.* The reasons it gave do not smack of frivolity. (J-10) Furthermore, petitioner was offered in writing the opportunity for an informal appearance before the Board. (J-10) Petitioner, however, chose not to avail himself of this opportunity. There is no showing that petitioner was in any way deprived of due process within the context of *Donaldson,* or *Hicks, supra.* Absent a clear showing of arbitrariness, capriciousness or bad faith, the Board's action is entitled to a presumption of correctness. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Sally Klig v. Board of Education of Palisades Park, Bergen County*, 1975 *S.L.D.* 168 (decided March 4, 1975); *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521, (*E.&A.* 1948) Therefore, the Commissioner will not interpose his judgment for that of the Board.

The record shows that in this school district the Board failed to employ the Superintendent, the high school principal and an elementary school principal at the end of the 1974-75 school year. While a question is raised with regard to such sweeping changes, the Commissioner must point out that the Board, while responsible to the Commissioner for the legality of its actions, is responsible to its constituents for the wisdom of such determinations as it legally makes in the operation of the school district. *Boult and Harris, supra; Thomas v. Morris Township Board of Education, supra*

The New Jersey Superior Court in *Porcelli, supra,* reaffirmed that the responsibility of local boards of education for the employment of staff members is as follows:

> "***We endorse the principle, as did the court in *Kemp v. Beasley,* 389 *F.* 2*d* 168, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***."
> (at p. 312)

In the similar case of *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County,* 1972 *S.L.D.* 5, wherein a nontenured teaching staff member was not awarded a successor contract, the Commissioner opined:

> "***Under such circumstances and because, without legal compulsion and on its own initiative, the Board publicly stated the reasons for its decision not to renew petitioner's contract and afforded him the opportunity of a full hearing on the merits thereof, the Commissioner holds that there is no reason for his intervention in this matter. The Board's actions herein were certainly deliberate and time consuming; naked and unsupported allegations are insufficient to establish grounds for action. *George A. Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, 10, affirmed by the State Board of Education, 1968 *S.L.D.* 11, affirmed by the New Jersey Superior Court, Appellate Division, March 24, 1969; *John Ruggiero v. Board of Education*

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of Greater Egg Harbor Regional School District, decided by the Commissioner March 17, 1970; *U.S. Pipe and Foundry Company v. American Arbitration Association*, 67 *N.J. Super.* 384 (*App. Div.* 1961)

"Further, the Commissioner holds that the judgment made by the Board in this instance was one it made within the scope of its statutory authority. Therefore, absent a weighty and forceful offer of proof that the action was arbitrary or that it was taken for proscribed reasons, the Commissioner will not substitute his own discretion in this matter for that of the Board.***" (at p. 8)

Again, it was stated by the Appellate Division of the New Jersey Superior Court in the case of *Michael A. Fiore v. Board of Education of the City of Jersey City, Hudson County*, 1965 *S.L.D.* 177, that:

"***The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, *R.S.* 18:3-14, and thereafter to the State Board, *R.S.* 18:3-15. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken*, 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nomine Flechtner v. Board of Education of Hoboken*, 113 *N.J.L.* 401 (*E.&A.* 1934) Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C.J.S., Schools and School Districts*, § 128, p. 920; *Boult v. Board of Education of Passaic*, 135 *N.J.L.* 331 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948). *** In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. *Boult, supra.* (136 *N.J.L.* at p. 523) ***" (at p. 178)

The Commissioner finds no valid reason to interpose his judgment, in the instant matter, for that of the Board. Petitioner's contract expired by its own terms and the matter of the successor contract was solely within the purvue of the Board, which determined not to issue a contract to petitioner for the 1975-76 academic year.

This controverted matter is one of law rather than material fact. Petitioner's argument that certain members of the Board *may have met* in private session, set forth in such nebulous fashion as it is, merits no further consideration. *Lee, supra* The remaining arguments set forth by the parties also require no further consideration. The facts are clear that for a matter of many weeks the Board had under discussion the employment status of its then Superintendent of Schools. The resolutions passed at the April 16, 1975 meeting were in no way defective, but indicative of the decision of the majority of the

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full membership of the Board on a matter which required action by April 30 pursuant to *N.J.S.A.* 18A:27-10 *et seq.* The Board's action was legal. The Commissioner so holds.

The Commissioner is constrained at this juncture to advise the Board and all boards of education that the Legislature has recently enacted *c.* 132, *L.* 1975, effective July 1, 1975, for the purpose of strengthening the supervisory process of educational systems in the interest of improving instruction. This law requires boards, henceforth, to provide observations and evaluations of all nontenured "teaching staff members," *which term includes superintendents and principals* (*N.J.S.A.* 18A:1-1), in accordance with the provisions of the law herein set forth in its entirety as follows:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during each semester, provided that the number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.
>
> "Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.
>
> "The provisions of this act shall be carried out pursuant to rules established by the State Board of Education.
>
> "This act shall take effect July 1 next following enactment."

Therefore, it is encumbent upon boards of education to set in motion procedures which will assure full and immediate compliance with this law and to include within such procedures some regulations with applicability to administrative staff. (See *Sallie Gorny v. Board of Education of the City of Northfield, et al., Atlantic County,* 1975 *S.L.D.* 669 (decided September 4, 1975).)

Accordingly, the Commissioner finds for the Board for the reasons hereinbefore set forth. Petitioner is not entitled to the relief which he seeks. Respondent's Motion is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 15, 1975
Pending before State Board of Education

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the Town of Boonton,

Petitioner,

v.

Mayor and Board of Aldermen of the Town of Boonton, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, Maraziti and Maraziti (Joseph J. Maraziti, Jr., Esq., of Counsel)

Petitioner, the Board of Education of the Town of Boonton, hereinafter "Board," appeals from an action of the Mayor and Board of Aldermen of the Town of Boonton, hereinafter "Governing Body," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Morris County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. It is agreed between the parties to submit the matter to the Commissioner of Education for Summary Judgment based on the pleadings and the parties' written documentation in support of their respective positions.

At the annual school election, held March 11, 1975, the Board submitted to the electorate proposals to raise $2,142,044 by local taxation for current expense costs of the school district. This proposal was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Governing Body for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Town of Boonton in the 1975-76 school year, pursuant to the mandatory obligation imposed on it by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Governing Body made its determinations and certified to the Morris County Board of Taxation an amount of $2,057,844 for current expenses, a reduction of $84,200 from the original proposal presented to the electorate by the Board on March 11, 1975.

The Board contends that the Governing Body's action was arbitrary, unreasonable, and capricious and relies upon its documentation of need for the reductions recommended by the Governing Body through its Petition and written testimony. The Governing Body maintains that it acted properly and after due deliberation, and that the amount of moneys reduced by its action are not necessary for a thorough and efficient educational system. The Governing Body also documents its position with written testimony and its Answer to the Petition, filed herein. As part of its determination, the Governing Body

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suggested specific accounts of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Gov. Bdy.'s Proposal	Amount Reduced
CURRENT EXPENSE:				
J211	Sals. Prins.	$139,280	$119,280	$20,000
J220	Textbooks	32,000	30,000	2,000
J230	Sch. Lib./A-V Mats.	43,800	41,800	2,000
J240	Teaching Supls.	80,000	79,000	1,000
J250	Other Exps. Instr.	44,238	43,238	1,000
J545	Field Trips	9,000	–0–	9,000
J610	Sals. Plant Oper.	184,000	180,000	4,000
J630	Heat for Buildings	60,000	53,500	6,500
J640b	Electricity	60,000	53,500	6,500
J720	Contr. Serv. Plant Maint.	23,683	18,583	5,100
J730a	Repl. Instr. Equip.	41,215	21,215	20,000
J730b	Repl. Noninstr. Equip.	9,530	5,530	4,000
J830	Rental Land and Bldgs.	3,000	–0–	3,000
TOTAL CURRENT EXPENSE		$729,746	$645,646	$84,100

While the Governing Body certified an amount of $2,057,844 to the Morris County Board of Taxation for current expense purposes, or $84,200 less than the sum the Board originally proposed to its electorate, the chart above reflects recommended reductions by the Governing Body in the amount of $84,100.

In budget disputes such as the instant matter municipal governing bodies have the responsibility of supplying a statement which sets forth their underlying determinations and supporting reasons for any reductions made in the school budget. *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) The Governing Body in this instance met that responsibility. Boards of education, on the other hand, bear the burden of proof to demonstrate that the moneys which are reduced by governing bodies are essential to provide a thorough and efficient school program. *Board of Education of East Brunswick Township, supra* In this instance, the Board filed its supporting reasons of need.

The Commissioner has reviewed the total record before him. There appears to be no necessity to deal *seriatim* with each of the areas in which the Governing Body recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the

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exercise of its discretion as needs develop and circumstances alter.***"
(at p. 142)

The Commissioner finds that reinstatement of the following curtailments recommended by the Governing Body are necessary to insure an adequate school program in the school district:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J211	Sals. Prins.	$20,000	$20,000	$ –0–
J220	Textbooks	2,000	–0–	2,000
J230	Sch. Lib./A-V Mats.	2,000	–0–	2,000
J240	Teaching Supls.	1,000	–0–	1,000
J250	Other Exps. Instr.	1,000	–0–	1,000
J545	Field Trips	9,000	8,000	1,000
J610	Sals. Plant Oper.	4,000	4,000	–0–
J630	Heat for Buildings	6,500	–0–	6,500
J640b	Electricity	6,500	–0–	6,500
J720	Contr. Serv. Plant Maint.	5,100	–0–	5,100
J730a	Repl. Instr. Equip.	20,000	6,000	14,000
J730b	Repl. Noninstr. Equip.	4,000	–0–	4,000
J830	Rental Land and Bldgs.	3,000	3,000	–0–
TOTAL CURRENT EXPENSE		$84,100	$41,000	$43,100

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by the Governing Body is insufficient by an amount of $41,100, for the maintenance of a thorough and efficient system of public schools in the district. He therefore directs the Morris County Board of Taxation to add to the certification of appropriations for school purposes the sum of $41,100, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $2,098,844.

COMMISSIONER OF EDUCATION

December 15, 1975

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Joanne Sieja,

Petitioner,

v.

Board of Education of the East Windsor Regional School District and Dr. John Hunt, Superintendent, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

Petitioner is a nontenured teacher who was employed by the Board of Education of the East Windsor Regional School District, hereinafter "Board," and was not reemployed for the 1974-75 academic year. Petitioner prays for reinstatement in her former position, together with any back pay and privileges to which she is entitled, on the grounds that her non-reemployment was procedurally and statutorily defective.

A hearing was conducted in this matter on April 8, 1975 in the office of the Mercer County Superintendent of Schools, Trenton, by a hearing examiner appointed by the Commissioner of Education. A joint Stipulation of Facts was submitted by counsel prior to the hearing. Briefs and exhibits are also part of the record. The report of the hearing examiner follows:

The essential material facts pertinent to an adjudication of this controversy are not in dispute. The issues that demand resolution are concerned with an interpretation of certain exhibits, and of agreements reached between petitioner and the Superintendent of Schools concerning conversations between them relative to petitioner's reemployment.

Petitioner was employed initially as a teacher from February through June 1973 (Tr. 23), and she was reemployed for the 1973-74 academic year. (R-1) Petitioner received a letter from the Superintendent dated March 14, 1974, which reads as follows:

> "The evaluations and recommendations for reemployment have progressed to the point that I am now able to advise you of your status. On the basis of the recommendations made to me by your Principal, you will be recommended for reemployment for the next school year on the condition that you attend the district's summer training program.
>
> "If you like, please stop by my office and we can review the specifics of the summer school program.

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> "I am sure you understand that decisions such as these are not made easily by those involved, and they reflect a concern for the long range well-being of the person involved as well as our commitment to the instructional program in the East Windsor Schools. It is on these bases which the judgment concerning your reemployment has been made." (Exhibit A)

Petitioner thereafter notified the Board by letter dated May 3, 1974, that:

> "It is my intention to accept reemployment for the 1974-75 year, upon attendance in summer school." (Exhibit B)

By letter dated June 11, 1974, the Superintendent notified petitioner that she would be reassigned in the 1974-75 academic year. That letter reads in pertinent part as follows:

> "***We have been studying the staff reassignments and these deliberations have progressed to the point where I am now able to advise you of your assignment for next year. To accomplish the necessary distribution of talent, your assignment for next year will be to one half K-2 in the W. C. Black School and one half 6-8 in the Intermediate School.
>
> "Reassignments are never easy to make and many factors are considered. I am confident you will make a significant professional contribution again next year in the above assignment. If, however, you feel some factor might have been overlooked in making this assignment, please don't hesitate to contact me at your earliest convenience.
>
> "Best wishes in your new assignment." (Exhibit C)

A letter from the principal to a staff member dated June 24, 1974, indicated that petitioner was being placed in summer school on a conditional basis to improve her teaching techniques in team teaching and planning. (Exhibit K)

The Superintendent testified that summer school is a training program for teachers and likened it to "boot camp," by stating that upon satisfactory completion of the program, those who attended it would be fine teachers. (Tr. 54-55)

Unfortunately for petitioner, she received two unsatisfactory evaluations concerning her performance in summer school (Exhibits L, M) which were followed by a letter dated August 19, 1974 from the Superintendent which reads as follows:

> "The evaluations and recommendations for re-employment have progressed to the point that I am now able to advise you of your status. On the basis of the recommendations made to me by your Principal and the summer school evaluation of your performance, you will *not* be offered employment for the next school year. (*Emphasis supplied.*)
>
> "If you would like, please stop by Mr. Major's office and we can provide

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you with information we have about openings in the area.

"I am sure you understand that decisions such as these are not made easily by those involved, and they reflect a concern for the long range well-being of the person involved as well as our commitment to the instructional program in the East Windsor Schools. I therefore want to wish you well in your future endeavors." (Exhibit E)

Petitioner argues that she was not notified pursuant to the appropriate statutes that she would not be reemployed for the 1974-75 academic year. The statutes *N.J.S.A.* 18A:27-10, 11, and 12 read as follows:

N.J.S.A. 18A:27-10

"On or before April 30 in each year, every board of education in this State shall give to each nontenured teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

"b. A written notice that such employment will not be offered."

N.J.S.A. 18A:27-11

"Should any board of education fail to give to any nontenured teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

N.J.S.A. 18A:27-12

"If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

Petitioner asserts also that the Superintendent's letter (Exhibit A) is an offer of employment which she accepted (Exhibit B), and that further evidence of her continued employment is found in the Board minutes dated June 10, 1974 in which she was included in the summer school staff at a salary of $870.00 (Stipulation of Facts) and in the letter from the Superintendent dated June 11, 1974 (Exhibit C) reassigning her for the 1974-75 academic year.

The Board contends that the Superintendent's letter (Exhibit A) was not

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an offer of reemployment but rather, by its wording, an authorization to expend moneys on conditional employees who would be reemployed upon successful completion of the summer training program. (Tr. 58-63) The Board asserts also that petitioner's letter (Exhibit B) is not an acceptance of employment because none was offered, and her alleged acceptance letter was conditioned on a future successful completion of the summer training program. (Board's Brief, at pp. 5-6)

The Board argues finally that it later offered, and petitioner accepted, employment as a substitute teacher for the 1974-75 academic year, thereby waiving any alleged right to employment which she claims. (Exhibit D; Board's Brief, at pp. 8-10)

The hearing examiner cannot agree. The Commissioner has previously held that the "***primary intent of the statute, *N.J.S.A.* 18A:27-10, is to provide teaching staff members timely notice that they will not be reemployed in order that they may seek employment elsewhere.***" (*Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County,* 1975 *S.L.D.* 112 (decided February 26, 1975), reversed State Board of Education, June 4, 1975, for reasons of termination pay) Additionally, the following decisions of the Commissioner have held that teaching staff members are entitled to proper notice, pursuant to statute, by April 30 of each academic year: *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975) aff'd State Board of Education May 7, 1975; *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975), reversed and remanded State Board of Education, June 4, 1975, for reasons of termination pay; *George Mazawey v. Board of Education of the City of Union, Hudson County,* 1975 *S.L.D.* 285 (decided May 1, 1975); *Marilyn Frignoca v. Board of Education of the Northern Regional High School District, Bergen County,* 1975 *S.L.D.* 303 (decided May 2, 1975).

Nowhere do the statutes or the decisions by the Commissioner and the State Board of Education provide for "conditional" employment based on a teacher's evaluations after a training program, or for any other reason. In the hearing examiner's judgment the conditional offer of employment by the Board cannot be supported and must be set aside. Such employment as advanced herein constitutes a contravention of the clear statutory mandate (*N.J.S.A.* 18A:27-10) that nontenure teachers must be informed by April 30 in each school year of their employment status in the ensuing year.

The hearing examiner finds, therefore, that petitioner was offered and accepted a contract for the 1974-75 academic year. (Exhibits A, B) Further evidence of her continued employment is found in the Superintendent's letter dated June 11, 1974 (Exhibit C), which provides for her reassignment for the 1974-75 academic year.

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The hearing examiner finds, also, that petitioner was entitled to employment for the 1974-75 academic year and recommends that she be paid her full salary. and all benefits for the 1974-75 academic year, less mitigation of moneys earned by her in other employment during that period of time.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has examined the record of the herein controverted matter including the Briefs, the hearing examiner report and the exceptions filed thereto by respondents pursuant to *N.J.A.C.* 6:24-1.16.

Respondents, herein, determined not to issue to petitioner, prior to April 30, 1974, either a contract of employment or an unconditional offer of employment for the ensuing 1974-75 school year. Nor did respondents, pursuant to *N.J.S.A.* 18A:27-10 *et seq.*, notify her that she would not be reemployed. Rather, the Superintendent as chief executive officer of the district notified petitioner that she would be "***recommended for re-employment for the next school year on the condition that [she] attend the district's summer training program.***" (Exhibit A) A careful reading of Exhibit A reveals no further condition such as that which is suggested by the Superintendent that petitioner was required to achieve a standard of performance in the summer training program. (Tr. 54-55)

Petitioner responded on May 3, 1974, as follows:

> "It is my intention to accept reemployment for the 1974-75 school year, upon attendance in summer school." (Exhibit B)

The Commissioner determines that the above factual context constitutes a conditional promise of employment by the Board and an acceptance thereof by petitioner who agreed to the condition imposed. Having done so, she was notified by the Superintendent on June 11, 1974, that she would be assigned to the W.C. Black School and the Intermediate School for the ensuing year. (Exhibit C) Thus, on two separate occasions, petitioner was given reason to believe that upon completion of the Board's summer training program she would be provided with a written contract to which she and the Board would at that time affix the proper signatures in the usual fashion as applied in the district. Instead of being issued such a contract, petitioner was notified on August 19, 1974, that she would not be employed by the Board for the ensuing school year. Thus, petitioner was finally notified of her actual employment status less than two weeks prior to September 1, the beginning of the next academic year.

Such notification procedures as were employed by respondents, herein, are contrary to both the letter and the intent of *N.J.S.A.* 18A:27-10 *et seq.* which were promulgated by the Legislature to guarantee that nontenured teaching staff members continuously employed since the preceding September 30 be provided timely notice by April 30 of their employment status.

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It is clear that the Superintendent was motivated by consideration and kindness when he failed to recommend that the Board act in accord with the statute. Without question he was similarly motivated when he failed to make clear to petitioner that it was his intent not to recommend her for reemployment if she failed to meet certain standards of the summer program. It is unfortunate, however, that he did not do so. The Commissioner is constrained to comment that failure to share fully with teaching staff members an evaluation of their weaknesses and failures, as well as their strengths and successes, is seldom the ultimate kindness. Rather, the cumulative withholding of such frank and open evaluations deprives a teacher of the opportunity to forthrightly improve performance in the interest of the best possible educational program for youth.

The Commissioner recently commented upon the essentiality of the frankness and openness necessary to the implementation of an effective supervisory program in *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669 (decided September 4, 1975) as follows:

> "***The Commissioner has observed that many problems have been created, with extensive litigation, as the result of evaluation programs conducted in an excessively charitable manner, whereby beginning teachers have not had the benefit of candid and complete constructive criticisms of their deficiencies and shortcomings. When evaluations fail to enlighten the beginning teacher regarding his/her deficiencies and provide no suggestions for improvement, the teacher is mistakenly led to believe that his/her services and performance are at least adequate. Subsequently, when reemployment is not offered, the teaching staff member is at a loss to understand the reasons.***
>
> "The Commissioner takes notice that the Legislature has recently enacted *c.* 132, *L.* 1975, effective July 1, 1975, which is clearly intended to serve the purpose of strengthening the supervision process, thereby assisting the improvement of instruction received by children in the public schools. This addition to the school law reads in its entirety as follows:
>
> > 'Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during each semester, provided that the number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.
> >
> > 'Any teaching staff member receiving notice that a teaching contract

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> for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.
>
> 'The provisions of this act shall be carried out pursuant to rules established by the State Board of Education.
>
> 'This act shall take effect July 1 next following enactment.'***"
>
> (at pp. 681-682)

In any event, given the factual context presented herein, *N.J.S.A.* 18A:27-10 required a frank and forthright statement in writing from the Board to petitioner informing her prior to April 30, 1974, as to whether or not she would be employed for the 1974-75 school year. The statute must be given its ordinary meaning in the absence of specific intent to the contrary. *Abbott Dairies v. Armstrong,* 14 *N.J.* 319 (1954) The language of the statute contemplates no conditional notification, as was provided by respondents to petitioner. Therefore, it is determined that the Board was in noncompliance with the statute and that petitioner was entitled to employment for the 1974-75 school year. She was entitled to be reinstated for the 1974-75 school year and made whole for her lost earnings.

The Board of Education of the East Windsor Regional School District must provide to petitioner her full salary and attendant emoluments for the 1974-75 school year, less mitigation in the amount of her earnings in alternate employment from September 1, 1974 through June 30, 1975. It is so ordered.

COMMISSIONER OF EDUCATION

December 24, 1975

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Francis Filardo,

Petitioner,

v.

Board of Education of the Township of Mahwah, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Sullivan and Sullivan (John J. Sullivan, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Mahwah, hereinafter "Board," avers that he was denied a salary increment during the 1973-74 school year without just cause and in violation of his rights pursuant to statutory mandate and provisions of the Constitutions of New Jersey and the United States. He requests restoration of such increment. The Board avers that its action controverted herein was a legally proper exercise of its authority and discretion and that the Petition should be dismissed.

A hearing in this matter was conducted on May 28, June 11, July 25, and November 4, 1974 by a hearing examiner appointed by the Commissioner of Education at the offices of the Morris County Superintendent of Schools, Morris Plains. Subsequent thereto, Briefs were filed by petitioner and the Board. The report of the hearing examiner is as follows:

Petitioner is a teacher of fifth grade pupils who in the 1972-73 school year engaged in a lengthy and unsuccessful effort to have a pupil assigned to his class removed from such class and assigned elsewhere. His contention that the pupil's assignment was inappropriate for the pupil and deleterious to the learning of other pupils were contrary to the views of the school's Child Study Team and school administrators. The conflict which was thus engendered served as a primary concern in the decision of the Superintendent of Schools on April 6, 1973 to recommend that petitioner's increment for the ensuing year be withheld. (P-1) The instant Petition followed.

The documentation with respect to this dispute is extensive. It consists of a total of thirty-five exhibits in evidence. Sixteen of these exhibits were submitted by petitioner and are directly pertinent to the "concerns" of the Superintendent expressed in his letter of April 6, 1973, noted, *ante.* (P-1) These concerns were, in effect, charges against petitioner which served as the basis for the Board's ultimate decision to withhold the salary increment. Thus, such concerns are of prime importance to the adjudication herein since petitioner

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disputes their validity while the Board relies on them. For purposes of this report the hearing examiner proposes to summarize these concerns as expressed by the Superintendent in his letter and to analyze the evidence with respect to each, prior to a finding of fact of specific pertinence. These summarizations, the analysis, and findings are set forth as follows.

Concern No. 1

This concern is a compendium of allegations by the Superintendent against petitioner. The summary of its expression is found in the last paragraph:

> "***your initial failure to follow established procedures has been expanded by your subsequent actions *** and is consistent with your actions of previous years to the extent that you demonstrate a clear unwillingness to abide by duly authorized and agreed upon procedures.***"

Specifically, the Superintendent alleged:

> (a) petitioner has filed a grievance, with respect to the placement of the pupil "S.M.," in the wrong forum;
>
> (b) petitioner has given S.M. no special help after school although such help was required by a negotiated agreement;
>
> (c) petitioner had never, as required, initiated a meeting with the parents of S.M.;
>
> (d) petitioner had refused to sign an administrative directive of his school principal;
>
> (e) petitioner had filed a second grievance which was illogical and had initiated a court action against school administrators.

Petitioner's testimony with respect to the detail of Concern No. 1 is found at Tr. I-18 *et seq.* In this respect he testified he had filed the first grievance ("a", *ante*) pursuant to the negotiated agreement between the Board and the teachers' association because his rights and those of the pupils in his class were violated. (Tr. I-20, 22) (See P-4.) This grievance was filed with the grievance chairman of the local education association. (Tr. I-34) He testified he had not told the Superintendent that special help was not given S.M. and that such help had in fact been given. He testified that such help was, however, ordered to be halted by the school principal. (Tr. I-35) He testified that he had met with the parents of S.M. (Tr. I-38), but that the principal had later told him not to meet with them again. (Tr. I-39) He testified he had not signed the administrative directive immediately as requested because he wanted time to reflect on it (Tr. I-46) and that he signed it approximately a week and a half later. (Tr. I-47) He testified he had not rejected the recommendations of the Child Study Team with respect to the education of S.M. (Tr. I-50) and he recited the scheduling changes which were, in fact, made for the pupil's benefit. (Tr. I-55-56)

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Petitioner further testified, however, with respect to his continuing disagreement with the Child Study Team's recommendation to place S.M. in a regular class but with a modified schedule. (Tr. I-57 *et seq.*) He testified he "***looked into special schools for emotionally disturbed children***" and prepared a pupil behavior profile at the request of the principal. (Tr. I-57-58) Petitioner testified he has filed a civil suit in the court system against school officials for libel and slander. (Tr. I-68) (Note: Petitioner testified that a previous 1971 action by him in civil court against the Board for alleged violation of sabbatical leave policies had been denied because of a failure to follow other procedural remedies. See P-1, at page 4; Tr. I-70.)

The documents pertinent to the merits of the dispute, *sub judice,* are listed as follows:

P-5 – A document dated September 15, 1972 in which petitioner opined that S.M. was in "dire need" of psychiatric care and a transfer to a special school.

R-14 – Petitioner's grievance of November 27, 1972, which was filed by petitioner with the grievance chairman of the local education association. Therein petitioner characterized or classified S.M. as an emotionally disturbed child in need of "***immediate, individualized, all-day instruction and care.***"

R-6 – Petitioner's response dated December 4, 1972 to a report of his principal dated December 1, 1972 (R-13) wherein the principal had expressed concern over petitioner's alleged disregard of "line-staff procedures."

R-15 – Principal's reply to R-6, dated December 4, 1972.

R-20 – A letter dated December 20, 1972 from petitioner's attorney to the Superintendent requesting a retraction of the principal's allegations contained in the letter of December 1, 1972 (R-13) and stating that an "action on behalf of my client" would be instituted unless such request met with compliance.

P-4 – Petitioner's second grievance of the 1972-73 school year in which he requested removal of S.M. from his class.

R-17 – A report by petitioner concerning after-school sessions which had been scheduled for S.M.

P-11 – A letter dated February 20, 1973 to petitioner from his principal which instructed petitioner to discontinue weekly meetings with the mother of S.M.

P-6 – A notice from the principal to petitioner instructing petitioner to discontinue "after school sessions" with S.M.

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The Board's primary testimony in support of the allegations of Concern No. 1 was given by petitioner's school principal and the Superintendent of Schools. (See Tr. III-18-50; Tr. II-72 *et seq.*) The principal testified he was shocked and surprised that petitioner filed a grievance concerned with the placement of S.M. and he indicated he was "bothered" that the grievance had been filed with a teacher and not with him as principal. He testified he wondered whether such placement was a grievable matter.(Tr. III-24) He further indicated he felt his own authority was challenged (Tr. III-33) and that petitioner had been unduly critical. (Tr. III-66, 69) The principal testified he thought petitioner's action undermined the principal's role but he indicated that there was no clearly labeled defiance by petitioner. (Tr. III-88) He testified that he believed petitioner's actions verged on defiance or insubordination but that a stronger indication of insubordination would have resulted in a recommendation to "fire" petitioner. (Tr. III-88) The principal testified he was "scared to death" of petitioner's court suit against him and believed that differences between petitioner and administrators could have been resolved "in the school." (Tr. III-80-81)

The Superintendent testified the district's Child Study Team had recommended S.M. be kept in regular class with supplemental instruction and modified scheduling, and petitioner's grievance to have S.M. removed from the class was "***not complying with the spirit of the recommendation or with the expectation of a master teacher.***" (Tr. II-130) (See Child Study Team evaluation, R-5.) The Superintendent classifies the filing of the grievance as insubordination and he also avers that the subject was not a grievable matter. (Tr. II-140)

The hearing examiner has examined all such relevant testimony and evidence and sets forth the following observations and findings of fact.

There can be no question with respect to Concern No. 1 that petitioner's attitude during school year 1972-73 was truculent. In the words of petitioner's counsel, petitioner "***hollered and screamed and created some discomfort for the Board of Education and the administration***." (Tr. II-130) He filed grievances which would appear to be singularly inappropriate and perhaps in the wrong forum. His recriminations resulted in the agitation of a principal new to his position, and the reaction of this administrator resulted in an even more inappropriate lawsuit by petitioner, a second grievance, and resultant friction and agitation.

The hearing examiner concludes that all such results were directly traceable to petitioner's actions and caused by them. The hearing examiner cannot, however, characterize these actions as clear insubordination or, in major respects, fault the procedures which petitioner followed. The evidence leads to a conclusion instead that, while petitioner protested, he also generally complied with administrative direction. (See Tr. II-128-129, 134; Tr. III-58, 88, 93.) While his first grievance was filed in the wrong forum, his second was filed with the school principal. Petitioner did give after-school help to S.M. He did meet with the parents as directed. He even signed the memorandum of his principal, albeit tardily. (P-7)

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In summation, the hearing examiner classifies petitioner's conduct which is the subject of Concern No. 1 as truculent, perhaps obstructionistic, but as constituting something less than insubordination or other just cause, when standing alone, to serve as the basis for the withholding of a salary increment. This limited finding must, however, be viewed *in pari materia* with other findings, *post,* in the total parameter of an evaluation of the Board's action controverted, *sub judice.*

Concern No. 2

This expressed concern is also lengthy and detailed and is centered around an allegation that petitioner displayed conduct "unbecoming a teacher." (P-1, at p. 4) Specifically the Superintendent said that petitioner:

1. had told the mother of S.M. that he, petitioner, "didn't have the spare time for her son," while at the same time telling her that the pupil needed special class placement;

2. had made certain statements and conclusions which exceeded his authority (*i.e.* a statement that a conference with the mother of S.M. had not been initiated because the mother was "***too disturbed to make such a conference of any value***" and a statement that S.M. should be placed in a private school; (P-1, at p. 4)

3. had in prior years exhibited conduct also unbecoming a teacher in that he had:

(a) written a letter to the Board President characterizing the philosophy of the Board as part of a "morass" of political ineptitude, etc.; (P-1, at p. 5)

(b) had signed the name of another teacher to a letter nominating himself as "Teacher of the Year";

(c) had refused to participate in a bus evacuation drill;

(d) had repudiated the principal's legal authority by demanding an apology in an incorrect manner;

(e) had made unprofessional and denigrating remarks about the appointment of a Black educator to the post of principal in his school (*i.e.* "Angela Davis is taking his place at Betsy Ross School.")

Petitioner testified with respect to this concern. (Tr. I-70 *et seq.*)

Petitioner testified that his conversation with the mother of S.M. could have been misconstrued. He testified he said that "***as much as I would like to help a child that needs special help there, it would mean that I would have to neglect the other 24 children in my class***." (Tr. I-71) He testified that he told the mother of S.M. that her son needed special attention. (Tr. I-72)

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Petitioner denied telling the Superintendent that the mother of S.M. was too disturbed to make a conference of any value. He testified that, instead, he had said such a conference would be of no value. Petitioner testified there was no requirement that conferences must be initiated by teachers. (Tr. I-72) Petitioner testified that he didn't reject the authority of the Child Study Team but that he didn't agree with it and further stated he complied with the Team recommendations to the best of his ability. (Tr. I-79)

Petitioner testified he had, as alleged, written the letter to the Board President in 1971. (Tr. I-83; P-10)

Petitioner testified that he had, as alleged, signed another teacher's name for his own (petitioner's) nomination for recognition of teaching accomplishment. He averred that such an action was "foolish" and "stupid" and he indicated he regretted it. (Tr. I-89 *et seq.*)

Petitioner's testimony with respect to the bus evacuation drill is found at Tr. I-92 *et seq.* He testified that the children were "screaming" while in the bus and he couldn't see himself "***sitting in the bus while children were making all kinds of noises***" and so he asked to be excused. He testified that part of the reason for the request was a difference in philosophies with respect to the conduct of children and a difference between his own philosophy and that of the former principal who conducted the bus evacuation drill. Petitioner testified he had, at the end of the drill, helped the children down from an emergency exit door. (Tr. I-93)

Petitioner testified that he had as alleged requested an apology from the principal for the principal's letter of concern. (R-13) Such apology was requested in the letter of petitioner's attorney to the principal. (R-20)

Petitioner testified that, as alleged, he had used the name of Angela Davis in connection with administrative changes but he maintained that such use was in a context of relaxed and joking conversation in the teachers' room and did not contain the implication given to it. (Tr. I-97) He denied his use of the expression, as alleged, in the hall of the school building in a conversation with his principal prior to the opening of school. He demands an apology from the Superintendent. (Tr. I-98) (See also Tr. I-104 *et seq.* and Tr. I-121.)

Petitioner testified that he believed S.M. met the requirements for entrance to a private school for emotionally disturbed children. (Tr. I-123) (Note: The Child Study Team classified S.M. as socially maladjusted. See *post.*)

The principal of petitioner's school at the time of the alleged denigrating remark and the bus incident testified, with respect to Concern No. 2, that petitioner was informed one morning in the school hallway of the appointment of a Black principal to the school in which petitioner taught. The former principal testified that on that occasion petitioner responded by saying, "Yes, and I hear that Angela Davis is replacing him at Betsy Ross." (Tr. II-58) (Note: Betsy Ross is another school in the district from which the principal was transferred.) The former principal testified, with respect to the bus drill incident,

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that on that occasion he had requested petitioner to sit in the back of the bus with his pupils. He testified that within a minute, however, petitioner had left his seat and left the bus with the statement that he had claustrophobia. (Tr. II-60)

He testified that petitioner did not assist further with the drill but remained outside the bus approximately 50 feet away. (Tr. II-63)

The Superintendent of Schools testified that S.M. was approximately 56 inches tall and weighed 79 pounds during the year he was in petitioner's class. (Tr. II-79) The Superintendent testified that the Child Study Team had been evaluating S.M. since 1968 and had made a special report on the pupil in January 1973. (Tr. II-77) This report (R-5) indicates that the difficulties of S.M. had "***been real, but comparatively moderate in degree.***" (R-5, at p.1) The report classified S.M. as socially maladjusted and recommended regular class placement with supplemental instruction and modified scheduling. (R-5, at p.2) The Superintendent testified that in his opinion petitioner consistently and repeatedly rejected these recommendations. (Tr. II-90)

The primary documents pertinent to this concern which must be reviewed in the context of the testimony, *ante,* are: P-4, P-5, P-7, P-10, R-1, R-6, R-12, R-13, R-14, R-15, R-17, R-18, R-20.

The hearing examiner has considered such documents and testimony and finds it to be true in fact that:

1. petitioner did say something that could be construed as meaning he had no spare time for S.M.;

2. petitioner did state he believed a conference with the mother of S.M. would be of no value; (R-6)

3. petitioner did write the letter to the Board President wherein it was stated that the philosophy of the Board was part of a political morass; (P-1)

4. petitioner did sign the name of another teacher to a letter nominating himself as Teacher of the Year;

5. petitioner did leave his post of duty in a bus evacuation drill in 1971;

6. petitioner did demand an apology from the principal for comments the principal made;

7. petitioner did as alleged make the remark about Angela Davis both in the hall of the school and in the teachers' room. (See R-1.)

The question remains, however, whether in the context of each finding and in the circumstances pertinent to it there was conduct that could be classified as unbecoming conduct. In this regard the hearing examiner finds little significance

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in findings 1, 2, 3, and 6, but holds the findings of 4, 5 and 7 must be afforded weight in a review of the Board's action in withholding petitioner's increment for the 1972-73 school year. Petitioner admitted he had falsely signed his name to the letter of recommendation and that he had left the bus during the drill. In this latter regard his own testimony does not give "claustrophobia" as the real reason for leaving (Tr. I-92), but instead the "screaming" of children and a difference of philosophy he had with the former principal. The testimony of the former principal at the hearing and his letter to petitioner dated April 5, 1972 (R-1) attest to the truth of an allegation that petitioner's remark to the principal about Angela Davis was not made in jest and was, in the circumstances, an inappropriate remark. The letter of the former principal characterized the remarks as in "poor taste." The hearing examiner finds no reason to disagree with such characterization. (Tr. I-126 *et seq.*)

Concern No. 3

The primary thrust of this concern is an allegation that petitioner was a negative force in the school. Specifically petitioner is alleged to have commented adversely about the Superintendent of Schools, a health curriculum, a mathematics curriculum, and a science program. Additionally, it is alleged that petitioner "***rarely, if ever, [had] any constructive comments to make at staff meetings.***" (P-1, at p. 6)

Petitioner's direct testimony with respect to this concern is found at Tr. I-86 *et seq.* He testified that he had made more than forty suggestions for improving the school system. (Tr. I-86, 164) The details of such suggestions were recited by petitioner and included a vocational program, a spelling bee, an outdoor education program, etc. (Tr. I-87) Documents pertinent to this concern include P-10, P-13, P-14, P-17, R-2, R-6, R-13, R-16, and R-20.

The Board produced little direct testimony with respect to this concern except in substantiation of the authenticity of documents in evidence.

The hearing examiner finds that the limited proofs with respect to this concern do not support it. While petitioner did freely criticize, he also contributed creative ideas to the educational program of his class and school. (P-17) His caustic comments and apparently sarcastic remarks (R-2; P-10) may in the context of a professional's relationships to superiors be labeled unfortunate, perhaps even censorable, but they do not support the principal thrust of this concern; namely, that petitioner had not also contributed "***some positive and constructive effort." (P-1, at p.6)

Concern No. 4

The primary allegation of Concern No. 4 is that the quality of petitioner's teaching in 1973 was substandard. The allegation is specifically founded on two observations of petitioner's class made by his Superintendent and principal on April 3 and 5, 1973.

A report of the Superintendent's observation is contained in Exhibit P-12. (See also Tr. II-88.) This report indicated that the Superintendent questioned

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the quality of petitioner's teaching on that occasion. The Superintendent testified that "***two or three of the children were in effect excluded from the class***" by a lack of textbooks and that a disruptive entry of S.M. into the classroom was ignored by petitioner. (Tr. II-88) The Superintendent's report indicated that his ensuing questioning of petitioner had resulted in a criticism of the reading program instead of a relevant reply.

The principal's observation of April 5, 1973, resulted in his report P-14. This report indicated that petitioner had not included the lesson of the day in his lesson plan, that the lesson plans generally were inappropriate or inadequate, and that textbooks in use were not covered with protective material as required.

Petitioner's testimony with respect to these observations is found at Tr. II-10 *et seq.* Petitioner testified it was his contention that the Superintendent had observed his class on April 3, 1973 "***specifically to give me a negative report.***" (Tr. II-11) He testified that a few pupils had not been excluded from the class, as alleged, and that the incident with S.M. was a disturbance over which he could not exercise control. (Tr. II-27) He testified that there was "nothing [he] could have done" in the circumstances and that his actions could have been interpreted as "letting the situation run its course." (Tr. II-28) He testified that from his knowledge of S.M. his handling of the incident was the "best way." (Tr. II-29) In his reply to the Superintendent's evaluation (P-13), petitioner again averred that S.M. was an emotionally disturbed child.

Petitioner testified, with respect to the principal's observation, that it could have been true that the lesson of the day was not in the plan book. He testified further that directions to cover textbooks had been issued just the day before the observation and that he deemed the lesson of the day appropriate. (Tr. II-37 *et seq.*) Petitioner "***questioned the evaluation of any teacher during 1/2 day sessions and not having a normal school day program.***" (Reply of Petitioner to Evaluation Report, P-14)

The hearing examiner notes that petitioner does not essentially contest the factual allegations of the two school administrators, reported *ante,* but sets forth the circumstances pertinent thereto to excuse them. S.M. did, as alleged, create a disturbance without evident positive measures to correct it by petitioner. The books were not covered. The lesson plan of the day may not have contained the lesson which was observed, etc.

However, it is true that other observations of the principal during the year were favorable to petitioner. The judgment with respect to the two which were not favorable must be tempered as a result.

The hearing examiner has considered all such testimony and evidence with respect to this concern and finds that, despite petitioner's avowals, the concern is generally supported with respect to the two specific occasions, but is not supportable as a judgment with respect to the quality of petitioner's teaching for the 1972-73 school year as a whole. This limited finding must be considered *in pari materia* with respect to other findings, *ante.*

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Concern No. 5

This concern is a compendium of allegations contained in Concerns Nos. 1-4 and was not the subject of proofs at the hearing, *ante*. It contains the recommendation of the Superintendent of Schools that petitioner's salary increment for the 1973-74 school year be withheld.

This concludes a narrative recital of the concerns and the proofs pertinent thereto which served as a basis for the Board's controverted action.

Petitioner's Brief avers that the real reason for the Board's decision to withhold his salary increment was the controversy over the classification and placement of S.M. in petitioner's class and that concerns other than that one "***did not enter into the decision***." (Petitioner's Brief, at p. 2) Petitioner also maintains, however, that his actions and protests with respect to S.M. were an exercise of constitutionally protected free speech which may not serve as the basis for the Board's action. In support of this avowal, petitioner cites *Pickering v. Board of Education of the Township High School District 205*, 391 *U.S.* 563 (1968); *Board of Education of Union Beach v. NJEA et al.*, 53 *N.J.* 29, 40 (1968); the Superior Court opinion in *Pietrunti v. Board of Education of Brick Township*, 128 *N.J. Super.* 149 (*App. Div.* 1974), *cert. den.* 65 *N.J.* 573 (1974), *cert. den.* United States Supreme Court December 9, 1974. While maintaining that the real reason for the withholding of the increment is as stated above, petitioner nevertheless, in apparent contradiction, avers that the Board relied on and considered "stale facts" with pertinence to a prior year. He avers that such reliance was misplaced and cites *Hershaw v. Board of Education of Atlantic City*, 1938 *S.L.D.* 409 (1931), aff'd State Board of Education 412 (1932). Petitioner further avers that the utilization of a grievance procedure should not result in a punishment and maintains that this was the practical result herein.

The Board avers, on the other hand, that its controverted action was not arbitrary or capricious but an honest exercise of its prerogative and authority taken with proper consideration. The Board maintains in particular that its placement of S.M. in petitioner's class was grounded in the legal authority of the Child Study Team and that petitioner's actions with respect to the placement constitute a demonstration that "***his opinions and not the opinions of his superiors should prevail.***" (Brief of the Board, at p.8)

The Board cites decisions of the Commissioner to buttress its position with respect to the authority of Child Study Teams. *Parents of "K.K." v. Board of Education of the Town of Westfield*, 1971 *S.L.D.* 234; *In the Matter of "D" v. Board of Education of the Borough of Scotch Plains-Fanwood et al.*, 1971 *S.L.D.* 509. Furthermore, the Board maintains that petitioner's actions cannot be condoned as an exercise of the constitutional right of free speech and it cites *Winston et al. v. Board of Education of the Borough of South Plainfield*, 64 *N.J.* 582 (1974); *Chitwood v. Feaster*, 468 *F.* 2d 359 (4th *Cir.* 1972). Additionally the Board cites *Thomas v. Board of Education of Morris Township*, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 58, to support a view that its controverted decision must stand unless it is held to be arbitrary, capricious, or unreasonable.

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The hearing examiner has carefully reviewed such testimony and documentary evidence in the context of petitioner's allegations and applicable law with respect to the withholding of his salary increment. The primary question for decision is whether or not such testimony and evidence refutes or supports a judgment that the Board acted reasonably and with justification when it acted in 1973 to withhold petitioner's salary increment for the 1973-74 school year.

The parameters of the responsibility of the Commissioner with respect to such a question was set forth by the Court in *Kopera v. Board of Education of West Orange,* 1958-59 *S.L.D.* 96, affirmed State Board of Education 98, remanded to the Commissioner of Education, 60 *N.J. Super.* 288 (*App. Div.* 1960), decided by the Commissioner on remand 1960-61 *S.L.D.* 57, affirmed Docket No. A-632-58, New Jersey Superior Court, Appellate Division, January 10, 1963. In its remand to the Commissioner the Court specifically defined the Commissioner's role in the review of decisions by local boards of education to withhold salary increments. The Court said, in quoting with approval a Brief by the Attorney General:

> "***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.***"
> (60 *N.J. Super.* at 295)

And,

> "***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 appellant." (*Id.* at 296)

In his decision on remand in *Kopera, supra,* the Commissioner added a further dimension of consideration in such matters when he said:

> "***To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teachers' Tenure Act.***"
> (1960-61 *S.L.D.* at 62)

The Commissioner was also concerned with the withholding of a salary increment in *William Myers v. Board of Education of the Borough of Glassboro, Gloucester County,* 1966 *S.L.D.* 66. He said:

> "The evaluation of a teacher's performance is often a matter of total impression, based upon both objective evidence and subjective judgment. No generalization concerning the amount and type of classroom

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observation required for a valid evaluation is possible; frequently, as in the present case, the responsiveness of the teacher to suggestions for improvement of his teaching becomes more significant than the number of classroom visits made by the evaluator. See *Haspel v. Board of Education of Metuchen,* 1963 *S.L.D.* 78, affirmed State Board of Education, October 9, 1964, affirmed Superior Court, Appellate Division, June 10, 1965; *Charen v. Board of Education of Elizabeth,* decided by the Commissioner October 27, 1965. Similarly, justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents. In the context of dismissal, but with equal force here, it was said in *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E.&A.* 1944):

> '***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.***'

"The quantum of proof required to sustain a decision to withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure." (at p. 68)

See also *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449; *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974, *cert. den.* 66 *N.J.* 313 (1974).

In such a context of applicable consideration the hearing examiner finds no reason to hold that the Board acted herein in an arbitrary, unreasonable, or capricious manner or in contravention of any of the rights of petitioner. The whole conduct of petitioner during the period 1971-73 was scrutinized by the Board with respect to salary increment entitlement. Such scrutiny of a series of incidents was not inappropriate (*Redcay, supra,*) and, even if petitioner's repeated criticisms of superiors and expressions of opinion are disregarded, the hearing examiner finds sufficient reason in the findings, *ante,* to provide necessary support of the action the Board took. School administrators and the Board had a reasonable basis for concluding that on at least two occasions in the 1972-73 school year petitioner's teaching was unsatisfactory. Petitioner did leave his post of duty in a school bus drill in 1971 in a precipitate manner. Petitioner did, by his own admission, affix the name of another teacher to a nomination of petitioner as a teacher to receive special notice. These findings are set, moreover, in the context of a record of petitioner's truculence and repeated assertions of his own correctness of judgment as opposed to the judgment of those with whom he worked which can hardly be held to contribute to an improvement of education for young pupils but can be held to be deleterious to it.

Accordingly, the hearing examiner recommends that the Petition be dismissed.

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The Commissioner has reviewed the report of the hearing examiner and the exceptions and replies thereto filed by petitioner and the Board. The reply of the Board is supportive of the total finding of the hearing examiner. Petitioner's exceptions, while extensive, have, as a principal argument against the report, an assertion that the Board's decision to withhold petitioner's increment was grounded solely in the charges with respect to S.M. and that the other charges did not constitute the true reasons for the Board's action and thus should be disregarded. It follows, petitioner avers, that his prayers for relief must be granted since "***the Hearing Examiner did find that the concerns with regard to S.M. did not serve as the basis for withholding of an increment.***" (Petitioner's Exceptions, at p. 3) (Note: It would appear in the context of petitioner's exceptions that petitioner's argument herein is that charges against him which involved his handling of the pupil, S.M., were found by the hearing examiner to be inconclusive and to constitute no reason for the withholding of an increment. In this interpretation of the exception the words "did not serve" must be interpreted to mean "could not serve.") Petitioner asserts further that charges other than those involving S.M. were "trivial" and "trumped up" and "***were clearly not within the mind of the Board of Education when it made the decision to withhold the increment.***" (Petitioner's Exceptions, at pp. 1, 3) In petitioner's view, then, there was no basis for the withholding of his increment and, to the extent that the decision of the Board was grounded in petitioner's expressions of protest regarding the placement of S.M. in his class, it was unconstitutional. In support of this view, petitioner cites *Spevack v. Klein,* 385 *U.S.* 511, 515 (1967); *Jersey v. Martin,* 336 *F. Supp.* 1350 (*D.W.Va.* 1972); *Skeehan v. Board,* 501 *F.*2d 31 (3rd Cir. 1974); *Lusk v. Estes,* 361 *F.* 2d *Supp.* 653 (*D. Tex.* 1973), etc.

The Commissioner holds that any interpretation of the hearing examiner's report which avers the hearing examiner found that the charges which involved petitioner's handling of S.M. "could not serve" as a basis, at least in part, for the withholding of petitioner's increment is a misinterpretation of the finding. Such finding was clear that the proofs with respect to Concern No. 1 could not, when "standing alone," serve as the basis for the withholding of an increment, but that the totality of the finding could be considered "***in the total parameter of an evaluation of the Board's action controverted *sub judice.*" (ante)

The Commissioner concurs with this view and holds that the extensive record herein supports a judgment that the exercise of the Board's discretion in this instance was not an arbitrary one or one rendered in a capricious manner. It was one, instead, grounded in consideration over a long period of time of a series of incidents and provides no reason for an interposition of discretion by the Commissioner for that exercised by the Board. The Commissioner so holds.

It was not necessary herein for the Board to have a quantum of proof "***sufficient to justify dismissal under the Teachers' Tenure Act.***" *Kopera, supra* Evaluation of the performance of an employee of a local board of education may be grounded in classroom observation, subjective judgment and a total impression of effectiveness in the performance of duties with school pupils.

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Mary Donaldson v. Board of Education of the City of North Wildwood, 65 *N.J.* 236 (1974); *William Myers v. Board of Education of the Borough of Glassboro, supra* The Commissioner finds nothing in the record before him as a reason to countermand such authority or the clear statutory prescription. *N.J.S.A.* 18A:29-14

Accordingly, the instant Petition is dismissed.

COMMISSIONER OF EDUCATION

December 16, 1975

Mae Stack and Luretha Wilson,

Petitioners,

v.

Board of Education of the Borough of Elmwood Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

Petitioners, who are school nurses in the employ of the Board of Education of the Borough of Elmwood Park, hereinafter "Board," allege that the Board has improperly established their individual salaries since July 1, 1972 in contravention of *N.J.S.A.* 18A:20-4.2. Petitioners now demand judgment of the Board in the form of compensation they allege they should have received and they request an order of the Commissioner of Education requiring the Board to henceforth comply with the provisions of law with respect to their salaries. The Board denies the allegations set forth herein and avers that its determinations in regard to each of petitioners' salaries since July 1, 1972, has been and is in all respects proper and legal.

A hearing was conducted in this matter on June 19, 1974 at the office of the Essex County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner. Subsequent thereto, petitioners filed a memorandum of law in support of their position. The report of the hearing examiner is as follows:

Petitioners Stack and Wilson have been employed as school nurses by the Board for fourteen and fifteen years respectively. (Tr. 6-7) While each possesses

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a standard school nurse certificate, neither is in possession of a baccalaureate degree. Petitioners allege that by virtue of *N.J.S.A.* 18A:29-4.2 and the subsequent holding of the Commissioner in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County*, 1972 *S.L.D.* 577 they are entitled to have their salaries determined according to the rates set forth in the bachelor's scale of the Board's teachers' salary policy, rather than at the lower rates set forth in the non-degree scale.

In this regard, *N.J.S.A.* 18A:29-4.2 provides as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

The Commissioner held in *Lenahan, supra,* that:

> "***a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's,* shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.***" (*Emphasis in text.*)
> (1972 *S.L.D.* at 581-582)

In support of their claim that their salaries must be determined by the Board according to the rates set forth in its bachelor's degree scale of its teachers' salary policy, petitioners argue that the Board's past practice demands such relief as they now request. In this regard, petitioners argue that the Board's 1963-64 teachers' salary policy (J-1A) contained four special provisions, one of which is pertinent herein and is recited in full:

> "2. Teachers who have reached the 15th step of the Non-Degree guide to be put on the 15th step on the Bachelors Degree guide."

At this juncture, the hearing examiner observes that the Board's 1963-64 teachers' salary policy sets forth a non-degree scale, as well as a bachelor's, master's and master's plus 30 degree scale. It is also pointed out that since at least 1963-64, the Board has continued its adoption of a non-degree scale as part of its teachers' salary policy. (Tr. 19) (Yearly Salary Policies J-1; J-1A; J-1B; J-1C; J-10; J-1E; J-2)

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The Superintendent of Schools, who has been in the Board's employ since January 1971 (Tr. 14) testified as a witness called by petitioners that he had undertaken research into the Board actions for 1963-64 in regard to its special provision set forth above. As a result, the salaries of five teaching staff members, none of whom possessed a baccalaureate degree but all of whom were employed for at least fifteen years, were determined according to the bachelor's degree scale of the Board's teachers' salary policies each succeeding year. (Tr. 22, 35-36) The Superintendent testified that these five persons are now retired, the last one having retired in June 1973. (Tr. 35) No other non-degree teaching staff members have been compensated according to the bachelor's degree scale, however, since at least 1963-64. (Tr. 68, 70)

Presently, the hearing examiner observes that, in addition to petitioners herein, the Board also employs two other teaching staff members who do not possess baccalaureate degrees and whose rates of compensation are determined according to the Board's non-degree scale. (Tr. 19-20)

Petitioners argue that they are entitled to have their salaries established according to the bachelor's degree scale by virtue of the fact that the special provision of the 1963-64 salary policy, *ante*, has never been formally rescinded by any succeeding Board, albeit no other non-degree teaching staff members have been compensated at the bachelor's degree scale since 1963-64. Additionally they rely upon *N.J.S.A.* 18A:29-4.2 and subsequent determinations of the Commissioner.

The hearing examiner observes that while the special provision is explicitly set forth in the Board's salary policy (J-1A) for 1963-64, no such provision is set forth in any of the subsequent salary policies adopted by the Board: 1964-65 (J-1B); 1965-66 (J-1C); 1966-67 (J-1D); 1967-68 and 1968-69 (J-1E); 1969-70 (J-1F); 1970-71 (J-1G); 1971-72 (J-1E); 1972-73 (J-1); 1973-74 and 1974-75 (J-2). It is also a fact that from the time the five non-degree teaching staff members were transferred for salary purposes to the bachelor's degree scale in 1963-64, no other teaching staff members similarly situated were transferred. The hearing examiner also further observes that the five who were transferred remained there until their retirement, and that the last of these teachers retired at the close of the 1972-73 academic year. Consequently, the hearing examiner finds that the special provision set forth in the 1963-64 salary policy (J-1A) of the Board was not in effect for any additional teachers who reached the fifteenth step of the non-degree guide subsequent to 1963-64. In the hearing examiner's view, any relief to be granted petitioner must be anchored upon *N.J.S.A.* 18A:29-4.2, as of its July 1, 1972 effective date and as interpreted by the Commissioner in a series of decisions subsequent to its adoption. See *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County,* 1975 *S.L.D.* 389 (decided May 19, 1975); *Passaic Education Association et al. v. Passaic Board of Education, Passaic County,* 1975 *S.L.D.* 425 (decided May 29, 1975); *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975); *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, reversed and remanded State Board of Education June 4, 1975; *Elizabeth Stiles and*

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Grace Ferraioli v. Board of Education of the Borough of Ringwood, Passaic County, 1974 *S.L.D.* 1170; *Julia Anne Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434; *Evelyn Lenahan, supra.*

In *Ascough, supra, Passaic Education Association, supra, Schmidt, supra,* and *Martinsek, supra,* (upon reversal by the State Board of Education) it was determined that the boards of education had employed school nurses who were not in possession of degrees, but who held standard school nurse certificates. These persons were compensated according to non-degree scales in their respective salary positions. However, in each case the boards of education had also compensated other non-degree teaching staff members according to the higher rates set forth in the respective bachelor's degree scales. In each instance, it was held that the school nurses, as teaching staff members, were being discriminated against by such action.

In the matter, *sub judice,* the Superintendent testified that the last of the five teaching staff members without degrees who were being compensated according to the bachelor's scale retired at the close of the 1972-73 year. Consequently, for at least that year it would appear that there was discrimination since their salaries were established by the terms of the non-degree guide while at least one other teaching staff member without a degree, and for whatever reason, had her salary established according to the higher rates set forth in the bachelor's degree scale of the Board's salary policy. Consequently, it is the finding of the hearing examiner that for at least 1972-73, petitioners' salaries as well should have been established according to the bachelor's degree scale. No such finding, however, is made for subsequent years for there is no evidence that the Board continued to compensate any non-degree teaching staff member according to its bachelor's degree scale.

As the Commissioner stated in *Schmidt, supra*:

> "***Once a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.,* non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at p. 24)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner to which neither party filed objections nor exceptions.

The Commissioner adopts as his own the findings of the hearing examiner and determines that petitioners' salaries were improperly established for 1972-73 according to the lower rates set forth in the Board's non-degree salary guide. (J-1) This is so by virtue of the fact that at least one other teaching staff member

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without a degree was compensated by the Board according to its bachelor's degree salary guide for 1972-73.

Consequently, Petitioner Stack, by reason of her experience (Tr. 6) should have been compensated during 1972-73 according to the thirteenth step of the then existing bachelor's scale, or $12,500. Petitioner Wilson, by reason of her experience (Tr. 7) should have been compensated during 1972-73 according to the fourteenth step of the then existing bachelor's scale, or $12,850. The rates of compensation for both petitioners were erroneously established at $10,150 for 1972-73. (Tr. 6-7) Therefore, Petitioner Stack should be compensated in the amount of $2,350 and Petitioner Wilson the amount of $2,700.

The Commissioner also finds that while the Board could have continued petitioners on the non-degree guide for 1973-74 and subsequent years so long as they were not being discriminated against, their respective 1972-73 salaries may not be diminished except pursuant to the tenure law. *N.J.S.A.* 18A:28-5, *et seq.*

Accordingly, the Board of Education of the Borough of Elmwood Park, Bergen County, is hereby directed to forward to Petitioner Stack the sum of $2,350 and to Petitioner Wilson the sum of $2,700 at its next regularly scheduled pay period.

COMMISSIONER OF EDUCATION

December 15, 1975
Pending before State Board of Education

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Claire Haberman,

Petitioner,

v.

Board of Education of the Borough of Morris Plains, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Cassell R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent, Bangiola and Simon (Paul Bangiola, Esq., of Counsel)

Petitioner, a nontenured teacher in the employ of the Board of Education of the Borough of Morris Plains, hereinafter "Board," was informed by the Board on April 17, 1974 that she would not be offered a contract for the 1974-75 school year. Thereafter she demanded a statement of reasons from the Board and "***a hearing to determine whether or not those reasons are arbitrary and capricious or violate any of Petitioner's constitutional rights." (Petition of Appeal, at p. 2) The Board initially refused to afford the statement of reasons or a hearing in conformity with petitioner's request.

Subsequently, the Board did afford reasons and did offer petitioner a hearing, or the opportunity to appear before the Board. At this juncture petitioner avers that the reasons the Board gave for its failure to renew her contract were not the true reasons and that its action was arbitrary, capricious, and unreasonable. Petitioner has not availed herself of the Board's offer of a hearing or appearance but, instead, demands a hearing before the Commissioner of Education.

In this regard, the hearing examiner assigned to this matter by the Commissioner addressed the following letter to counsel for petitioner on February 24, 1975:

> "We are in receipt of your letter of February 6, 1975 in the above-entitled matter and its contents have been noted. Most importantly, you request '***that a hearing be conducted into this situation by the Commissioner.' In support of such requests you advance argument which contradicts the merits of the 'statement of reasons' given by the Board for its decision not to rehire petitioner.
>
> "However, your letter does not '***set forth reasons which would, or should, cause the Commissioner to assume jurisdiction***' in the matter and I find none from my own perusal of the record. (See conference agreements, paragraph 2.) To the contrary, it appears to me, at this juncture, that if there is jurisdiction for such a hearing, or 'appearance' to

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express a point of view, such jurisdiction lies with the local board of education and not with the Commissioner. *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) Furthermore, it would appear that the recent decision of the Court in *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood* [Docket No. A-2122-73], which was handed down by the Appellate Division of Superior Court on January 28, 1975 has an immediate application to a consideration of the procedure in the instant matter. According to the Court in *Sherman,* the *Donaldson* case is to be given '***only prospective application.'

"Thus, petitioner Haberman was not entitled on April 17, 1974, and cannot be entitled now as a matter of right, to a statement of reasons or to a subsequent appearance before the local Board of Education. It would appear to follow that absent an offer of proof that her non-rehire was occasioned by a proscribed constitutional reason she is not entitled, either to a hearing before the Commissioner or to a review by him of the decision of the Board.

"Accordingly, it is my opinion now that I should recommend to the Commissioner that the instant Petition be dismissed. However, such recommendation will not be forwarded until you have had an opportunity to show cause why the rationale therein set forth is faulty and should be set aside. If you request an oral argument in this regard, it will be promptly granted.

"In any event, I would appreciate a communication from you at your earliest convenience."

The oral argument of reference was requested by petitioner and was conducted on May 13, 1975 by the hearing examiner. The report of the hearing examiner is as follows:

The instant Petition was filed on or about the date of August 25, 1974 with the Division of Controversies and Disputes, State Department of Education. Thereafter the Board was required to furnish and did furnish an Answer which, as noted, *ante,* rejected petitioner's requests for a statement of reasons for her non-rehire and a hearing before the Board.

Subsequently, at a conference of counsel held on November 26, 1974, it was agreed that:

1. The Board would furnish a statement of reasons and petitioner would reserve judgment with respect to the need for a subsequent hearing before the Commissioner.

2. If a hearing was demanded by petitioner, she would set forth the reasons which would or should cause the Commissioner to assume jurisdiction.

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3. If petitioner requested an informal appearance before the Board, it would be granted to her.

In a letter of December 12, 1974, the Board did set forth its reasons for its decision not to rehire petitioner. The letter to petitioner's counsel is recited in its entirety as follows:

> "Please be advised that the Board of Education for the Borough of Morris Plains reached a decision not to offer to Mrs. Claire Haberman a teaching contract for the 1974-1975 school year for the following reasons.
>
> "As may be noted from the enclosed tabulations of enrollment, the School District consisted, in 1973-1974, of 44 class sections taught by 42 teachers, including *14* 'primary' class sections (i.e. grades 1 through 3). In 1974-1975, the District consists of 43 class sections taught by 41 teachers, and includes only *13* 'primary' class sections. This adjustment had been made in accordance with varying class sizes at different grade levels, and mandated the termination of services of one 'primary' teacher.
>
> "Mrs. Haberman was selected as the teacher who was not to be rehired based on the evaluation conducted of her by Mr. James Burrows in his capacity as Superintendent of Schools. The evaluation indicates:
>
> > "Although Mrs. Haberman has been pleasant and congenial with her colleagues, and has never failed to respond to administrative requests and directives, she has not fulfilled her role of potential effectiveness on a schoolwide basis, Hers is a tendency to work within the confines of her own classroom and has not (sic) shown a high level of appreciation for the problems of other teachers, specialists and non-teaching personnel. Mrs. Haberman came to this district with 'veteran status' and we would have hoped that her school could have received greater benefit of her many years of experience.
>
> "It was this failure to work effectively on a schoolwide basis that served as the predominant factor in the Board's decision that Mrs. Haberman was the teacher whose position had been eliminated.
>
> "I trust this statement will be satisfactory."

Following receipt of the letter, however, petitioner did not request a hearing or appearance before the Board but in a letter of February 6, 1975, requested a hearing before the Commissioner and alleged that the reasons the Board gave in its letter of December 12, 1974, were not the true reasons for her non-rehire. Specifically she alleged "***that one primary class teacher resigned, thus, had that particular teacher's spot not been filled by hiring an outside teacher, the attrition would have been accomplished without the necessity of terminating her employment.***" She further averred that she had performed meritorious district-wide services and that the Superintendent's statement that "***she had not fulfilled her role of potential effectiveness on a schoolwide

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basis***" would be refuted at a hearing. (See letter of petitioner, February 6, 1975.)

There followed on February 24, 1975, the letter of the hearing examiner to counsel for petitioner, cited in its entirety, *ante,* and letters of reply from petitioner dated March 13, 1975, and from the Board on March 26, 1975. In these letters and in the oral argument the positions of the parties are set forth.

In petitioner's view, the application of the principles enunciated by the Court in *Donaldson v. North Wildwood, supra,* to the instant matter do not constitute a retroactive application since the Petition in *Donaldson* was concerned with the 1969-70 school year and the instant matter is concerned with a notice of April 17, 1974. (Note: The Donaldson decision of the Supreme Court was handed down on June 10, 1974, and provided that "hereafter" local boards of education would be required to afford reasons for non-rehire of nontenured teachers and to afford the opportunity for appearance before the board on request.) Further, petitioner argues that the present matter is not concerned with whether *Donaldson* should be given retroactive or prospective application – since reasons were afforded petitioner in the matter herein – but with "***whether or not the reasons are true in fact or sufficient.***" (Tr. 5) Petitioner maintains that an "appearance" before the Board would not be determinative in this regard and that, therefore, the Petition of Appeal is properly before the Commissioner at this juncture.

The Board maintains that there is an insufficient basis in the Petition of Appeal for a hearing before the Commissioner since

> "***in this case, as in *Ruch,* 'petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations.' Petitioner Haberman has merely alleged that 'the reason provided her is insufficient at best and untrue at worst.'***" (Letter of the Board to the Hearing Examiner, March 26, 1975)

Further, the Board argues that its controverted action herein was taken before the time of the Court's decision in *Donaldson* (when reasons were not required to be afforded to nontenure teachers whose contracts were not renewed) and that the Board's subsequent statement of reasons should not now be the subject of an adversary proceeding before the Commissioner.

The hearing examiner has considered such arguments in the context of the facts set forth, *ante,* and at this juncture, by way of summary and emphasis, sets forth the following facts, observation, and conclusions of law:

1. Petitioner, as a nontenured teacher was not entitled by existing law or practice to a statement of reasons and a hearing before the Board at the time in April 1974 when the Board, by statutory mandate, was required to offer her a contract for the 1974-75 school year or "[a] written notice that such employment [would] not be offered." *N.J.S.A.* 18A:27-10

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2. Such statements of reasons for decisions of local boards of education concerned with the non-rehire of nontenured personnel were required to be afforded by local boards subsequent to the decision of the Court in *Donaldson, supra,* on June 10, 1974.

3. Thereafter, whether required or not, the Board did give petitioner reasons why her contract was not renewed.

4. Petitioner now alleges that such reasons were not the true reasons and although she has not requested an appearance before the Board she demands an adversary hearing before the Commissioner because "***there may be some reason underlying the whole transaction which perhaps only the Commissioner could ascertain.***" (Tr. 10)

The hearing examiner concludes that such an argument, or the other arguments of petitioner, are not sufficient to justify or warrant an adversary hearing by the Commissioner. Even assuming, *arguendo,* that the reasoning of the hearing examiner's letter of February 24, 1975, *ante,* is incorrectly founded, petitioner was given reasons by the Board for its failure to renew her contact. One of those reasons was a subjective judgment by the Superintendent of Schools that petitioner had "***not fulfilled her role of potential effectiveness on a schoolwide basis.***" (Letter of December 12, 1974, *ante*)

If such a subjective judgment may trigger a request for, and the granting of, a plenary hearing before the Commissioner and require a subsequent decision concerned with the merits of the judgment, then the discretion of local boards to employ personnel is severely compromised. The distinction between the employment or the discharge of nontenured or tenured personnel is a distinction without a difference. In either case, the local board is left to its proofs–of reasons or charges–and, in effect, the mere status of employment confers on those who have not met the precise conditions for the privilege of a tenured accrual (*N.J.S.A.* 18A:28) all of the privileges of those who have.

The hearing examiner cannot conclude from a review of the Court's opinion in *Donaldson, supra,* that such a result was intended since therein the Court cited *George Ruch v. Board of Education of Greater Egg Harbor, Atlantic County,* 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202 in support of an argument that "***the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons***" was an indication of how negligible such fears were. In *Ruch,* as in the matter herein, the Commissioner and the Court were concerned with a subjective judgment made by a local board of education. In *Ruch,* as herein, reasons for non-retention had been afforded a nontenured teacher, although such reasons were not required, and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reason in *Ruch* to order an adversary hearing and said:

"***The fact that respondent made available to petitioner the report of

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> his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing, such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***" (1968 *S.L.D.*, at p. 10)

And further,

> "***While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U.S. Pipe and Foundry Company v. American Arbitration Association,* 67 *N.J. Super.* 384 (*App. Div.* 1961) Petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective. There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administration and the Board of Education considered the report and, although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.***" (*Id.*, at pp. 10-11)

The Court in *Donaldson* commented favorably on the Commissioner's decision in *Ruch* and said that the dismissal of the Petition by the Commissioner was grounded in an

> "***opinion by the Commissioner which set forth substantive and

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> procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.***" (65 *N.J.* at 247)

(See also *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood,* Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975.) The hearing examiner's conclusion is grounded in just such "substantive and procedural principles." Petitioner was afforded reasons for her non-rehire which in part at least were grounded in subjective judgment. She was offered an "appearance" before the Board. She is not entitled at this juncture to a "plenary hearing as a matter of right."

Accordingly the hearing examiner recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the reply and objections pertinent thereto filed by petitioner. Such reply does not aver that the subjective judgment exercised by the Superintendent of Schools with respect to petitioner's continued employment "***in or of itself triggers the right to a plenary hearing***" but that the reasons afforded petitioner in this instance, including the one contained in the subjective judgment, were not the true reasons to which she is entitled. (Reply of Petitioner, at p. 2) Thus, petitioner restates her request for an adversary hearing before the Commissioner in order that she might prove her contentions with respect to the truth of these reasons. Further, petitioner cites two decisions of the Commissioner in support of an avowal that decisions of local boards of education, with respect to employment, may be subjective, but may not be arbitrary, capricious, or unreasonable and must be subject to statutory contractual and constitutional limitations. *Marilyn Stein v. Board of Education of the Borough of North Bergen,* 1975 *S.L.D.* 524 (decided July 7, 1975); *Antell et al. v. Board of Education of Newark,* 1960 *S.L.D.* 141

Thus, in general, petitioner agrees in principal respects with certain views of the hearing examiner and with certain cautions expressed in prior decisions of the Commissioner. There is an agreement that subjective judgment may be the grounds for a decision against renewal of the contract of a nontenured teaching staff member. There is no disagreement with the view that the hiring practices of local boards must be considered ones subject to certain limitations.

A principal question arises in the instant matter, however, from petitioner's contention that the subjective judgment given as one reason for petitioner's non-rehire was a false reason. The question is whether any such reason afforded to any nontenured teacher would ever be accepted as a true reason without resort to an adversary hearing and a presentation of proofs. The Commissioner holds that acceptance of similar subjective judgments would be

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the exception not the rule – and that the Court's opinion in *Donaldson, supra,* that any affording of reasons to nontenured personnel would not constitute an "undue burden" would prove to be false. The phrase in context is:

> "***The handling of *Ruch* at all levels indicates how negligible are the fears of tenure impairment and *undue burden* expressed by those who have thus far insisted on the withholding of reasons.***" (*Emphasis supplied.*) (at p. 248)

In this context, and to avoid an "undue burden," the Commissioner reaffirms the view previously expressed by the Commissioner and the Court that an "affirmative offer" of proof that a local board of education has acted for a proscribed reason to deny employment to a nontenured employee is a basic prerequisite to consideration in an adversary proceeding before the Commissioner. *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975; *Barbara Hicks v. Board of Education of the Township of Pemberton,* 1975 *S.L.D.* 332 (decided May 6, 1975) He finds no such offer herein and in fact petitioner's argument that a hearing is justified because "***there may be some reason underlying the whole transaction which perhaps only the Commissioner could ascertain ***" (Tr. 10) appears to confirm an opinion that affirmative proof either could not or would not be offered if a hearing were scheduled as petitioner requests.

Accordingly, the instant Petition is dismissed.

COMMISSIONER OF EDUCATION

December 15, 1975

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In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Barclay P. Malsbury, Esq.

For the Respondent, Satterthwaite & Satterthwaite (Henry F. Satterthwaite, Esq. of Counsel)

This matter comes before the Commissioner of Education for review as a sequel to a decision by the Commissioner in November 1972. *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County,* 1972 *S.L.D.* 627 Therein the Commissioner determined that the Petition of Appeal for severance was "premature," and found that "good and sufficient" reason had not been advanced by the Upper Freehold Regional Board, hereinafter "Regional Board," in support of its request as required by statute *N.J.S.A.* 18A:38-13. (1972 *S.L.D.* at 637) The Commissioner also found that his denial of the request might well "***be rendered obsolete by future events within a rather short period of time***" and he retained jurisdiction in the matter "***through June of 1974.***" (at p. 637) Further, the Commissioner directed the Washington Township Board to "***explore in depth the alternatives to the present sending-receiving relationship***" and indicated that an updated review of the relationship between the districts would be required subsequent to June 1974.

Pursuant to the requirement in this latter respect a conference of counsel was conducted at the State Department of Education, Trenton, on June 17, 1974 by a representative of the Commissioner, and it was agreed that data necessary for review would be submitted for Summary Judgment by the Commissioner. Such data has now been submitted and the Commissioner determines that it indicates the situation concerned with the relationship between the districts has not been substantially altered in the interim since the prior decision. In fact, it would appear from the data submission that certain expressed fears of the Regional Board with respect to population growth in Washington Township have not materialized and that the pupil population from Washington Township in September 1974 was substantially lower than had been estimated. This data and other data of pertinence may be succinctly set forth as follows:

1. At the hearing of June 12, 1972, it was estimated by the Regional Board that 235 pupils from Washington Township would be enrolled in the Regional High School in 1974. (See 1972 *S.L.D.* 629.) In fact only 194 pupils are said to have been in attendance in that month. (See School Building Study of Washington Township dated January 1975, hereinafter "R-2.") In a letter of

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February 14, 1975, the Washington Board states the enrollment had dropped to 186.

2. At the hearing on June 12, 1972, it was estimated by the Regional Board that 1,163 pupils would be in attendance in the Regional High School in the 1974-75 academic year. (Tr. I-29) "A Study of the Utilization of Educational Facilities in the Upper Freehold Regional School District" dated June 20, 1974, hereinafter "P-16," indicates that the enrollment would total approximately 1,050.

3. At the hearing of June 12, 1972, the Regional Board projected a substantial general population growth in both the Regional District and in Washington Township. (See 1972 *S.L.D.* 628.) Exhibit R-2 indicates that, at least in Washington Township, such growth has not occurred and in fact is not presently either expected or considered probable. (See R-2, Table III-4.) Similarly, the Commissioner can find no evidence in the record before him that growth of the general population in the Regional district has been as rapid as projected. (Tr. I-48)

Despite such facts, however, the Regional Board maintains its requests for severance of Washington Township as a sending district and maintains that the Washington Township Board has not, as recommended, presented an alternative plan for the education of its high school pupils.

This latter avowal appears to be true although R-2 is certainly representative of an attempt by the Washington Board to objectively assess its problems and to plan an educational program for future years. (See R-2, at Section VI.) Similarly, however, the Commissioner observes that the Regional Board presents no evidence that it has acted to expand present facilities in the interim since the 1972 decision, despite the finding therein that some kind of building program was required "***regardless of whether or not Washington Township leaves or stays as a sending district.***" (at p. 636)

The Commissioner has considered such facts and arguments and finds no reason at this juncture to alter his prior decision in this matter. While there is clearly need for continued assessment of the problems of overcrowded conditions in the Regional High School which have occasioned double sessions and/or other special scheduling procedures there is no basis to reverse now the determinations which were set forth in 1972.

Accordingly, the Commissioner dismisses the Petition at this juncture without prejudice to the advance of a new Petition which may be pertinent in the context of new conditions. The Commissioner does determine, however, that there is a variance in the estimated functional capacity of the Regional High School as contained in the document P-16 (1,000 pupils) and in testimony and other evidence adduced at the June 12, 1972 hearing (786 pupils), and he concludes that there is a need for clarification in this respect. Therefore, he hereby directs the Bureau of Facility Planning Services of the State Department

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of Education to conduct a review of such capacity and to submit a report to the Regional Board and the Commissioner for inclusion in the instant record.

COMMISSIONER OF EDUCATION

December 16, 1975

Board of Education of the Borough of Union Beach,

Petitioner,

v.

Mayor and Council of the Borough of Union Beach, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mary Lou Ackerman, *Pro Se*

For the Respondent, Healy and Falk (Patrick D. Healy, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Union Beach, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Union Beach, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on September 12, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held March 11, 1975, the Board submitted to the electorate proposals to raise $976,873 by local taxation for current expenses and $96,504.07 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of Union Beach in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Monmouth County Board of Taxation an amount of $904,873 for current expenses and $96,504.07 for capital outlay. The pertinent amounts in dispute are shown as follows:

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	Current Expense
Board's Proposal	$976,873
Council's Proposal	904,873
Amount Reduced	$ 72,000

The Board documents its need for the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J130a	Bd. Members' Exp.	$ 4,000	$ 3,000	$ 1,000
J130f	Adm. Exp.	1,100	700	400
J230c	A-V Mats.	10,550	5,550	5,000
J240	Teach. Supls.	25,000	22,000	3,000
J250a	Misc. Supls. Instr.	4,000	3,000	1,000
J520a	Trans. Reg.	49,200	46,000	3,200
J640d	Tel. and Telegraph	4,500	4,000	500
J720c	Contr. Servs. Equip. Repair	4,000	3,500	500
J730a	Repl. Instr. Equip.	4,800	3,800	1,000
J730c	Purch. Instr. & Noninstr. Equip.	15,400	10,000	5,400
J740a	Other Exp. Grd. Maint.	2,000	1,000	1,000
J870	Tuition	815,000	765,000	50,000
	TOTALS	$939,550	$867,550	$72,000

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

The Board Secretary testified that the Board's budget is inadequate by reason of the fact that it has shown a deficit in its current expense free appropriations balance for the past two years. The June 30, 1974 audit report

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confirms that testimony for the 1973-74 school year. Council did not refute the Board's testimony that the June 30, 1975 audit report would likewise show a deficit in the current expense free appropriations balance.

The Board Secretary testified further that this deficit has previously been met by the Board, by paying its current tuition obligation to the Borough of Keyport with the next year's school appropriations.

At the request of the Assistant Commissioner of Education in charge of Controversies and Disputes, a special audit was made of the Board's budget in regard to the Board's deficits and its tuition payments to Keyport by representatives of the Division of Administration and Finance.

That report, marked by the hearing examiner as Exhibit A, clearly shows that the $765,000 allowed by Council in line item J870 for tuition purposes is more than adequate to meet the Board's tuition needs, including its 1972-73 tuition adjustment obligation.

The hearing examiner recommends, therefore, that the $50,000 reduction in this line item be allowed to stand.

The hearing examiner further recommends, however, that the remaining sum of $22,000 deemed appropriate for reduction by Council be restored. This recommendation is founded in a consideration of the total appropriations available to the Board and in the context of two successive deficits incurred by the Board in the 1973-74 and 1974-75 academic years.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by the Board pursuant to *N.J.A.C.* 6:24-1.16.

The hearing examiner's report reveals that a special audit of the Board's budget was made by representatives of the Division of Administration and Finance of the State Department of Education pursuant to a request made by the Assistant Commissioner of Education in charge of Controversies and Disputes. That report is in sharp conflict with the exceptions filed by the Board. (Exhibit A)

Under these circumstances the Commissioner will rely on the reports of the hearing examiner and the Department of Education audit team.

The Commissioner determines, therefore, that the certification of appropriations necessary for current expense school purposes for 1975-76 made by Council is insufficient by an amount of $22,000 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that the Monmouth County Board of Taxation add to the certification for school purposes made by Council the sum of $22,000, so that

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the local tax levy for current expenses of the school district for the 1975-76 school year shall be $926,873.

COMMISSIONER OF EDUCATION

December 17, 1975
Pending before State Board of Education

In the Matter of the Special School Election Held in the Township of North Brunswick, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of a special election held on December 2, 1975 in the North Brunswick School District, authorizing the Board of Education, hereinafter "Board," to undertake a capital project for the purposes of the improvement of its athletic facilities and to expend therefore a sum not to exceed $350,000, which sum was proposed to be raised through the issuance of bonds in that amount, were as follows:

	At Polls	Absentee	Total
YES	662	9	671
NO	675	1	676

Pursuant to a request submitted by the Secretary of the Board, a hearing examiner appointed by the Commissioner of Education conducted a recheck of the totals on the voting machines used in this election. The recheck was made at the voting machine warehouse of the Middlesex County Board of Elections in Edison on December 11, 1975 at 11 a.m.

The hearing examiner reports that the recheck confirms the totals set forth above.

* * * *

The Commissioner has read the report of the hearing examiner and determines that the proposal submitted to the citizens of the School District of the Township of North Brunswick at the special school election on December 2, 1975, failed to be approved by the voters.

December 17, 1975

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In the Matter of the Tenure Hearing of Vincent J. Guarino, School District of the City of Newark, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Barry A. Aisenstock, Esq.

For the Respondent, C. Robert Sarcone, Esq.

On February 1, 1974, the City of Newark Board of Education, hereinafter "Board," certified to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, a series of nineteen charges against respondent, a tenured teacher in its employ. These charges may be categorized as charges of inefficiency, incapacity, conduct unbecoming a teaching staff member, and other just cause which, the Board avers, if proven true, would warrant respondent's dismissal. Respondent denies each and every charge against him and seeks immediate reinstatement to his teaching position from which he has been suspended.

Hearings were conducted in this matter on June 17 and 18, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed written summarizations and supplemental information. The report of the hearing examiner is as follows:

The time lapse between the certification of the charges by the Board, February 1, 1974, and the dates of hearing, June 17 and 18, 1975, is attributable to a lengthy trial in which counsel for respondent had been involved. An agreement was reached between the parties that this matter would move to hearing as soon as possible. The earliest possible dates of June 17 and 18, 1975, were then set down. Furthermore, subsequent to the Board certifying the charges to the Commissioner on February 1, 1974, the Board's then counsel-of-record, Victor A. DeFilippo, Esq., died.

It is also observed that on May 14, 1974, oral argument was heard on a Motion to Dismiss those charges dealing with inefficiency for failure of the Board to provide respondent with ninety days to correct the alleged inefficiencies pursuant to *N.J.S.A.* 18A:6-14. Thereafter, however, the parties requested that the Commissioner's decision on the Motion be held in abeyance. The request was granted.

Respondent has been employed by the Board for twenty years. Since 1970, he has been employed as a swimming instructor and assigned to Central High School. (Tr. II-88) Respondent is a properly certified teacher and also possesses a Water Safety Instructor's certificate issued by the American Red Cross. (Tr. II-90) No question is raised herein as to respondent's academic qualifications with respect to his position of swimming instructor.

The event which triggered the charges against respondent was a tragic

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occurrence during one of his swimming classes on December 14, 1973. An eleventh grade pupil, "N.J.," who was assigned to respondent's swimming class that day drowned in the pool. From this tragedy, the Board prepared and certified the nineteen charges, *sub judice,* against respondent.

The hearing examiner proposes to group the nineteen charges into one general category and to set forth the principal evidence pertinent thereto. It is necessary, however, to establish the factual background of uncontroverted events which occurred on that day.

The chairman of the Board's department of physical education and health testified that as of the academic year 1973-74 participation in swimming was mandatory upon all pupils. (Tr. II-27) It appears from the record that the total number of pupils assigned to respondent for swimming instruction that year had been divided into several groups and that each group, consisting of fifteen pupils, attended swimming classes for a certain number of weeks. The collective testimony of the witnesses herein reflects that December 14, 1973, was the first day of swimming instruction for the group to which N.J. had been assigned. (Tr. I-7, 47, 62, 74; Tr. II-93-96)

During the course of that swimming class, N.J. was noticed lying on the bottom of the twelve-foot-deep section of the pool. Respondent and another pupil, after several unsuccessful attempts to get N.J. to the surface, got him to the pool deck where respondent and another teacher, who happened on the scene, administered artificial respiration. Thereafter, the Newark Emergency Squad, in response to respondent's call, appeared and they too administered first aid through the use of a resuscitator. All these efforts were in vain for N.J. was dead on arrival at Martland Medical Center. A subsequent autopsy (C-4) revealed that death was due to "***asphyxia due to drowning in swimming pool; accidental; visceral congestion.***"

It is stipulated by the parties that an investigation of the drowning was undertaken by the Newark Homicide Squad and the Homicide Squad of the Essex County Prosecutor's Office. The investigation revealed no evidence to sustain a criminal charge of manslaughter or homicide against respondent. (Tr. I-2-3)

With respect to the tenure charges being considered herein, four pupils who were in the pool with N.J. that day testified on behalf of the Board. Another pupil, J.G., also was present during that swimming class and did testify; however, he did not participate in the class itself. The collective testimony of the pupils, including that of J.G., is as follows:

On December 14, 1973, the first swimming class was held for this group of pupils and, in terms of swimming skills, the group was categorized by respondent as advanced beginners. (Tr. II-93-94) The pupils testified that they reported to the locker room to change into their swim trunks. (Tr. I-12, 29-30, 42, 60) Upon entering the pool area, it appears as if respondent instructed at least two pupils to return to the locker room to take showers prior to entering the pool. (Tr. I-14) Among the pupils testifying herein, there are conflicting statements with

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respect to whether respondent was standing at the gate entrance to the pool taking attendance (Tr. I-13, 26), or whether respondent was actually in the pool area itself standing near an office door (Tr. I-29-30) or standing between the office door and the pool gate. (Tr. I-61) Respondent, on the other hand, appears to clearly remember that upon opening the locked pool gate he stationed himself on the outside of that gate and checked each pupil who entered the pool area. (Tr. II-94-95)

The four pupils who had participated in the swimming class with N.J. testified individually that they could swim. (Tr. 115, 29, 49, 67) Each of the four pupils' testimony also reflects that N.J. knew how to swim. (Tr. I-18, 31, 53-54, 68) The fifth pupil who testified herein had been excused from participation that day by the school nurse. (Tr. I-74-76) J.G. was one of four pupils who sat on a bench in the pool area during the class. Respondent directed the other three nonparticipating pupils to sit on the bench because they reported unprepared. (Tr. II-97) Consequently, there were five pupils swimming in the pool and four pupils sitting on a bench during the class.

The five pupils entered the pool at the shallow end, which has a depth of four to four and one-half feet. (J-1) According to the testimony of the pupils and respondent, the pupils were instructed to swim across the pool while respondent, standing on or near the pool apron and within two feet of the water, observed and judged their respective swimming skills: arm stroke, basic kick, and overall swimming ability. (Tr. I-9, 15-16, 30; Tr. II-99) Respondent determined that while each of the five pupils in the water could swim, their kicking needed improvement. (Tr. II-99-101) Consequently, he directed the pupils to practice kicking through the use of kickboards and to do so in the shallow area. (Tr. I-16; Tr. II-99)

The hearing examiner relies on the testimony of respondent with respect to determining the chronology of these events as they occurred. The class assembled at 1:05 p.m., after which the pupils took between five and ten minutes to change. They reported to the pool between 1:10 and 1:15 p.m. (Tr. II-93, 103) Respondent testified that he had instructed the five pupils to practice their kicking at about 1:15 p.m. which practice lasted until 1:25 p.m. (Tr. II-100) Since the class was scheduled to end at 1:45 p.m., instruction would have had to cease at approximately 1:35 p.m. to allow time for the pupils to get dressed. (Tr. II-103)

Subsequent to the ten-minute practice session with the kickboards, the pupils were allowed what respondent refers to as recreational swimming. (Tr. II-101) Recreational swimming allowed the pupils the unstructured but supervised use of the length of the pool, the deepest part of which is twelve feet. (J-2) Respondent testified that he allowed recreational swimming because he had expected fifteen pupils to participate in the class but with only five being prepared, he decided that if the four pupils sitting on the bench saw that the other pupils were enjoying themselves, that might be an incentive for them to henceforth report to swimming class prepared. (Tr. II-101) Respondent testified that he had remained in the pool area and at the deep end at all times during recreational swimming. (Tr. II-102)

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It was during this ten-minute period of recreational swimming that the tragedy occurred.

The pupils testified that four of the five pupils swam to the deep end of the pool (Tr. I-19) while one, D.H., remained in the shallow end. (Tr. I-30) Each of the four pupils now in the deep part were swimming and, in fact, saw N.J. swimming and treading water. (Tr. I-54) Their testimony is that he was not struggling nor showing any signs of difficulty. (Tr. I-18, 55-56) Respondent testified that he, too, saw N.J. swimming, submerging, diving, and treading water. (Tr. II-104) One of the three pupils who was with N.J. testified that he had noticed him dive into the water while another testified he heard the splash. (Tr. I-31, 68) Respondent testified that he, too, saw N.J. dive into the water. (Tr. II-105) It was from this dive that N.J. failed to surface.

It appeared to two of the pupils that N.J. was simply holding his breath underwater (Tr. I-31, 57) and they did not believe anything was wrong during the dive or immediately thereafter. (Tr. I-37, 55-56) Another of the three pupils testified that someone asked about N.J. and it was then that he was noticed lying at the bottom of the pool. (Tr. I-9)

At this juncture, the hearing examiner finds the following testimony of respondent substantially the same as the testimony of the pupil witnesses for the Board.

As soon as N.J.'s body was seen on the bottom of the pool, respondent, who had been standing nearby and in the pool area, removed his wind-breaker type jacket and kicked off his sandals. He immediately dove into the water but could not reach the body because of the water pressure. Respondent surfaced and immediately went back down to retrieve the body. Again, respondent could not reach the bottom because of the water pressure. (Tr. II-108) Respondent surfaced and yelled for someone to throw him the shepherd's crook. (Tr. II-109) The hearing examiner observes that a shepherd's crook, a swimming safety device, is a long light pole with a blunted hook at one end and large enough to encircle a victim's body. It is also important to observe at this juncture that respondent testified he could not have used the shepherd's crook while standing on the edge of the pool because the crook was only eight feet long and N.J. was lying in twelve feet of water. It is further observed that respondent had requested an extension for the crook and other safety equipment for the pool but had received none. (Tr. II-107)

After the shepherd's crook was thrown to respondent while he was in the water, respondent yelled for assistance. A pupil dove into the water and between the two of them got N.J. to the surface and to poolside. (Tr. II-109) Respondent estimated that approximately one minute elapsed from the time he saw the body on the pool bottom to the time it was placed at poolside. (Tr. II-110) Thereafter, artificial respiration was administered by respondent and another teacher who arrived on the scene, in addition to the Newark Emergency Squad's use of its resuscitator. (Tr. II-111) These efforts were in vain.

This concludes the factual presentation of the matter herein and it is from

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this occurrence and factual presentation that the Board grounds its allegations that respondent was inefficient, and his conduct reflected not only unbecoming conduct, but incapacity and other just cause, all of which or separately would warrant his dismissal. In their essence, the nineteen charges allege that respondent failed to properly supervise the pupils during the swimming class, that he failed to follow his approved lesson plans for that day, and that he failed to have adequate safety devices present in the pool area.

The Board argues that respondent failed to provide proper supervision by virtue of the fact that N.J. drowned, coupled with what the hearing examiner finds to be the unproven allegation that respondent was "***not observing the pool***." (Board's Memorandum, at p. 1) The hearing examiner finds that the Board's sweeping allegation of improper supervision has not been sustained by the evidence. Respondent's credible testimony clearly shows that he was present in the pool area and stationed at the deep end during recreational swimming. Furthermore, respondent testified, as did two other pupils, that he saw N.J. dive into the water and submerge. Obviously, what respondent did not see or have knowledge of, nor did any of the pupils who were swimming with N.J., was the tragic fact that subsequent to that dive something occurred to N.J. which resulted in his drowning. In its allegations, the Board does not specify what respondent could have or should have done by way of specific in-pool supervision to prevent the accident.

With respect to not following his own lesson plans on that day, which had been procedurally approved by his department chairman (Tr. II-32-33), respondent testified that he did deviate from his established plan because of the presence of only five pupils for swimming instruction. (Tr. II-101) While the department chairman testified that respondent's plan for December 14, 1973, called for the teaching of beginning skills of kicking, pulling, arm stroke, crawl stroke, and safety skills, respondent's testimony reflects that he did have pupils practice their kicking, that he informally discussed safety with the pupils, and that he observed their respective swimming skills prior to recreational swimming. (Tr. I-9, 15-16; Tr. II-99, 116) The hearing examiner does not find this deviation to be in any sense conduct inappropriate to a teaching staff member. It is fallacious to argue that such a reasonable deviation represents unbecoming conduct or incapacity which resulted in a pupil's death.

With respect to the lack of safety equipment at poolside, the department chairman at the time the pool was opened in 1971 testified that he had requested safety items such as shepherd's crook, leaning poles, reaching poles, ring buoys, first aid kit, resuscitator, and teaching aids. As of June 1972, he had received kickboards and the shepherd's crook. (Tr. II-85) Respondent testified that he himself requested of the present department chairman various items of safety equipment for use in the pool, but received no additions to the already present shepherd's crook and kickboards. (Tr. II-107)

The hearing examiner finds that the Board failed to sustain the burden with respect to a charge that respondent failed to have adequate safety equipment at poolside when it is clear that such equipment was requested of his superiors but never received.

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Upon a thorough review of the relevant testimony and evidence before him, the hearing examiner finds that the Board, in each and every respect, failed to sustain any charge of improper conduct on the part of respondent which contributed in any fashion to the tragic and accidental death of N.J.

Accordingly, the hearing examiner recommends that the tenure charges against respondent be dismissed and that he be restored to his former position in the employ of the Board.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner to which neither party filed objections, exceptions, or replies.

The Commissioner accepts as his own the finding of the hearing examiner that the Board failed in its proofs to sustain the allegation that respondent's conduct on December 14, 1973, was a contributing factor in the tragic accident which occurred. The record clearly discloses that once N.J. dived into the water and the subsequent emergency developed respondent reacted quickly in his rescue effort. Respondent's efforts as well as the efforts of the Newark Emergency Squad failed, however, to forestall the ultimate tragedy. In such circumstance the Commissioner holds that nothing can be gained by improperly placing blame on one whose actions, as reflected by the total testimony elicited herein, were consistent with his duties as a swimming instructor.

The Commissioner views with dismay, however, the apparent lack of safety equipment and first aid supplies in the context of respondent's repeated requests for such materials. Therefore, the Commissioner directs the Board to review its policies with respect to swimming instruction and to insure the availability of sufficient safety equipment and first aid supplies in the immediate poolside area.

The Commissioner further directs the Board of Education of the City of Newark to reinstate Vincent J. Guarino to its employ and to further assign him a position within the scope of his certificate with all emoluments which are his due, including salary less mitigation, which he would have received had he not been suspended on February 1, 1974.

COMMISSIONER OF EDUCATION

December 17, 1975

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Pasquale Maffei,

Petitioner,

v.

Board of Education of the City of Trenton et al., Mercer County.,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, James Logan, Jr., Esq.

For the Respondents, James J. McLaughlin, Esq.

Petitioner, an employee of the Board of Education of the School District of the City of Trenton, Mercer County, hereinafter "Board," appeals to the Commissioner of Education for temporary relief, *pendente lite,* restraining the Board from adopting a resolution setting forth contract terms for the employment of a Superintendent of Schools, who was appointed by an action of the Board at a special meeting held September 7, 1972.

The City of Trenton, a municipal corporation of the State of New Jersey, hereinafter "City," filed a Petition of Appeal on September 26, 1972, against the Board of Education, requesting similar *pendente lite* relief in the form of a restraining order by the Commissioner.

On September 26, 1972, the return date of the Notice of Motion for temporary relief, counsel for petitioner, the Board, and the City presented oral argument on the Motion before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. Counsel for petitioner filed an affidavit executed by petitioner in support of his Motion. The report of the hearing examiner is as follows:

Petitioner alleges, *inter alia,* in his pleadings that the action taken by the Board at a special meeting held September 7, 1972, appointing a Superintendent of Schools for the School District, was substantively improper and procedurally defective and should, therefore, be nullified by the Commissioner.

Petitioner also alleges that three members of the Board, along with certain other persons, conspired to have charges signed against him in order to prevent fair consideration by the Board of his candidacy for the position of Superintendent of Schools. Petitioner argues that should he prevail in proving his allegations on the merits after plenary hearing, the votes cast by these three members of the Board will be disqualified, by virtue of personal conflict of interest, from being counted as part of the total vote of five ayes and no nays by which the Board voted the appointment of a Superintendent on September 7, 1972.

For the purpose of this Motion, petitioner alleges that the Board will meet

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on September 26, 1972, and will adopt a resolution setting forth certain contract terms, including salary, moving expenses, and a three-year term of office, for the successful candidate who was appointed Superintendent of Schools on September 7, 1972. Therefore, petitioner makes application for temporary relief in the form of a restraint against the Board from adopting such resolution until such time that the issues raised in the Petition of Appeal are decided by the Commissioner.

Petitioner argues that irreparable and substantial harm will result to him, specifically by adversely affecting his status as a candidate for the Superintendency, if the Board is not enjoined from its proposed course of action. Also, petitioner maintains that the citizens of the School District of the City of Trenton will suffer irreparable harm if the Board members, as their representatives, are permitted to enter into a contract of employment for a three-year term, containing substantial salary remunerations but no "escape" clause.

In support of his argument that the Board's proposed action would cause him irreparable harm, as shown by the aforementioned allegations, petitioner cites *Cullum v. Board of Education of the Township of North Bergen, Hudson County,* 15 *N.J.* 285 (1954), and *Mackler v. Board of Education of the City of Camden, Camden County,* 16 *N.J.* 362 (1954).

Counsel for the City of Trenton argues that a Stay should be granted by the Commissioner until the pending Petition of Appeal is decided on its merits. The City contends that, even if the Commissioner finds the Board's September 7, 1972 action appointing a Superintendent invalid and consequently nullifies the resulting contract of employment, a certain sum of money would have been expended by the Board for the costs entailed in transporting the Superintendent's household to New Jersey. These costs, the City contends, could not be recouped and therefore the taxpayers would suffer irreparable harm. Also, the City contends that additional legal costs could befall the taxpayers of the City because of litigation between the Superintendent and the Board, which may result if the Commissioner nullifies both the appointment and the contract approved by the Board.

The Board answers that neither petitioner nor the City meet the test of a clear showing that irreparable harm would be caused to them if the Board is permitted to exercise its discretion by adopting the aforementioned resolution setting contract terms for the previously-appointed Superintendent. The Board asserts that if the Commissioner finds the Board's appointing action taken September 7, 1972, was illegal, then any additional Board actions pursuant to the appointment would also be null and void. Consequently, says the Board, the Superintendent would only be entitled to receive the specific amount of salary he had earned and nothing more.

The Board contends that irreparable harm would, in fact, result for the School District if the Commissioner enjoins the Board from its proposed action. The Board avers that it conducted an extensive and time-consuming search for a new Superintendent, and that if it is restrained from approving this appointee's

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contract of employment, the result could be that he would decline to accept the position. The Board states that the School District has been without the services of a Superintendent for several months, and that no individual is presently serving in an acting capacity until the actual employment of the new Superintendent commences. The failure of the new appointee to accept the position as a result of a restraint by the Commissioner, the Board avers, could leave the Trenton School District without a Superintendent of Schools for the remainder of this 1972-73 school year.

In response to the argument raised by the City concerning the expenditure of moneys for moving costs, the Board points out that it has realized savings for the several months that no salary has been paid a Superintendent.

The Board further asserts that the cases cited by petitioner, *Cullum, supra,* and *Mackler, supra,* are clearly distinguishable from the matter before the Commissioner and do not provide sufficient weight to prove irreparable harm.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

In the first instance, the Commissioner determines that a monetary loss, argued by petitioner as possibly resulting from the execution of a contract of employment with the Superintendent for a three-year term and without an "escape" clause, would not be sufficient grounds for the Commissioner to invoke the extraordinary remedy of enjoining the Board from an action legally within its discretion. The same reasoning applies to the allegation of possible monetary loss argued by the City, and the Commissioner so holds. See *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 96 *N.J. Super.* 371 (*Ch. Div.* 1967) at pp. 390-391.

The remaining issue argued herein is that the execution of an employment contract between the Superintendent and the Board would adversely affect the candidacy of petitioner for the position of Superintendent, providing that petitioner prevails in proving either/or an improper appointing action by the Board and a conspiracy of several Board members to discredit him as a candidate. Balanced against this allegation by petitioner is the obvious need of the Board of Education to have a Superintendent of Schools at the helm of this large City School District.

The Commissioner is aware of the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint. In *United States v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) the Court cited *Communist Party of the United States of America v. McGrath,* 96 *F. Supp.* 47 (*D.D.C.* 1951) as follows at p. 48:

"*** Issuance of a preliminary injunction is a matter within the sound

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discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***"

In the judgment of the Commissioner, the interests of the pupils, their parents and the community at large are best served by permitting the Board to exercise its legal discretion by adopting a resolution setting forth terms of employment for the previously-appointed Superintendent of Schools. This action will hasten the assumption of duties by the Superintendent. It is clear to the Commissioner that a large urban school district requires the presence of a Superintendent in order to function effectively in the best interests of the community.

The Commissioner agrees with the Board that petitioner's reliance on *Cullum, supra,* and *Mackler, supra,* is not convincing, these cases being clearly distinguishable from the matter controverted herein.

The Commissioner is constrained to state that the action taken by the Board is entitled to the presumption of correctness, and the Commissioner will not overturn its decision unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

In the instant matter, petitioner has failed to provide any convincing reason why the Board should be restrained pending a decision on the merits of the pleadings.

Having considered the foregoing facts and arguments, the Commissioner finds and determines that no sufficient grounds have been presented to support the application for a restraining order against the Board. Accordingly, the Motion for *pendente lite* relief is denied.

COMMISSIONER OF EDUCATION

September 29, 1972

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Pasquale Maffei,

Petitioner,

v.

Board of Education of the City of Trenton and Donald Jones, Mahlon Thomas and Robert Lawrence,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, James Logan, Jr., Esq.

For the Respondents, McLaughlin, Dawes, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner, employed as an Assistant Superintendent of Schools by the Board of Education of the City of Trenton, hereinafter "Board," moves before the Commissioner of Education for an Order granting the relief requested in the Petition of Appeal under paragraph "A," namely, that charges filed with the Secretary of the Board of Education against petitioner, by three members of the Board of Education on July 31, 1972, be dismissed in accordance with *N.J.S.A.* 18A:6-13.

By Cross-Motion for Summary Judgment, the Board moves for an Order granting a judgment of dismissal of paragraph "B" of the Petition of Appeal, namely, that the action taken at the special meeting of the Board of Education held September 7, 1972, be declared null and void.

On November 9, 1972, the return date of the Notice of Motion and Cross-Motion, counsel for both parties presented oral arguments. Counsel for petitioner filed a Memorandum of Law, and counsel for the Board filed a supporting affidavit. The oral argument was heard by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

On July 24, 1972, three members of the Board filed affidavits with the Secretary of the Board, comprising formal charges against petitioner. On July 31, 1972, these three Board members filed revised affidavits which contained essentially the same charges. (Exhibits R-1, R-2, R-3)

Petitioner contends that, as an employee with a tenure status, he is entitled to the protection and process afforded him by the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.* In accordance with *N.J.S.A.* 18A:6-13, the written charges filed under *N.J.S.A.* 18A:6-11, should at this time be dismissed by the Commissioner.

N.J.S.A. 18A:6-13 reads as follows:

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> "If the Board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, *the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."* (*Emphasis ours.*)

Petitioner asserts that the time period of forty-five days has in fact elapsed, and the Board has made no determination whatsoever regarding the charges; therefore, the Commissioner should order the charges dismissed in accordance with *N.J.S.A.* 18A:6-13.

The Board admits that it has not made a determination whether or not the charges and the evidence in support of such charges would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary and further admits that it has not certified the charges to the Commissioner. *N.J.S.A.* 18A: 6-11 The Board argues that it has not made such a determination because it does not believe the charges would warrant a dismissal or a reduction in salary. Therefore, says the Board, it should be permitted a reasonable time to conduct a local hearing in order to determine whether a reprimand would be in order for petitioner.

This concludes the argument regarding petitioner's Motion for dismissal of charges.

In regard to the Board's Cross-Motion for dismissal of paragraph "B" of the Petition of Appeal, the following contentions were presented:

Counsel for the Board avers that a special meeting of the Board had been scheduled for September 7, 1972, at 8:00 p.m. Letters addressed to the Board Secretary by three members of the Board, requesting the special meeting on the above-named date were marked in evidence. (Exhibit R-5) The letter under date of September 6, 1972, wherein the Secretary notified the President of the Board regarding the special meeting, was also marked in evidence. (Exhibit R-7) By affidavit, the Board Secretary stated that he also had notice of this meeting hand-delivered to each member of the Board. (Exhibit R-4) In this affidavit, the Secretary states that shortly prior to 8:00 p.m. on the evening of September 7, 1972, counsel for the Board informed him that a verified complaint and Order to Show Cause had been filed that same day against the Board in the Superior Court, Chancery Division, Mercer County, by petitioner. Counsel requested time to advise the Board regarding the fact of said legal action, as well as to offer legal advice to the Board.

The Secretary also states that when a quorum of the Board was present, at or immediately after 8:00 p.m., he advised the Board of counsel's request and the Board agreed to spend a few minutes to be apprised of the legal action and to hear counsel's legal advice. According to the Secretary, at the conclusion of counsel's presentation to the Board, at approximately 8:15 p.m., the Board entered the meeting room and convened the special meeting. (Exhibit R-4)

Counsel states that he was present in court during the late afternoon of

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September 7, 1972, in regard to the aforementioned litigation against the Board, and immediately upon leaving court, he went to the Board's meeting. Counsel argues that the unforeseen nature of this litigation necessitated his conference with the Board, and therefore the Board's meeting should be considered by the Commissioner as a properly constituted meeting. Also, counsel points out that the litigation described had a direct bearing upon the business which the Board was transacting on the evening of September 7, 1972.

Petitioner answers the Board by averring that the requirement that meetings of local boards of education shall be called to commence not later than 8:00 p.m. is statutory (*N.J.S.A.* 18A:10-6) and therefore is mandatory. Petitioner also asserts that if the time requirement is not complied with by the Board, business transacted during the course of that meeting would be defective, and null and void.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner, the evidence contained therein, and the record in the instant matter.

The Commissioner takes notice that as of the date of this oral argument, a total of 101 calendar days has elapsed since the written charges were filed against petitioner by three Board members on July 31, 1972. (Exhibits R-1, R-2, R-3) Also, the Commissioner takes notice of the fact of the Board's admission that no determination (*N.J.S.A.* 18A:6-11) has been made by the Board regarding these charges, within the forty-five day period prescribed by *N.J.S.A.* 18A:6-13.

The Board relies upon the argument that the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, does not apply because the Board believes that the charges may, if true in fact, merely warrant a reprimand and not dismissal or a reduction in pay. The Board therefore states that it must have a reasonable time to conduct a local hearing to make such a determination.

The Commissioner does not agree. On the contrary, the statute, *N.J.S.A.* 18A:6-13, specifically applies to the instant matter. The facts are clear. The written charges filed against petitioner have been before the Board for 101 calendar days, which is far in excess of the statutory limit of forty-five days.

The second argument advanced by the Board, namely that a local hearing should be permitted to determine whether or not a reprimand should be issued to petitioner, is not convincing. The charges (Exhibits R-1, R-2, R-3) were formally filed and copies were served upon petitioner.

Accordingly, petitioner has a right to know the Board's disposition of these charges. The question of local boards of education conducting hearings has been dealt with at length by the Commissioner in *Boney v. Board of Education of the City of Pleasantville et al., Atlantic County*, 1971 *S.L.D.* 579. The

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Legislature has preempted this procedure by the enactment of the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.* Appeals of actions by the Board in regard to nontenure positions or persons are properly made to the Commissioner. *Boney v. Pleasantville* Accordingly, the Commissioner finds and determines that the Board's arguments are without merit and orders that the written charges filed against petitioner on July 31, 1972, are dismissed, and no further proceeding or action shall be taken thereon. *N.J.S.A.* 18A:6-13

In regard to the Board's Cross-Motion for dismissal of paragraph "B" of the Petition of Appeal, the Commissioner takes notice of the unusual and unforeseen circumstances which caused the admitted delay in the convening of the special meeting held September 7, 1972. The Board's purpose for that meeting was to select and appoint a Superintendent of Schools. That very same afternoon counsel for the Board was served a verified Complaint and Order to Show Cause for a restraint against the Board's proposed action.

In *Eluria Milliken v. Board of Education of the City of Camden et al., Camden County,* 1957-58 *S.L.D.* 53, the Commissioner considered the validity of a special board meeting which commenced at 4:00 p.m. and was then adjourned until 8:15 p.m. In that case the Commissioner found no inadvertence such as was the case in *Frank H. O'Brien v. Board of Education of West New York,* 1938 *S.L.D.* 31, aff'd State Board of Education 33 (1912) and in keeping with his consistent view that this statute is clear and must be complied with, found that the meeting was illegal and the business transacted null and void.

In the instant matter, the delay was clearly inadvertent. *O'Brien v. Board of Education of West New York, supra.*

In fact, the Board could not proceed with the purpose of the special meeting of September 7, 1972 without the advice and information imparted by its counsel, since the eleventh hour litigation against the Board that same afternoon bore directly upon the Board's planned action that evening. This is a classic example of unavoidable, unforeseen and inadvertent delay of a public agency's attempt to conform to a statutory requirement. The public interest would not be served, in fact a public disservice would be created, if the Commissioner were to defeat the Board's action by a tactical reliance on the fact that, through no fault of its own, it was impossible for the Board to proceed with its special meeting at precisely 8:00 p.m. on September 7, 1972. Accordingly, for the reasons stated, the Commissioner hereby dismisses paragraph "B" of the Petition of Appeal.

The Commissioner, having disposed of counts "A" and "B" of the Petition of Appeal in this decision, and having disposed of count "D" in a previous decision, notices that only count "C" of the Petition of Appeal remains to be adjudicated. That issue may now be scheduled for hearing in order to move toward a final determination of the instant matter.

COMMISSIONER OF EDUCATION

December 22, 1972

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Pasquale Maffei,

Petitioner,

v.

Board of Education of the City of Trenton et al., Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, James Logan, Jr., Esq.

For the Respondents, Henry F. Gill, Esq.

Petitioner, employed as an Assistant Superintendent of Schools by the Board of Education of the City of Trenton, hereinafter "Board," alleges that three members of the Board, in conjunction with certain other persons, did conspire to have tenure charges filed against him in order to prevent fair consideration by the Board of his candidacy for the position of Superintendent of Schools for the Trenton School District. Petitioner requests that the Commissioner of Education declare illegal the votes cast by three Board members at the September 7, 1972 Board meeting, which resulted in the appointment of a Superintendent of Schools.

In his original Petition, petitioner requested temporary relief, *pendente lite,* restraining the Board from adopting a resolution setting forth contract terms for the employment of a Superintendent of Schools, who was previously appointed at the special meeting held September 7, 1972. The City of Trenton, a municipal corporation of the State of New Jersey, filed a Petition of Appeal against the Board requesting similar *pendente lite* relief in the form of a restraining order by the Commissioner. Following oral argument, the Commissioner denied the requests for a restraining order by a Decision on Motion dated September 29, 1972.

Petitioner next moved before the Commissioner for an order granting the relief requested under paragraph "A" of his Petition of Appeal, namely, that the charges filed against him with the Secretary of the Board, by three members of the Board on July 31, 1972, be dismissed in accordance with *N.J.S.A.* 18A:6-13. By Cross-Motion for Summary Judgment the Board moved for a dismissal of paragraph "B" of the Petition which requested that the action taken at the special meeting of the Board on September 7, 1972 be declared null and void. In a Decision on Motion dated December 22, 1972, the Commissioner ordered the written charges filed against petitioner on July 31, 1972, dismissed and stated that no further action or proceeding could be taken thereon. Additionally, the Commissioner dismissed paragraph "B" of the Petition which alleges that the Board's special meeting held September 7, 1972, was improper because it commenced at an hour which was later than 8:00 p.m., as required by *N.J.S.A.* 18A:10-6.

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The remaining issue of the Petition is paragraph "C," which alleges that three Board members conspired with certain other persons to file tenure charges against petitioner in order to prevent the Board's fair consideration of petitioner's candidacy for the position of Superintendent. Petitioner also alleges that these three Board members had a conflict of interest when they voted for the appointment of a Superintendent at a special meeting held September 7, 1972, and he therefore requests that the vote which appointed the new Superintendent be declared a nullity.

A Motion to Dismiss the Petition for failure to prosecute was filed by the Board under date of May 1, 1974, and oral argument on the Motion was heard on May 10, 1974. By order dated May 15, 1974, the Commissioner denied respondents' Motion to Dismiss, finding that depositions of seventeen witnesses had been taken on March 29, 1973, May 2, 1973, June 7, 1973, October 3, 1973, December 26, 1973, January 11, 1974, and March 13, 1974.

On May 16, 1974, counsel for the Board resigned, and a substitution of counsel was approved on June 20, 1974.

Hearings in this matter were conducted on September 3, 9, and 12, 1974 by a hearing examiner appointed by the Commissioner. Numerous items of evidence, documentary and in the form of recorded tapes, were received at the hearing. Petitioner filed a Brief on December 13, 1974, and respondents filed a Reply Brief on January 28, 1975. The report of the hearing examiner is as follows:

The genesis of this dispute is the announced resignation of the incumbent Superintendent of Schools effective August 31, 1972, which was communicated to the Board at its meeting held April 11, 1972. (Exhibit P-1) Petitioner, as an Assistant Superintendent, became a candidate for the position of Superintendent.

At its regular meeting held May 8, 1972 (Exhibit P-2), the Board approved the appointment of two consultants to assist with the recruitment of candidates for the position of Superintendent. The minutes of the Board's special meeting held June 13, 1972 (Exhibit P-3), and the regular meeting held June 20, 1972 (Exhibit P-4), are devoid of any substantive record of the Board's progress with this task. The minutes of the regular meeting held July 11, 1972 (Exhibit P-5), disclose the Board's announcement that the list of final candidates had been expanded to four by the inclusion of Petitioner Maffei. The minutes of the special meeting held July 24, 1972 (Exhibit P-6), record approval of a procedure by which means candidates for the position of Superintendent would be permitted one hour of time at public meetings to address the public and answer questions. At the July 24, 1972 special meeting, the Board also voted to approve a procedure of voting for the final selection of a Superintendent. The Board determined that:

> "***the method of voting be by roll call with no eliminations and that voting continue until one candidate received a majority of votes. It was further stipulated that Board members be allowed to change their vote

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before the tally of votes was announced.***" (Exhibit P-6)

The Board also voted at its July 24, 1972 meeting to postpone discussion regarding the date when the Board would make its final selection of a Superintendent from among the candidates. (Exhibit P-6)

In order to properly understand the development of this controversy, a review of some background events is essential.

The former Board President, John Tesauro, testified that the Board's two consultants were given the responsibility of screening applicants and recommending approximately ten individuals for the Board's consideration. The consultants were not to screen local candidates. Instead, the Board was to determine which local candidates, if any, were to be included with several finalists the Board would select from those recommended by the consultants. (Tr. I-32)

The Board's procedure for selecting several final candidates from those recommended by the consultants included interviewing individual candidates during a dinner, and later, an interview at a Board conference with individual candidates. Subsequently, the Board held public meetings where candidates were given one hour to address the public and answer questions posed by citizens. (Tr. I-32, 42)

The former Board President testified that Dr. Flores who was subsequently appointed Superintendent in September 1972, was not considered at first to be a local candidate, although he was employed by the Board on a special internship arrangement. Dr. Flores was not included by the consultants in the list of those ten recommended for interviews by the Board. According to the former President, the Board decided, at a meeting he did not attend, to consider Dr. Flores as a local candidate. (Tr. I-34) According to the former President, the Board ultimately divided into three factions at the meeting held July 11, 1972. He testified that one faction consisted of the four Negro members of the Board, Lawrence, Jones, Thomas, and Anderson. The second faction consisted of himself, Contardo, Potkay, and Hutchinson. The third faction was Kiser. (Tr. I-38)

The former President testified that at a conference session held July 5, 1972, the Board employed a system of voting to select three finalist candidates for the position of Superintendent. As the result of the balloting, Petitioner Maffei was not included among the three finalists selected by the Board. (Tr. I-35) The three finalists chosen were Dr. Flores, Mr. Johnson from Brooklyn, New York, and Dr. Wayson from Ohio. (Tr. II-82) The former President testified that Board member Kiser was very distressed at the fact that Petitioner Maffei was not included among the finalists. (Tr. I-36) The following day, Kiser telephoned the former President and expressed his sincere regret that Petitioner Maffei was not included as a finalist. The former President testified as follows regarding this conversation:

"The next morning Mr. Kiser called me in my office and expressed his

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feeling at that time that he felt a great feeling of regret that Mr. Maffei wasn't included. A person who spent 26 years in the school system and not being given this chance was unfair as far as he was concerned and I said to Reverend Kiser that Mr. Maffei isn't included, if there isn't enough, if there aren't 5 votes to make Mr. Maffei the Superintendent then we shouldn't include him as a finalist otherwise it's a sham to go through the ritual of including him as a finalist and then to cast him aside. Reverend Kiser knew, he knew how 4 of the Board members felt because they expressed their feelings to him and I asked him at that time to be very sure he wanted to do this, I refused to call a meeting to appoint the third candidate, Mr. Maffei and I said to Reverend Kiser, I didn't feel it was fair, the Board had voted and there isn't a majority. He said to me that he did want me to call a meeting and he would petition me and he represented that 2 other Board members would also petition me and I believe I asked him to send the petition. I think the petition was mailed to the Secretary of the Board requesting a special meeting and I reminded Dr. Kiser, Reverend Kiser that unless he was going to vote for Mr. Maffei there would be no reason to call a special meeting because the Board members had already expressed their feeling and he assured me he was going to vote for Mr. Maffei and I said to him well, under the circumstances, we can save this town a great deal of crisis and chaos if you commit yourself, if you feel he should be Superintendent, you should say so and on that basis we can proceed to conduct the final interview and select a Superintendent and that was the extent of our conversation." (Tr. I-36-37)

The tape recording of the Board's July 5, 1972 conference (Exhibit P-14) has been reviewed by the hearing officer. The then President Tesauro discussed the purpose of the conference, which was to narrow the number of candidates for the superintendency. The then President described a previous method used by the Board in the selection of a number of candidates for the superintendency. The Board agreed that it would select three finalists. The then President explained that candidates should receive five votes to be considered finalists. After considerable discussion the Board decided to cast three votes for respective candidates on the first ballot, from among the nine candidates. There was considerable confusion among the Board members regarding the voting procedure. It is clear that the Board as a whole was uncertain regarding what would result after the first ballot. The Board concluded that it would await the results of the first ballot before deciding what method would be used for a second ballot. On the first ballot Candidates Wayson and Johnson received five votes each; Candidates Maffei, Simpkins and Luke received four each; Candidate Flores received three votes; Candidates Wilson and Cody received one each; and the ninth candidate received no votes. Considerable discussion was then held regarding the procedure for a second ballot. The Board agreed that Wayson and Johnson were finalists, but there was confusion regarding the next procedure. It was finally agreed that each Board member would cast three votes for respective candidates among the seven remaining names. On the second ballot Candidate Flores received eight votes; Candidate Cody received six; Candidates Maffei and Simpkins each received four votes; Candidate Wilson received three; Candidate Luke received two; and the last candidate received none. Immediately following the second ballot, Board member Kiser began to express dissatisfaction with the

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results of the balloting. Board member Potkay also stated her dissatisfaction. It appears to be a logical conclusion that Board member Kiser had not voted for Candidate Maffei on either ballot. Kiser stated that he now believed the Board should have followed the then President's advice to have each member vote for only one candidate on the second ballot. Other Board members agreed that the procedure should have been one vote on the second ballot. Kiser suggested changing the procedure, but the then President pointed out that two members had already left the conference. Potkay stated that she did not understand what had happened to Mr. Maffei, and she thought the Board owed him a place as a finalist. (Exhibit P-14) The President of the Board at the time of the hearing, Mrs. Potkay, testified that she and Board members Kiser and Contardo signed the letter to former President Tesauro requesting the calling of a special meeting of the Board for the purpose of considering Petitioner Maffei as the fourth finalist for the position of Superintendent. (Tr. II-83) She testified that, at the close of the July 5, 1972 conference session, she and Board member Kiser discussed the fact that Maffei had not been included among the finalists. She characterized the voting procedure (described in Exhibit P-31) as having been conducted in "a very unusual manner." (Tr. II-82-83) President Potkay also testified that it had been her clear understanding that all local candidates would be finalists in addition to those selected by the Board from the ten individuals recommended by the two consultants. (Tr. II-98)

The special meeting of the Board was called for July 11, 1972. Prior to the special meeting, specifically on Sunday, July 9, 1972, Petitioner Maffei made telephone calls from his home to Board members Lawrence, Jones, Anderson, and Thomas. It is the substance of these telephone calls which forms the basis of this controversy. Petitioner, in sum, alleges that three of the Board members, Lawrence, Thomas, and Jones, used these telephone calls as a means to discredit his candidacy for the position of Superintendent. Petitioner maintains that these three Board members entered into a conspiracy to achieve this end. According to petitioner, the subsequent filing of tenure charges against him by these three Board members, based upon the telephone calls, was one example of evidence of the alleged conspiracy.

The testimony of a principal employed by the Board, who has been a friend of petitioner for forty years, disclosed that he was in petitioner's home on Sunday, July 9, 1972, and was seated next to petitioner at the dining room table during the entire time that petitioner made the telephone calls. According to this witness, petitioner first telephoned Board member Lawrence and asked that he be given full and fair consideration in view of his experience and his knowledge of the Trenton School System. (Tr. III-1-6) This witness examined the affidavit of Board member Lawrence (Exhibit R-2), which was originally signed on July 24, 1972, corrected on July 31, 1972, and subsequently filed as a tenure charge with the Board against petitioner. This affidavit states, in pertinent part, the following:

> "***1. On Sunday, July 9, 1972 at approximately 9:25 a.m. I received a telephone call at my home from a person who identified himself as 'Pat Maffei.'

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"2. I recognized the voice as that of Pasquale Maffei, an applicant for the position of Superintendent of Schools, City of Trenton.

"3. The substance of Mr. Maffei's conversation was that he wanted to be placed back into the finals because he had worked hard and felt that he deserved the job of Superintendent of Schools.

"4. Mr. Maffei said the following things to me during that conversation:

"a. 'You guys have shit on me and I feel that I should get a better break. Don't try to sweet talk me. Don't play any darn games with me. If I had been black, I would have gotten the job a month ago.'

"b. 'I'm calling you because I feel that you are one of the more reasonable people on the board and you can help me get back into the finals.'

"c. 'The talents that I've used for 26 years constructively, I would use those same talents to disrupt the system if I don't get the job.' " (Exhibit R-2)

This witness testified that petitioner started his telephone conversation by making the statement in paragraph "b" above, and then proceeded to enumerate his qualifications. (Tr. III-6-7) This witness then continued his testimony as follows:

"***At another point I did hear Mr. Maffei say something to the effect that: I feel like I'm being crapped on; but it was not said in any derogatory way, it was just a way of saying that; well, I'm not getting a fair treatment. As far as Item C, the talents I used for twenty-six years constructively, Mr. Maffei never said that, he never said that.***" (Tr. III-7)

The witness further testified that at no time did petitioner show anger or any emotion other than disappointment during this telephone conversation. (Tr. III-7)

This witness testified that petitioner next called Board member Jones. After examining Jones' affidavit (Exhibit R-3), he testified regarding his recollection of the conversation. The pertinent part of the affidavit reads as follows:

"1. I am a member of the Board of Education of the City of Trenton.

"2. On Sunday, July 9, 1972 at approximately 9:45 a.m. I received a telephone call at my home from a person who identified himself as 'Pat Maffei.'

"3. I recognized the voice as that of Pasquale Maffei, applicant for the position of Superintendent of Schools, City of Trenton.

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"4. Mr. Maffei stated that he had worked hard in the school system for 26 years and felt that he deserved the job of superintendent.

"5. He stated that the decision appears to have become a Black-White issue.

"6. He stated that it would be very difficult for him to cooperate with anyone else–(who might get the job)." (Exhibit R-3)

According to the principal, petitioner did make the statement in item 4 above, but he did not hear petitioner make the statements in items 5 or 6. (Tr. III-9-10)

The Principal testified that petitioner next telephoned Board member Anderson, but was unable to reach him. Petitioner then telephoned Board member Thomas. (Tr. III-10) The Principal examined the affidavit of Board member Thomas (Exhibit R-1), which states in pertinent part the following:

"1. On Sunday, July 9, 1972 at approximately 10:00 a.m. I received a telephone call at my home from a person who identified himself as 'Pat Maffei.'

"2. I recognized the voice to be that of Pasquale Maffei, applicant for the position of Superintendent of Schools, City of Trenton.

"3. During the course of the telephone conversation, Mr. Maffei said the following:

"a. 'I feel that the board is not treating me like a man; I feel that I deserve more consideration.'

"b. 'I have been in the system twenty-six years and I have worked hard. I deserve the job of superintendent.'

"c. 'I worked closely with Dr. Watson. A new superintendent coming into the system will need help. If I am not selected as superintendent, I will use my talents which I've used before constructively, I will use these same talents to disrupt. It will be very easy for me to do this.' " (Exhibit R-1)

The principal testified that petitioner made the statement in item "b" above, but that he did not hear petitioner make any statement which could have been construed or misconstrued as a threat. He also testified that petitioner made a statement that he had worked closely with Dr. Watson, the Superintendent, and that he was recommended by Dr. Watson. (Tr. III-11)

Petitioner's wife testified that she overheard all of petitioner's conversation with Board member Thomas, and at one point her husband held the telephone so that she could hear the other party. She testified that she heard a woman's voice speaking in a very agitated manner. (It was subsequently

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established that the woman was the wife of the Board member.) According to petitioner's wife, petitioner made no threats nor did he refer to racial bias during this conversation. She testified that he spoke in a normal tone of voice during his conversation with Board member Thomas. She also testified that petitioner had announced that morning he was going to call Board members Lawrence, Jones and Thomas, and she replied that he should not telephone them because she did not believe that they would give him fair consideration. (Tr. III-41-42)

Several other persons were present in the living room of petitioner's home on July 9, 1972, while he was making the aforementioned telephone calls, but it may be concluded from their testimony that they did not overhear more than a small portion of petitioner's side of these telephone conversations. (Tr. II-126-127, 131-132)

Testimony of the vice-president of the Fermi Federation disclosed that, just prior to the week-end when petitioner made telephone calls to the Board members, the vice-president received a telephone call from the wife of Board member Thomas. According to this witness, Mrs. Thomas wanted to know why the Fermi Federation was supporting Maffei's candidacy for the superintendency. He testified that Mrs. Thomas remarked that the Federation could not be a very good organization if it supported Maffei, who, she said, was not even rated as a candidate. This witness testified further that Mrs. Thomas informed him that the lid would blow off of the city of Trenton if Maffei were appointed Superintendent. This witness testified that he asked Mrs. Thomas who was shouting in the background and she replied that it was her husband. The witness stated that he recognized the voice of Board member Thomas shouting information to his wife. The witness testified that this telephone conversation took place either on July 7 or 8. (Tr. II-110-111)

Immediately following this telephone conversation, the witness testified, he telephoned petitioner and repeated his conversation with Mrs. Thomas. (Tr. II-111)

Board member Contardo testified that on or about July 8, 1972, he received a telephone call from Mrs. Thomas, the wife of Board member Thomas, in which she tried to influence him not to support Maffei's candidacy. (Tr. I-14) This witness testified that Mrs. Thomas indicated to him that there was a possibility there would be trouble in the schools if Maffei were chosen Superintendent, but she was not threatening. (Tr. I-15)

Board member Contardo testified that he informed petitioner either in person or by telephone that Mrs. Thomas telephoned him for the purpose of enticing his support away from Maffei. (Tr. I-17-18)

Petitioner testified that he received a telephone call from the vice-president of the Fermi Federation who informed him of the telephone conversation he had had with Mrs. Thomas, wherein she attempted to discredit petitioner's candidacy. (Tr. III-78) The following day, Saturday, petitioner testified, he received a telephone call from Board member Contardo who informed him that Mrs. Thomas had telephoned him in an attempt to discredit

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petitioner's candidacy. (Tr. III-79) Petitioner testified that he became concerned at this point because the wife of a Board member, whom he did not know and had never met, was attempting to discredit his candidacy. (Tr. III-80-81)

Petitioner decided on Sunday, July 9, 1972, to telephone certain Board members to reaffirm his interest as a candidate, particularly because of his having been excluded as a finalist on July 5, 1972. Also, he testified, he wanted to contact Board members, including Mrs. Thomas, in order to offset the damage being done to his professional reputation by Mrs. Thomas. (Tr. III-81) According to petitioner, he telephoned Board member Lawrence and asked him to review his credentials and to give him fair and full consideration. Petitioner testified that Lawrence replied that the Board had made its decision on July 5 and, insofar as he was concerned, that was a final decision. Petitioner testified that he stated to Lawrence that he hoped the Board would keep him in contention as a finalist, but Lawrence took what petitioner considered to be a hard and rigid position that the Board's July 5 decision was final. Petitioner testified that he told Lawrence he felt offended at his position, that it was almost an insult to be shut out this way, and "***that's like crapping in a man's face.***" (Tr. III-83-84)

Petitioner testified that he had the understanding that, as a local candidate he would be considered a finalist, but he was not so included on July 5, and he was aware of the Board meeting called for July 11, 1972. (Tr. III-81-83, 85)

Petitioner also testified that he did not make the statement, recited in Lawrence's affidavit (Exhibit R-2), that he would disrupt the school district if not selected as Superintendent. (Tr. III-84) Petitioner also denied the direct quotes in paragraph "a" of Lawrence's affidavit. (Tr. III-85)

Petitioner denied that he told Board member Jones he deserved to be Superintendent. In fact, he testified that he did not make such a statement to any of the Board members. (Tr. III-88) He also denied the statements in paragraphs 4, 5, and 6 of the Jones' affidavit. (Exhibit R-3) (Tr. III-88)

Petitioner telephoned Board member Anderson, who was not at home, but subsequently reached him by telephone on Monday, July 10, 1972, at which time he requested that Anderson consider his credentials and give him fair consideration. (Tr. III-90)

Petitioner telephoned Board member Thomas, and Mrs. Thomas interrupted from an extension telephone. According to petitioner, Mrs. Thomas stated that Dr. Daniels did not receive any consideration when he applied for the superintendency at the time the former Superintendent was chosen, so why was petitioner calling for consideration. (Tr. III-91) Petitioner testified that he urged Board member Thomas to read his letter of recommendation from Mr. P.J. Hill, a former principal for whom petitioner had worked, in the hope that Thomas would keep an open mind, since his wife was negative toward petitioner. (Tr. III-93)

Petitioner testified that he also telephoned Board member Contardo later

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on Sunday, July 9, 1972. He attempted to reach Board member Kiser on the same day but was unsuccessful. He also telephoned the then Board President, Tesauro, on the following Monday. (Tr. III-103)

The tape recording of the conference session of the Board, which was held Tuesday, July 11, 1972, just prior to the public meeting, has been reviewed. (Exhibit P-15) The Board members expressed concern at this conference over the fact that a very large number of people were present, awaiting the opening of the meeting. Board member Lawrence requested that Board member Hutchinson, a law enforcement officer, remove his firearm from the conference room. This was done and the conference proceeded. The Board discussed the possibility of permitting members of the public to speak at the opening of the meeting, because there was a large crowd, an emotional atmosphere, and the meeting room was very warm and uncomfortable. The Board decided to follow this procedure, but held in abeyance the question of the amount of time to be allotted to any individual citizen.

Board member Contardo stated that he was one of three members who requested the special meeting because he believed that a majority of the Board wanted the local candidate, Maffei, to be a finalist. Board member Potkay stated similar sentiments, since she also had requested the special meeting. Board member Kiser, the third member to request the special meeting, termed the second balloting of the July 5 conference session a "fiasco." He proposed that the Board declare null and void the second balloting and that the Board repeat the procedure with a different type of voting. President Tesauro suggested that the Board consider adding a fourth candidate rather than declare the previous results void. Board member Kiser stated that he would agree with that position and with Contardo's proposal.

Board member Lawrence stated that on Thursday he was inclined to agree with Contardo, Potkay and Kiser that perhaps the Board had done the voting procedure improperly. At the present time, however, he felt that any decision the Board made would "set off" the community. He pointed out that "***right now it is the Italian-American segment," and if the Board rescinded the previous vote the Afro-American segment would object. He recommended that the matter be postponed until the tensions in the community were reduced.

President Tesauro stated that the special meeting request had to be honored, and the Board had to face the question. He suggested the Board consider expanding the candidate finalists to four. In his opinion, Tesauro stated, the Board had affronted Mr. Maffei, although it was purely by accident, because of the method of voting.

Board member Anderson stated that he did not believe there had been confusion, because Maffei did not receive five votes on either the first or second ballot, when the Board chose two finalists on the first ballot and was aware that only one could be chosen on the second ballot. He pointed out that community pressure and "power plays" thereafter may have changed the minds of some Board members to include Maffei at this time.

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The Board members discussed the possibility of listening to the tape of the July 5 conference to determine what had happened. This was not done.

Board member Lawrence offered several reasons why he believed the Board would lose its credibility with the public if it disturbed the results of its previous decision regarding the finalists. He stated that the results of the Board's previous conference on July 5, 1972, had been reported in the newspaper, and the Board was now being subjected to pressures and increased community tensions which he described as a very bad situation. The Board President, Tesauro, stated that the Board had the right to expand the finalists to four, and those citizens who disagreed had the right to express such opinions.

Board member Thomas stated that on Sunday, July 9, 1972, he received a telephone call from Candidate Maffei who threatened that if he did not receive the appointment as Superintendent of Schools, he would use his talents to disrupt the school system. Thomas said he did not think this man should become Superintendent. He stated that he was so upset because of the telephone call that he did not know what to do about it. Thomas stated that this action by Maffei "turned him off" as far as Maffei was concerned. Thomas also stated that this information would go to the newspapers if the Board did not take some action on it.

Board member Lawrence stated he had not wanted to bring up this subject because he liked Maffei personally although he was not close enough to him to evaluate his performance. Lawrence stated that he also received a telephone call on Sunday at 9:30 a.m., and he stated that apparently Maffei was much milder with Thomas than with him. Lawrence stated that Maffei used profanity and cursed him. He stated that Maffei threatened him with the disruption of the school system. Board member Lawrence stated that this is on tape. He said that he questioned Maffei's leadership abilities since he "stooped" to such a level in his telephone conversation. Lawrence stated that up until Sunday he agreed that Maffei should have been a candidate, and would have voted for him, but he now thought Maffei should not be a candidate.

Much discussion followed these comments. Board member Jones stated that he also received a telephone call from Maffei, who said that he regretted the black versus white situation which was being created. According to Jones, Maffei's last comment was that it would difficult to work with someone else who would be selected as Superintendent. Jones stated that he had called Anderson, but his father answered and told Jones that Maffei had called and Anderson was not home.

Board member Contardo said that he had received calls suggesting that certain things would happen if Maffei were appointed Superintendent, and he viewed as normal the pressure from the community upon Board members over the question of the superintendency.

The Board recessed for several minutes. Board member Lawrence asked the Board members to keep confidential the statements which were made

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regarding the telephone calls because it could be damaging to Mr. Maffei. Board President Tesauro agreed.

Board member Contardo made a motion that Maffei be added to the list of finalists for the position of Superintendent, which motion was seconded. Board member Lawrence asked what justification the Board could use for taking such action to expand the number of finalists. Tesauro stated that Maffei was an Assistant Superintendent, had twenty-six years' service in the school system and had demonstrated ability to deal with responsibility. Tesauro stated that Maffei was the "favorite son" candidate and the only local candidate.

Board member Thomas stated that if this were done, the information concerning the telephone calls would be put before the public. The Board voted five to four to add Maffei as a finalist. Tesauro, Hutchinson, Contardo, Potkay, and Kiser voted aye, and Thomas, Jones, Lawrence, and Anderson voted nay. (Exhibit P-15)

The tape recording of the public meeting which immediately followed the aforementioned conference is difficult to understand because of the noises generated by the large audience and the poor acoustics. At the opening of the meeting, President Tesauro announced that thirty-five persons had made requests to speak, and therefore the citizens would be permitted to speak before the Board began its business. President Tesauro announced that, at the conference prior to the meeting, the Board had decided to increase the number of finalists to four. He named the four finalists, including Candidate Maffei. Thereafter, numerous persons addressed the Board, the majority speaking favorably on behalf of Maffei.

Board member Thomas' wife addressed the Board and questioned why the selection procedure was now considered improper so that it was necessary to add another candidate. She also stated that a telephone call was made by Maffei to her husband on Sunday, and she had listened to the conversation. She stated that, during the conversation between her husband and Maffei, Maffei stated that he had worked hard for the school system, and had come through the ranks. He stated, according to Mrs. Thomas, that he was well qualified and should get the superintendency. She stated that her husband reminded Maffei that Dr. Daniels had once applied for the superintendency, and was well qualified, and came up through the ranks, but he did not go to the community after he lost, pressuring anyone, because he was too much of a man for that. She stated that her husband told Maffei the procedure which had been used by the Board should stand. She stated that Maffei said that, if he did not get the assignment, he would not work with any other Superintendent who was appointed, and he would use his talents to disrupt the school system. This latter statement was greeted with shouts of derision from the audience. The President regained order and made a statement that, when Mrs. Thomas addressed the Board, it should be on the basis of fact, and not on the basis of what is assumed to be fact. The remainder of the President's remarks are unclear. (Exhibit P-16, Tape One)

A news reporter for radio station WTTM testified that immediately following the meeting, he recorded a conversation with Board member Lawrence

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for broadcast the next day. He testified that he asked Lawrence whether the telephone call was threatening and Lawrence responded that he did not consider that he had been threatened. (Tr. I-115)

The affidavits signed by Board members Thomas, Lawrence, and Jones (Exhibits R-1, 2, 3) were originally executed on July 24, 1972, and all were notarized by the same person, a former Board member named Joseph Ganie. These affidavits were subsequently corrected and were executed and notarized by Ganie on July 31, 1972.

The evening of July 27, 1972, was set as candidate night for the finalists to address the public. One of the candidates, Wayson, had withdrawn in the interim; therefore, Candidates Johnson, Flores, and Maffei were the remaining participants.

At the conference of the Board held on July 27, 1972, Board member Lawrence stated to the Board that it was a fact that threatening telephone calls had been made to several members, that there were affidavits to verify this, and these affidavits would be presented to the Board at a later time. The Board discussed Mrs. Thomas' comments at the previous public meeting. Board member Jones stated that the Board should disqualify Maffei as a candidate. He stated that if a Board employee had made statements, such as those alleged to have been made by Maffei, to President Tesauro, or Board members Potkay or Hutchinson, that person would have been called in immediately and been reprimanded. He stated that at present the community was severely divided because of the incidents which had occurred during the past several weeks, and the Board's integrity was being questioned. Board member Jones asked the Board to take some action against Maffei, for the simple reason that, if the Board did not act, it would be unable to deal with any teacher or administrator. He asked President Tesauro what action he would take if an administrator or teacher telephoned him and threatened the school system. The President replied that there would be a proper time and place to make such charges, but this was not the time, because the candidates and the public were waiting for the presentations to begin. A vigorous discussion ensued regarding the previous conference and special meeting. Board members Thomas and Jones commented that the Board must do something about the situation resulting from Maffei's telephone calls. The President stated that he thought it would be grossly unfair to bring up charges against Maffei at this time, and this statement set off a spirited discussion. The President was accused of defending Maffei's actions, which he strongly denied. One of the Negro Board members stated that he would prefer to deal with this issue within the four walls of the conference room, but this was opposed. One Board member stated that, if the Board refused to deal with the issue now, he would take further steps. One of the Negro members asked whether any Board member questioned the integrity of the three members who made the affidavits regarding Maffei's telephone calls. President Tesauro stated that no one made such a statement. Board member Hutchinson stated that he had serious questions about the telephone calls because a voice over the telephone is not conclusive evidence to identify the caller. This initiated a sharp debate among the members, and much rapping of the gavel. President Tesauro stated that he resented anyone attempting to "sabotage" the

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interviewing of candidates by a demand that Maffei be disqualified that evening. This sparked more sharp debate, and the tape recording ended. (Exhibit P-18)

The conclusion which must be reached at this point in time is that Board members Lawrence, Anderson, Jones, and Thomas were convinced that the Board majority did not wish to deal directly with any action of a disciplinary nature against Maffei as a result of his telephone calls.

A second tape of Exhibit P-18 records Maffei's appearance on July 27, 1972 before the Board for an interview. President Tesauro opened the proceeding with a question to Maffei. This was followed by several additional questions by Board members. Board member Lawrence next asked Maffei whether he had called any members of the Board in regard to becoming a finalist. Maffei answered that he had. Lawrence then asked whether Maffei had made any statements that could be construed as threatening. Maffei answered "not at all," and stated that he wished that each of the telephone conversations had been tape-recorded because he felt he was the victim of gross injustice because of the way the telephone calls had been interpreted. Maffei stated that he liked the truth, and to have been treated in this fashion by anyone was as much of an insult to him as anything could be. Lawrence asked Maffei whether he was going to tell him that he did not say he would use his talents to disrupt the school system. Maffei answered that he certainly would tell him that here and now and "all over the world." He stated he does not speak that way, nor think that way, and he abhorred the use of such a question in this type of conference. President Tesauro stated he thought it essential that these questions be asked at this time. Maffei told the President that this was a typical "do you still beat your wife question," which he would not accept under any conditions anywhere. Maffei stated that this was unfair and "below the belt." In response to a question from another Board member, Maffei recited that Mrs. Thomas had called a civic leader on July 7, 1972, and attempted to derogate him in a lengthy telephone conversation. Maffei related that the civic leader called him immediately afterward and explained the telephone conversation. Maffei stated that on Saturday, July 8, 1972, Mrs. Thomas called a Board member and stated derogatory things about him. On Sunday, July 9, 1972, he called Mr. Thomas, but he did not disclose his knowledge of Mrs. Thomas' telephone calls. He said his purpose was to ask, which he did in a gentlemanly manner, that Mr. Thomas look carefully at his credentials, particularly a letter of recommendation from Mr. P. J. Hill, who had known Maffei longer in a professional capacity than anyone else and had given him an outstanding recommendation. He stated that at no time did he say the things which Mrs. Thomas had recited at the public meeting, which he did not attend. Maffei stated that he did not want to be involved in any "side show" antics with any person who was not a member of the Board.

Board member Lawrence asked Maffei whether he had called him on July 9, 1972, and Maffei answered affirmatively. Lawrence asked whether Maffei would like to repeat the opening remarks of that conversation and Maffei replied he would not care to do that. Maffei asked Lawrence whether he would care to do that.

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Lawrence stated that Maffei's opening remark, after identifying himself, was, "You know the reason I'm calling you; I think you guys shit on me." Lawrence asked Maffei whether he had said that. Maffei answered, "Yes, I wanted you to say it; I could have said it." Lawrence asked Maffei whether he was playing games. Maffei replied that he was not, but a lady was present. Maffei stated that that was the language he did use with Lawrence, man-to-man, which he called "straight talk."

Board member Lawrence next asked Maffei whether he had said that he would have had the job a month ago if he were a black man. Maffei replied that he had said, "I should think that if I were any black person I might have had the job a month ago without all this." Maffei then said that Lawrence was right, he had said that, and there was good reason to say that. Lawrence then asked why there was good reason for Maffei to say that. At this point, President Tesauro interrupted, but Maffei stated that he would be pleased to answer. Maffei stated his reason that it seemed unbelievable after a man had devoted his entire life to a career, with outstanding performance by record of all the professional evaluators who were qualified to evaluate him, that four black school board members could ignore all of these qualifications, and not one vote for him. Lawrence asked how Maffei knew how the Board members had voted for the candidates. Maffei replied that he knew in the same fashion that other persons had learned.

Lawrence stated that Maffei needed five votes to become a finalist, but in the voting never received five. He questioned why Maffei was blaming the black Board members for this situation. Maffei recited the voting results of the first balloting and the subsequent second ballot. Maffei stated that the Board's voting seemed to be an improper process, whatever it was, not only to him but to any observer. Maffei asked the Board members to put themselves in his shoes and imagine how he felt about the results. Lawrence stated that five Board members had not voted for Maffei, so why did he blame the black Board members. Lawrence further stated that Maffei had made a black-white issue out of it, and it was not a black-white issue. Maffei replied that he hoped it was not a black-white issue, and Lawrence stated that Maffei had made it such by his statements.

Board member Jones reminded Maffei of their telephone conversation on Sunday, July 9, 1972, when Maffei had said to Jones that "we now have a black-white issue," and Jones stated that he had replied, "Pat, I think you have helped make it." Maffei stated that he did not believe he was personally responsible for the polarization of this town, and if Jones were trying to "pin that" on him, it was grossly wrong. Maffei then explained that polarization was being increased by the behavior of many persons in the total community at this point. Maffei stated that he was merely trying to explain this to Board member Jones in the telephone conversation.

Board member Lawrence again asked Maffei whether he had said he would use his talents to disrupt the school system, and Maffei denied making such a statement. Lawrence then stated that he was saying that Maffei did make that statement, and he asked Maffei whether he was calling him, Lawrence, a liar. Maffei replied that he was not calling Lawrence a liar. Maffei said that Lawrence

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could say that, but he would repeat what he previously said. Maffei next explained at some length why he would not make such a statement. Lawrence then said to Maffei that he had made the statement that the talents he was now using constructively he would use to disrupt the system. Lawrence stated that he told Maffei that by making such a statement he was telling a lot about his leadership qualities, and Maffei had replied, "maybe I am." Maffei denied this, and again assured all the Board members present that he had never made a statement remotely like that. Maffei stated that his behavior before he became a finalist was his "struggle to retain his professional survival."

Board member Thomas began to relate his telephone conversation with Maffei, particularly that portion in which he reminded Maffei that Dr. Daniels had once been a candidate for the superintendency, but when he was not chosen, he did not behave the way Maffei was behaving. Thomas recited that he had told Maffei that on both ballots he had received only four votes. Thomas then related that Maffei had said that a new Superintendent coming from the outside would need help from the inside. According to Thomas, Maffei then said that when Dr. Watson became Superintendent and needed help, he, Maffei, had helped him. Thomas stated that Maffei next said he had worked hard and felt he deserved this job, and it would be difficult for him to work with any other Superintendent from the outside. Thomas stated that Maffei also said he would use his talents to disrupt and it would be very easy. Maffei interrupted and said that Thomas was making comments that were grossly untrue. Thomas said, "I think a great deal of you." Maffei stated that Thomas was giving him a "snare case," [phonetic] and he did not appreciate it. Maffei stated that Thomas was lying. Thomas stated that he did not know what to say to Maffei and Maffei again accused him of lying. Thomas said he had always thought Maffei was a nice person, but when he called that Sunday and talked about disrupting the system, he did not believe it could be Maffei. Maffei said that Thomas was repeating that lie over and over and over again, and every time Thomas made such a statement he would say Thomas was lying. Thomas replied that he would swear to it, and Maffei replied, "You do that."

President Tesauro interrupted this discussion and suggested that this be ended. He pointed out that the Board had a policy which could be followed if Board members had a complaint against an employee.

Maffei stated that the reports in the newspapers had been very disturbing to him and to many persons who knew him, and therefore he could not tolerate these distortions and lies. Maffei said that he had not used the word "lies" in public but he wanted it to be a matter of record with the Board that these were cases of false witness and of lies, and he could prove it by the testimony of others.

The next part of this tape is not audible, but next Maffei addressed the President and asked since when was it a sin to engage in telephone calls, and what was the purpose of the communication mechanism of the telephone but to communicate. Maffei stated that all of a sudden was it a crime for a person seeking a superintendency or an official of the school system to try to keep an open line of communication to Board members, especially when being denied a

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proper chance to seek a position for which, his record indicated, he was very qualified. Maffei said it spoke for itself; it was too bald a case to even explain it. He said a person who took that lying down would not be fit to do any job in the country, much less this one.

The President, finding no further questions by Board members, began to thank Maffei for his replies. Maffei interrupted to state that if there was any conduct which was not befitting a certain station, it should be applied to Board members, as well as to any other citizen of the city on an equal basis, not on an unequal basis.

The President began to make a statement but Maffei interrupted by stating that he wanted to say one more thing which he desired Board member Lawrence to hear, but unfortunately he had left the room. Maffei stated that one Board member had told him that certain Board members were under such pressure and duress that they could not consider a person like him for the position. Maffei stated that this is the kind of information that all Board members should be told and should deal with. He said there were too many hidden agendas and that was a big problem "for all of us" at this point and in this school system. He stated that what was needed was a little more honesty all the way around. He said that if three or four Board members were not free to be independent thinkers and analyze a decision for what it was worth then "we do not have an effective, functioning Board of Education." In response to a question, Maffei replied that there was pressure to keep him out.

Next, an exchange took place between Board member Hutchinson and several other Board members regarding whether the issue had become one of black versus white. After some further remarks by Maffei, President Tesauro made some closing remarks. Maffei thanked the members of the Board for the opportunity for the interview. At this point the tape concluded. (Exhibit P-18)

The Board also conducted interviews with two other candidates, Johnson and Flores, prior to the public meeting later the same evening when the three candidates addressed the citizenry. The fourth candidate, Wayson, who had been favored by Board member Kiser, had withdrawn his candidacy some days previous to July 27, 1972.

According to the testimony of President Tesauro, Board member Hutchinson and Maffei, during Maffei's presentation on candidates' night, Board member Lawrence attempted to seize the microphone to read to the public the contents of the three affidavits. The Board Secretary attempted to restrain him from doing this, and he was joined by Kiser and Hutchinson, who rushed to the stage with Board member Jones. President Tesauro testified that he pulled the plug of the public address system in order to stop the reading of the affidavits by Lawrence. (Tr. I-42-43; Tr. III-50-51; Tr. III-110-111; Tr. IV-14)

The three affidavits were presented to the Board Secretary as formal charges against Maffei on August 2, 1972. (Tr. IV-15)

The Board held a conference meeting on August 3, 1972 at the request of

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Board members Kiser, Lawrence and Jones, and voted by a five to four margin to add Candidates Cody and Simpkins as finalists for the superintendency. The five affirmative votes included Kiser, Jones, Anderson, Thomas, and Lawrence. (Exhibit P-19 Tape and Conference Notes) The Board also decided by eight affirmative votes and one abstention to invite these two candidates to meet with the public during the week of August 7, 1972. The Board next voted unanimously that it would set a date no later than one week following the above-mentioned meeting of these two candidates with the public, at which time the Board would select a Superintendent. (Exhibit P-19)

The President next brought up the issue of the charges which had been brought to the Board by three members against Maffei. The Board's counsel at the time rendered a verbal opinion to the Board, together with a written opinion. (Exhibit P-30) Counsel advised the Board that, in view of the fact that the charges listed in the three affidavits did not request either dismissal or reduction in salary, the charges should not be forwarded to the Commissioner, but instead should be the subject of a hearing by the Board. Counsel further stated that the three Board members who brought the charges would be requested to testify in order to prove the charges, and therefore could not sit in judgment on the truth of the charges. (Exhibit P-19, P-30) Board member Lawrence asked whether the remaining six members could properly conduct a hearing on the charges, and counsel replied that he had researched the question and in his opinion a majority of five could properly conduct such a hearing. More questions were asked by various Board members and counsel generally replied that the Board's determination as the result of such a hearing could be appealed to the Commissioner and eventually to the courts. (Exhibit P-19)

It is perfectly clear that the Board members failed to understand, as a result of this discussion, that its responsibility under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, was to determine whether or not the charges, if true in fact, would warrant dismissal or a reduction in salary, and, if so, to certify such charges to the Commissioner for a formal hearing and determination.

The Negro members of the Board made comments at this conference of August 3, 1972, which disclose their dissatisfaction with the procedures described by the then attorney for the Board.

Several Board members recommended that Maffei be suspended from his position until the Board could conduct a hearing on the charges, but Board member Hutchinson argued against this.

Board member Kiser questioned whether there were formal charges at this time. He stated that he regretted that there were charges and he wished the matter could be handled in another way. Board member Lawrence stated that if the Board would listen he believed the matter could be handled in another way, but the Board members refused to listen.

The President asked when the Board desired to meet to conduct a hearing on the charges. Board member Lawrence said it should be as soon as possible and

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said that he would step aside so as not to impede the hearing. Board members Thomas and Jones said they would wait to see whether the Board decided to disqualify them. Contardo, Tesauro, Hutchinson, and Kiser stated that the three Board members who signed charges should be disqualified. A motion that the three disqualify themselves was passed with seven affirmative votes and with Lawrence and Jones abstaining.

One of the Negro Board members, apparently Anderson, suggested that the Board members making the charges and also Maffei should be asked to take a lie detector test. On a motion to this effect the vote was as follows: no, Contardo, Hutchinson, Kiser, Potkay, and Tesauro; yes, Anderson, Lawrence, Jones, and Thomas. The motion was defeated five to four.

Board member Lawrence asked to address the Board in private on a matter that concerned the welfare of the Board. President Tesauro stated that if it was not on the agenda he did not want to hear it. He said he did not wish to hang around here with "Mickey Mouse" people. Lawrence stated that this emotional level was what he wanted to talk about, but the recording ends abruptly. (Exhibit P-19)

Under date of August 8, 1972, petitioner addressed a letter to all Board members which requested that the Board "***take immediate action to review the charges and dismiss them forthwith***," so that "***the cloud of these false accusations***" not adversely affect his opportunity to be fairly considered for the Superintendent's position. (Exhibit P-33)

Petitioner addressed a second letter dated August 15, 1972 to all Board members, again requesting that the Board "***review the unfounded charges against me and dismiss them forthwith.***" (Exhibit P-34)

The minutes of the regular meeting of the Board held August 15, 1972 from which President Tesauro was absent, disclose a motion by Board member Jones, seconded by Thomas, that the Board disqualify itself regarding the charges against Maffei, and give this matter to the Commissioner. The motion was defeated by a four to four vote, with Anderson, Jones, Thomas and Lawrence voting for the motion, and Contardo, Hutchinson, Kiser, and Potkay opposed. Board member Lawrence stated that, if it hadn't been for the charges, Mr. Maffei would probably be Superintendent of Schools today. Board member Potkay stated that it was the responsibility of the Board to resolve this problem. (Exhibit P-7)

A conference meeting of the Board was held on August 17, 1972 with President Tesauro and Board member Anderson absent. Much discussion was held regarding whether or not the Board should appoint an acting Superintendent until a Superintendent was appointed. A motion was made by Potkay and seconded by Kiser that the Board determine to select an acting Superintendent. Hutchinson and Contardo voted no, Thomas abstained, and Potkay, Kiser, Jones and Lawrence voted yes. Board President Tesauro was contacted prior to the vote by telephone and had informed the Board that he was in favor of an acting Superintendent. The Board decided to discuss some

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names of possible persons to be acting Superintendent. Several names were suggested from within the system's staff. The Board voted five to two that Assistant Superintendent Halbert would be appointed acting Superintendent. The Board concensus was that this appointment would be made at a public meeting. The Board also determined that if Halbert were unable to serve for any reason, such as health, the Board would name Assistant Superintendent Walker as acting Superintendent.

The Board also discussed at length whether or not it would have a special public meeting the following evening, and decided it would not.

The question of the charges was brought up next, and Board member Lawrence asked when the Board would set a date to hear the charge. Potkay pointed out that only four members were present who were not disqualified, so the Board did not have a majority to set a date. The Board read and discussed the letter opinion from its counsel (Exhibit P-30), and again reached the mistaken conclusion that it had to conduct such a hearing. It was tentatively determined that a date would be set immediately after Thomas returned from his vacation during the first week of September. The question was raised whether Board members, who had indicated for whom they would vote for the superintendency, could fairly conduct such a hearing and make a determination. Hutchinson stated that in fairness to Board member Thomas, the hearing should not be conducted until he returned from vacation. Thomas stated that people in the community did not want the Board to hear this case, but favored that it be heard by the Commissioner. He pointed out that if the three Board members lost the case, people would say it was because some remaining Board members had announced their favoring of Maffei for the superintendency.

Much confusion regarding the conduct of a hearing by the Board is evident from the Board's discussion. For instance, Contardo advised the Board members who signed the charges that they would be required to submit evidence prior to the hearing so that the Board could determine whether the charges were sufficiently specific before deciding to hear such charges. Kiser stated that he had agreed that the three Board members be disqualified from sitting on such a hearing, but he could not see how Board members who were committed to Maffei's candidacy for the superintendency, and were continuing that advocacy in spite of the charges, could vote on a question of this kind and claim to be impartial. He stated that he was uneasy about allowing Board members who were on Maffei's side to remain as judges when they were advocates of Maffei. He suggested that perhaps these members should disqualify themselves.

Lawrence questioned the applicability of the tenure laws, and counsel repeated the legal advice previously recited.

Lawrence pointed out that the Board had opposed lie detector tests, and now Board members were arguing that the rules of evidence in criminal law did not apply to the hearing it would conduct. He characterized this as talking from both sides. He stated that the three Board members would voluntarily take lie detector tests. Board member Thomas pointed out that the Board had refused to deal with the issue of Maffei's telephone calls unless presented as charges. Now

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that the issue had been formalized into charges, some Board members still did not believe him. He stated that if the Board members did not believe him, how could they expect him to believe that they would hear the charges honestly. He stated that this did not make any sense. He also stated that many people in the community were expressing the opinion that the Board would not conduct a fair hearing. He stated that an impartial arbitrator should hear the case. Lawrence stated that he still believed the matter could be settled within the Board.

Kiser asked Contardo why he would not disqualify himself and permit him and Anderson, who had expressed no preference, to hear the charge. Kiser stated that, although he had voted "no" to having the Commissioner hear this case, he would not say that he would continue to vote "no" if the question came up again. There was much discussion regarding whether the Board should refer this matter to the Commissioner. Thomas stated that now the Board has a "kangaroo court."

Lawrence stated that this issue should be dealt with before the school year started. No definitive decision was reached by the Board when it adjourned the conference. It appears that the matter was left until Board member Thomas returned from his vacation during the first week of September. (Exhibit P-22)

The record in this matter contains much additional testimony, tape recordings and documentary evidence, all of which is corollary and not specifically persuasive when applied to the central issue. Therefore, it need not be recited.

The issue posed by petitioner is the narrow allegation that Board members Lawrence, Thomas, and Jones, together with other persons, conspired to file charges against petitioner in order to prevent the Board's fair consideration of his candidacy for the position of Superintendent. Petitioner also maintains that these Board members prevented the final determination of the charges in order to discredit his candidacy.

The facts hereinbefore recited disclose that the allegation of a conspiracy is not supported by the evidence. The tape recordings, particularly of Board conferences, which were never intended to be public records, present a clearer picture of the actual events than the testimony of the witnesses. The discrepancies between the testimony and the tape recordings show that the recordings were accurate verbatim records of the events which transpired.

It is noteworthy that petitioner, in his testimony, denied every statement recorded on the three affidavits, about which he was questioned. In contrast, the tape recording, *ante,* clearly discloses his admission to some of the statements which he denied making in his testimony.

Petitioner denied ever stating that he deserved the superintendency (Tr. III-88), but the principal who testified on his behalf stated he heard petitioner make that statement. (Tr. III-9-10) Petitioner also denied the statement in item 5 in the Jones' affidavit (Exhibit R-3; Tr. III-88), but he admitted to an almost identical statement during his interview with the Board. (Exhibit P-18) The

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principal who testified on behalf of petitioner was specifically asked by the hearing officer to examine item 4, paragraph "a" of the Lawrence affidavit, and was then questioned whether the words therein were used by petitioner in his telephone conversation. The witness testified that the words were not those used by petitioner. (Tr. III-34-35)

In the tape recording (Exhibit P-18), petitioner is heard admitting the use of the expletive stated in item 4, paragraph "a" of the Lawrence affidavit.

It is clear that petitioner made the telephone calls to the three Board members, and it is equally clear that the charges arose solely from those telephone calls. These Board members filed charges as the result of the majority of the Board's lack of attention to their complaints regarding the telephone calls.

There is no evidence in the record to support the allegation that the three Board members who filed the charges attempted to delay a determination of the charges in order to discredit petitioner. On the contrary, the Board received incorrect legal advice regarding its proper role in dealing with the charges and, subsequently, the Board majority delayed any action on the charges until September, when a Superintendent was appointed.

Based upon the large number of facts hereinbefore reported, the hearing officer must reach the conclusion that the evidence clearly fails to support the allegation of a conspiracy. Accordingly, it is recommended that the Commissioner dismiss the Petition of Appeal.

This concludes the report of the hearing officer.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the lengthy exceptions pertinent thereto filed by petitioner. Such exceptions dispute the weight given by the hearing examiner to certain parts of the voluminous record before him and contain an avowal that the hearing examiner "***ignores the totality of the evidence, which unquestionably and clearly overwhelmingly supports the Petitioner's claim of a conspiracy.***" (Petitioner's Exceptions, at p. 7) In particular, petitioner disputes the hearing examiner's findings which are grounded in a review of the tape recordings. He avers that these recordings do not support a conclusion that petitioner had, in fact, made the statements attributed to him and do not refute his allegations that there was a conspiracy against him which prevented the Board from affording him fair consideration as a candidate for the position of Superintendent of Schools. Petitioner further maintains that the hearing examiner "fails to come to grips" with an inference that a "conspiracy [was] under foot" when the charges by the Board members against petitioner were presented in the context of petitioner's candidacy and not in a usual disciplinary procedure. (Petitioner's Exceptions, at p. 4)

The Commissioner finds no merit in such exceptions and determines, instead, that the report of the hearing examiner and the findings contained

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therein are supported by ample credible evidence in the total record of this involved litigation. Indeed, it is clear from this record and report that the charges against petitioner were lodged only as a last resort, subsequent to complaints by Board members who were recipients of telephone calls from petitioner and because such complaints were not considered as reason for internal censure. Such circumstance may attest to confusion and emotional reaction. It does not constitute conspiracy. The Commissioner so holds. In any event, despite the charges and in the context of confusion, it is clear that the Board did in fact give consideration to petitioner's candidacy and in rejecting it exercised authority expressly conferred with respect to the selection of school administrators. *N.J.S.A.* 18A:16-1

Accordingly, the Commissioner concurs with the findings and report of the hearing examiner. The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 17, 1975
Pending before State Board of Education

Barbara Rockefeller,

Petitioner,

v.

Board of Education of the Borough of River Edge, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner is a teacher who was employed by the Board of Education of the Borough of River Edge, hereinafter "Board," and was terminated pursuant to the sixty day termination clause in her contract. She claims tenure in the district by virtue of her four consecutive contracts and avers that her termination by the Board was procedurally and statutorily defective and that the Board's action was, therefore, arbitrary, capricious, and invalid. She prays for reinstatement in her position.

A hearing in this matter was conducted on December 17, 1974 in the office of the Somerset County Superintendent of Schools, Somerville, before a hearing examiner appointed by the Commissioner. Several exhibits were

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admitted in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner follows:

The essential issues of material fact are not in dispute. Petitioner was employed initially by contract for the period January 1, 1971 through June 30, 1971. (J-1-A) Thereafter, she was awarded three consecutive contracts for the academic years 1971-72, 1972-73, and 1973-74. (J-1-B, C, D) Each contract provided in part as follows:

> "***It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same***." (J-1-A, B, C, D)

On October 9, 1973, petitioner received a notice from the Superintendent of Schools as follows:

> "Pursuant to the third paragraph of your individual teacher employment contract with the River Edge Elementary Schools Board of Education you are hereby advised that the Board is exercising the sixty (60) day cancellation clause.
>
> "From this date forward, your last day of work in the River Edge School System shall be no later than December 10, 1973." (J-1-F)

Because of this termination notice, petitioner requested a hearing before the Board which was denied her. (P-1, 2) On November 19, 1973, the Board adopted a resolution ratifying the action of the Superintendent in giving petitioner the termination notice of October 9, 1973, and on December 17, 1973, petitioner received a letter from the Superintendent advising her of the Board's ratification action which reads as follows:

> "This is to notify you that the River Edge Board of Education formally approved the termination of your contract to teach in the River Edge Schools for the 1973/74 school year, effective December 10, 1973.
>
> "Action of the Board transpired at the Regular Meeting held on November 19, 1973.
>
> "Good luck in your future endeavors." (J-1-G)

She stopped working on December 10, 1973.

Petitioner avers that the Superintendent's letter terminating her employment (J-1-F) is not effective since it is not a notice of Board action, and there is no statutory authority for the Superintendent to terminate employment. If that notice is invalid, she argues, then the Board's action of November 19, 1973, ratifying the Superintendent's action is also invalid and must be set aside. Petitioner argues also, that even if the Board's resolution of November 19, 1973 (J-1-G) is held to be valid, it must be interpreted as an original notice and the sixty day termination notice would begin on that date and terminate on January

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19, 1974. Therefore, the attempted dismissal did not stop the running of time toward her accrual of tenure and she has tenure pursuant to *N.J.S.A.* 18A:28-5 (c) by serving "***the equivalent of more than three academic years within a period of any four consecutive academic years***."

Petitioner testified, also, that her evaluations were good and did not supply sufficient reason to terminate her. (Tr. 16-17)

The Board asserts that its notices and actions regarding petitioner were valid in all respects and demands that the Petition of Appeal be dismissed. The Superintendent and the Board Secretary testified that the Board decided to terminate petitioner during a private work session held on October 8, 1973, and directed the Superintendent to so notify petitioner. (Tr. 64-67, 80) This action was taken because of the Superintendent's recommendation to the Board to terminate petitioner. He testified that his recommendation was based on his own observations of her teaching and upon observation reports given to him by her principal which were concerned with her teaching. (Tr. 65-66)

The Commissioner has commented about the termination of employees in several recent decisions. Among them are: *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975), affirmed State Board of Education May 7, 1975; *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975), remanded for salary consideration State Board of Education, June 4, 1975; *George Mazawey v. Board of Education of the City of Union, Hudson County,* 1975 *S.L.D.* 285 (decided May 1, 1975); *Marilyn Frignoca v. Board of Education of the Northern Regional High School District, Bergen County,* 1975 *S.L.D.* 303 (decided May 2, 1975). In *Bolger and Feller,* the Commissioner commented as follows:

> "***Petitioners do not contest the timeliness of the notice, but rather, its form. They contend that the Board's determination not to reemploy them must be made at a public meeting of the Board and not at a private work session, as occurred in the matter herein.
>
> "The provisions of *N.J.S.A.* 18A:17-20 are relevant to the instant matter. It reads in pertinent part as follows:
>
> > 'The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.***'

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"The Commissioner asserted in *Aitken, supra,* as follows:

> '***It is clear that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***' (*Emphasis supplied.*)
> (1974 *S.L.D.* at 209)

"In *Burgin, supra,* the Commissioner determined that *N.J.S.A.* 18A:17-20 read *in pari materia* with *N.J.S.A.* 18A:27-10 clearly permits that written notice can be

> '***given by any designated school administrator or board secretary *after the board has made its decision* [not to renew contracts] *in public or private* [session] ***.' (*Emphasis in text.*)
> (1974 *S.L.D.* at 400)

"As was previously stated, the intention of the notice statute, *N.J.S.A.* 18A:27-10, is to provide timely written notice to teaching staff members who will not be reemployed for the subsequent academic year. In the judgment of the Commissioner, the requirements of the statute are met when local boards of education decide in public session or executive conference session that reemployment will not be offered to certain teaching staff members and directs the school administrator or board secretary to give notification to such teaching staff members in writing of this determination on or before April 30.

"In the instant matter, the determination made by the Board did not deprive petitioners of any rights or any protection afforded by the school laws.

"It is the Commissioner's considered opinion that problems regarding staff personnel should not be discussed by local boards of education in public sessions. Likewise, when a board discusses recommendations concerning the performance of nontenured teaching staff members with the purpose of determining who shall be offered reemployment, it is in the best interest of the teaching staff members, the board and the entire school system that such deliberations not be public.***"

Although the Commissioner was addressing the interpretation of other statutes in *Bolger and Feller, supra,* his comments regarding the private work sessions of the Board are appropriate to the matter, *sub judice.* The hearing examiner finds, therefore, that the letter from the Superintendent (J-1-F) is valid, and that he was authorized by the Board to notify petitioner pursuant to the termination clause in her contract. Having found that notification valid, petitioner's contract ended by its own terms on December 10, 1973, and, therefore, the Board's ratification of the Superintendent's action was unnecessary. When asked why the Board found it necessary to ratify the

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Superintendent's action the Superintendent testified that the Board's reason for not acting earlier concerning this ratification, was based on his report that petitioner might resign. However, when she did not resign immediately, the Board then ratified his action. (J-1-G; Tr. 73)

The hearing examiner finds, also, that even if it is held that petitioner was not notified properly until November 19, 1973, and that her sixty day termination notice expired on January 19, 1974, tenure would not have accrued since she has not served more than three years within a period of four consecutive years. *Canfield v. Board of Education of Pine Hill,* 51 *N.J.* 400 (1968), reversing 97 *N.J. Super.* 483 (*App. Div.* 1967)

The Court language in *Canfield, supra,* would have required that petitioner serve in her position after January 1, 1974, in order to acquire a tenure status. She was terminated on December 10, 1973.

Petitioner's reliance on *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) is misplaced. *Donaldson* represents the Court's interpretation of a board's obligation to give a teacher reasons for non-reemployment when requested. The matter herein involves a sixty day notice of termination pursuant to contract. Moreover, *Donaldson,* decided on June 10, 1974, is to be operative prospectively and not retrospectively. *Sherman v. Connor et al.,* Docket No. A-2122-73, New Jersey Superior Court, Appellate Division, January 28, 1975

In consideration of the findings, *ante,* the hearing examiner recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions pertinent thereto filed by petitioner. Such exceptions are, in effect, a reiteration of petitioner's views as set forth by the hearing examiner in his report and a second assertion that petitioner had accrued a tenured status which barred her dismissal by the Board.

The Commissioner concurs, however, with the findings of fact and conclusions of law contained in the hearing examiner's report and, accordingly, determines that petitioner's termination of employment was legally correct. Indeed, the Board's action controverted herein was one grounded in the contractual agreement between petitioner and the Board that the contract could be terminated with "sixty days notice in writing" (J-1) and the record provides ample proof that the decision to exercise that option was one the Board made, as petitioner's employer, upon the recommendation of its Superintendent. This decision was not rendered *ultra vires* by procedural defect (*Aitken, supra*) and petitioner's service as a teaching staff member in the employ of the Board was

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not sufficient for a tenured accrual. *N.J.S.A.* 18A:28-5(c); *Canfield, supra* The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 17, 1975
Pending before State Board of Education

Board of Education of the Township of West Milford,

Petitioner,

v.

Township Council of the Township of West Milford, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Evans, Hand, Allabough & Amoresano (Douglas C. Borchard, Jr., Esq., of Counsel)

For the Respondent, Township Counsel, *Pro Se*

Petitioner, the Board of Education of the Township of West Milford, hereinafter "Board," appeals from an action of the Township Council of the Township of West Milford, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Passaic County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on August 19, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $7,305,824.56 by local taxation for current expenses and $87,100.12 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of West Milford in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

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After consultation with the Board, Council made its determinations and certified to the Passaic County Board of Taxation an amount of $6,503,480.31 for current expenses and $87,100.12 for capital outlay. The pertinent amounts in dispute are shown as follows:

	Current Expense
Board's Proposal	$7,305,824.56
Council's Proposal	6,503,480.31
Amount Reduced	$ 802,344.25

The Board documents its need for the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that, after due deliberation, the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written testimony. As part of its determination, Council suggested specific items of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110b	Sals. Bd. Secy. Off.	$ 84,995	$ 76,440	$ 8,555
J110f	Sals. Supt. Off.	91,668	61,918	29,750
J120b	Legal Fees	11,800	8,000	3,800
J120d	Contr. Serv.	19,500	12,500	7,000
J130a	Bd. Members Exp.	7,260	5,290	1,970
J130b	Bd. Secy's Exp.	8,335	6,685	1,650
J130d	Sch. Elections	3,000	2,700	300
J130f	Exp. Supt's Off.	7,500	5,275	2,225
J130m	Oth. Exp. Prtg. & Publ.	3,000	1,500	1,500
J130n	Misc. Exp. Adm.	4,500	3,395	1,105
J211	Sals. Prins.	282,106	243,220	38,886
J212	Sals. Supvr. Instr.	110,420	63,343.25	47,076.75
J213.1	Sals. Tchrs.	4,033,143	3,827,947	205,196
J213.3	Sals. Supp. Instr.	315,048	233,698	81,350
J214b	Sals. Guid. Pers.	119,333	85,925.50	33,407.50
J214c	Sals. Psych. Pers.	198,413	152,331	46,082
J215a	Sals. Secys. Prins. Offs.	84,721	76,321	8,400
J215c	Sals. Secys. Instr. Staff	61,117	53,002	8,115
J216	Sals. Aides	58,100	* 58,000 + 27,000	–0–
J220	Textbooks	77,542	67,542	10,000
J230a	Lib. Books	43,000	30,000	13,000
J230c	A-V Mats.	30,130	25,130	5,000
J240	Teaching Supls.	181,900	170,000	11,900
J250a	Misc. Supls. Instr.	20,820	15,000	5,820
J250b	Travel Exp. Instr.	5,000	3,000	2,000
J250c	Misc. Exp. Instr.	78,948	60,000	18,948

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J310a	Sals. Attendance	10	* 10 + 12,000	–0–
J320b	Travel Exp.	1,050	600	450
J410a.1	Sals. Phys.	6,825	6,325	500
J410a.2	Sal. Dentist	500	200	300
J420a	Supls. Health	3,500	3,000	500
J420b	Travel Exp. Health	200	50	150
J420c	Misc. Exp. Health Servs.	2,500	2,000	500
J520a	Trans. - Reg.	84,600	70,600	14,000
J545	Athl. Trans.	15,650	12,650	3,000
J550e	Supls. & Garage Exp.	9,865	9,645	220
J610a	Sals. Custs.	320,200	306,200	14,000
J610b	Sals. Maint. of Grnds.	35,802	30,139	5,663
J620	Contr. Servs. Plant Oper.	44,400	21,700	22,700
J640a	Water & Sewerage	10,000	8,000	2,000
J640b	Electricity	135,000	126,000	9,000
J640d	Telephone	31,000	28,000	3,000
J650a	Cust. Supls.	39,800	38,800	1,000
J660d	Misc. Exp. Plant Oper.	650	250	400
J615	New H.S. Oper.	50,000	–0–	50,000
J710b	Sals. Bldg. Repair	54,188	42,943	11,245
J720a	Contr. Servs. Plant Maint.	6,800	–0–	6,800
J720b	Contr. Servs. Bldg. Repair	47,000	27,000	20,000
J730a	Repl. Instr. Equip.	14,555	12,555	2,000
J730b	Repl. Noninstr. Equip.	2,000	–0–	2,000
J730C1	Adm. Equip.	1,020	–0–	1,020
J730C2	Instr. Equip.	30,000	12,000	18,000
J730C3	Attend. & Health Equip.	4,578	3,578	1,000
J730C6	Equip. Food Serv.	13,000	–0–	13,000
J740a	Other Exp. Grnds.	4,310	2,310	2,000
J740b	Other Exp. Bldg. Repair	24,000	20,000	4,000
J810a	State Retire. Fund	62,000	57,040	4,960
J810b	Social Security	95,600	88,100	7,500
J820b	Employee Ins.	332,500	305,900	26,600
J920	Exp. Food Servs.	500	200	300
J930	Exp. Deficit	500	–0–	500
TOTAL CURRENT EXPENSE		$7,425,402	$6,623,057.75	$841,344.25 * –39,000.00
*When $39,000 is added to "Amount Reduced" column, the net reduction is $802,344.25				$802,344.25

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated.

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It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
(1968 *S.L.D.* at 142)

Certain categories of line items are set forth in detail, *post.* It should be noted that Council advanced seven basic reasons for its reductions. These reasons are reproduced here as follows:

"Major Criteria Used in 1975/76 School Budget Review

"a) Should emergency arise, requiring additional personnel, provision should be made for the hiring of said personnel under the (CETA) The Comprehensive Employment and Training Act.

"b) Areas for reduction based on an overwhelming voter rejected budget should not be in those areas which will effect a thorough and efficient education. The demand for economy must, however, be answered wherever possible.

"c) The increase in this area has been disproportionate to the growth of student population (8.3%) over the last three years.

"d) Prior years and/or current year spending to date do not warrant the budgeted amount requested.

"e) It is felt that mandated economies can be effected by closer supervision of related expense and/or personnel.

"f) Unbridled spending in areas not directly effecting a thorough and efficient education detracts from total money available for the primary purpose of levying a school tax.

"g) Economies should be effected by having administrative and supervisory personnel assuming a more direct responsibility in these areas."

In applying its specific reasons for reductions in each line item account, Council stated in one instance "See Criteria a) and b)" and in another instance, "See Criteria a), b), c), e), and f)." Council did set forth a few other reasons; however, for the most part the criteria, designated by letters a through g, *ante,* were used repeatedly and provided, basically, Council's rationale for its recommended budget reductions.

The hearing examiner concludes that this broad brush approach in giving reasons for school budget reductions does not meet the spirit and intent of the principles established by the New Jersey Supreme Court or principles set forth in prior Commissioner's decisions. *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966); *Board of Education of the City of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 489

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(1970); *Board of Education of Trenton v. City Council of Trenton, Mercer County,* 1967 *S.L.D.* 172; *Board of Education of Haledon v. Mayor and Council of Haledon, Passaic County,* 1970 *S.L.D.* 70, aff'd State Board of Education, 1970 *S.L.D.* 75

Perhaps the most inclusive discussion of such principles is contained in the unanimous opinion of the New Jersey Supreme Court in *East Brunswick, supra,* which said:

> "***All in all, it is evident that, when preparing the budget which it ultimately determines to be necessary and appropriate in view of the nature of the local community, its educational needs and financial abilities, the local board must have clearly in mind the educational mandate in our Constitution and the State's statutory and administrative requirements. It, of course, retains a considerable measure of discretion, particularly when dealing with matters which the State's supervisory agencies have recommended rather than directed; but in no event may it disregard the general standard in the Constitution or the specific standards which have been announced legislatively or administratively. In the course of its endeavors, the local board affords suitable hearing to the local citizenry (*N.J.S.A.* 18:7-77.1 and 77.2) [now 18A:22-7, 8, 10, 11, 12, 13, 32] and soundly brings together its intimate knowledge of local conditions and needs and the wide educational expertise of its members and professional staff.
>
> "Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. *That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools.* Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But *its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.* Where its action entails a significant *aggregate reduction* in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. *Cf. Davis* [Administrative Law] § 16.05.***" (*Emphasis supplied.*) (48 *N.J.* at 105-106)

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And further;

> "***As in *Booker,* the Commissioner in deciding the budget dispute here before him, will be called upon to *determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled.* Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***" (*Emphasis supplied.*)
>
> (48 *N.J.* at 107)

The Board has not requested restoration of its moneys based on allegations of arbitrariness, nor is any such recommendation made by the hearing examiner; however, the reasons for the recommended reductions set forth in writing by Council do not weigh heavily against the documentation submitted by the Board, for the most part, in support of its budget. At the hearing, Council offered additional statements in support of its recommended reductions, and the Board defended its needs for the restoration of all moneys.

The line items, numbering sixty-one in total, will be discussed in related groups.

J100 Series and Salaries

Recommendations for reductions were offered in fifteen line item accounts. Council suggested also that two accounts be increased by a total of $39,000 to provide aides and an attendance officer. (Line Items J216, J310a) The hearing examiner recommends that this $39,000 not be added to the budget so that the Board can implement its own program to provide these services. Further recommendations are as follows:

J110b Board Secretary Office: It is recommended that this position be left vacant and the starting salary of $6,870 for a secretary be eliminated. J110f Superintendent's Office; J211 Principals; J212 Supervisor of Instruction; J213.1 Teachers; J213.3 Supplemental Instruction; J214b Guidance; J214c Psychological, Personnel; J215a Secretaries, Principals' Offices; J215c Secretaries, Instructional Staff; J410a.1 Physicians; J410a.2 Dentist; J610a Custodial Services; J610b Grounds; J710b Repair of Buildings: It is recommended that the moneys set aside by the Board for salaries in these line items be restored. The documentation shows reductions in personnel in several areas although there is an increase overall in the salary line item totals due to contractual obligations with staff and commitments made in negotiations with personnel which were not completed at the time of the hearing.

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The hearing examiner recommends that the total of $531,456.25 be restored in the above salary line items.

Adequate documentation supports the Board's request for restoration of moneys in the following 100 series line items: J130b Board Secretary, Expenses - $1,650; J130d School Elections - $300; J130f Superintendent's Office, Expenses - $1,500. The following recommended reductions should not be restored: J120b Legal Fees - $3,800; J120d Contracted Services - $7,000; J130a Board Members Expenses - $1,970; J130f Superintendent's Office, Expenses - $725; J130m Other Expenses, Printing and Publishing - $1,500; J130n Miscellaneous Expenses, Administration - $1,105.

The total amount in this 100 series which is recommended for restoration is $3,450 and the total amount recommended to be eliminated from the budget is $16,100.

J200 Series – Supplies

Except for salary considerations, the Board did not document its need for the increases it proposed in the 200 series line items to the degree required to mandate full restoration of all moneys. The recommended reductions by Council provided for modest increases in a few line items; therefore, it is recommended that the full reduction be made in the following line items:

J220 Textbooks - $10,000; J230a Library Books - $13,000; J230c Audiovisual Materials - $5,000; J240 Teaching Supplies - $11,900; J250a Miscellaneous Supplies, Instruction - $5,820; J250b Travel Expense, Instruction - $2,000; J250c Miscellaneous Expense, Instruction - $18,948, for a total reduction of $66,668.

J300 Series – Attendance and Health

It is recommended that $450 be restored to line item J320b Travel Expense. This money is needed by the Board for attendance purposes in implementing its attendance program. This is also a necessary expenditure because of the hearing examiner's recommended reduction of $12,000 where Council recommended an increase in line item J310a. (See also the earlier recommendations under *Salaries.*)

J400 Series – Health Services

The hearing examiner recommends that full restoration of moneys be made in these line items: J420a Supplies, Health - $500; J420b Travel Expenses, Health - $150; J420c Miscellaneous Expenses, Health Services - $500. The total proposed budget is $6,500, which is $1,700 less than the amount budgeted last year, and that approximates the actual expenditure by the Board in these line items during the 1973-74 school year.

J520a Transportation, Regular
J545 Field and Athletic Trips, Transportation

These moneys are for contracted salaries and services and committed

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transportation expenses which must be provided. In addition to interscholastic athletic commitments, expenses must be paid for transporting atypical pupils.

The hearing examiner recommends that the sum of $14,000 and $3,000 be restored in these line items.

J550e Supplies and Expense, Garage

The elimination of $220 in this line item still allows a modest increase over the amount budgeted last year.

The hearing examiner recommends that the $220 reduction be sustained.

J620 Contracted Services, Plant Operation

Council recommended a reduction of $22,700 in this line item based on the "Westbrook cleaning contract." The record shows, however, that the amount estimated for this contract work is less than the proposed reduction.

The hearing examiner recommends that a $10,000 reduction be made. The line item would then reflect an amount approximating last year's proposal.

J600 Series – Operation

The Board proposals show pronounced increases in the J600 series line items over the amount budgeted in 1974-75. On the other hand, Council's recommended reductions allow for substantial increases. Both the Board and Council base their determinations on the rapidly increasing prices for these necessary utility and other services.

The hearing examiner recommends that Council's proposed reductions be sustained as follows:

J640a Water & Sewerage - $2,000; J640b Electricity - $9,000; J640d Telephone - $3,000; J650a Custodial Supplies - $1,000; J660d Miscellaneous Expenses, Plant Operation - $400.

J615 New High School, Operations

This is a new special line item in which the Board has proposed an expenditure of $50,000 predicated on the new high school's opening on March 1, 1976. Council's reduction of $50,000 is based on its doubts that the school will be ready prior to September 1976.

The hearing examiner recommends that the $50,000 be restored absent any showing that the school will not open as planned.

J720a Contracted Services, Plant Maintenance
J720b Contracted Services, Repair of Buildings

Expenditures by the Board in these line items are requested for certain specified repairs, maintenance, and/or replacement of expendable items in each of the district's schools and its administration and maintenance departments.

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The hearing examiner finds that the $6,800 requested in line item J720a is not a necessary expenditure for the coming school year. Additionally, it is recommended that the proposed expenditure in line item J720b be reduced to $40,000, which approximates the actual expenditure in the line item during the 1973-74 school year.

The hearing examiner recommends reductions of $6,800 and $7,000 in these line items.

J730a Replace Instructional Equipment
J730b Replace Noninstructional Equipment

A reduction of $2,000 by Council in line item J730a is nominal and should be sustained. Several of the items to be replaced may be postponed to another school year. A reduction of $2,000 in line item J730b would eliminate the total proposed expenditure.

The hearing examiner recommends that $2,000 be restored to the J730b line item.

J730C-1 Equipment, Administration
J730C-2 Equipment, Instruction
J730C-3 Equipment, Attendance and Health Services

The Board has not adequately documented its need for the equipment requested in these line items. It appears that most items listed therein are desirable but not necessary. The hearing examiner recommends, therefore, that Council's reductions of $1,020, $18,000 and $1,000 be sustained.

J730C-6 Equipment, Food Services and Student Body Activities

The Board justifies the need for the specific equipment requests in this line item which amount to a total of $13,000. One item is a freezer for the Westbrook School cafeteria; the second is the proposed replacement of fifteen-year-old dishwashing equipment in the high school cafeteria which has a life expectancy of only ten years; and the third is for assorted kitchen equipment for the new high school cafeteria.

The hearing examiner recommends that this $13,000 be restored.

J740a Other Expenses, Upkeep of Grounds
J740b Other Expenses, Repair of Buildings

The recommended reductions by Council are nominal and should be sustained. The combined proposed allocation by the Board when reduced by $6,000 will still allow an expenditure of $22,310.

J810a State Retirement Fund
J810b Social Security
J820b Employee Insurance

Council recommended reductions in employee positions which would result in savings in these line items. The hearing examiner recommends that all

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positions proposed by the Board be filled and funded as documented by the Board; therefore, the 800 series of line items must also be fully funded.

The hearing examiner recommends that the proposed reductions of $4,960, $7,500, and $26,600 in these line items be fully restored.

J920 Expenses, Food Services
J930 Expenses to Cover Deficit

These line item expenditures were not fully explained by the Board as necessary. The hearing examiner recommends, therefore, that the $300 and $500 reductions by Council be sustained.

A recapitulation of the line item amounts as recommended by the hearing examiner follows:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110b	Sals. Bd. Secy. Off.	$ 8,555	$ 1,685	$ 6,870
J110f	Sals. Supt. Off.	29,750	29,750	–0–
J120b	Legal Fees	3,800	–0–	3,800
J120d	Contr. Serv.	7,000	–0–	7,000
J130a	Bd. Members Exp.	1,970	–0–	1,970
J130b	Bd. Secy's Exp.	1,650	1,650	–0–
J130d	Sch. Elections	300	300	–0–
J130f	Exp. Supt's Off.	2,225	1,570	725
J130m	Oth. Exp. Prtg. & Publ.	1,500	–0–	1,500
J130n	Misc. Exp. Adm.	1,105	–0–	1,105
J211	Sals. Prins.	38,886	38,886	–0–
J212	Sal. Supvr. Instr.	47,076.75	47,076.75	–0–
J213.1	Sals. Tchrs.	205,196	205,196	–0–
J213.3	Sals. Supp. Instr.	81,350	81,350	–0–
J214b	Sals. Guid. Pers.	33,407.50	33,407.50	–0–
J214c	Sals. Psych. Pers.	46,082	46,082	–0–
J215a	Sals. Secys. Prins. Offs.	8,400	8,400	–0–
J215c	Sals. Secys. Instr. Staff	8,115	8,115	–0–
J216	Sals. Aides	–0–	–0–	*
J220	Textbooks	10,000	–0–	10,000
J230a	Lib. Books	13,000	–0–	13,000
J230c	A-V Mats.	5,000	–0–	5,000
J240	Teaching Supls.	11,900	–0–	11,900
J250a	Misc. Supls. Instr.	5,820	–0–	5,820
J250b	Travel Exp. Instr.	2,000	–0–	2,000
J250c	Misc. Exp. Instr.	18,948	–0–	18,948
J310a	Sals. Attendance	–0–	–0–	*
J320b	Travel Exp.	450	450	–0–
J410a.1	Sals. Phys.	500	500	–0–
J410a.2	Sal. Dentist	300	300	–0–
J420a	Supls. Health	500	500	–0–

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J420b	Travel Exp. Health	150	150	–0–
J420c	Misc. Exp. Health Servs.	500	500	–0–
J520a	Trans. - Reg.	14,000	14,000	–0–
J545	Athl. Trans.	3,000	3,000	–0–
J550e	Supls. & Garage Exp.	220	–0–	220
J610a	Sals. Custs.	14,000	14,000	–0–
J610b	Sals. Grnds.	5,663	5,663	–0–
J620	Contr. Servs. Plant Oper.	22,700	12,700	10,000
J640a	Water Sewerage	2,000	–0–	2,000
J640b	Electricity	9,000	–0–	9,000
J640d	Telephone	3,000	–0–	3,000
J650a	Cust. Supls.	1,000	–0–	1,000
J660d	Misc. Exp. Plant Oper.	400	–0–	400
J615	New H.S. Oper.	50,000	50,000	–0–
J710b	Sals. Bldg. Repair	11,245	11,245	–0–
J720a	Contr. Servs. Plant Maint.	6,800	–0–	6,800
J720b	Contr. Servs. Bldg. Repair	20,000	13,000	7,000
J730a	Replace Instr. Equip.	2,000	–0–	2,000
J730b	Replace Noninstr. Equip.	2,000	2,000	–0–
J730C1	Adm. Equip.	1,020	–0–	1,020
J730C2	Instr. Equip.	18,000	–0–	18,000
J730C3	Attend. & Health Equip.	1,000	–0–	1,000
J730C6	Equip. Food Serv.	13,000	13,000	–0–
J740a	Other Exp. Grnds.	2,000	–0–	2,000
J740b	Other Exp. Bldg. Repair	4,000	–0–	4,000
J810a	State Retire. Fund	4,960	4,960	–0–
J810b	Social Security	7,500	7,500	–0–
J820b	Employee Ins.	26,600	26,600	–0–
J920	Exp. Food Servs.	300	–0–	300
J930	Exp. Deficit	500	–0–	500
SUBTOTAL CURRENT EXPENSE		$841,344.25	$683,466.25	$157,878
Less		*–39,000		
(See previous Table)				
TOTAL CURRENT EXPENSE		$802,344.25		

The hearing examiner recommends, therefore, that $683,466.25 be added to the amount previously certified by Council for current expense purposes for the 1975-76 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto by the litigants pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner finds that petitioner's exceptions have four "items" attached thereto which attempt to add extensive documentation to the record which was not introduced at the hearing. It is, however, inappropriate to offer in

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evidence materials which were not a part of the record in this matter prior to the hearing or introduced as evidence during the hearing. Therefore, those documents which have been submitted subsequent to the hearing examiner's report will not be considered.

The hearing examiner's report accurately states that his recommendations are not based on Board allegations of arbitrariness. Nowhere does the Petition of Appeal advance that contention; furthermore, the record shows that Council consulted the Board on more than one occasion before making its determination and certifying an amount of money it deemed necessary for the operation of the school district for the 1975-76 school year. *East Brunswick, supra; N.J.S.A.* 18A:22-37 It is clear that the Board feels that Council did not give adequate or serious consideration to the problems of the school district; however, the evidence does not establish the kind of hasty, biased determination on the part of Council such as the Commissioner condemned in *Board of Education of National Park v. Borough of National Park et al., Gloucester County,* 1967 *S.L.D.* 66

Council's exceptions assert that absent a finding of arbitrariness by the hearing examiner, the Commissioner may not substitute his judgment for that of Council; therefore, all of its reductions must be sustained. Council takes exception to the conclusions in the hearing examiner's report which recommend restoration of certain funds, by asserting that the hearer attempted to shift the burden of proof of need for specific items, from the Board to Council. Council asserts finally that the Commissioner's analysis of selected line items J211, J212, J213.1, J213.3, and J214b will clearly demonstrate the factual, legal, and fiscal errors committed by the hearing examiner. Council contends, therefore, that the Board has not borne its burden to demonstrate that it cannot operate a thorough and efficient system of public schools within the budget Council determined to be sufficient. Nor, Council avers, did the hearing examiner make any finding of fact that the amounts it proposed are so inadequate that the Board would be unable to operate a thorough and efficient system of schools.

After reviewing the exceptions and the record, the Commissioner cannot agree with the allegations and conclusions set forth by Council in its exceptions.

Council selected five line items, *ante,* to point out certain errors made in the hearing examiner's report. These five selected line items comprise a major portion of the Board's proposed budget, or $4,860,050. The aggregate reduction by Council for these five selected items was $405,916.25.

It is noteworthy here to examine the criteria set forth by Council for making these reductions. For the first two line items Council stated, "See Criteria b), c), and f)." For the third line item, teachers' salaries, Council stated:

> "The practice of having certain teachers responsible for fewer than six teaching periods a day, while receiving full time compensation, is considered to be the major inflationary factor in this entire budget. At the high school level, where this practice is most prevalent, a teaching period runs from 41 to 44 minutes each. Six periods a day would still have the

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> teachers doing teaching duties only 4½ hours a day for 188 days a year. Additional instructional and building aids (sic) have been recommended to free teachers from current lunchroom, hallway period and other nonteaching duties in order to facilitate this."

The fourth and fifth selected line items refer to criteria c) and g).

Each of these referenced criteria is written out fully in the hearing examiner's report.

The Board in defending its proposed expenditures in these line items stated that Council's reductions, if sustained, would necessitate a reduction of a principal, some administrative personnel and guidance counselors which would further decrease the kinds of services it offered to pupils. The Board states that these reductions would place the district further from the proposed goals set forth in the Commissioner's view of a thorough and efficient education.

It further defended its needs in the "salaries" line item and stated that it has the continuous burden to classify and identify pupils for supplementary instruction. The Board also stated that its existing negotiated agreement with its staff would not permit further reductions of personnel. Council suggests, however, that teachers should teach six rather than fewer periods per day. This recommendation is made irrespective of the terms and conditions of employment in the teachers' negotiated agreement with the Board and it does not consider the concomitant educational ramifications, *e.g.,* additional preparation time required by the teachers and the increased teaching load in each day. This teaching load can amount to 125 pupils per week.

In his review of this matter the Commissioner finds no procedural error by the hearing examiner; nor does he find the factual, legal, and fiscal errors on which Council bases its exceptions. The hearing examiner reviewed the written documentation and listened to the testimony at the hearing. It is from these presentments that he recommended an amount he found to be necessary to operate a thorough and efficient system of schools in the district. This is an educational determination based on the record. It may be argued that increasing class size slightly will have no effect on pupils' learning. However, experience demonstrates that at some point class size and the teaching load become unwieldy and counterproductive. *Board of Education of the Township of South Harrison v. Township of South Harrison, Gloucester County,* 1973 *S.L.D.* 438, 439 It is this kind of educational determination based on educators' experience and subjective judgment which led to the hearing examiner's conclusions and recommendations with respect to the necessities for a thorough and efficient system of public schools.

The determination as to what constitutes sufficient funds to provide a thorough and efficient education must be made by the Commissioner during the current budget year. The Commissioner cannot wait a year to see the results of the funding made available by Council's certification; therefore, his determination must be grounded on the record, the past experience in the school

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district, the written and oral exposition, and the educational considerations and recommendations of the hearing examiner.

As the Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County,* 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its economies in the indicated items but may adjust its expenditures in the exercise of its discretion as needs develop and circumstances alter.***"
>
> (at p. 142)

See, also, *Board of Education of the City of Hoboken v. Mayor and Council of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 731 (decided by the Commissioner September 22, 1975).

For the above reasons, the Commissioner concurs, therefore, with the report of the hearing examiner and determines that his recommendations are required to be given effect if a thorough and efficient program of education is to be maintained in West Milford. Accordingly, the Commissioner directs that an amount of $683,466.25 be added by the Passaic County Board of Taxation to the original assessment of $6,503,480.31 deemed appropriate by Council so that the total amount of the tax levy for the thorough and efficient operation of the West Milford Schools in the 1975-76 academic year shall be $7,186,946.56.

COMMISSIONER OF EDUCATION

December 17, 1975
Pending State Board of Education

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Albert Ruffini and Jean Ruscica,

Petitioners,

v.

Board of Education of the Township of Wayne, Passaic County,

Respondent.

In the Matter of the Application of the Board of Education of the Township of Wayne, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

For the Intervenor, Albert James Palumbo, *Pro Se*

Petitioners, citizens resident in Wayne, challenge the resolution of the Board of Education of the Township of Wayne, hereinafter "Board," which grants early tenure to Albert James Palumbo, hereinafter "intervenor," as transportation supervisor. The Board does not appear as an adversary in this matter; rather, it seeks a Declaratory Judgment from the Commissioner of Education concerning its granting of tenure to the intervenor. Oral argument of counsel and intervenor was held on May 27, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

After the filing of the Petition of Appeal in this matter the Board filed its Petition for a Declaratory Judgment pursuant to *N.J.S.A.* 52:14B-8. The two Petitions related to the same matter and were joined by the hearing examiner to be presented to the Commissioner for Declaratory Judgment.

The essential issues of material fact in this matter are not in dispute. All parties stipulate that intervenor was employed January 10, 1974 through June 30, 1974, and was reemployed July 1, 1974 through June 30, 1975. The Board resolved to grant intervenor early tenure as transportation supervisor on February 13, 1975. (Exhibit B) The Petition of Appeal and the Petition for Declaratory Judgment followed:

In the judgment of the hearing examiner the issues to be decided are:

1. Can tenure accrue to a transportation supervisor?

2. If so, may early tenure be granted?

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3. If the answers to the above are in the affirmative, was the Board's action on February 13, 1975, granting early tenure, legal and proper?

Intervenor asserts that he has tenure as transportation supervisor by virtue of the fact that he has successfully completed seven courses in the field of pupil transportation as recommended by the Director of Pupil Transportation, State Department of Education, Trenton. He asserts further that he holds certificates for each of those courses. (Exhibits C through J) Intervenor further asserts that his predecessors were granted tenure by the Board; therefore, in the context of past practices of the Board and his qualifications for the position, he asserts that his grant of tenure by the Board is legal and proper and it should stand.

Petitioners assert that Title 18A, Education, makes no provision for the granting of tenure to individuals employed as transportation supervisors. Therefore, they pray for a judgment from the Commissioner declaring the resolution of the Board dated February 13, 1975, granting such tenure, as void and of no effect.

The Board does not take an adversary position in this matter but, rather, joins in the factual stipulations so that the legal issues may be determined by the Commissioner.

In *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962), *cert. den.* 371 *U.S.* 956, 83 *S.Ct.* 508, 9 *L.Ed.2d* 502 (1963) the Court held as follows:

> Except for *statutory conditions,* a teacher is retained solely on a contract basis during his probationary employment." (*Emphasis added.*)
> (38 *N.J.* at 75)

Intervenor herein is not a teacher; however, in the hearing examiner's judgment the statutory conditions of reference must be evident in any category in which tenure is to be obtained. The Court proceeded in *Zimmerman, supra,* to quote from *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941) which reads as follows:

> "***It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met.***"
> (at p. 544)

The Commissioner and the courts have held, therefore, that the entitlement to tenure is a mandate of the statutes alone. Further, tenure can be conferred only on categories of persons and it cannot be conferred on an individual as a special privilege. *Marie Rinaldi v. Board of Education of the Township of North Bergen, Hudson County,* 1959-60 *S.L.D.* 109; *Clifford L. Rall v. Board of Education of the City of Bayonne, Hudson County, and the State Board of Education, State of New Jersey,* 54 *N.J.* 373; *George I. Thomas v. Board of Education of the Township of Morris, Morris County,* 89 *N.J. Super.* 327, affirmed 46 *N.J.* 581; *Angelo Spadoro v. Robert A. Coyle and Board of*

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Education of the City of Jersey City, Hudson County, 1965 *S.L.D.* 134; *Charles Knipple v. Board of Education of the Township of Egg Harbor, Atlantic County*, 1971 *S.L.D.* 210; *Gerard E. Murphy v. Board of Education of the Borough of Cliffside Park, Bergen County*, 1971 *S.L.D.* 317

In *Rinaldi, supra*, the Commissioner held that:

> "***A vice of the resolution *** is that it confers tenure upon an individual. The public policy of the State is not served when a board of education may arbitrarily and capriciously select an individual to be given tenure. It is the opinion of the Commissioner that it was the intention of the Legislature to delegate to boards of education the power to shorten the period for acquisition of *tenure for school employees according to classification properly established.****" (*Emphasis added.*)
> (1959-60 *S.L.D.* at 111)

In *Spadoro, supra*, the Commissioner held:

> "***that the granting of outright tenure to petitioner contravenes the intent of the Legislature as expressed in *R.S.* 18:13-16 [now *N.J.S.A.* 18A:28-5] by conferring upon petitioner a personal benefit not available to others in his employment category.***" (1965 *S.L.D.* at 138)

In *Crisafulli v. Board of Education of the Township of Florence, Burlington County*, 1971 *S.L.D.* 604, the Commissioner commented that:

> "***Tenure is obtained only when the precise conditions of the statutes are met. *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (1941) *'Eligible to obtain tenure'* (*N.J.S.A.* 18A:28-6, *supra*) can only mean that the person must first hold an appropriate certificate issued by the State Board of Examiners.***" (at p. 607)

N.J.S.A. 18A:28-5 and 6 regulate the acquisition of tenure by teaching staff members and other employees who are in positions which require them to hold certificates issued by the State Board of Examiners. Additional statutes provide that certain other specific employees may acquire tenure as follows: secretaries, assistant secretaries, school business administrators, business managers, and secretarial and clerical employees, *N.J.S.A.* 18A:17-2; janitorial employees, *N.J.S.A.* 18A:17-3; attendance officers, *N.J.S.A.* 18A:38-33.

Nowhere do the statutes provide that tenure may be acquired by a transportation supervisor or any other category of employee except those specifically enumerated in the statutes. Nor does intervenor hold a position which requires a certificate issued by the State Board of Examiners. Further, there is no State Board of Examiner's certificate for the position of transportation supervisor. (See *Ahrensfield, supra.*)

The hearing examiner has considered these reasons and finds that tenure may not accrue to a person holding a position as transportation supervisor; therefore, it is not necessary to address the other two issues raised.

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The hearing examiner recommends, therefore, that the Commissioner determine that intervenor has not and cannot acquire a tenured status in his position, and that the Board's action granting early tenure should be rendered a nullity.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner to which neither party filed objections, exceptions, or replies.

The acquisition of a tenure status by an employee of a board of education is a legislative expression of protection granted those who meet the precise conditions set forth in the statutes. *Ahrensfield, supra* Furthermore, such protection is granted only to those categories of employees specifically set forth at *N.J.S.A.* 18A:28-5 and specific employees as set forth at *N.J.S.A.* 18A:17-2, 18A:17-3 and 18A:38-33. The category of transportation supervisor, as controverted herein, is not a category to which a tenure status accrues.

Consequently, the action of the Board of Education of the Township of Wayne, Passaic County, on February 13, 1975, by which it allegedly granted tenure to the incumbent in its position of transportation coordinator is declared a nullity and is hereby set aside.

COMMISSIONER OF EDUCATION

December 24, 1975

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the Township of Hazlet,

Petitioner,

v.

Township Committee of the Township of Hazlet, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Crowell and Otten (Robert H. Otten, Esq., of Counsel)

For the Respondent, Francis X. Journick, Esq.

Petitioner, the Board of Education of the Township of Hazlet, hereinafter "Board," appeals from an action of the Township Committee of the Township of Hazlet, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on August 13, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $4,801,067 by local taxation for current expenses of the school district. This item was rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Committee for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of Hazlet in the 1975-76 school year, pursuant to the mandatory obligation imposed on the Committee by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Committee made its determinations and certified to the Monmouth County Board of Taxation an amount of $4,338,067 for current expenses. The pertinent amount in dispute is shown as follows:

	Current Expense
Board's Proposal	$ 4,801,067
Committee's Proposal	4,338,067
Amount Reduced	$ 463,000

The Board contends that the Committee's action was arbitrary and capricious and documents its need for the reductions recommended by the Committee with written testimony and a further oral exposition at the time of the hearing. The Committee maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are

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not necessary for a thorough and efficient educational system. The Committee also documents its position with written and oral testimony. As part of its determination, the Committee suggested specific aggregate amounts of the budget in which it believed economies could be effected.

The Board's budget is submitted as a Planned Programmed Budgeting System (PPBS); therefore, the several economies recommended by the Committee are grouped by *title* or *program* rather than by specific line item account. Those recommended economies are as follows:

Item or Program	Recommended Reduction
Elementary School Teachers (18)	$ 180,000
Fringe Benefits	38,000
Administrative Vice-Principals	70,000
Central Administration	40,000
Maintenance	15,000
New Buses (2)	20,000
Preparation, Research and Development	100,000
Total	$ 463,000

The hearing examiner does not find the reduction of the budget by the Committee to be arbitrary or capricious. The Board's budgeting system does not easily lend itself to specific line item reductions, and the Board, in fact, did not submit a line item summary for evaluation. The Committee, on the other hand, in the spirit of the Court's directive in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966), recommended the reductions in the table, *ante.* The Court's directive follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***" (at pp. 105-106)

The hearing examiner finds that the Committee has met its obligation pursuant to the Court's directive. Therefore, an analysis of the budget dispute is in order.

Three items may be grouped for discussion as follows:

Elementary School Teachers (18)	Reduction	$180,000
Fringe Benefits	Reduction	38,000

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Administrative Vice-Principals Reduction 70,000

The record shows that pupil enrollment in the district has decreased by approximately seven hundred fifty pupils since the 1972-73 academic year. The Committee argues that this decrease must result in the need for fewer teachers and a resultant saving in fringe benefits. The Committee argues further that vice-principals should be returned to the classrooms as teachers and that teachers with lessor seniority should be eliminated.

The Board admits that it employs the same number of teachers now as it did in the 1972-73 academic year (158.5) despite the decrease in enrollment. The decrease has been from 4,786 pupils to 4,036 pupils in 167 separate classes. (Exhibit A)

The hearing examiner finds, however, that seventeen of those classes are kindergarten classes, and their maximum size (25 pupils) is mandated by State Board of Education rule *N.J.A.C.* 6:26-2.4, subject to review on request by the County Superintendent of Schools. The implementation of that rule would preclude the elimination of kindergarten teachers in many instances. A review of the decline in other grade enrollment figures shows that class size has been reduced on an average from more than thirty pupils per class in 1972-73 to slightly more than twenty-three pupils per class in 1975-76.

This review discloses a number of inconsistencies in an argument that teaching staff may be easily reduced. For example, one school, West Keansburg, has thirteen classes ranging in class size from fifteen to twenty-six pupils. Four of the smaller classes result, however, from a restructuring of two classes containing large enrollments of thirty-one and thirty-eight pupils respectively. This is the Board's educational consideration for those class sizes, and in the judgment of the hearing examiner the consideration is a meritorious one.

The Committee did not suggest how classes could be regrouped to reduce the need for eighteen teachers; rather it suggested that the average class size would not be overly burdensome with fewer teachers. On the other hand, a breakdown of class size in the eight elementary schools reveals the following:

Class Size – Grades One Through Eight	
30 or over	10
26 to 29	51
20 to 25	75
15 to 19	14
Total	150

It is notable that ten of the classes ranging in size from fifteen to nineteen are found in one school (West Keansburg) at five different grade levels. While such enrollments are small, a consolidation, as noted *ante,* would result in class sizes which are not appropriate but in excess of an optimum number.

The hearing examiner recommends, therefore, that the proposed reduction

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of $180,000 and the necessary $38,000 in fringe benefits, which are affected by the proposed reduction, be restored.

The Superintendent testified that elementary vice-principals were necessary in five of the eight elementary schools because of the number of pupils in those schools and the attendant educational duties required. Those duties will not be detailed here. Suffice it to say, however, that they are numerous, were extensively detailed by the record, and include some classroom teaching.

The Committee's suggestion to give the vice-principals full-time teaching duties and eliminate certain low seniority teachers cannot be supported.

The hearing examiner finds that such a recommendation, if followed, would leave five schools without sufficient administrative support. The record also shows that the vice-principals' teaching was generally limited to grades five through eight and that, therefore, it would be unfeasible, even if economical, to replace a low seniority first, second, third, or fourth grade teacher with vice-principals certified or with experience only in the fifth through eighth grades. The Committee did not sustain its burden of proof to show how this economy could be effected. Thus the hearing examiner recommends that the amount of $70,000 for the administrative vice-principals be restored.

Central Administration *Reduction $40,000*

The Committee suggested that the number of secretaries, clerks, and similar personnel is excessive and that the administrative offices are over-staffed. It recommends specifically the elimination of six clerks thereby effecting a saving of $40,000 in salaries and fringe benefits.

The Superintendent testified and defended the need for these six persons. He explained that they had specific duties to perform and that they were not all located in one building, but were in different locations in the school district.

The Committee did not substantiate its position with respect to the elimination of the six clerks; therefore, the hearing examiner recommends that the $40,000 reduction be restored.

Maintenance *Reduction $15,000*

The Committee contends that there is no need for a "clerk of the Works" in the district and $15,000 in salary and fringe benefits for this position can be eliminated.

The Board maintains that it has no such person and that the correct title (of the referred-to maintenance man) is "Supervisor of Buildings and Grounds." The Superintendent described the duties in detail and explained that this is not a new position but, rather, a position which holds the Supervisor of Buildings and Grounds responsible for the maintenance of buildings and grounds and repairs necessitated by vandalism to buildings worth more than $14 million dollars.

The testimony offered by the Superintendent supports the Board's

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documentation for this expenditure; therefore, the hearing examiner recommends that the $15,000 be restored.

New Buses (2) *Reduction $20,000*

The Committee does not deny the Board's need for two buses. However, it asserts that leasing two buses for $12,000 per year rather than buying two buses for $32,000 will result in a saving of $20,000.

The Board argues that the greater economy may be effectuated by purchasing two buses since they need be replaced only at ten year intervals or 100,000 miles, whichever first occurs.

The hearing examiner concurs with the Board in this regard and recommends that its discretion be sustained and that the deleted sum be restored.

Preparation, Research, and Development *Reduction $100,000*

The Board grounds its request for this program on the continuous need for review, evaluation, revision, and refinement of the curriculum and for the supervision and evaluation of teachers by its department chairmen and administrators. This need is defended in broad educational terms and rationale.

In the PPBS budget, an itemization of salaries alone exceeded $82,000, a 19.7 percent increase over school year 1974-75. In the judgment of the hearing examiner, a $100,000 reduction in this program will not terminate its effectiveness since the amount remaining for the program will be $414,703. (Exhibit B)

The hearing examiner recommends, therefore, that the reduction of $100,000 be sustained.

The following table reconstructs the recommended restorations and reductions of the hearing examiner:

Program	**Restored**	**Not Restored**
Elementary School Teachers (18)	$180,000	$ –0–
Fringe Benefits	38,000	–0–
Administrative Vice-Principals	70,000	–0–
Central Administration	40,000	–0–
Maintenance	15,000	–0–
New Buses (2)	20,000	–0–
Preparation, Research and Development	–0–	100,000
Totals	$363,000	$100,000

In summary, the hearing examiner recommends that $363,000 be restored to the Board's budget, and that a $100,000 reduction by the Committee be sustained.

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Committee pursuant to *N.J.A.C.* 6:24-1.16.

The Committee in its exceptions avers that:

1. The hearing examiner's recommendation to restore eighteen elementary teachers was grounded on his determination that class size should not exceed an "optimum number," and that such recommendation lacks foundation in statute or rule;

2. The hearing examiner's recommendation to restore vice-principals was not supported by the evidence;

3. The Board failed to sustain its burden of proof with respect to the need for clerks in the central administration and for the purchase of buses.

The Commissioner does not agree with these exceptions.

The record shows, with respect to the recommended reduction of eighteen teachers, that the total pupil population has been reduced throughout the school district; however, the impact in any one school was minimal and insufficient in scope to demand the release of any teachers.

The Committee accurately states that regular classes in grades one through twelve are not regulated by size pursuant to any legislative or administrative rule. However, the Commissioner adopted the report of the hearing examiner in *Board of Education of the Township of South Harrison v. Township of South Harrison, Gloucester County,* 1973 *S.L.D.* 438 and commented as follows:

"***Although there is no conclusive research on optimum class size for elementary school pupils, the experience of educators has shown that smaller classes greatly enhance the learning environment, thus enabling more pupil-teacher contact which in turn helps develop the self-image of pupils. Class size must also be considered with respect to the intellectual-emotional needs of pupils and type of learning desired.

"Educators' experience in this State for more than 100 years has demonstrated that there is a greater variety of instructional methods used in smaller classes and that the more desirable educational teaching practices tend to be lost when classes increase in size. In the instant matter, the testimony shows that the Board has determined that a large class size in first grade will not be thorough nor efficient in quality for its first graders.

"The *Report of the State Committee to Study the Next Steps of Regionalization and Consolidation in the School Districts of New Jersey,*

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April 2, 1969, Appendix C, Part I, reads as follows:

> '***In order to provide the necessary instruction *needed by each pupil,* the maximum class size should be 25 pupils***.' (at p. 3) (*Emphasis supplied.*)***" (at p. 439)

Although this determination considered only first graders, it is no less applicable for other grades. The Commissioner so holds.

The record shows that fourteen classes in the district may be characterized as "small" (15 to 19), and that ten classes may be characterized as "large" (30 or over). The great majority of the remaining classes (126) are of an average number between 20 and 29. The record shows also that these disparate class sizes occur across all grade levels and throughout each school in the district. The Commissioner holds, however, that it is not practical to divide a number of pupils by a number of teachers to determine the need for a proper number of teachers, rather the grade level and attainments of the pupils must be considered first before the teaching staff may be assigned. A review of the record shows that this procedure has been followed. (Exhibit A)

Since a principal purpose of the public school system is to instruct the pupils therein, a reduction in teaching staff for the sake of economy cannot be accepted as a valid reason when the Board has determined that such a reduction would adversely affect the attainments of its pupils. The testimony shows that a reduction of teaching staff would require a complete reorganization of the curriculum in each of the eight elementary schools.

Contrary to the Committee's exception to the finding which recommended restoring the vice-principals' positions, the record shows that these vice-principals also have some teaching duties, limited to grades five through eight in addition to their other duties. The Board's proof through the Superintendent's testimony is sufficient to demonstrate the need for these positions. The testimony shows that the positions are not new, but have been established for five or more years. One such position has been established for at least ten years. The record shows also that three schools do not have assistant principals. A teacher in at least one of those remaining schools is paid a stipend to perform some of the duties of an assistant principal.

The Superintendent's testimony with respect to the six clerks and the "clerk of the Works" adequately sustained the Board's burden of proof of the need for these positions. He testified that serious administrative problems would result by their termination in that necessary work could not be done. The Superintendent testified that the proper title of the clerk of the Works is "Supervisor of Building and Grounds" and that he has responsibility for maintenance and repair of a $14 million dollar school plant.

The Committee's final exception is grounded on the hearing examiner's recommendation to purchase, rather than lease, two buses. This determination by the Board was made after considering the age, mileage and cost of leasing as opposed to purchasing buses. Although a saving might be effected for one year,

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as the Committee argues, by leasing the two required buses, it is also obvious that such an economy would be practically lost in the following year. The Board's argument is persuasive that the greater economy is effectuated by purchasing rather than leasing buses. The record shows that the Board owns seventeen buses and seven vans, therefore its experience with these vehicles must be considered and weighed in examining this testimony.

The Commissioner adopts the report and the recommendations of the hearing examiner and finds that the amounts recommended by him are necessary for the maintenance and operation of a thorough and efficient system of the public schools of the Township of Hazlet. *Board of Education of the Black Horse Pike Regional School District v. Mayors and Councils of the Boroughs of Bellmawr and Runnemede, and the Mayor and Township Committee of the Township of Gloucester, Camden County,* 1970 *S.L.D.* 227, 238

Accordingly, the Commissioner directs the County Board of Taxation of Monmouth County to raise by local taxation an additional sum of $363,000 for the current expenses of the Township of Hazlet School District in the 1975-76 academic year.

COMMISSIONER OF EDUCATION

December 24, 1975
Pending before State Board of Education

**In the Matter of the Tenure Hearing of Fred J. Hoffman,
School District of the City of Asbury Park, Monmouth County.**

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education (August E. Thomas, Director, Division of Controversies and Disputes) by Thomas W. Cavanagh, Jr., attorney for respondent, on a Notice of Motion for salary payments to respondent (suspended without pay) consistent with *N.J.S.A.* 18A:6-14; and,

The arguments of counsel having been heard regarding the allegation by Complainant Board of Education of the City of Asbury Park that *N.J.S.A.* 18A:6-14 is not applicable in this matter primarily because of (1) delays effected by respondent, and (2) the concomitant expenditure of taxpayers money while the matter languishes in litigation; and,

The Commissioner having considered the arguments of counsel and the applicable law; and,

The Commissioner having commented in an earlier determination *In the*

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Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County, 1974 *S.L.D.* 501 that the legislative intention set forth in *N.J.S.A.* 18A:6-14, amended by *Chapter* 435, *Laws* of 1971, is to provide financial assistance to individuals who are suspended without pay from their employment with local boards of education, pending the determination of formal charges, and, consequently, find themselves in protracted legal proceedings. The Commissioner further held that it was not the legislative intention to consider that period of time a legislatively imposed penalty upon the suspended employee; and,

The Complainant Board having been unable to show any specific deliberate delay effected by Respondent Hoffman; therefore,

IT IS ORDERED that respondent's request for salary payments be granted at his appropriate step on the salary guide beginning on the 121st day subsequent to his suspension by the Board; and

IT IS FURTHER ORDERED that this matter proceed to a final determination as expeditiously as possible.

Entered this 17th day of November 1975.

COMMISSIONER OF EDUCATION

Fred J. Hoffman,

Petitioner,

v.

Board of Education of the City of Asbury Park, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

For the Respondent, Morgan, Melhuish, Monaghan, McCoid & Spielvogel (Richard J. Toniolo, Esq., of Counsel)

Petitioner, a teacher with a tenure status in the employ of the Board of Education of the City of Asbury Park, hereinafter "Board," appeals from a determination of the Board directing him to undergo a psychiatric examination. His appeals to courts of competent jurisdiction did not grant the relief he

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requested and, because he would not submit to the allegedly unreasonable, unconstitutional, and unjustifiable request to undergo a psychiatric examination, the Board suspended him without pay and certified tenure charges against him to the Commissioner of Education.

At the time of the filing of the tenure charges, the Board filed a Motion for Summary Judgment to dismiss the Petition of Appeal which was followed by two Cross-Motions for Summary Judgment by petitioner. The first Cross-Motion requested immediate relief and reinstatement of petitioner in his former position pending a full hearing of his Appeal by the Commissioner; the second asserted that the record did not contain adequate support for the Board's directive that petitioner submit to a psychiatric examination; therefore, they were in direct opposition to the Board's Motion.

Oral argument was presented on June 2, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The record includes the moving papers before the Commissioner and the courts, transcripts of the Board hearing, transcripts of the court's findings, and Orders, affidavits, exhibits, and Memoranda of Law. The report of the hearing examiner follows:

The oral argument in this matter and the resultant findings and recommendations of the hearing examiner are limited to the Motion, Cross-Motions, and supporting documentation. No consideration is made of the tenure charges except to note their existence and the causes leading to them. The essential facts in this matter, for the purposes of the Motions, are not in dispute.

On January 14, 1975, the Board notified petitioner by letter as follows:

> "The Board of Education of the City of Asbury Park has directed me to notify you that you are required to submit to a physical examination by Myra R. Zinke, M.D., F.A.C.P., at her office in Holmdel, N.J. at 895 Holmdel Road, at a time to be conveniently arranged between you, and a psychiatric examination by John P. Motley, M.D., F.A.P.A., at his office in Point Pleasant, N.J. at 3822 River Road, also at a time to be conveniently arranged between you. In accordance with the provisions of N.J.S.A. 18A:6-2 (sic), the purpose of these examinations is to determine the state of both your physical and mental health. Both examinations will be performed at no cost to you.
>
> "The Board makes this inquiry because there has been serious concern regarding your general health and your performance as a teacher. You can understand the Board's concern regarding both your physical and mental health since you are an elementary school teacher in constant close contact with a classroom of young children. This directive by the Board is based in part upon the fact that Dr. O'Scanlon, your psychiatrist, has stated in writing under letter of November 26, 1974, that you were emotionally unfit to work and could not return to your teaching duties until Monday, December 2, 1974.

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"We are also concerned by emotional instability which occurred in the past and which seems now to have chronic character. The administration of the school system over the years has also been burdened by bizarre communications with the administration and the Board of Education.

"If you have any objection to submitting to the physical and psychiatric examinations required by the statute, please notify Allen B. Weissberger, Secretary of the Board of Education, and you will be permitted to be heard by the Board of Education in private concerning this request."
(Exhibit B-1)

The statute under which the Board asserts its authority, *N.J.S.A.* 18A:16-2, reads as follows:

"Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

"Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

Subsequently, on January 21, 1975, a representative of petitioner objected to the required examinations, stating that such directives from the Board were "***issued without reasonable and sufficient justification and specification.***" The letter also requested a meeting with the Board to ascertain why petitioner should submit to the examinations. (Exhibit B-2)

The meeting was scheduled as requested and set for February 5, 1975 at 8:00 p.m. By letter of January 27, 1975 (erroneously dated 1974) the Board notified petitioner's representative, who made the request for the meeting, that petitioner could be represented by the President of the Asbury Park Teachers Association, hereinafter "Association." That letter further suggested the presence of a court reporter and requested that petitioner present his own treating psychiatrist. (Exhibit C)

On the evening of the scheduled hearing, petitioner asserted that he wished to be represented by the following four persons: the President of the Association, a special consultant to the Association, the secretary of the Association, and a Field Representative of the New Jersey Education Association. The Board acknowledged petitioner's right to be represented and stated that he could have anyone he chose; however, the Board limited petitioner to one representative at the meeting and would not accede to his demand to have all four representatives present. (Transcript of Proceedings, February 5, 1975)

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The Board grounds its authority on the law and its interpretation of pertinent decisions. In that regard, *N.J.S.A.* 18A:25-7 reads as follows:

> "Whenever any teaching staff member is required to appear before the board of education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

The Board also cites the Commissioner's decision in *John Gish v. Board of Education of Paramus, Bergen County,* 1974 *S.L.D.* 1150, affirmed State Board of Education June 26, 1975.

Petitioner cites *N.J.S.A.* 34:13A-3(e) to support his claim for the four representatives as follows:

> "(e) The term 'representative' is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them."

Because petitioner refused to agree to having one, rather than all four representatives, petitioner and his representatives left the scheduled hearing and the Board proceeded in an *ex parte* manner. On February 11, 1975, the Board Secretary notified petitioner by letter as follows:

> "On February 5, 1975 the Board of Education of the City of Asbury Park conducted a private hearing for you in connection with their request that you submit to physical and psychiatric examinations.
>
> "The Board conducted this hearing without your being present since you elected to absent yourself from the proceedings. It is the decision of the Board of Education that you submit to the physical and psychiatric examinations as outlined in Mr. Dempsey's letter of January 14th, a photo-copy of which is attached. If you have not made appointments within ten (10) days to have these examinations the Board will consider what action to take concerning your continuing contact with students while questions exist about your health." (Exhibit D)

Following this meeting and the Board's continued determination to require the psychiatric examination, petitioner filed a Verified Complaint (Docket No. 75-299) in the United States District Court, District of New Jersey, in which he complained of the activities of the Board as set forth, *ante,* and

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complained also, *inter alia,* that the Board had violated his rights under the First and Fourteenth Amendments of the United States Constitution. The Hon. Clarkson S. Fisher, Judge of the Federal District Court, denied petitioner's Motion for Summary Judgment and request for an injunction against the Board from proceeding in accordance with its notice to petitioner. (Exhibit B-1) Petitioner has appealed that determination and upon advice of counsel has refused to submit to the examination. Judge Fisher's Letter Opinion dated March 24, 1975, is reproduced here as follows:

> "This action is before the court on cross-motions for partial summary judgment. I take jurisdiction by virtue of the Fourteenth Amendment of the Constitution, 28 U.S.C.A. Section 1343 (3) and (4) et seq., and 42 U.S.C.A. Section 1983 and 1988.
>
> "Plaintiffs' factual contentions have been previously discussed in this court's opinion of February 28, 1975 in which their application for a preliminary injunction was denied. Subsequent to that date, plaintiffs moved to amend their complaint to add a count challenging the constitutionality of N.J.S.A. 18A:16-2 and requesting the convening of a three-judge panel to determine this claim. An order granting the amendment was signed on March 4, 1975. The court will reserve decision on this count.
>
> "*However, this court feels that the other relief demanded by plaintiffs is not warranted. There has been no demonstration that defendants, in any way, failed to fully comply with the requirements of N.J.S.A. 18A:16-2 and the guidelines imposed for its application in Kochman v. Keansburg Board of Education,* 124 N.J. Super. 203 (Ch. Div. 1973).
>
> "*In actuality, plaintiffs' claims for relief relate to their challenge to the constitutionality of the above-cited statute. This challenge will be determined by a three-judge court if and when it is decided it is worthy of submission to such a panel.*
>
> "Therefore, on the basis of the foregoing and the opinion previously rendered by this court, all of the relief requested by plaintiffs is denied.
>
> "Defendants' motion for partial summary judgment is granted.
>
> "Submit an order." (*Emphasis supplied.*) (Schedule H)

Irrespective of Judge Fisher's Opinion, petitioner refused to be examined pursuant to the Board's request (Exhibit B-1), which refusal led to the filing of tenure charges by the Board.

Petitioner also sought a preliminary injunction against the Board in the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-2892-74 (May 2, 1975). The Honorable Merritt Lane, Jr., J.S.C., commented in an oral opinion in part as follows:

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"***Essentially what plaintiff wants by his order to show cause is to be reinstated pending the disposition of this action and of his appeal to the Commissioner.

"Now, as we all know, a preliminary injunction is a drastic remedy. It requires the exercise of exacting, sound, judicial discretion in view of all the circumstances of the particular case. Gen. El. Co. v. Gem. Vacuum Stores, 36 N.J. Super. 234, 236 (App. Div. 1955).

"Usually the purpose of a preliminary injunction is to prevent an immediate and irreparable harm occurring prior to a full and deliberate determination on the merits of the case.

"Here plaintiff is seeking a mandatory injunction.

***

"Such an injunction will not be granted where the legal rights of the moving party are disputed and unsettled.

"It's rarely granted before a final hearing and it will only be ordered to prevent extreme or very serious damage. It does not issue as [a matter] of course. Allman v. United Brotherhood of Carpenters & Joiners of America, 79 N.J. Eq. 150, 155 Chancery, aff'd o.b. 79 N.J. Eq. 641 (E.&A. 1911); Nystrom v. Pennycook, 29 N.J. Super. 456, 461 (App. Div. 1954); Moss Industries v. Irving Metal Co., Inc., 140 N.J. Eq. 484, 485 Chancery (1947).***"

Petitioner's Order to Show Cause before Judge Lane why he should not be reinstated was discharged, and his request for Summary Judgment was denied.

In the judgment of the hearing examiner, the Cross-Motions for Summary Judgment filed by petitioner should be denied. However, the record shows in two letters from petitioner's own physician (Schedules C, E) and letters to school personnel from petitioner which the Board characterized as "bizarre" (Schedules F, G, B-4, and the envelope addressed to the Superintendent of Schools), that the Board had concern for petitioner's health and thereby ordered his examination pursuant to *N.J.S.A.* 18A:16-2.

The record does not support petitioner's claim that his constitutional rights have been violated in that due process was denied him; nor is there support for his argument that he could not speak in his own behalf or be represented by a person of his choosing. Rather, the record shows that petitioner could not have the number of persons (four) he selected to appear before the Board and speak in his behalf.

Petitioner did not present his physician on his behalf as requested (Exhibit B-1), despite the fact that his physician supplied a letter modifying the letter of November 26, 1974 (Schedule C), which stated in part that petitioner had "***been emotionally unfit***" to work. In Dr. O'Scanlon's letter dated

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January 24, 1975 this language was modified to read "***_unable_ rather than emotionally unfit.***" (*Emphasis in text.*) (Exhibit B)

Moreover, one of the letters classified as "bizarre" by the Board had been sent in an envelope to the Superintendent of Schools, and had printed on its face, "OLD POLITICIANS NEVER DIE THEY JUST STEAL AWAY!" In school business letters to a principal and to the Superintendent, the salutations read "Esteemed Sir" and the letters are signed "Humbly yours, Fred J. Hoffman." Although the hearing examiner does not attach great significance to the contents of these letters, their salutations or the manner in which they are signed, it must be observed that the quotations from these letters, *ante,* show examples which exhibit unusual kinds of communications from petitioner to his superiors about matters which were of a business nature in the school system. In this regard, they could certainly be considered by the Board as part of its reasons for requesting an examination.

The hearing examiner relies, therefore, on the Opinion of Judge Fisher, the decision in *Kochman, supra,* and *Gish, supra,* and the statute *N.J.S.A.* 18A:16-2 in making a finding that the Board had the authority and proceeded properly to require petitioner's physical and psychiatric examination. (Exhibit B-1; Transcript of Proceedings) Petitioner's appeal to the United States Court of Appeals for the Third Circuit challenging the constitutionality of *N.J.S.A.* 18A:16-2, *inter alia,* cannot be grounds for the Commissioner to hold otherwise. Judge Fisher's Opinion is final unless reversed.

The hearing examiner recommends that the Board's Motion for Summary Judgment be granted and that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed by petitioner pursuant to *N.J.A.C.* 6:24-1.16.

Petitioner implies that the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes has influenced the report of the hearing examiner and is prejudiced in favor of the Board. He grounds this complaint on the following factors:

1. The Assistant Commissioner was formerly the Superintendent of Schools in Asbury Park, which school district is demanding that petitioner submit to a physical and psychiatric examination.

2. The Assistant Commissioner is a former colleague of the ex-Superintendent of Schools in Asbury Park who was involved in this matter.[1]

[1]Subsequent to the filing of the Petition of Appeal in the instant matter, the Superintendent of Schools of the City of Asbury Park was dismissed by the Board. He has now filed a Petition of Appeal with the Commissioner of Education seeking reinstatement and tenure.

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The Commissioner is constrained to state that the Assistant Commissioner of Education in charge of Controversies and Disputes must follow the guidelines set forth in the statutes (*N.J.S.A.* 18A:6-10 *et seq.*) and the directives of the Commissioner whenever an appeal is filed in this office.

The Commissioner has fully explored the complaint set forth in petitioner's exceptions alleging prejudice and improper influence over the hearing examiner's report and finds them without merit.

The Assistant Commissioner and each hearing examiner is a former school administrator in this State; therefore, occasionally, litigants are known or have had some earlier professional relationship with each one of them. In most instances, however, hearing examiners are selected for individual appeals because they have had no prior association or knowledge of the matters appealed to the Commissioner. Such is the case herein.

The Commissioner is satisfied, after making his own inquiry, that nothing improper has occurred in the instant matter. There is no need, therefore, as petitioner requests, for a hearing to determine the Assistant Commissioner's involvement. The Assistant Commissioner merely followed the legislative mandate of the statutes (*N.J.S.A.* 18A:6-9 *et seq.*) in assigning and processing the matter herein controverted. Therefore, petitioner's complaint of possible prejudice and influence in this regard is mere speculation and must be disregarded.

The Commissioner observes that Judge Fisher's letter opinion dated March 24, 1975, held that petitioner herein failed to demonstrate that the Board violated the provisions of *N.J.S.A.* 18A:16-2, or the guidelines imposed for its application in *Kochman v. Keansburg Board of Education,* 124 *N.J. Super.* 203 (*Chan. Div.* 1973). Furthermore, Judge Fisher viewed petitioner's claim for relief as being grounded upon the constitutionality of the above-cited statute and added that if and when such constitutional challenge were considered worthy for submission to a three-judge district court panel, such panel would be convened for that purpose.

A three-judge panel of the United States District Court of New Jersey was convened to consider the constitutionality of *N.J.S.A.* 18A:16-2. In its deliberation of that issue and in its written opinion of September 24, 1975, Docket No. 75-299, the Court dealt with the merits of petitioner's arguments concerning the preliminary procedures used by the Board with respect to its implementation of the above-referenced statute, as well as its constitutionality.

In considering the petitioner's challenge to the constitutionality of *N.J.S.A.* 18A:16-2, the *per curiam* opinion of the three-judge panel held:

> "***[T]his Court finds the challenge [by petitioner] to the constitutionality of *N.J.S.A.* 18A:16-2, to be without merit.***" (Opinion, at p. 9, unpubl.)

Petitioner also complained to that Court that he should have been

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afforded a full adversary hearing before the Board prior to its determination that he should report for a psychiatric examination. With respect to a "***full adversary hearing" at such a preliminary stage, the Court held that:

> "***the type of hearing proposed need not take on all the formalities of a trial or a proceeding in the nature of a trial. There was no unconstitutional mischief awaiting plaintiff at this stage. The Board was affording plaintiff his statutory rights to notice and an opportunity to be heard and represented [by inviting petitioner to a private hearing on February 5, 1975, which, at his own choosing, he failed to attend].***"
>
> (Opinion, at pp. 6-7)

Petitioner's second argument addressed by the Court was that the statement of reasons provided by the Board was inadequate to allow him to assert his Fourteenth Amendment rights. In this regard, the Court held that:

> "***[D]ue process [for the purposes of petitioner's complaint before the Court and in the Commissioner's judgment, with respect to the complaint stated herein] does not require absolute specificity as to the standard of notice and the hearing. *** We [the Court] find the notice given to plaintiff Hoffman [by the Board] sufficient to apprise him of the Board's determination of his deviation from normal mental health.***"
>
> (Opinion, at p. 8)

Petitioner's final argument before the Court was that the Board is not a fair and impartial tribunal before which a hearing should be held, because the Board has already made an affirmative finding that petitioner should submit to a psychiatric examination. Consequently, petitioner alleged that the Board is called upon merely to reaffirm its own judgment.

The Court held that that argument was without merit and so stated in its opinion:

> "***The purpose of the Board of Education is to oversee the smooth and efficient operations of the educational system. In carrying out its responsibilities, the Board must continually re-examine the qualifications of the teachers it selects. Once the Board has notified a teacher that it desires the teacher to undergo a medical examination there still remains an opportunity for the teacher to appear before the Board in an effort to dissuade the Board of the need for an examination.*** Such a procedure at this [preliminary] stage of the proceedings does not violate due process. However, the burden of overcoming the mandate to submit to a psychiatric examination should properly remain with the teacher particularly in view of the full panoply of due process afforded plaintiff subsequent to the Board's initial determination.***" (Opinion, at p. 9)

Petitioner cited *Snead v. Department of Social Services, City of New York,* 355 *F. Supp.* 764 (*S.D.N.Y.* 1973) to support his position. However, the Court also quoted *Lombard v. Board of Education of the City of New York,* 502 *F. 2d* 631, 637 (*2d* Cir. 1974) which held that "it is not consistent with constitutional

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due process to permit to stand a 'finding' that appellant is, in effect, mentally incompetent or inadequate without giving him an opportunity in *any* tribunal to confront his accusers in an evidentiary type of hearing." The Court then stated the following:

> "***If, however, the Board was not dissuaded from its original determination, the plaintiff could then challenge the decision by filing a formal petition of appeal with the Commissioner, before whom the proceedings become fully adversary with all the elements of due process. *N.J.S.A.* 18A:6-9 At such proceedings, the opportunity is provided to argue all relevant issues both at the prehearing conference and at the hearing itself. Witnesses may be subpoenaed, pursuant to *N.J.S.A.* 18A:6-20, and are subject to cross-examination. A detailed hearing examiner's report is prepared and submitted to both parties for exceptions, *N.J.A.C.* 6:24-1.16, at which point the Commissioner's decision is rendered. A teacher or other board employee may then appeal from an adverse decision by the Commissioner to the State Board of Education. *N.J.S.A.* 18A:6-27 Finally, the matter may be appealed to the Appellate Division of the New Jersey Superior Court, pursuant to Rule 2:2-3(a) (2)."*** (Opinion, at p. 7)

The Commissioner, after having reviewed the entire record of the matter before him, including the decision of the three-judge panel of the United States District Court, portions of which are set forth above, finds and determines that, on the basis of the essential relevant facts before him, the Board is entitled as a matter of law to Summary Judgment in its favor. Accordingly, the Board's Motion for Summary Judgment is granted, and petitioner's Cross-Motion for Summary Judgment is denied.

COMMISSIONER OF EDUCATION

December 29, 1975

See Court Case List

You are viewing an archived copy from the New Jersey State Library.

Kieffer Shriner,

Petitioner,

v.

Board of Education of the Town of Boonton, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

Petitioner, a tenured teacher in the employ of the Board of Education of the Town of Boonton, hereinafter "Board," appeals an action of the Board establishing petitioner's salary at $15,980 for the school year 1973-74. (P-2) Petitioner alleges that this action of the Board constitutes a reduction in salary in contravention of *N.J.S.A.* 18A:6-10 which provides in part that:

> "No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure***except for inefficiency, incapacity, unbecoming conduct, or other just cause and then only after a hearing held pursuant to this subarticle, by the commissioner, ***after a written charge or charges, or the cause or causes of complaint, shall have been preferred against such person ***and filed and proceeded upon as in this subarticle provided.***"

Petitioner requests the Commissioner of Education to issue an order declaring this action of the Board null and void and directing the Board to compensate petitioner at $16,500 for the 1973-74 school year with other appropriate relief.

The Board denies that its action which established petitioner's salary at $15,980 for the 1973-74 school year constituted a reduction in salary in violation of *N.J.S.A.* 18A:6-10 or was in any way improper or illegal.

A hearing to establish the relevant facts was conducted on December 3, 1974 at the office of the Morris County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner, at the time of the hearing was serving his forty-fourth year as a teacher for the Board. (Tr.8) During this period he had served for varying periods of time as athletic director and head of the physical education department and held both of these positions at the time the instant controversy arose.

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Petitioner in 1964 requested that the Board incorporate his then stipend of $550 for serving as athletic director into a single contract salary for teaching. (Tr. 25) The Board agreed to do so on March 23, 1964. (R-11, 12) Thereafter the Board notified petitioner annually of his appointment to serve as teacher and athletic director and head of the physical education department at Boonton High School at a single designated salary for each ensuing year through the 1972-73 school year when his contract salary was $16,500. (P-7; R-3; Tr. 34)

Petitioner on May 8, 1973, informed the Board in writing that he claimed a salary of $16,980 for the 1973-74 school year and proceeded to grieve the matter. (Tr. 31) His grievance was denied by the Superintendent and the Board. attributable to his duties as athletic director. (P-1; Tr. 59) The Board acted upon the Superintendent's recommendation, assigned the duties of the athletic director to the vice-principal, and reduced by $1,000 the amount which petitioner would otherwise have been paid for the 1973-74 school year had he continued to serve as athletic director. Petitioner has not been assigned to or paid for any duties as athletic director since July 1973. (Tr. 6, 40)

Petitioner on May 8, 1973, informed the Board in writing that he claimed a salary of $16,980 for the 1973-74 school year and proceeded to grieve the matter. (Tr. 31) His grievance was denied by the Superintendent and the Board. (R-5; R-6; R-7; R-8; P-5) The Superior Court of New Jersey, Chancery Division, Morris County, entered judgment on January 9, 1974, restraining petitioner from proceeding with arbitration and the matter has since proceeded before the Commissioner.

Petitioner makes no claim to tenure in his previous position as athletic director (Tr. 16) but rests his claim to additional compensation on *N.J.S.A.* 18A:6-10. He asserts that the Board, having incorporated the stipend for athletic director duties as an integral part of his contractual teaching salary, may not legally reduce that salary absent certification of charges before the Commissioner.

Conversely, the Board argues that it may not legally pay petitioner for services not performed and that it may not exceed the compensation provided in its negotiated agreement with the Boonton Education Association. (Tr. 54)

The hearing examiner finds that the Board, having incorporated petitioner's stipend for performing as athletic director into his contract salary in 1964, thereafter treated it as a single salary. Payments that were made to the Teachers' Pension and Annuity Fund on petitioner's behalf were computed on the total amount of the contract salary. (Tr. 45-57) Such action by the Board is supportive of the conclusion that the Board, while it did negotiate the amount of stipend to be paid an athletic director, looked upon, and in fact established the additional compensation of its athletic director, as an integral portion of his salary as a teaching staff member. It therefore follows that when the Board established petitioner's salary at $15,980 for the 1973-74 school year, it reduced his salary from the $16,500 he was paid in 1972-73 by $520.

It is axiomatic that words of a statute are to be given their ordinary and

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usual meaning. *U.S. v. Chesbrough,* 176 *F.* 778 (*D.C.N.J.* 1910); *State v. Sperry and Hutchinson Co.,* 23 *N.J.* 38 (1956); *Duke Power Co. v. Patten,* 20 *N.J.* 42 (1955) See also *Louis Alfonsetti and Lakewood Education Association v. Board of Education of the Township of Lakewood, Ocean County,* 1975 *S.L.D.* 297 (decided May 1, 1975).

The Commissioner stated in *Nancy Weller v. Board of Education of the Borough of Verona, Essex County,* 1973 *S.L.D.* 513 that:

> "***the negotiation privilege may not intrude on clear statutory authority or render it a nullity.***" (at p. 523)

In the light of such clear law, it is recommended that the Commissioner determine that the Board's establishment of petitioner's 1973-74 salary at a figure $520 below his contract salary for 1972-73 was a violation of *N.J.S.A.* 18A:6-10 and an *ultra vires* act.

In the event such determination is made, the Commissioner is also called upon to determine the validity of petitioner's claim to a continuing salary $1,000 higher than the negotiated figure for teaching staff members with petitioner's training and years of experience and assigned duties.

In *Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1972 *S.L.D.* 638, it was determined that petitioners could not be deprived of a right acquired by action of the Board in fixing their salaries. In another matter, *Elizabeth Stiles et al. v. Board of Education of the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 1170, the Commissioner stated that salaries once established, albeit in error, by a board of education may not later be reduced by rescinding action of the board. However, the Commissioner went on to state therein, that:

> "****This determination, however, does not require the Board to continue to compensate petitioners* according to the provisions of its bachelor's degree scale***. [P]etitioners do not possess baccalaureate degrees***. *Accordingly, the Board may hold petitioners* at their present respective salaries until *their years of experience entitle each of them, respectively, to receive the next increment on the non-degree salary scale.****" (*Emphasis supplied.*) (at p. 1175)

The hearing examiner takes cognizance of the fact that petitioner has not performed the work of an athletic director since July 1, 1973, and recommends that the Commissioner determine that, while petitioner may not be reduced in salary, he has no continuing entitlement to a salary $1,000 greater than that called for in the negotiated agreement for one of his years of experience and training and assigned duties. See also *Agnes D. Galop v. Board of Education of the Township of Hanover, Morris County,* 1975 S.L.D. 358 (decided May 16, 1975).

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has reviewed the record and the hearing examiner's report in the instant matter and it is noted that neither party has filed objections or exceptions to it. The Commissioner concurs with the report and with all recommendations contained therein.

In the instant matter, petitioner's total contract salary for 1972-73 was established at $16,500. The Board could, with propriety, have established a stipend, exclusive of petitioner's teaching salary, and not made such stipend an integral part of petitioner's regular salary. The facts disclose that no distinction had been made between his compensation as athletic director and that as a teaching staff member.

Petitioner has no continuing entitlement beyond 1972-73 to a salary $1,000 greater than that called for in the negotiated salary policy for a teaching staff member of his years of experience, training, and assigned duties. The Commissioner so holds. Consequently, the Board may establish petitioner's salary at $16,500 subsequent to school year 1972-73 until his years of experience entitle him to receive the next increment on his assigned salary scale. *Stiles et al. v. Ringwood, supra*

The Commissioner holds the Board improperly established petitioner's 1973-74 salary at $15,980 which was a reduction of $520. It is well established that a board of education may not reduce the salary of a tenured employee without the certification of tenure charges to the Commissioner who alone has the power to determine whether or not a salary reduction may be invoked as a penalty. *N.J.S.A.* 18A:6-10; *In re Fulcomer, 93 N.J. Super.* 404 (*App. Div.* 1967)

Accordingly, the Board of Education of the Town of Boonton is directed to compensate petitioner forthwith in the amount of $520, an amount which the Board improperly withheld from petitioner's salary during the 1973-74 school year.

COMMISSIONER OF EDUCATION

December 23, 1975

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Rosalyn M. Haratz,

Petitioner,

v.

Board of Education of the Tinton Falls Regional School District and George Malone, Superintendent of Schools, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Brian Boyle, Esq.

For the Respondents, Reussille, Cornwell, Mausner & Carotenuto (Martin Barger, Esq., of Counsel)

Petitioner is a substitute teacher who was employed for varying numbers of days during the school years beginning 1966-67 through 1969-70 by the Tinton Falls Regional Board of Education, hereinafter "Board." She alleges that as a result of her attendance at a Parent-Teacher Association meeting, "Candidates Night," on January 21, 1970, wherein she criticized the then President of the Board and certain practices utilized in the Tinton Falls School library, the Board improperly removed her name from its list of approved substitute teachers, thereby denying her the opportunity to be employed on a *per diem* basis as a substitute teacher. Petitioner also alleges Respondent Superintendent of Schools stated petitioner would never again be called to teach within the school district. Petitioner further alleges that on or about September 3, 1971, she contacted the Superintendent and requested that her name be placed upon the Board's list of approved substitute teachers for the 1971-72 school year, and that the Superintendent denied her request. Petitioner asserts that the Board denied her request for a hearing with respect to this matter on October 12, 1971. Petitioner alleges in sum that the Board's refusal to place her name on its approved list of substitute teachers constitutes retaliation against her and thereby violates her rights of freedom of speech.

Petitioner requests relief from the Commissioner of Education in the form of an order requiring the Board to employ her as a substitute teacher.

The Board and the Superintendent admit certain of the factual allegations made by petitioner but deny that the Superintendent made the statement that petitioner would never again be called to teach, and also deny that their actions violated any rights possessed by petitioner. The Board asserts that petitioner's employment was at the discretion of the Board and the Superintendent, which petitioner cannot question, and also states that the Commissioner does not have the authority to order the Board to employ petitioner as a substitute teacher.

The Board filed a Motion to Dismiss, and oral argument was heard on February 6, 1973 by a hearing officer appointed by the Commissioner. Both parties subsequently filed Briefs on the Motion.

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The Motion was denied by the Commissioner on June 5, 1974. However, the Commissioner determined that there were insufficient proofs at this juncture which would permit him to render judgment with respect to petitioner's allegations of discrimination by the Board. Accordingly, the Commissioner ordered a plenary hearing scheduled so as to afford petitioner an opportunity to present proofs with respect to these specific allegations.

A hearing in the instant matter was held on January 16, 1975 by a hearing officer appointed by the Commissioner at the office of the Monmouth County Superintendent of Schools, Freehold.

For the purpose of clarity and completeness, the hearing examiner will repeat in pertinent part the contentions and conclusions previously set forth in the Decision on Motion rendered by the Commissioner on June 5, 1974.

> "***There is no question in this case that petitioner was never employed by the Board as a full-time teaching staff member, and therefore did not receive a contract to teach. Petitioner's employment was merely as a substitute teacher hired on a *per diem* basis to replace an absent teacher. The distinction between a regularly employed full-time teacher and a substitute teacher was examined and described by the Commissioner in *Yanowitz et al. v. Board of Education of the City of Jersey City, Hudson County,* 1973 *S.L.D.* 57 wherein the applicable statutory provisions and decisions of the Commissioner and the courts were reviewed.
>
> "In the instant matter, the Board argues that petitioner's status as a substitute teacher who cannot acquire tenure precludes the right to a hearing, and to further employment where no contract has existed. The Board relies on *Zimmerman v. Newark Board of Education,* 38 *N.J.* 65, 70 (1962) wherein the Court stated the long-standing principle that no person has a right to demand employment as a teacher, and further that a local board of education may decline to employ or reemploy any applicant for any reason whatever or for no reason at all.
>
> "Petitioner relies upon *Donaldson v. Board of Education of North Wildwood,* 115 *N.J. Super.* 228 (*App. Div.* 1971) and *Pickering v. Board of Education of Township High School, District 205,* 391 *U.S.* 513 (1968) for the principle that even nontenure teachers are entitled to a hearing if their failure to receive reappointment or reemployment is based upon proscribed, discriminatory reasons. In this instance petitioner argues that the Board may not retaliate against her as the result of her exercise of the right of freedom of speech.
>
> "This particular issue of alleged non-reemployment by a local board of education of a teaching staff member who exercises the right to speak on issues of public importance is not novel in this State. For an example of a case where the Commissioner's decision denying a hearing to a nontenure teaching staff member was reversed see *Marilyn Winston et al. v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App.*

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Div. 1973), 64 *N.J.* 582 (1974), dismissed with prejudice by Commissioner of Education November 1, 1974.***

"The novel feature in the instant matter is that petitioner has never been employed as a full-time teaching staff member. Instead, her employment was only on a *per diem* basis as a substitute teacher. Notwithstanding these facts, it is the judgment of the Commissioner that petitioner must be given the opportunity to prove her serious allegation that the Board and Superintendent removed her name from the approved list of substitute teachers in retaliation for her public statements. It must be made clear, however, that if petitioner is able to sustain the heavy burden of proof required and thereby prevail in this matter, the only relief which the Commissioner can afford petitioner would be to direct the Board to reinstate her name on the approved list of substitute teachers and to treat her the same as all other substitute teachers. The Commissioner cannot order the Board to employ petitioner for a minimum number of days as a substitute teacher during a specific school year. This is so because the common practice in public school administration is that various substitute teachers are employed on a *per diem* basis for classes which they can best teach, on days when they are needed and are available. The discretionary authority rests with the Board and Superintendent to determine on a given day which one of all available approved substitute teachers would be most effective and therefore most desirable to teach a certain class or combination of classes in the absence of the regular teacher. It would be clearly illogical and harmful to the educational process for the Commissioner to interpose his judgment in such a vital day-by-day procedure as the selection of substitute teachers in a local school district.

"For the reasons stated, the Commissioner determines that petitioner must be granted a plenary hearing to prove her allegations of discrimination. The hearing will be before the Commissioner, in the person of his representative. Should petitioner prevail in such hearing, the relief as hereinbefore described will be granted to her.***"

The report of the hearing examiner is as follows:

For the purpose of this report certain facts admitted in the pleadings are not considered to be in dispute.

Petitioner testified she was employed as a substitute teacher by the Board approximately forty days per year from 1966-67 through 1969-70 (Tr. 4, 5, 6), and that her last day of employment in such capacity occurred in early January 1970. (Tr. 8)

The Board avers that petitioner was called upon to substitute teach "***approximately fifty (50) odd times***" during the 1968-69 school year and that during "***the 1969-1970 school year she was called upon to substitute October 2, November 17, December 10 and January 15.***" (Board's Memorandum of Law, at p. 1)

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Petitioner testified that she attended "Candidates Night," on February 11, 1970, and on this occasion she raised the following question:

> "***It was a question of – Dr. Camano (phonetically) was an incumbent of the Board running for reelection, and in his statement he spoke about what a fine library we have at Tinton Falls School and I was a little upset because I subbed at Tinton Falls quite frequently and I discovered – well, I have children who attended the school at that time and I found out that before the holidays, the major holidays of Easter or Christmas, the children were not allowed to take books out of their library. This was the time when they really needed the books, because reports were due and everything else, and here Mr. Camano was talking about what a fine library we have and I felt they were not being used satisfactorily, so I asked why our children could not take out books before the major holidays and he said he would look into it.***" (Tr. 8, 9)

Although petitioner's testimony refers to the date of "Candidates Night" as being February 11, 1970, and not January 21, 1970, as previously established in the pleadings and documents submitted in the instant matter, the hearing examiner finds that further comment with respect to this discrepancy is unwarranted.

Petitioner testified that subsequent to the aforementioned meeting she noticed a change in the Board's library policy inasmuch as her children were then permitted to bring library books home before major holidays. (Tr. 19)

The Superintendent testified that he was unaware that pupils were precluded from taking books out of the school library before major holidays "***until it was brought up at the meeting to which Mrs. Haratz [petitioner] refers, and immediately upon hearing about this I went to the Head Librarian***and told her that I was amazed that such a policy existed.***" (Tr. 20) The Superintendent further testified that "***I told her [Head Librarian] I didn't agree with the policy. I said, what good is a library if you can't use it and the policy was changed as a result of that.***" (Tr. 21) Petitioner testified that she called the Superintendent's secretary during the 1969-70 school year to inform her that "***I [petitioner] was still available and I haven't been called to substitute***." Petitioner called the Superintendent's secretary again, at the end of the 1969-70 school year and said, "***I do hope to be put on your list for the next year [1970-71] even though I haven't been called too much this year.***" (Tr. 10) During this period of time (1969-70) petitioner's testimony reflects that her husband wrote a letter to a member of the Board "***asking him to look into the situation, and one time when I [petitioner] called Mr. Malone [Superintendent] he said, 'your husband is writing threatening letters to the Board. That's why you are not being called.'***" (Tr. 14)

Petitioner asserts that her request to the Superintendent for placement on the approved list of substitute teachers for the 1970-71 school year was also denied "***because your husband is threatening the Board.***" (Tr. 15)

Petitioner's husband stated that he was present on candidates night when his wife questioned the school library policy. (Tr. 35)

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Petitioner's husband maintains that the subject of his wife's substitute teaching was never a topic of discussion between the Superintendent and him. (Tr. 37) The conversation with respect to petitioner's substitute teaching occurred one year after candidates night in January 1970 between petitioner's husband and the President of the Board. It was at this time, petitioner's husband testified, that he submitted a letter (P-2) addressed to the Board through the President of the Board alleging that petitioner was being denied employment as a substitute teacher because she exercised her right to free speech. (Tr. 37) Other communications of similar nature were exchanged between petitioner's husband and the Monmouth County Superintendent of Schools. (P-3, P-4)

The Superintendent of Schools testified that he approved the names on the substitute list which are submitted annually for Board approval at the August meeting. (Tr. 21) He further stated that "***names were added or deleted during the year as the occasion arose.***" (Tr. 21) The primary responsibility for contacting substitute teachers on a day-by-day basis was initially vested with the Superintendent's secretary, until such time as it was transferred to a secretary at the Swimming River School. (Tr. 16, 22)

According to the Superintendent's testimony, he did not assume personal supervision with respect to the persons who were called to substitute from the Board's approved list. Exceptions to this procedure, according to the Superintendent, occurred when "***the Principals would report to me that certain people were better at this or that, or that they didn't want them called for whatever reason.***" (Tr. 22)

Evaluations of substitute teachers were performed by the principals of the schools where substitute personnel were employed. The Superintendent said that written evaluations of the substitute teachers were not required from the school principals. Some of the evaluation reports were communicated by telephone from the principals to the Superintendent. (Tr. 23)

The following testimony of the Superintendent reflects the series of events which ultimately resulted in petitioner's name being removed from the approved substitute list for the ensuing school years:

***

"Q. Do you know why she [petitioner] was not called after this meeting?

"A. Yes, during that year, [1969-70] I forgot the exact date, the Principal, Mr. Price, reported to me that he did not want her [petitioner] substituting for him and on that basis I informed*** [secretary in charge of substitute calls] not to call Mrs. Haratz [petitioner] unless it was an extreme emergency.

***

"Q. No explanation?

"A. No." (Tr. 23)

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***

"Q. Did you ever make a statement that she would never teach in your schools again?

"A. I made a lot of statements in my 25 years there. I don't recall exactly, but if I did it would relate to what Mr. Price told me***that he didn't want her there [Tinton Falls School].

***

"Q. You made no attempt to discover why Mr. Price did not want her teaching?

"A. No, I wasn't particularly interested in the reasons." (Tr. 24)

***

"Q. Did you ever discuss Mrs. Haratz [petitioner] with***[secretary in charge of substitute calls]?

"A. Only to the extent that I did tell her that I didn't want Mrs. Haratz [petitioner] called except in an extreme emergency during that period to the end of the year [1969-70].

"Q. That was based upon Mr. Price's report?

"A. Mr. Price's evaluation." (Tr. 28)

***

"Q. Are you telling us that the reason you didn't call her [petitioner] anymore was because of the report of Mr. Price?

"A. Right" (Tr. 29)

***

"Q. Why was her [petitioner] name not placed on the list for the '71-72 academic year?

"A. Because of these reports that I received from Mr. Price.

"Q. Report or reports?

"A. Evaluations report***. It was verbal.***" (Tr. 33)

When asked whether he told petitioner in September 1970 that the reason she was not being hired was because her husband was threatening the Board, the Superintendent stated:

"***I don't recall that talk. I don't remember giving her [petitioner] any

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particular reason except that Mr. Price didn't want her on the list.***"
(Tr. 26)

While it has been established as a matter of law by the courts of this State and by the Commissioner that a *per diem* substitute teacher is not entitled to be guaranteed employment by a local board of education, it has also been held by the Commissioner that a board of education may not use its statutorily prescribed discretionary powers in an arbitrary, capricious, unreasonable, or discriminatory manner. *Preston Mears et al. v. Board of Education of the Town of Boonton, Morris County,* 1968 *S.L.D.* 108 In this decision the Commissioner said:

> "***The Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. *But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions.* Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained. Neither in *Seamans* [1968 *S.L.D.* 1] nor in the present matter could the Commissioner find such reasonable basis, and he therefore was impelled to the conclusion that the Board's action was unreasonable and arbitrary.***" (*Emphasis supplied.*) (at p. 111)

In the instant matter the Board produced no witnesses on its behalf. The testimony of the Superintendent of Schools who was called as a witness in support of petitioner's allegations of discrimination clearly indicates that neither he nor the Board was apprised by the principal of the Tinton Falls School of any viable reason which justified the actions taken with respect to petitioner's employment as a *per diem* substitute teacher. Clearly, the Board and the Superintendent of Schools were entitled to be given reasons by the principal which would have provided the Board with appropriate information to determine that some reasonable basis existed for its actions pertaining to petitioner's employment status.

The hearing examiner concludes on the basis of the evidence adduced herein that, because of the absence of any reasonable basis for the actions taken by the Superintendent or the Board, petitioner's allegation of discrimination should be sustained. The hearing examiner recommends that the Commissioner concur with the above findings and take whatever action he determines to be appropriate with respect to petitioner's Appeal.

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner. The Commissioner observes that neither party filed objections thereto.

In this case, the Board determined not to produce witnesses on its behalf in defense of its action controverted herein. Rather, the Board relies on its Answer filed to the Petition herein in which it avers that petitioner served at the pleasure of the Board and the Superintendent of Schools, that petitioner has no standing to question the actions of the Board or its Superintendent, and that the Commissioner lacks the authority to order this Board to hire or employ petitioner as a substitute teacher.

While the Commissioner recognizes his responsibility to consider affirmative defenses filed by respondents in administrative proceedings before him, he is also cognizant of his responsibility to determine the legal efficacy of allegations brought under the education laws, Title 18A.

In the instant matter, the record supports the conclusion that petitioner has been specifically excluded by the Board from being called as a substitute teacher in its schools as the direct result of her questioning library policy during the meeting held January 21, 1970. Such action by the Board constitutes an abridgement of petitioner's right to free expression. Even if petitioner's criticisms of the library policy were held to be negative criticism of the Board, the Superintendent, or the school principal, such comments are still within the realm of free expression. It is obvious that petitioner's comments were sincere and truthful, for the record discloses that thereafter the library policy was indeed changed to comport with her criticisms.

The Commissioner determines that petitioner has been excluded from being considered for employment as a substitute teacher on grounds that violate her constitutional rights.

The Commissioner hereby directs the Board of Education of the Tinton Falls Regional School District to immediately reinstate the name of Rosalyn M. Haratz on its approved list of substitute teachers and to afford her consideration for substitute assignments which is comparable to that afforded all other substitute teachers in its employ.

COMMISSIONER OF EDUCATION

December 23, 1975

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Irwin Stoolmacher,

Petitioner,

v.

State Board of Examiners,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Irwin Stoolmacher, *Pro Se*

For the Respondent, Jane Sommer, Attorney at Law

Petitioner, who is the Business Manager employed by the Board of Education of the City of Jersey City, appeals the October 31, 1974 determination of the State Board of Examiners, hereinafter "Board," denying petitioner a permanent school business administrator's certificate for which he had made application. (P-19, at p. 9) He asserts that his academic training, personal attributes, and work experience amply qualify him for the issuance of this certificate. (Tr. 103-104) Petitioner seeks an order from the Commissioner of Education directing the Board to issue in his name a school business administrator's certificate.

The Board, denying that petitioner is entitled at this time to the certificate which he seeks, asserts that careful consideration has been given to petitioner's application by members of the Board, who are experts in the field of education, and that the Board's determination is entitled to a presumption of correctness.

Petitioner, having protested the aforementioned determination of the Board, was ordered to show cause why a school business administrator's certificate should be issued to him. A hearing was conducted on April 10, 1975 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner made application for the aforementioned certificate and was advised by the Director of the Bureau of Teacher Education and Academic Credentials on August 26, 1974, that he lacked the required academic credits in each of those seven areas of academic study which are required for this certificate by *N.J.A.C.* 6:11-10.10 as follows:

1. School Business Administration
2. School Buildings
3. School Finance
4. School Law
5. Accounting
6. Organization and Administration of Public Education
7. Public School Curriculum

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Thereupon, petitioner appealed through the Hudson County Superintendent of Schools to the Appeals Committee of the Board pursuant to *N.J.A.C.* 6:11-3.31. The Appeals Committee, after review of pertinent evidence, recommendations, and other data, is authorized only to make recommendations to the Board relative to the issuance of a regular or a provisional certificate. *N.J.A.C.* 6:11-3.31(c)7 In the event that a regular certificate is issued by the Board it is issued "***for a period of two years until the person has demonstrated his competency and justified the exception made in his case." *N.J.A.C.* 6:11-3.31(c)7

In the instant matter, the Appeals Committee reviewed and considered the material submitted by petitioner and others on his behalf (Tr. 100) and recommended to the Board that a provisional school business administrator's certificate be issued to petitioner, and that all deficiencies be waived except one course in public school curriculum which deficiency was to "***be removed at the end of one year.***" (P-19, at p. 9; Tr. 66) There is dispute as to what was meant by this quoted phrase. The Acting Director of the Bureau of Teacher Education and Academic Credentials who sits as secretary of the Appeals Committee represents that it required the successful completion of an academic course in public school curriculum studies. Petitioner contends that such a course requirement was not intended. (Tr. 67-68)

A determination of what was meant by the Appeals Committee relative to this phrase is not imperative, however, in view of the Board's action relative to the Committee's recommendation. After approximately thirty-five minutes of discussion of this recommendation (Tr. 102), which had been mailed to the Board's members prior to its October 31, 1974 meeting (Tr. 101), the Board voted to deny the Appeals Committee's recommendation by a vote of seven to two, with one abstention. Petitioner was notified that his appeal was denied, whereupon he sought clarification as to whether this denial pertained to all seven areas of academic deficiency. (P-7; P-8; P-17) After further review of his credentials the Board informed petitioner on March 19, 1975, that requirements of academic credits in the area of school business administration, school buildings, and school finance would be waived. The Board further stated that:

> "***[O]n the request of an employing school district, a conditional school business administrator's certificate may be issued, valid to September 1, 1976, by which time the requirements in accounting, organization and administration of public education, public school curriculum, and school law must be completed.
>
> "***[T]he Board is fully aware of the sudden schedule shifts in college course availabilities. Should such shifts create obstacles***considerations will be extended to you.***" (R-1)

Petitioner appeals the matter to the Commissioner contending that in those four areas of academic study not waived by the Board he possesses equivalent work experience, training or expertise sufficient to merit the waiver of those academic credits as follows:

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SCHOOL LAW

Petitioner presented to the Appeals Committee and relies on commendatory letters from two practicing attorneys who have recently served the Board of Education of the City of Jersey City. These letters attest to his knowledge and familiarity with the content and subtleties of school law, particularly as it applies to the financial operation of school districts. (P-4; P-14) In this regard, petitioner submits another letter of reference from a New Jersey Superior Court Judge, Hudson County, who has served as a member and President of the Jersey City Board of Education. He attests therein to petitioner's "***understanding of the applicable statutes, rules and regulations pertaining to the business affairs of the Board of Education***." (P-13) Additionally, testimony was given at the hearing by the attorney for the Jersey City Board of Education who attested to petitioner's familiarity with all phases of school law that apply to building construction, finance, and the office of the school business manager in the second largest city in the State. (Tr. 30-33)

ACCOUNTING

Petitioner relies in this area upon his successful work experience as Coordinator of Federal and State Aid for one year and thereafter as Assistant Business Manager and Business Manager of the Jersey City Board of Education for two years from August 1973 to the present (P-16) as attested to by the Secretary of the Jersey City Board of Education. (P-5) Petitioner further relies upon previous successful work experience in budgeting and accounting for all grants-in-aid funds received and expended when he served as Urban Coordinator of the St. Peter's College community outreach programs from December 1970 to March 1972 as attested to by the President of the College and the former Director of the New Jersey Council for Urban Affairs. (P-2; P-10; Tr. 8, 36, 52, 59)

ORGANIZATION AND ADMINISTRATION OF PUBLIC EDUCATION

In lieu of academic credits in this field, and in addition to his present duties as Business Manager of the Jersey City Board of Education, petitioner advances evaluations of his experience as Coordinator of Federal and State Aid with the Jersey City Board of Education from March 1972 through April 1973 (P-6; P-12); as Urban Coordinator at St. Peter's College (P-2); and as Field Representative with the New Jersey Department of Education's Office of Model Cities from April 1970 to July 1970. (P-20; Tr. 47-50, 52)

PUBLIC SCHOOL CURRICULUM

Petitioner lays claim in this area to equivalent experience in lieu of formal academic course credit by reason of his following listed work experience, publications and letters of recommendation:

A. Four months of experience as a short term field representative with the Department of Education's Office of Model Cities, which service encompassed the formulation of educational projects. (P-1; Tr. 10-12)

B. Urban Analyst, New Jersey Council for Urban Affairs, Office of the

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Governor, from June 1969 to March 1970, involved in research and development of educational and manpower programs in conjunction with interdepartmental coordinating bodies. (P-16)

C. Publication of article entitled "How the World of Construction Came to Jersey City" in *Urban Community News and Views,* published by Jersey City State College Urban Institute, undated. (P-24)

D. Publication of article co-authorized by petitioner entitled "Going for Broke" in the Jersey City Chamber of Commerce *Forum,* January-February 1973. (P-25)

E. Letter of recommendation from the Acting Superintendent of Schools, Jersey City Board of Education dated August 8, 1974. (P-6)

F. Letter of May 2, 1974 from the Chancellor of Higher Education of New Jersey appointing petitioner to the State Advisory Council of the Title I, Higher Education Act program. (P-23)

In addition to the above, petitioner sets forth as evidence of his qualifications, numerous civic and social organizations and professional associations in which he has worked or been a member. (P-16)

Petitioner asserts that the foregoing varied work experience, coupled with his distinguished academic record, having graduated *magna cum laude* from the State University of New York at Binghamton in 1969, and having been awarded a master's degree thereafter from Rutgers University (P-22), provides ample reason to waive the remaining four courses required by the Board of Examiners. (Tr. 37-40, 103) In this regard petitioner stated that:

> "***[I]t is my sincere opinion that***the ideal *modus operandi* for someone to be a good business administrator is to be in a place like *** Jersey City with all the problems of a large district, to grapple with those problems on a day to day basis, work at it, put time in and ***, if he applies himself and starts off with a fairly good head, will be a better business administrator than someone who took the academic courses, and had no *** on the job experience.***" (Tr. 103-104)

The Board does not contest that petitioner has served well as Business Manager for the Board of Education of Jersey City since January 1974 nor that his academic record is outstanding. In recognition thereof, the Board has waived formal course studies, otherwise required, in the fields of school business administration, school buildings, and school finance. The Board points out that petitioner's service as Business Manager and Assistant Business Manager is limited to a single large city in the State, whereas the certificate he seeks would be valid throughout the entire State during petitioner's lifetime. (Tr. 104) The Board views the functions of a business manager, a position which does not require a certificate, as less pervasive than those of a business administrator. (Tr. 84) It, therefore, views the seven required areas of successful academic study or

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equivalent experience therefore as essential for the issuance of the business administrator's certificate. The Board views the requirement in school law as a broader exposure than those facets to which petitioner as a business manager has been exposed in the performance of his duties. (Tr. 83) It takes a similar view of the requirements of courses of study in school curriculum (Tr. 88-89) and organization and administration of public education. (Tr. 89) It maintains that such formal studies covering a wide range of topics, with the attendant lectures, readings, and discussions are necessary to ready one for the broad responsibilities for which one is certified as a school business administrator. In this regard the Board maintains that reliance upon a known body of course work and training is essential in the absence of equivalent or superior experience or alternate education. The Board maintains, herein, that petitioner has such equivalent experience and education in school business administration, school buildings, and school finance. However, the Board in its discretion, has determined that petitioner does not have such equivalent experience and training in school law, accounting, public school curriculum and organization and administration of public education. The Board maintains that its determination has been made after due deliberation and is, therefore, entitled to a presumption of correctness.

The hearing examiner finds that petitioner has been afforded a proper review of his credentials and work experience by the Board and its Appeals Committee pursuant to *N.J.A.C.* 6:11-1.1 *et seq.* The Certification Appeals Committee, after due consideration, recommended to the Board that all but one course requirement be waived. Upon review of this recommendation, the Board, however, determined that only three of the seven required areas of study could properly be waived. Petitioner has, therefore, been afforded the due process accorded by law and by regulations of the State Board of Education. This being so, the Commissioner is confronted with the narrow issue of whether the Board's final determination is a reasonable one. As was said in *Ronald T. Glab v. Board of Education of the Borough of Belmar, Monmouth County,* 1975 *S.L.D.* 243 (decided April 18, 1975):

> "***The Commissioner has jurisdiction over controversies and disputes arising under the school laws (*N.J.S.A.* 18A:6-9)***. Thus the Commissioner clearly has jurisdiction to examine the propriety and discretion of the Board's actions***." (at p. 245)

It is observed that there are three alternatives by which one may satisfy the requirements for a school business administrator's certificate:

1. Successful completion of a college curriculum approved by the New Jersey State Department of Education. *N.J.A.C.* 6:11-10.10(3)i

2. Successful completion of thirty semester hours of college credit including work in *each* of the previously mentioned seven areas of study. *N.J.A.C.* 6:11-10.10(3)ii

3. Equivalent education and/or experience as evaluated by the Certification Appeals Committee and acted upon by the Board of Examiners pursuant to *N.J.A.C.* 6:11-3.31.

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Petitioner neither qualifies for nor lays claim to the certificate under the first two of these alternatives. Thus, the reasonableness of the Board's determination to require four areas of additional academic study must be viewed within the confines of petitioner's academic preparation and his work experience to the present date.

A review of petitioner's undergraduate and graduate credits (P-22) reveals a strong concentration in the field of political science with numerous courses in government, politics, sociology, humanities, economics, legal processes, philosophy, and international relations. No courses were taken by petitioner in the fields of accounting, public school curriculum, or organization and administration of public education. Whereas petitioner completed six graduate credits in Problems In Legal Processes, there is no showing that these courses provided such scope or breadth or otherwise embraced the wide body of school law that is typically treated in courses in school law. Nor is there a showing that those academic courses completed by petitioner treated the areas of accounting, school curriculum, or organization and administration of public education in such depth as to qualify them as the equivalent of such specific courses as are required for certification as a business administrator.

While in no way demeaning petitioner's outstanding academic record, it is recommended that the Commissioner determine that petitioner does not possess academic credits which are the equivalent of those four areas of required studies in accounting, curriculum, school law, and organization and administration of public education.

It remains to consider the equivalency of petitioner's work experience in these areas. Work experiences have been presented for those six years following petitioner's graduation from Rutgers Graduate School in June 1969. The attestations to petitioner's performance record as hereinbefore described, are enthusiastic and highly commendatory. These work experiences may be summarized from June 1969 to the present as follows:

1. Ten months as an Urban Analyst, New Jersey Council for Urban Affairs.

2. Sixteen months as Urban Coordinator, St. Peter's College, Jersey City.

3. One year as Coordinator of Federal and State Aid, Jersey City Board of Education.

4. Two years as Assistant Business Manager and as Business Manager, Jersey City Board of Education.

Petitioner's work experiences indicate that he has been responsible for approximately a two-year period for supervising the accounting of funds received and expended by the second largest school district in the State and that, previous thereto, he had accounted for all funds for fourteen community outreach programs of St. Peter's College.

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In view of this experience and the attestations presented in regard to the effectiveness thereof, the hearing examiner recommends that the Commissioner determine that the requirement of credits in accounting may be waived as a requirement for certification.

Petitioner's letters of attestation show clearly that he has more than a passing acquaintance and familiarity with school law as it pertains to the purchasing, construction and remodeling of buildings, and those areas pertaining to the work of a business manager. There is, however, no showing that such knowledge of school law has been required or exhibited in those broader facets of school operation which are presented by lectures, discussions, required readings, and study in courses in school law. Nor is there evidence that petitioner's work experience has been sufficiently broad, extensive, or of such duration as to justify the waiver of the discipline of formal academic study in the areas of public school curriculum or the organization and administration of public education. Such disciplines may be expected to broaden the perspectives and abilities of those who engage therein and will better prepare them for service as school business administrators in the varied types of school districts in the State.

Absent such studies or equivalent studies or work experience, which may be considered sufficient to waive their requirement, it is recommended that the Commissioner determine that petitioner, to be permanently certified, must present evidence of successful completion of academic courses in public school curriculum, school law, and organization and administration of public schools.

It is further recommended that the Commissioner determine that the Board, having thoroughly reviewed petitioner's academic record and work experience, and having determined that courses in school business administration, school buildings, and school finance may reasonably be waived, has therein exercised reasonable discretion and that that aspect of the Board's determination is entitled to a presumption of correctness.

Finally, it is recommended that the Commissioner direct the Board to issue to petitioner a conditional School Business Administrator's certificate valid to September 1, 1977, by which time petitioner is to present to the Board evidence of successful completion of academic credits in school law, public school curriculum, and organization and administration of public education, whereupon a permanent school administrator's certificate may be issued.

This completes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record of the herein controverted matter including the exceptions to the report of the hearing examiner filed pursuant to *N.J.A.C.* 6:24-1.16.

The Board of Examiners has determined to waive those three requisites of *N.J.A.C.* 6:11-10.10 which would require petitioner to present evidence of

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satisfactory completion of academic courses in School Business Administration, School Buildings, and School Finance. The hearing examiner has recommended that a fourth requisite course, of the seven required by *N.J.A.C.* 6:11-10.10, namely Accounting, be waived.

The Commissioner concurs and directs that these requisites be waived, by reason of evidence presented by petitioner to the Board of Examiners and at the show cause hearing before the hearing examiner. This evidence is supportive of the conclusion that petitioner has equivalent work experience and expertise that may reasonably be recognized in lieu of successful completion of formal academic study in these four areas.

The Commissioner has diligently searched the record with respect to the documentary evidence, testimony offered on petitioner's behalf, and arguments and exceptions to the hearing examiner report. There is insufficient evidence to conclude that petitioner does in fact have sufficient work experience or expertise to offer in lieu of formal academic training in the areas of Public School Curriculum, Organization and Administration of Public Education, and School Law.

Consequently, these requirements may not be waived. The Commissioner so holds.

The Commissioner directs that, in the event petitioner makes application to the Board of Examiners for a conditional school business administrator's certificate, he be issued such a certificate, valid until September 1, 1977 in any school district in this State which, pursuant to *N.J.S.A.* 18A:17-14.1, has approval to employ a school business administrator.

To this limited extent petitioner's prayer is granted. The remainder of petitioner's prayers are denied.

COMMISSIONER OF EDUCATION

December 26, 1975

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Ruth D. Trued,

Petitioner,

v.

Board of Education of the Borough of Ho-Ho-Kus, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Carpenter, Bennett & Morrissey (Arthur M. Lizza, Esq., of Counsel)

Petitioner is a teacher who alleges that she acquired a tenured status in the school district operated by the Board of Education of the Borough of Ho-Ho-Kus, hereinafter "Board," and, therefore, that her termination by the Board is illegal. The Board denies that petitioner acquired a tenured status and asserts that her termination was proper in all respects.

A hearing in this matter was conducted in the office of the Union County Superintendent of Schools, Westfield, on May 22, 1974 before a hearing examiner appointed by the Commissioner of Education. On that occasion several documents were submitted in evidence. Briefs were filed subsequent to the hearing. The report of the hearing examiner is as follows:

Certain essential facts pertinent to the instant matter are not in dispute. They are that petitioner taught for three consecutive academic years, 1970-71, 1971-72, 1972-73, and that at all times she held a valid permanent certificate for the subject she was teaching. (Respondent's Brief, at p. 3; Exhibits A, B, C, D) In addition to this employment, petitioner was also employed by the Board at various times between January and June 1970. She worked as a substitute teacher on January 6, 12, 13, 14, 15 and 16, 1970, and April 27 and 29, 1970. (Respondent's Brief, at p. 3) Petitioner alleges, also, that she worked as a substitute teacher several days in February 1970. (Petitioner's Brief, at p. 3) This latter allegation is not, however, material to the matter in dispute, since, even if true, the employment was as a substitute teacher. (Tr. 72)

At issue here is petitioner's employment status during June 1970, and her termination by the Board in the spring of 1973 which will be addressed, *post.* Specifically, petitioner was employed under contract with the Board for the period June 5 through June 12, 1970. (Exhibit A) Petitioner asserts that this time must be counted with her employment for the next three consecutive academic years, and, therefore, she has tenure in the school district pursuant to *N.J.S.A.* 18A:28-5(c) which reads in pertinent part as follows:

"The services of all teaching staff members including all teachers *** and

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> such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education *** shall be under tenure *** after employment in such district or by such board for:
>
> ***
>
> "(c) the equivalent of more than three academic years within a period of any four consecutive academic years ***."

Therefore, an analysis of petitioner's employment during the period June 5 through June 12, 1970, must be made.

The facts reveal that the regular vocal music teacher notified the Superintendent on May 19, 1970, that she would not return to teach in the next academic year beginning September 1970. The Superintendent so notified petitioner, who was offered and accepted a contract in May 1970 for the 1970-71 academic year at a salary of $9,400, the sixth step of the salary guide. She was given credit for five years' prior experience. (Tr. 113-115; P-1) Unexpectedly, however, the regular teacher resigned on June 4, 1970, effective immediately, and petitioner was notified because she had taught there earlier in the year and had already been engaged to teach in the school district in the coming fall session. (Tr. 115-116) She met with the Superintendent to discuss the vacated position; however, their testimony is conflicting concerning that meeting.

Petitioner testified that a contract had been prepared for her to teach for the period June 5 through June 12 prior to her meeting with the Superintendent on June 4. (Tr. 59) The Superintendent testified that he discussed the length of the contract and her pay prior to having the contract made out. He testified, also, that petitioner was advised that she would have no responsibilities for the eighth grade graduation program or the choruses. (Tr. 74-75, 117) The Superintendent testified further that a contract was not ordinarily given to substitutes but was necessary in this instance because petitioner insisted on receiving $25.00 per day, the rate she received in a neighboring school district which was $5.00 higher than the regular substitute wage authorized by the Board. When such exceptions were made, he continued, the unwritten policy of the Board dictated that he issue a contract and have it ratified by the Board for their records. (Tr. 117-119, 124)

In the hearing examiner's judgment, the Superintendent's testimony is the more accurate. It would appear improbable that a contract could be drawn up prior to any discussions with petitioner about its length, what was expected of her, and her rate of pay. In any event, she was issued a contract to teach from June 5 through June 12, 1970, six teaching days, at a salary of $150.00 to be paid in one lump sum. (Exhibit A)

The Board asserts, however, that she did not perform the services of a regular teacher. In this regard, the Superintendent testified that report cards had already been prepared (Tr. 62); that the graduation program was handled by an

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assistant to the teacher who had resigned (Tr. 116); that some of her classes were changed to study halls (Tr. 127-128); and that during the last two days of school, June 15 and 16, petitioner worked as a substitute teacher in the Glen Rock School District. (Tr. 79-82)

The Superintendent testified further that, at first, he was not going to replace the teacher who resigned. However, he testified that he hired petitioner as a substitute for the six days in question, at the request of other teachers who complained, so that they would not lose their preparation periods while covering classes for the teacher who resigned. (Tr. 116-117)

Petitioner avers that she did all that was required of her as a regular teacher and that she did teach vocal music in June 1970. She admits that she did not participate in the graduation program. (Tr. 59, 63-64, 84-85)

The hearing examiner has reviewed all such contentions and the facts of the instant matter and finds that petitioner's service as an employee of the Board during the period June 5 through 12, 1970, may not be added to her latter full years of regular employment for purposes of tenure accrual. Such service was not the "consecutive" period which the statute *N.J.S.A.* 18A:28-5 mandates as necessary for the accrual of tenure. Thus, the precise conditions requisite in the prescription of the statute were not met. Tenure did not accrue. (See *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941).) Furthermore, even assuming, *arguendo,* that such service was consecutive to the successive three-year period of petitioner's service, it would not be properly countable toward a tenure accrual, since it was clearly the service of a substitute and not of a regularly employed teacher. Many, if not all, of the duties of the regular teacher had been completed for the year. Petitioner's service was interrupted by employment in another school district while the school district in which she now claims tenure was still in session.

It must be conceded that time spent in substitute teaching may not be counted toward the acquisition of tenure. *Schultz v. State Board of Education et al.,* 132 *N.J.L.* 345 (*E.&A.* 1945); *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, aff'd Superior Court of New Jersey, Appellate Division, 1972 *S.L.D.* 692; *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick, Bergen County,* 1974 *S.L.D.* 360, aff'd State Board of Education, 368; *Weehawken Education Association and John J. Corbett v. Board of Education of the Town of Weehawken, Hudson County,* 1975 *S.L.D.* 505 (decided June 30, 1975) In every one of these cases, the petitioner was found to be a regular teacher and not a substitute teacher.

However, this matter is distinguishable in one significant aspect. In each of the above-cited cases, petitioner was either employed in the middle of a school year through June 30, the end of an academic year, or was given the title of substitute teacher and paid accordingly, even though he/she taught continuously from one academic year through the next. In the latter instances, the courts have held that nomenclature may not be used to defeat the intent of the statutes, nor

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is the method of compensation definitive as to whether or not a teacher is a substitute.

In *Zielinski, supra,* the State Board of Education determined that the distinction between service as a regular teacher and service as a substitute was of great importance. The State Board said:

> "***These statutes [*N.J.S.A.* 18A:28-5] lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who *taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken* where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board. We find support for this position in *Board of Education of Jersey City v. Wall, supra,* [119 *N.J.L.* 308 (*Sup. Ct.* 1938)]. There, the teacher was employed by the local board as a 'so-called substitute' and was paid on a per diem basis. She was assigned to a regular position in the same manner as teachers having tenure and taught continuously from 1931 to 1936. In holding that tenure was acquired, the Court stated:
>
> > 'The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years. A mere occasional absence of a teacher by reason of illness or excuse could not disturb this right, and the local board of education cannot evade the statute, *notwithstanding the alleged employment by the day if a teacher actually serves for the requisite period of years.****
> >
> > 'Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise.' (119 *N.J.L.* at 309)***" (*Emphasis supplied.*) (1971 *S.L.D.* at 668)

The Commissioner, also, had reason to review such tenure statutes in *Biancardi, supra.* He said:

> "***The Commissioner observes that the Legislature in its wisdom was not totally reliant upon nomenclature but was purposefully comprehensive regarding who should be clothed with the benefits of tenure wherein it included in *N.J.S.A.* 18A:28-5:
>
> > '***such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners***.'
>
> "It is clear that a certificate was required for petitioner to teach as either a substitute or as a teacher. Since the Board first agreed to employ her for an uninterrupted period from April 27, 1970 through June 1970, it follows that a certificate issued by the State Board of Examiners was required, since she could serve uninterruptedly for no more than twenty

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days on a substitute certificate issued by the County Superintendent of Schools. Such finding alone, however, is not totally dispositive of the matter.

"The Commissioner has consistently *construed the tenure statutes not* to include *substitute teachers* employed to do particular substitute work for *absent teachers. Herein,* there was *no absent teacher,* however, and no evidence that the Board sought to replace petitioner from April 27, 1970 through June 19, 1970. Rather, the *evidence leads to the conclusion that the Board properly evaluated her teaching performance during the controverted period* and on June 8, 1970, offered her a contract for the subsequent school year. (P-4)

"The recognized purpose of the probationary period prior to acquisition of tenure is to afford the employing board an opportunity to properly evaluate its employee. As was said by the Court in *Schulz v. State Board of Education et al.*. 132 *N.J.L.* 345 (*E.&A.* 1945):

> '***The three year period which is, unless shortened by the employing board, a necessary antecedent to the acquisition of tenure, gives, if served under conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student *which is not afforded by the exigencies and distractions of substitute teaching* ***.' (*Emphasis supplied.*) (at p. 354)

"In the instant matter, the Commissioner having weighed the evidence herein presented, concludes that the necessary probationary period in excess of three academic years within a four-year period was served by petitioner as a regular teacher. *Nomenclature chosen at the convenience of the Board, attendant emoluments connected with employment, or the lack thereof, may in no way deprive petitioner of the statutory cloak of protection provided by tenure resulting from her years of service.****" (*Emphasis supplied.*) (at pp. 366-367)

In the hearing examiner's judgment, such is not the case in the instant matter. Schulz and Wall served continuously for the requisite period of time to attain tenure. Zielenski, Biancardi, and Corbett did likewise, although these three petitioners were employed initially in midyear, without contracts, and thereafter, *without interruption,* were offered three consecutive academic year contracts. As stated before, all acquired a tenure status after it was shown that they performed as regular teachers. These facts distinguish the instant matter from the cases cited.

Thus, the distinction between regular employment as a teaching staff member and as a substitute is a distinction which must be afforded great weight. It is clear that service as a substitute may not be added toward a tenured accrual. It is equally clear that petitioner's service in the period June 5 through 12, 1970, may be so categorized and, therefore, that she has not accrued a tenured status as an employee of the Board.

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There remains for discussion petitioner's claim that the Board did not terminate her properly pursuant to *N.J.S.A.* 18A:27-10, 11, and 12. The hearing examiner finds such argument *stare decisis.* The thrust of her argument is that the Board could not decide in private session to terminate her employment, and that her notice was improperly sent by the Board President and not a school administrator. The statute *N.J.S.A.* 18A:27-10 clearly authorizes a board to send such a notice. Therefore, in the hearing examiner's judgment, a notice from a board president or a designated board member would also be proper. *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975), aff'd State Board of Education May 7, 1975; *Patricia Fallon v. Board of Education of the Township of Mount Laurel, Burlington County,* 1975 *S.L.D.* 156 (decided February 28, 1975), rev'd and remanded State Board of Education June 4, 1975; *George Mazawey v. Board of Education of the City of Union, Hudson County,* 1975 *S.L.D.* 285 (decided May 1, 1975); *Marilyn Frignoca v. Board of Education of the Northern Regional High School District, Bergen County,* 1975 *S.L.D.* 303 (decided May 2, 1975)

The hearing examiner recommends, therefore, that the Petition of Appeal be dismissed.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the objection thereto as filed by petitioner. The Commissioner concurs in all respects with the findings, conclusions, and recommendations as set forth by the hearing examiner.

It is well established that tenure of office does not accrue until such time as the precise conditions are met as set forth in the statute. *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962); *cert. den.* 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L. Ed. 2d* 502 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941) The tenure statute of reference, *N.J.S.A.* 18A:28-5, provides, in pertinent part, as follows:

> "***The services of all teaching staff members *** in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education *** shall be under tenure 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

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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***."

The facts adduced in the matter herein amply demonstrate that petitioner has not met the precise conditions of the statute for acquisition of a tenure status. While it is noted that petitioner did serve in the capacity of a regular teacher for three consecutive academic years, 1970-71, 1971-72, and 1972-73, her reliance on the several days of employment as a substitute teacher to anchor her claim that she served the equivalent of more than three academic years as a regular teacher within a period of four consecutive academic years is misplaced. Time served as a substitute teacher under these circumstances may not be counted toward acquisition of tenure. *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education 1971 *S.L.D.* 664, affirmed Superior Court of New Jersey, Appellate Division, 1972 *S.L.D.* 692 A person engaged by a board of education as a substitute teacher during emergencies cannot be held to hold the same responsibility or obligation of the regularly assigned teacher. The regularly assigned teacher possesses the totality of responsibility for the pupils under his/her care and it is within this context that boards of education must be given the opportunity to observe and evaluate a regular teacher's performance. A person engaged as a substitute teacher has the limited role of following the regular teacher's lesson plan for the day or days in question, of accepting and carrying out specific directions of supervisors on a daily basis with respect to the classes they may be assigned, and to attempt to carry out temporarily an already developed master plan of instruction. This, then, differentiates the position of a substitute teacher from that of a regular teacher.

In this case, petitioner was engaged as a substitute teacher for intermittent days prior to being engaged as a regular teacher for three years and that time is not counted in the tolling of time for acquisition of tenure.

The Commissioner finds no merit in petitioner's argument that the Board violated *N.J.S.A.* 18A:27-10 *et seq.* because it decided in private session not to offer her reemployment.

Accordingly, the Commissioner, finding no basis to intervene herein, dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

December 26, 1975

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Board of Education of the City of Rahway,

Petitioner,

v.

Municipal Council of the City of Rahway, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Magner, Abraham, Orlando, Kahn and Pisansky (Leo Kahn, Esq., of Counsel)

For the Respondent, Romano, Hehl & Romankow (Theodore Romankow, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Union County Board of Taxation a lesser amount than that proposed by the Board in its 1975-76 budget which was rejected by the voters. The respective parties to the dispute submitted written testimony, and a hearing was conducted on September 5, 1975 at the offices of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held on March 11, 1975, the voters of the school district rejected the Board's proposal to raise by public taxation for the current expenses of the school district the amount of $5,955,489. The proposed budget was then delivered to Council, pursuant to statute, for the determination of the amount of appropriation for school purposes to be certified to the Union County Board of Taxation. Subsequently, Council adopted a resolution and certified to be raised by public taxation for such expense the amount of $5,386,450, thereby reducing the total proposed by the Board for current expense by $569,039.

The Board contends that this reduction was made arbitrarily and results in an insufficient amount of money to operate a thorough and efficient system of free public education in Rahway for the 1975-76 school year. Council advances a contrary view contending that its action was legal and proper and that the reductions made in the line items of the Board's budget effect appropriate economies which in no way threaten a viable educational program.

The hearing examiner has reviewed the evidence herein and finds no sufficient facts to form a conclusion that Council's determination was arrived at by other than legal and proper procedures. He proceeds, herewith, to set forth in chart form the line items recommended for reduction by Council:

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CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110F	Sup. Off. Sals.	$ 88,480	$ 85,980	$ 2,500
J110I	Bus. Adm. Off. Sals.	60,049	43,427	16,622
J130M	Prtg. & Publ.	3,500	2,000	1,500
J211	Prins. Sals.	322,972	258,972	64,000
J212	Supvrs. Sals.	249,868	147,980	101,888
J213A	Teachers Sals.	3,428,864	3,216,586	212,278
J213B	Subs. Sals.	62,100	60,000	2,100
J214B	Guidance Sals.	141,457	137,423	4,034
J214L	Supp. Sals.	106,583	94,583	12,000
J215B	Supvrs. Clerks	26,418	21,218	5,200
J215C	Other Clerks	37,035	31,094	5,941
J216	Other Instr. Sals.	6,100	4,300	1,800
J216A	Extra Service Aides	45,127	39,127	6,000
J250B	Travel Exp.	2,250	2,125	125
J250C	Misc. Exp.	48,000	31,683	16,317
J410A-1	Phys. Sal.	4,500	4,300	200
J410A-2	Dentist Sal.	3,000	2,800	200
J530	Repl. Veh.	6,800	–0–	6,800
J610B	Custs. Overtime	24,091	15,000	9,091
J610C	Subs.-Custodians	14,415	4,000	10,415
J630	Fuel Oil	155,000	125,000	30,000
J640B	Electricity	110,000	90,000	20,000
J640C	Gas	5,880	5,380	500
J640D	Telephone	22,650	21,650	1,000
J650A	Cust. Supls.	24,950	22,950	2,000
J710	Maint. Sals.	50,637	40,637	10,000
J740B	Bldg. Repairs	40,550	31,022	9,528
J810B	Social Security	42,000	40,000	2,000
J820B	Employee Ins.	172,183	170,183	2,000
J1020	Oth. Stud. Bdy. Exp.	67,050	54,050	13,000
	TOTALS	$5,372,509	$4,803,470	$569,039

The hearing examiner has considered these reductions in light of the evidence adduced at the hearing and from written testimony, and sets forth his recommendations on certain of the major reductions in narrative form as follows:

J110F Superintendent's Office, Salaries *Reduction $2,500*

Council contends that the Board, having entered into a contract with the Superintendent for an annual salary of $30,500 for the sixteen-month period from March 1, 1974 through June 30, 1975, was in no way obligated to substantially increase the Superintendent's salary after a limited period of employment.

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The Board asserts that it is legally bound to honor its 1975-76 contract to pay the Superintendent $33,000 for the 1975-76 school year.

The hearing examiner finds no evidence of impropriety on the Board's part in increasing the salary of the Superintendent by 8.2 percent after sixteen months of service. Consequently, it is recommended that $2,500 be restored to this line item.

J110I Business Administrator's Office, Salaries *Reduction $16,622*

Council seeks to delete the position of assistant business administrator and one clerk typist on three-quarters' employment. The Board asserts that it needs both the clerk typist, previously employed, and the new position of assistant business administrator to cope with the increased work load of this office resulting from parochial textbook aid, more detailed specifications to comply with bidding statutes, expanded accounting procedures, preparation of negotiation statistics, efficient purchasing, transportation of non-handicapped pupils within the district, and the work attendant upon numerous Federal and State grants.

The hearing examiner observes that no additional staff has been added for the past five years to cope with what is found to be a great increase in work required of this office. The uncontroverted testimony of the Business Administrator is convincing that assistance is needed in the interests of prompt and efficient operations and to reduce to a reasonable level that work load which the Business Administrator is now carrying. (Tr. 25-42) In consideration thereof, the hearing examiner recommends that $12,000 be restored to this line item, which will then be sufficient to both honor the salaries into which the Board has now entered and also employ an assistant business administrator. It is recommended that $4,622 of the reduction be sustained.

It is noted at this juncture that a reduction of $15,000 was effected by Council which objects to 4.5 percent merit increases for administrators' and supervisors' salaries beyond the regular increments which were called for in the Board's negotiated agreements.

The Board, absent specific delineation of Council's reduction by line items, has chosen to deal with this reduction in line items J211 and J212. While the Board admits that it has limited its merit increases sufficiently to meet this reduction by Council, it contends that there is desperate need elsewhere in its budget for this amount to be restored because of pressing needs, hereinafter described. The hearing examiner will deal with this proposed reduction *in pari materia* within the context of the entire considerations in these two salary line items and the Board's further plea for restoration of the reductions.

In any event, it has been clearly established that the funds necessary to implement the salary policies adopted by a board of education may not be curtailed by a municipal governing body in reviewing a board's budget. *N.J.S.A.* 18A:29-4.1 See *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, Passaic County,* 1974 *S.L.D.* 712. The

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salary policies of a board of education must be honored for all personnel listed as full time teaching staff members. It is clearly stated in *N.J.S.A.* 18A:29-4.1 that:

> "A board of education of any district may adopt a salary policy, including salary schedules for *all* full-time *teaching staff members****. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the *governing body of the municipality* or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year." (*Emphasis supplied.*)

J211 Principals, Salaries *Reduction $64,000*

Council seeks to eliminate three vice-principals in the elementary schools. The Board argues that two of these vice-principals are in schools with large enrollments of 788 and 611 pupils respectively and that one serves in two smaller elementary schools to which one principal and one vice-principal are assigned. The Board avers that the elimination of these vice-principals would provide for no direct and immediate administrative supervision in one school for each session and would provide an insufficient amount of supervision in each of its elementary schools.

The Commissioner has stated in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield et al., Union County,* 1974 *S.L.D.* 913 that:

> "***While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum *such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort.****" (*Emphasis supplied.*) (at pp. 920-921)

Within the context of *Plainfield* and recognizing that there has been but a small decline in pupil enrollment in Rahway, the hearing examiner finds no supportable reason to recommend that the Commissioner reduce by three the Board's previously assigned and employed vice-principals.

The hearing examiner further observes that the Board's budgeted amount in this line item was $322,972 and that its contractual obligations as of September 1975 were $314,652. (Addendum A) Since this is so, and absent further showing by the Board of need for restoration in this line item, it is recommended that $55,680 be restored to this line item, and that the reduction be sustained in the amount of $8,320.

J212 Supervisors, Salaries *Reduction $101,888*

Council advances arguments that the Board should eliminate the supervisor of student personnel services, two curriculum and instruction supervisors, the

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director of personnel, and two proposed additional department chairmen. The Board maintains that each of these positions is essential to the efficient operation of the school.

The hearing examiner finds that the position of director of personnel, listed at $23,650 has in fact been abolished by the Board. The Board proposes to appoint two additional department chairmen at an additional cost of $1,008. A recent Middle States Association of Colleges and Secondary Schools evaluation of the high school recommends the establishment of five additional department chairmen. In view of the Board's moderate approach in implementing this educational improvement, it is recommended that these new additions to the Board's supervisory program be provided for by the restoration of $1,008.

The Board employs a supervisor of student personnel services, presently under contract at $25,695. It has employed two supervisors of curriculum and instruction which Council seeks to eliminate at a savings of $45,535. The Board presents compelling reasons as to why these three previously existing positions should be maintained in the interests of sound and effective special education and regular education programs. It is, therefore, recommended that the positions of supervisor of student personnel services and the two contested supervisors of curriculum and instruction be maintained on a continuing basis at a cost of $71,230.

The hearing examiner finds that maintaining those presently established positions recommended above, as well as other continuing positions in this line item, will obligate the Board to an expenditure of $172,904. To this must be added $1,008 for the two additional department chairmen for a total cost of $173,912. The Board has budgeted $249,868. Accordingly, it is recommended that, of the $101,888 reduction by Council, $25,932 be restored and that the reduction be sustained in the amount of $75,956.

J213A Teachers, Salaries *Reduction $212,278*

Council maintains that teacher salary increases should be no more than five percent and states that for reasons of economy and reduced pupil enrollment six elementary school teachers ($54,000), one additional high school remedial reading teacher ($11,000), three junior high school physical education and remedial reading teachers ($33,000) and one half of one bilingual teaching position ($5,500) should be eliminated. The Board asserts that each of these is essential to a thorough program of education.

The hearing examiner observes that the Board's contractual obligations in this line item for 1975-76 currently total $3,094,078. (Addendum A) If all of the contested positions were to be restored, assuming *arguendo* that they are not already included in the $3,094,078, they would increase the Board's obligation in this line item by $103,500 to a total of $3,197,578. This figure is $231,286 less than the Board's originally budgeted amount which supports Council's reduction in this line item of $212,278. Consequently, it is recommended that no restoration be made to this line item and that the reduction be sustained in full.

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J630 Fuel Oil *Reduction $30,000*

Council avers that this line item has been computed by the Board assigning too great a percentage for increase in the price of fuel oil. The Board estimates a twenty percent increase in fuel oil prices.

Recent events indicate that a fifteen percent increase in fuel oil prices may be more realistic for the 1975-76 heating season. Applying this percentage increase to actual expenditures for 1974-75 of $131,127 results in the amount of $150,796 which is $4,204 below the Board's budget figure of $155,000. Accordingly, it is recommended that $4,204 of Council's reduction be sustained and that $25,796 be restored to this line item.

J640B Electricity *Reduction $20,000*

Council disagrees with the Board's estimate of a fifteen percent rate increase for 1975-76. Actual expenditure for electricity in 1974-75 was $84,900. Adding to this figure a fifteen percent increase ($12,735) produces $97,635 which is $12,365 less than the Board's originally budgeted figure. (See Chart I.) Therefore, it is recommended that $7,635 be restored to this line item and that the reduction be sustained in the amount of $12,365.

J710 Maintenance-Salaries *Reduction $10,000*

The Board, citing a Union County Chamber of Commerce study recommendation that fifteen additional maintenance personnel be added to the maintenance staff, desires to employ two additional maintenance workers. Council avers that one is sufficient until the effectiveness of full-time employees is evaluated as against contracted repair costs.

The hearing examiner has weighed the arguments of the parties and finds the Board's arguments convincing that its approach will be more economical than contracting for all such services. This finding is grounded on the testimony of the Business Administrator who stated at the hearing that $21,467 had been reduced by the Board from its budget in the areas of contracted services. Hence, it is recommended that the full amount of this reduction of $10,000 be restored.

The recommendations of the hearing examiner thus far set forth are summarized in Chart II, following:

CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J110F	Supt. Off. Sals.	$ 2,500	$ 2,500	$ –0–
J110I	Bus. Adm. Off. Sals.	16,622	12,000	4,622
J211	Prins. Sals.	64,000	55,680	8,320
J212	Supvrs. Sals.	101,888	25,932	75,956
J213A	Teachers Sals.	212,278	–0–	212,278
J630	Fuel Oil	30,000	25,796	4,204

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J640B	Electricity	20,000	7,635	12,365
J710	Maint. Sals.	10,000	10,000	–0–
	SUBTOTALS	$457,288	$139,543	$317,745

The hearing examiner has similarly examined the record before him and sets forth the following recommendations in Chart III with respect to the remaining relatively small reductions deemed appropriate by Council:

CHART III

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J130M	Prtg. & Publ.	$ 1,500	–0–	$ 1,500
J213B	Subs. Sals.	2,100	1,500	600
J214B	Guidance Sals.	4,034	2,000	2,034
J214L	Supp. Sals.	12,000	12,000	–0–
J215B	Supvrs. Clerks	5,200	5,200	–0–
J215C	Other Clerks	5,941	5,941	–0–
J216	Other Instr. Sals.	1,800	–0–	1,800
J216A	Extra Service Aides	6,000	6,000	–0–
J250B	Travel Exp.	125	–0–	125
J250C	Misc. Exp.	16,317	8,500	7,817
J410A-1	Phys. Sal.	200	200	–0–
J410A-2	Dentist Sal.	200	200	–0–
J530	Repl. Vehicle	6,800	6,800	–0–
J610B	Custs. Overtime	9,091	9,091	–0–
J610C	Subs.-Custodians	10,415	10,415	–0–
J640C	Gas	500	–0–	500
J640D	Telephone	1,000	1,000	–0–
J650A	Cust. Supls.	2,000	–0–	2,000
J740B	Bldg. Repairs	9,528	9,528	–0–
J810B	Social Security	2,000	–0–	2,000
J820B	Employee Ins.	2,000	2,000	–0–
J1020	Oth. Stud. Bdy. Exp.	13,000	9,500	3,500
	SUBTOTALS	$111,751	$ 89,875	$ 21,876
	SUBTOTALS CHART II	$457,288	$139,543	$317,745
	TOTALS	$569,039	$229,418	$339,621

The hearing examiner finds, additionally, that the audit of the Board's unappropriated balance in its current expense account was $1,392.73. It was further testified that the Board had no contingency amounts built into its budget to enable it to make major repairs or replacements such as that which was necessitated at the Grover Cleveland School where a boiler unexpectedly has had to be replaced since July 1, 1975 at a cost of $38,500. (Tr. 145) In view of this emergency, for which insufficient reserve funds are available for appropriation, the hearing examiner recommends that the Commissioner consider a further restoration of $38,500 to the Board's current expense budget.

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If, in the Commissioner's judgment, the previous recommendation of the hearing examiner and this further restoration are justified, the total amount of restoration would be $267,918 and the amount not restored $301,121.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record, the hearing examiner report and the exceptions thereto filed by the Board pursuant to *N.J.A.C.* 6:24-1.16. No exceptions were filed by Council.

The Board takes exception only to the recommendation of the hearing examiner that Council's proposed reduction of $212,278 in line item J213A be sustained in full. In this exception the Board states that the Business Administrator failed to report to the hearing examiner the correct amount of contractual obligations as of September 1975 for teachers' salaries by inadvertently omitting therefrom $172,467 for special education teachers' contracts. A review of the additional documentation submitted to Council and the Commissioner reveals that such an inadvertent omission of $172,467 was indeed made. (Addendum D) Accordingly, the amount to which the Board was contractually obligated for teachers' salaries in September 1975 was $3,266,545 rather than $3,094,078 as previously reported to the hearing examiner. (Addenda A, D) It therefore becomes necessary to examine in detail Council's proposed reductions in staff.

Council proposes to eliminate six elementary teaching positions, two new secondary remedial reading positions, two new secondary physical education positions and one half of one new bilingual teaching position.

The record reveals that the Board reduced its elementary teaching staff from ninety in 1974-75 to eighty-eight in September 1975. (Addendum B) During this same period elementary enrollment decreased by 125 pupils. (Addendum C) The Board's average elementary class size is 22.9. It is determined that in the interests of economy the Board may further reduce its elementary school teaching staff by two teachers without disruptive pupil redistribution during the current school year or increasing its average elementary class size.

The Board's secondary pupil enrollment increased in September 1975 by thirty-eight pupils over the 1974-75 school year, thereby necessitating an increase of two secondary teachers merely to maintain a consistent instructional program. *Plainfield, supra* As of September 1975, however, the Board had added only one teacher.

The Board's arguments are compelling wherein it asserts that physical education classes in the junior high school. ranging from fifty-five to eighty-four pupils with one teacher, not only present possible hazards to health and safety of pupils but prevent development of an effective program of instruction.

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Accordingly, it is determined that two additional physical education teachers are necessary at the junior high school in the interests of a safe, thorough and efficient program of physical education.

It is further determined that one additional remedial reading teacher is required at the secondary school level for the 1975-76 school year to instruct pupils who have been classified as critically deficient in basic reading skills.

Additionally, the Commissioner holds that the Board has compelling need for a one-half time teacher to meet the needs of twenty-three pupils whose serious learning problems occasioned by their non-English language background require that they be provided bilingual instruction.

The Commissioner's determinations of the Board's staffing adjustments may be summarized as follows:

Elementary Staff Adjustments		-2
Secondary Staff Adjustments		
To Maintain Class Size	+1	
Physical Education	+2	
Remedial Reading	+1	
Total Secondary		+4
Bilingual		+0.5
Net Adjustment Required		+2.5

The Commissioner observes that the Board has no contingency in this essential area of its educational program since its current expense account appropriation balance as of July 1, 1975, is shown by the audit report to be only $1,392.73. Accordingly, it is determined that a modest contingency of $25,000 shall be provided in line item J213A of the Board's budget to provide for such emergencies as may arise from pupil enrollment shifts or from other causes. In summary of the Board's needs, it is determined that the requirements of a thorough and efficient education necessitate that the following amounts be appropriated to this line item:

Salaries, September 1975	$3,094,078
Salaries - Special Education	172,467
Additional Teachers at $10,500 (2.5)	26,250
Contingency	25,000
Total Required	$3,317,795

The Board budgeted $3,428,864 for teachers' salaries of which amount $3,317,795 is found to be minimally required. Accordingly, it is determined that of Council's reduction of $212,278 in this line item, $111,069 shall be sustained and $101,209 shall be restored to the Board's budget.

In conclusion, the Commissioner accepts the findings and recommendations of the hearing examiner concerning the restoration of $229,418 to

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the remaining contested items of the Board's budget. Therefore, the Commissioner certifies to the Union County Board of Taxation the additional amount of $330,627 to be raised by public taxation for current expenses for the Board's use in providing a thorough and efficient system of public education during the 1975-76 school year. It is so ordered.

COMMISSIONER OF EDUCATION

December 26, 1975

**In the Matter of the Tenure Hearing of Ramona Hodgkiss,
School District of Bridgewater-Raritan Regional, Somerset County.**

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Complainant Board, Blumberg, Rosenberg, Mullen & Blackman (William B. Rosenberg, Esq., of Counsel)

For the Respondent, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

On December 4, 1974, the Superintendent of Schools of the Bridgewater-Raritan Regional School District suspended respondent, a tenured teaching staff member, from her position as a teacher in the employ of the Bridgewater-Raritan Board of Education, hereinafter "Board." Subsequently the Superintendent preferred charges to the Board of conduct unbecoming a teacher. On December 23, 1974, the Board determined to forward such charges to the Commissioner of Education pursuant to the statutory authority of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-9 *et seq.*

Respondent denied the charges against her and a conference of counsel was held on January 28, 1975 at which time it was agreed that respondent was to file interrogatory questions with the Board "within the week." Such questions were in fact filed. On February 28, 1975, respondent proposed that the scheduled hearing date of March 4, 1975, be postponed in order that she might inquire into "other areas" which the answer to interrogatory questions had opened. The request for postponement was granted and on March 13, 1975, respondent notified the hearing examiner assigned by the Commissioner to hear the dispute that she was ready to "proceed with a hearing on the merits of this matter." (Letter of Respondent, March 13, 1975) Subsequently a hearing was set down for May 6, 1975 and was held, although not completed.

In the interim between March 13, 1975, and May 6, 1975, however, a peripheral dispute arose between respondent and the Board with respect to her entitlement to be compensated "beginning on the one hundred twenty-first day"

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forward from the date of her suspension pending a final determination by the Commissioner of the charges against her. Such entitlement, and the conditions pertinent thereto, is set forth in the statute *N.J.S.A.* 18A:6-14 which provides:

> "Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, *excluding all delays which are granted at the request of such person,* then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary, from any substituted employment assumed during such period of suspension. Should the charges be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension." (*Emphasis supplied.*)

It is noted here that there is no question that the delay of the hearing in this matter was caused by respondent. The question is whether or not such delay triggered an automatic pause in the tolling of days toward the "120 calendar days" provision of the statute beyond which respondent was entitled to a resumption of "full salary."

It is respondent's claim, expressed in a letter memorandum of law and Motion dated April 8, 1975, that there was no alternative "***given the facts and circumstances of this case and the mandate that Respondent is entitled to adequate representation at any hearing on these charges." (Respondent's Letter Memorandum of Law, dated April 8, 1975) It is the Board's position that the "***number of days due to the requested adjournment should be excluded from the 120 calendar days pursuant to the terms of said statute.***" (Board's Memorandum of Law, dated April 11, 1975) Accordingly, the Board requests an order directing that the salary of respondent be resumed only when all days of delay requested by respondent have been excluded.

The hearing examiner reviewed the facts pertinent to the instant matter on April 14, 1975, and addressed the following letter to the parties:

> "I have considered the Motion and recent letters in this matter and have noted the contention of the parties. However, it is my firm conclusion that there has not been an unreasonable delay either by the Board or by respondent and that both counsel have proceeded diligently to prepare their respective cases.

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"Accordingly, it is my opinion that respondent should be compensated beginning with the 121st day pursuant to the statutory mandate. I recommend this payment be authorized immediately.

"If, however, the Board does not agree with this position an opportunity to show cause why it should not be given effect by the Commissioner will be afforded to the Board."

At the hearing of May 6, 1975, however, the Board waived oral argument with respect to the show cause direction of reference and stated it would submit the question for decision on its written arguments reported in part, *ante.* Accordingly, the question is now directly before the Commissioner for decision.

The Commissioner has considered the facts and the arguments which are a part of this record. He observes that the Board's position herein is a narrow one. It would have the Commissioner interpret the statute *N.J.S.A.* 18A:6-14 to mean that any and "all delays" requested by a respondent in a matter involving a tenure charge should be cause for a delay in the tolling of the 120 day provision, beyond which compensation is due. Such position is grounded in the clear and specific statutory prescription and is identical to that espoused by the Commissioner *In the Matter of the Tenure Hearing of Anthony Polito, School District of the Township of Livingston, Essex County,* 1974 *S.L.D.* 662.

In *Polito, supra,* as herein, a delay in a previously agreed hearing date was requested by respondent with respect to charges proffered against him by a local board of education pursuant to the Tenure Employees Hearing Law. (*N.J.S.A.* 18A:6-9 *et seq.*) The reason for delay was, as herein, not without merit. The Commissioner, however, interpreted the statutory mandate literally and excluded all days of delay in the hearing procedure caused by respondent from the toll toward the 120 day requirement set forth in the statute. (See also *In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County,* Decision on Motion, December 27, 1973, 1974 *S.L.D.* 501.)

The Commissioner finds no reason to justify another interpretation in the instant matter. The statute *N.J.S.A.* 18A:6-14, recited *ante,* is explicit and clear. A tempered, liberal interpretation of its explicit provisions may not appropriately be set forth by the Commissioner. He so holds. (See also *Frank S. Taylor, Howard A. Ozmon, Jr. v. Paterson State College and Marion E. Shea, President,* 1966 *S.L.D.* 33; *Charlotte F. Degen v. Board of Trustees of the Teachers Pension and Annuity Fund and Board of Education of the Town of Bloomfield, Essex County,* 1960-61 *S.L.D.* 175.)

Accordingly, the Commissioner determines that in the instant matter the days within the period March 4, 1975 (the first agreed-upon hearing date) to May 6, 1975 (the date of adjournment) may not be counted toward the 120 day period beyond which respondent is entitled to "full salary" payment (*N.J.S.A.* 18A:6-14), but that the toll of such days resumes on that latter date. It follows that, excluding the days of the controverted period, respondent is entitled to

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resumption of her "full salary" beginning on the one hundred and twenty-first day subsequent to her suspension by the Board on December 4, 1974, and to a continuation of that salary thereafter until such time as a final determination with respect to the merits of the charges against her has been made.

COMMISSIONER OF EDUCATION

July 22, 1975

**In the Matter of the Tenure Hearing of Ramona Hodgkiss,
School District of Bridgewater-Raritan Regional, Somerset County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Daniel C. Soriano, Esq.

For the Respondent, Ruhlman and Butrym (Paul T. Koenig, Esq., of Counsel)

The Board of Education of the Bridgewater-Raritan Regional School District, hereinafter "Board," avers that respondent, a tenured teaching staff member in its employ did willfully and knowingly falsify answers to a standardized achievement test and that such falsification constitutes conduct unbecoming a teaching staff member which is so gross as to warrant her dismissal as an employee of the Board. Respondent denies the charges against her.

A hearing in this matter was conducted on May 6 and 26, 1975 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education. Subsequent to the hearing both parties filed Briefs. The report of the hearing examiner is as follows:

Respondent began her present employment with the Board as a teacher in 1963 and has taught continuously since that time. Her most recent assignment during the 1974-75 academic year was as teacher of a fifth grade. She was suspended from such employment in December 1974, and the instant charges were proffered against her by the Superintendent of Schools and certified by the Board to the Commissioner for hearing pursuant to the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* Such charges are that she did willfully and knowingly (1) falsify answers to a "Seeing Through Arithmetic" test given by her to her fifth grade class on May 22, 1974 and/or did (2) "suffer and permit" the falsification.

The arithmetic test which is the subject of the instant charges against respondent is a standardized test published by Scott, Foresman and Company in

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conjunction with a textbook series. (Tr. I-8) It has been routinely administered for a period of years in the Bridgewater-Raritan School District for the purpose of comparison with national norms and as a basis for a recommendation with respect to summer school attendance of pupils. (Tr. I-8) During the 1973-74 academic year it was administered to approximately twenty-five sections of the fifth grade in the District on or about May 22, 1974. The administration of the tests was left to teacher discretion and following conclusion of the testing procedure the test booklets were marked and graded by individual teachers. Test booklets were then inserted in pupil files. (Tr. I-9)

In November 1974, the Board's supervisor of mathematics was informed that there were "irregularities" in certain tests taken by respondent's fifth grade pupils in May 1974 and an investigation was begun. (Tr. I-11) The supervisor testified he found that some pupils' answers had been entirely wrong but that full credit had been given for correct answers. (Tr. I-11) He further testified it was found that the tests were marked, in some instances, without the use of a scoring template (Tr. I-11) and that in some instances "***the marks for the answers and presumably those made by the teacher to correct the answers seemed to be the same, or written by the same hand.***" (Tr. I-13)

As a result of this preliminary scrutiny it was decided that a retest of a group of pupils was required and eleven pupils formerly enrolled in respondent's class were selected and were in fact retested. (Tr. I-14) The result of the retest was a lower score in each instance when the individual test results were compared with the results itemized by respondent. This comparison is set forth by the Board as follows in Exhibit P-3:

Pupil	Test Score of May 22, 1974	Test Score of November 26, 1974
L.B.	76	48
P.C.	66	41
R.D.	66	45
D.F.	64	49
C.H.	60	31
K.K.	72	50
P.L.	67	37
K.N.	71	43
F.S.	74	38
D.Y.	72	48
J.Z.	60	37

When such comparison had been made, the supervisor reported the results of his investigation to the Superintendent of Schools (Tr. I-19), and after some further investigation the Superintendent requested respondent and her school principal to report to his (the Superintendent's) office for a conference. (Tr. I-60) The Superintendent testified he also called the President of the local teacher's association, apprised him of the nature of his concern, and invited him to be present for the conference. (Tr. I-60) The Superintendent did not inform respondent concerning the reason for his request for a conference with her prior to the time the conference was held. (Tr. I-85)

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The conference was held in the Superintendent's office at approximately 3:00 p.m. on December 3, 1974. The only persons present with the Superintendent were respondent and her school principal. (Tr. I-62)

At the conference the Superintendent requested respondent to review the eleven test booklets and called her attention to a number of irregularities. He testified that she at first denied but then admitted that she had falsified test results. (Tr. I-64) The Superintendent testified that he wished to review the matter overnight and advised that she should do the same. (Tr. I-64) He then stated he would meet with her again at 10:00 a.m. on the following day, December 4, 1974. (Tr. I-65)

The Superintendent did meet respondent again on that date with the Director of Personnel also in attendance. (Tr. I-65) At this second meeting he told her that he had decided to recommend her dismissal but that she had the option of resigning. The Superintendent testified that respondent then told him she would resign and the Superintendent suspended her at that juncture. (Tr. I-65-66)

Subsequently respondent tendered a letter of resignation (PR-1) but in a letter dated December 9, 1974, she forwarded another letter (PR-2) to the Superintendent wherein she said:

> "I hereby rescind my letter of resignation which was submitted under duress to you on Wednesday, December 4, 1974."

The charges herein against respondent were then presented to the Board by the Superintendent and the Board certified them to the Commissioner. The hearing ensued.

At the hearing the test papers were examined in detail for examples of irregularity. There was rather extensive testimony concerned with whether or not respondent had or had not told the Superintendent she had "falsified" the tests and/or test results and there was a continuing argument over the meaning of the charge in this respect. (See Tr. II-86)

Respondent testified that her class in 1973-74 was classified as a "low" group and that there was no child in it at or above a "grade level" average in reading. (Tr. II-11) She testified that she had been told to "teach for the test" by a supervisor and that she and other teachers had done that. (Tr. II-12-13) She testified that she had administered the test in May 1974 over a period of several days and that time specifications for the test instruction booklet (P-5) had not been followed. (Tr. II-15) Respondent further testified that she had helped pupils who were not sure of the meaning of test questions and that this help had on occasion extended to an actual answer check (or X) by her in multiple choice questions when the answer was given to her by pupils. (Tr. II-17, 23) She testified that as sections of the tests were completed they were graded either by her or by aides assigned to her room for limited duty. (Tr. II-25, 85) At this juncture respondent admits that there were errors in test grading but that such

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errors were not intentionally made by her and that she did not, with intent, falsify test results. (Tr. II-36, 53, 145)

The aides who assisted respondent in her work and in test correction also testified at the hearing. (Tr. I-130 *et seq.*) One aide testified she had indeed corrected some parts of the test booklets here in question but she was unsure of just which parts and the testimony was inconsistent and unreliable. (See Tr. I-152-153.)

Other testimony at the hearing was elicited from the principal of respondent's school, from the Director of Personnel, and from representatives of the local teacher's association. Such testimony was concerned with whether respondent had or had not admitted that she had falsified test results or had "cheated" but, in the hearing examiner's judgment, need not be reported here in detail. A finding with respect to the truth or falsity of the charge *per se* does not depend on such testimony.

It depends instead on certain clear facts which are not in basic dispute and on the interpretation which is given to the word "falsify." The facts which are not in dispute and which are at point with respect to the charge may be set forth concisely as follows:

1. On or about May 22, 1974, respondent and all other fifth grade teachers were directed by school officials to administer a standardized arithmetic test according to directions contained in a test booklet which accompanied the test.

2. Respondent, as directed, did administer the test although she ignored specified time requirements and, thus, by this fact alone ensured an unreliable result if the test was to be used for comparison purposes with national norms.

3. Test booklets were corrected and graded by a teacher aide, or aides, and by respondent, in a careless manner and the marks which represented a cumulative total were an inaccurate and "false" portrayal of pupil achievement in arithmetic.

4. Respondent, as the certified tenured teaching staff member employed by the Board to teach a fifth grade class during the 1973-74 academic year, bears final responsibility for the inaccurate or false portrayal of her pupils' achievement although all of the correction work of test booklets was not done by her.

This finding that respondent did in fact "falsify" test results is grounded in the following interpretation of falsify as cited in *Black's Law Dictionary* 726 (rev. 4th ed. 1968):

> "The word 'falsify' may be used to convey two distinct meanings – either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue."

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In the context of this definition the hearing examiner finds that respondent did in fact "falsify" test results and that she did admit such falsification to the Superintendent in her meeting with him on December 3, 1974. (See Tr. I-73, 75.)

This finding, however, is one which is limited to the latter defined meaning of the word falsify and does *not* encompass the prior definition of the word which connotes fraud, a connotation which the Board appears to advocate as also applicable.

The hearing examiner finds no evidence herein to support a charge, with such a connotation, as true in fact. Respondent's demeanor as a witness at the hearing belies the truth of a charge so interpreted. There was no reason of personal gain to motivate a fraud. (See Tr. II-27) Respondent's recital of the assistance she gave pupils in the testing procedure indicates she employed the test more as teaching device than as a grading exercise and, while such use was not the specified or mandated reason for the test, the technique was not without merit. While, in essence, the charges against respondent are that she graded the test falsely in *favor* of her pupils, there are certain test answers which are clearly correct which were marked as incorrect. (See Tr. II-119, 130.) Such marking attests to inefficiency or carelessness. It does not attest to fraudulent favoritism.

Finally, in respondent's testimony and in the testimony of school administrators there is evidence that the purpose for which this specific test of arithmetic skills is given in the Bridgewater-Raritan Regional School District is not clearly defined. The test was not used in the establishment of a grade (Tr. II-64) although respondent testified that teachers were instructed to "teach for the test." (Tr. II-12) The supervisor of mathematics testified that the tests were used in part as "***the basis for remediation in the following grades***" (Tr. I-8), although the hearing examiner can find no such purpose of the test listed in the teacher's test manual booklet. (P-5) There is this statement contained therein:

> "These tests were prepared so that users can compare the achievement of their students with the achievement of students who use the same materials in other schools."

Such a purpose clearly indicates a test of a general nature with respect to the acquisition of a variety of mathematical skills. There is no indication that the test was designed as a diagnostic one to determine specific skill deficiencies in order that a plan of specific skill "remediation" might be developed.

In summation the hearing examiner finds that, in the limited meaning of the term, respondent did in fact falsify test results of her pupils in the 1973-74 school year and that such falsification was attributable to carelessness and a lack of diligence, but not to fraud.

In the context of this limited finding and of respondent's otherwise unblemished record as a teacher in the Board's employ, the hearing examiner recommends that she be restored to her position retroactive to the date of her

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suspension by the Board but that her salary for the 1974-75 academic year be established without increment over the salary paid to her in 1973-74. The hearing examiner further recommends that the Board be advised to closely reexamine its approved test procedures and clearly delineate the purposes for which all standardized tests are given.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exception and objection thereto filed by the Board. The Board avers that respondent's explanation of test irregularities is not supported by the weight of creditable evidence. In particular, the Board maintains that differences in check marks which appear on parts 1 and 2 of the May test as contrasted to the November test, are, in the context of respondent's testimony "gross irregularities" which connote "intentional and fraudulent falsification." (Board's Exception and Objection, at pp. 1, 3)

The Commissioner cannot agree that the evidence in the record before him is such that it clearly sustains this explanation of test irregularities and in the absence of such evidence he finds the hearing examiner's report eminently plausible in its final conclusion. He holds it as his own.

There is evidence in this record, however, of careless test administration and of an equally careless grading of test results for which respondent bears the ultimate responsibility, although an aide or aides performed some assignments in a mechanical manner and apparently with little instruction or plan. There is also evidence of some confusion with respect to the purpose of the test and strong indication that a traditional test program in this school district requires reevaluation in the context of an era which offers many reliable evaluative instruments which are helpful in the measurement of achievement. The Commissioner recommends such reevaluation to the Board.

Finally, the Commissioner directs that respondent be restored to her tenured position as a teaching staff member in the employ of the Board and that she be afforded all the emoluments of her position retroactive to the date of her suspension in December 1974. The Commissioner further directs that her salary level for both the 1974-75 and 1975-76 school years be the same as the salary level applicable during the 1973-74 school year. This latter direction takes cognizance of the fact that the Board's opportunity to evaluate respondent's work in the 1974-75 school year was a limited one.

In other respects the charges against respondent are dismissed.

COMMISSIONER OF EDUCATION

December 26, 1975
Pending before State Board of Education

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Dorothy Agress and Hamilton Township Education Association,

Petitioners,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Bard, Bogatz and Shore (Harold Bogatz, Esq., of Counsel)

For the Respondent, Henry F. Gill, Esq.

This matter having been opened before the Commissioner of Education by Harold Bogatz, Esq., counsel for petitioner, by formal Petition of Appeal in which, *inter alia,* interim relief is sought in the form of an Order restraining the Board of Education of the Township of Hamilton, Mercer County, hereinafter "Board," from reassigning petitioner, a tenured teacher, from a second grade class in the Sayen School, to teach a second grade class in the Mercerville School for the 1974-75 academic year, pending a plenary hearing and determination of the merits of the matter by the Commissioner of Education, in the presence of Henry F. Gill, Esq., counsel for the Board; and

The arguments of counsel having been heard regarding the allegation by petitioner that she will suffer irreparable harm unless the Board is restrained from transferring her pursuant to its resolution adopted on June 18, 1974; and

Further argument of counsel having been heard regarding the assertion by petitioner that the legal basis upon which the motion, *sub judice,* is grounded is that the Board's resolution of June 18, 1974, was adopted for improper reasons; and

The Commissioner, having reviewed the arguments of counsel and the Board's Brief in opposition thereto, as well as the pleadings, finds that no irreparable harm will befall petitioner as the result of being transferred, and further finds no basis upon which to grant the motion herein.

The Commissioner is constrained to state that the protection afforded petitioner by the tenure laws set forth in *Title 18A,* Education is in her position as a teacher. However, she has no right to a particular class, grade or school, but may be assigned by the Board to teach within the scope of her certificate. *Greenway v. Camden Board of Education,* 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942) Furthermore, the Commissioner finds that the action of the Board in this instance constitutes an exercise of its authority to transfer personnel. *N.J.S.A.* 18A:25-1 The courts of this state have determined in previous instances that an action of an

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administrative agency, such as a local board of education, is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such action was arbitrary, capricious, or unreasonable. *Thomas v. Board of Education of the Township of Morris,* 89 *N.J.Super.* 327 (*App. Div.* 1965) Petitioner is required to carry the burden of proof in showing that the determination of the Board to transfer her is, in fact, arbitrary, capricious, or unreasonable; therefore

IT IS ORDERED that the restraint requested by petitioner against the Board of Education of the Township of Hamilton is hereby denied.

The parties will be notified regarding further proceedings which are necessary to complete the record in this matter for adjudication on the merits by the Commissioner of Education.

Entered this 30th day of August 1974.

COMMISSIONER OF EDUCATION

Dorothy Agress and Hamilton Township Education Association,

Petitioners,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Bard, Bogatz and Shore (Harold Bogatz, Esq., of Counsel)

For the Respondent, Henry F. Gill, Esq.

The Hamilton Township Education Association, hereinafter "Association," joins petitioner in her complaint that the Board of Education of the Township of Hamilton, hereinafter "Board," transferred her involuntarily from one teaching assignment to another, which transfer she alleges was motivated by improper reasons emanating from certain school administrators. Petitioner now seeks reassignment to her former teaching assignment. The Board denies the allegations set forth herein and avers that its determination to transfer petitioner was proper in all respects.

Hearings were conducted in this matter on June 5 and 6, 1975 at the State

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Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Prior to a recitation of the testimony and evidence adduced at the hearing on petitioner's behalf, the hearing examiner notices that on August 30, 1974, the Commissioner denied petitioner's application for restraint against the Board from carrying out the disputed transfer for the 1974-75 academic year pending a plenary hearing. (See *Dorothy Agress and Hamilton Township Education Association v. Board of Education of the Township of Hamilton, Mercer County,* 1975 *S.L.D.* 984 (decided on Motion, August 30, 1974).) Additionally, it is also noted that petitioner acknowledges the statutory authority of the Board to transfer its teaching staff members within the scope of their teaching certificates pursuant to *N.J.S.A.* 18A:25-1.

In regard to the resolution (R-1) adopted by the Board on June 18, 1974 by which she and twenty-four other teaching staff members were transferred to other positions, petitioner raises no legal issues as to the propriety of that resolution *per se.* Petitioner does complain in her Petition, however, that her transfer was "***motivated by personal feelings of [the principal] ***" and that [the principal] "***has been trying for several years to get Petitioner Agress out of the Sayen School for his own personal reasons.***" (Petition of Appeal, Count 13) However, neither the pleadings filed herein nor petitioner's own testimony reflect any specificity in regard to the alleged personal reasons.

Petitioner testified that she has been employed by the Board for nineteen years. (Tr. I-7) For eighteen of those years, petitioner was assigned to the Sayen School where she taught first grade for four years and second grade for the remaining fourteen years. (Tr. I-8) Petitioner testified that she first learned of her transfer from the Sayen School to the Mercerville School on May 30, 1974 during a conference with the principal on her yearly evaluation. (P-2) The hearing examiner observes that the form used at this conference as the basis for the yearly evaluation, entitled "Annual Appraisal of Personnel" (P-2), is actually dated April 30, 1974. The date recorded as the date a copy was handed to and signed by petitioner is May 29, 1974. However, another duplicate copy (P-1) was submitted to petitioner by the Board in response to interrogatories during discovery and the date recorded here as an unsigned copy given petitioner is May 6, 1974.

In any event, petitioner is unequivocal in her testimony that the date she had first seen or received a copy of the Annual Appraisal of Personnel was May 29, 1974. (Tr. I-12) Petitioner testified that after she had reviewed her evaluation as prepared by the principal she was pleased. (Tr. I-9) The principal informed her then that because she was an outstanding teacher she was being transferred to the Mercerville School because that school needed a good teacher. (Tr. I-10) Petitioner testified that she was surprised at this information and informed the principal that the Sayen School needed good teachers as well. It is pointed out that the Annual Appraisal of Personnel form has a section which, *inter alia,* provides "*Recommended for Transfer ." In petitioner's instance, no mark has been entered on this line of either of the forms. (P-1, P-2)

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Petitioner testified that she informed the principal that she was not happy about being transferred and that he replied he had nothing to do with the decision on transfer. (Tr. I-13) Petitioner testified that the principal explained to her that if she wanted additional information in regard to the transfer she could contact the Director of Elementary Education, hereinafter "Director." (Tr. I-14) Petitioner explained that she telephoned the Director who denied having anything to do with the transfer. (Tr. I-15) The Director's recollection of that telephone conversation which occurred on a Saturday evening is that she advised petitioner that she, the Director, did not like to discuss school affairs over the telephone at home but that she would meet with petitioner on Monday in school. The Director testified that petitioner, who was upset on the telephone, responded, "***Well, the parents are going to picket on Monday morning, because they're upset [about petitioner's transfer] too***." (Tr. I-71) The hearing examiner observes that a resident of the community who did, in fact, participate in picketing the Board office in protest over the transfer of petitioner testified in support of petitioner's complaints herein. (Tr. II-67-68)

In any event, petitioner testified she spoke then with the Superintendent of Schools who informed her that he wanted "a very strong teacher, a good teacher" for the Mercerville School and for that reason she was being transferred. (Tr. I-15) Petitioner testified that the Superintendent gave no other reason and she did not pursue it any further. Thereafter, petitioner filed a grievance in regard to her transfer which was denied by the Board. (Tr. I-16)

As recited, *ante,* petitioner charges the principal with recommending her transfer for his own personal reasons and with trying to get rid of her. In regard to her relationship with the principal, petitioner testified that she had taught under him for six or seven years, that she had never had any difficulty or arguments with him and that she believed neither she nor the principal felt that a personality conflict existed between them. (Tr. I-16-17)

Petitioner concluded her direct testimony in her own behalf by reiterating that the reason given her by the principal for her transfer was because of her being an "outstanding teacher" and that the Superintendent wanted an outstanding teacher for the Mercerville School. (Tr. I-17)

At this juncture, the hearing examiner points out that the Board had determined to transfer certain pupils from its Morgan School to the Mercerville School for the 1974-75 school year. As a consequence, the Mercerville School then needed an additional first, second and third grade teacher. At a meeting with parents of those pupils affected by the transfer sometime in the spring of 1974, the Superintendent informed the parents that the three persons selected as the additional teachers would be effective teachers. It was to fill this need, the Superintendent testified, that petitioner was transferred.

On cross-examination, petitioner testified that the Superintendent informed her that teaching staff members who planned to retire in the near future would not be transferred involuntarily. (Tr. I-26) However, even if such a policy existed, and the hearing examiner points out that the Superintendent who was called to testify on behalf of petitioner was not asked to corroborate that

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statement as his, petitioner testified that her retirement plans, if any, were not known at that time. (Tr. I-26) However, petitioner later testified that, although she had submitted a letter to the Superintendent purportedly stating she intended to retire (Tr. I-38), she had refused to provide a date when such an event would occur. (Tr. I-39)

The hearing examiner observes that the sum and substance of petitioner's testimony is that she felt her transfer was and is an improper administrative decision because she is an outstanding teacher and that the Sayen School, as well as the Mercerville School, needs strong teachers. The hearing examiner can find no testimony from petitioner whatsoever which would support in any fashion the allegation that the principal recommended her transfer for improper personal reasons or that he was trying to get rid of her.

The principal did testify, on behalf of petitioner, that he recommended petitioner's transfer for the 1970-71 academic year for what he felt to be a morale problem with other teaching staff members emanating from petitioner and another teacher. However, because both persons could not be transferred at that time, he withdrew his request for the transfer. (Tr. I-82) Again in 1974, the principal testified that some friction between petitioner and other faculty members began to develop. (Tr. I-88) However, his primary reason for recommending petitioner's transfer for 1974-75 was based on the need for strong, effective teachers at the Mercerville School. (Tr. I-90) The principal testified he learned of the Superintendent's desire to place a strong teacher in the Mercerville School through the Director and the Superintendent. (Tr. I-108-109) The hearing examiner finds nothing in the total testimony of the principal which supports petitioner's complaint of his recommending her transfer for improper reasons.

Finally, the hearing examiner, after a thorough review of all the testimony elicited herein, finds no support to petitioner's allegations set forth above. Consequently, the hearing examiner recommends that the Petition of Appeal be dismissed.

* * * *

The Commissioner has reviewed the record in the instant matter including the hearing examiner's report and the objections filed thereto by petitioner.

In the Commissioner's judgment, petitioner's total objection is grounded upon the hearing examiner's finding that the controverted transfer herein was not motivated by improper reasons advanced by the school administration or the Board.

Petitioner preliminarily objects to the failure of the hearing examiner to "***respond to any of the issues as framed by the second petitioner (Hamilton Township Education Association) and this point had to be emphasized by counsel for petitioner at the very outset of the hearing (Tr. I-4).***" In this regard, the Commissioner has reviewed page four of the transcript, as well as page three, and finds that petitioner stated only that the Hamilton Township

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Education Association is a party petitioner herein. Petitioner did not, nor did the Association, raise viable issues which the hearing examiner was required to address, either collectively or independently, apart from those which were addressed.

With respect to the issues raised herein, the Commissioner observes that the Petition of Appeal, Count 11, alleges that:

> "***the transfer of Petitioner Agress is not for just and legitimate reasons but for unjust and illegitimate reasons resulting from personal feelings of [the school principal].***"

This assertion of improper "personal feelings" of the school principal being the reason for petitioner's transfer is repeated in Count 13 of the Petition. The Petition of Appeal, Count 14, alleges a violation of the existing Agreement between the Board and the Association with respect to the transfer, which is denied by the Board in its formal Answer. Consequently, that assertion by petitioner with respect to the Agreement became a matter subject to proof at the hearing. However, petitioner offered no proof by way of testimony or documentary evidence in support of her allegation that the Agreement was violated. Furthermore, if petitioner's transfer is determined to be legal and proper pursuant to her own acceptance of the Board's statutory authority to transfer its personnel, her transfer is valid.

With respect to petitioner's allegations that her transfer resulted from improper personal feelings by the school principal, it is her own testimony, as set forth by the hearing examiner, that stands in refutation thereof. Petitioner's testimony in regard to her relationship with the school principal whom she alleges harbored ill feelings toward her is worthy of repetition:

> ***
>
> Q. "Did you ever have any difficulty with [the principal]?
>
> A. "No.
>
> Q. "Any arguments or fights, or anything like that?
>
> A. "No.
>
> Q. "Did you feel that you had a personality conflict with [the principal]?
>
> A. "I never felt so.
>
> A. "Do you think he felt that way about you?
>
> A. "No, I don't.***" (Tr. I-16-17)

Petitioner objects to the failure of the hearing examiner to reconcile what she alleges to be basic contradictions of various witnesses called on her behalf and cites numerous transcript pages. The Commissioner has reviewed those portions of the transcripts. (Tr. I and II) and finds nothing of consequence to alter any finding of the hearing examiner.

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At this juncture, the Commissioner is constrained to state that the adjudication of the instant matter must be based not on legal arguments but rather upon the factual merits of the case. The Commissioner observes that the record establishes that petitioner is considered an effective teacher by her supervisors. It is also established that the Superintendent perceived a need for an effective teacher at the Mercerville School resulting from pupil transfers. It also appears that petitioner may have been a part of some organizational difficulty at the Sayen School during her assignment. The record is clear, however, that the reason petitioner was transferred was to fill a need at the Mercerville School. Even if her transfer had been motivated in part by what the principal saw as the less than harmonious relations in the Sayen School such a motivation is not illegal or improper.

The Commissioner notices that the record is void of specifics with respect to petitioner's allegation that her transfer was caused by unjust, illegitimate, or improper reasons. The Commissioner holds that the burden of proof is upon petitioner to support her claims, and a thorough review of the record discloses that petitioner failed in that responsibility.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 23, 1975

Board of Education of the Township of Bass River,

Petitioner,

v.

Board of Commissioners of the Township of Bass River, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, James L. Wilson, Esq.

For the Respondent, Shackleton, Hazeltine and Zlotkin (Malcolm S. Zlotkin, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Bass River, hereinafter "Board," appeals from an action of the Board of Commissioners of the Township of Bass River, hereinafter "Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Burlington County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the

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voters. The facts of the matter were educed at a hearing conducted on August 6, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held March 11, 1975, the Board submitted to the electorate proposals to raise $338,555 by local taxation for current expense costs of the school district. These items were rejected by the voters, and, subsequent to the rejection, the Board submitted its budget to the Commissioners for their determination of the amounts necessary for the operation of a thorough and efficient school system in Bass River in the 1975-76 school year, pursuant to the mandatory obligation imposed on the Commissioners by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Commissioners made their determination and certified to the Burlington County Board of Taxation an amount of $305,000 for current expenses. The pertinent amounts in dispute are shown as follows:

	Current Expense
Board's Proposal	$ 338,555
Commissioners' Certification	305,555
Amount Reduced	$ 33,000

The Board documents its need for the reductions recommended by the Commissioners with written testimony and a further oral exposition at the time of the hearing. The Commissioners maintain that they acted properly and after due deliberation, and that the items reduced by their action are only those which are not necessary for a thorough and efficient educational system. The Commissioners also document their position with written testimony; however, they did not attend the hearing. As part of their determination, the Commissioners suggested specific accounts of the budget in which it believed economies could be effected as follows:

Account Number	Item	Board's Proposal	Commissioners' Proposal	Amount Reduced or Transferred
CURRENT EXPENSE:				
J213	Sals.-Tchrs.	$110,000	$ 97,500	$ 12,500
J870	Tuition	192,000	182,000	10,000
*	Free balance, current expenses, June 30, 1975			$ 10,500
TOTAL CURRENT EXPENSE		$302,000	$279,500	$ 33,000

*In addition to these recommended economies, the Commissioners also recommended that $10,500 be appropriated from the Board's current expense free balance; therefore, the total recommended economies as shown in the Table, *ante,* is $33,000.

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The findings and recommendations of the hearing examiner are as follows:

J213 Salaries – Teachers

Evidence supplied by the Board adequately supports its need for one additional first grade teacher. The Commissioners' recommendation to reduce part-time professional staff and use the principal as a teacher cannot be viewed as a sound educational determination; therefore, the hearing examiner recommends that the $12,500 in this account be restored.

J870 Tuition

The Board's records and its testimony show that its projected tuition costs, as set forth in its budget, will be exhausted. The Commissioners have not proved that there is no need for this expenditure; therefore, the hearing examiner recommends that the reduction of $10,000 in this account be restored.

The testimony of the Board Secretary indicated an expected free balance in the Board's current expense account, on June 30, 1975, of $43,477.92. In the hearing examiner's judgment this account is sufficiently healthy, in regard to the total size of the budget, to sustain the $10,500 reduction as recommended by the Commissioners. He recommends therefore that the $10,500 reduction be sustained.

The following table summarizes the conclusions of the hearing examiner:

Account Number	Item	Amount of Reduction Or Transfer	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J213	Sals.-Tchrs.	$ 12,500	$ 12,500	–0–
J870	Tuition	10,000	10,000	–0–
Free balance, Current Expenses, June 30, 1975		10,500	–0–	$ 10,500
TOTAL CURRENT EXPENSE		$ 33,000	$ 22,500	$ 10,500

The hearing examiner recommends, therefore, that an additional amount of $22,500 be added to the amount already certified to be raised by the Burlington County Board of Taxation.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections filed thereto by the governing body.

The Commissioner observes that the Board's audit report for the 1974-75 school year reflects a current expense free balance of $82,178 as of June 30,

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1975. From that amount, the Board appropriated $11,000 for its 1975-76 school budget, leaving a balance of $71,178.

The Commissioner concurs in the recommendations of the hearing examiner with respect to the Board establishing its need of $12,500 and $10,000 for its teachers' salary and tuition line items respectively. The Commissioner also determines that the Board may, without jeopardizing its fiscal position, appropriate an additional $10,500 from its current expense free balance as recommended by the governing body.

Accordingly, the Commissioner hereby directs the Burlington County Board of Taxation to add $22,500 to the previous certification of the Board of Commissioners of Bass River, Burlington County, to be raised by local taxation for the 1975-76 current expenses of the Bass River Township Board of Education so that the total amount to be raised by local taxation for current expense shall be $328,055.

COMMISSIONER OF EDUCATION

December 23, 1975

Robert H. Beam,

Petitioner,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent, Casper P. Boehm, Jr., Esq.

Petitioner, a teaching staff member who has acquired a tenure status in the employ of the Board of Education of the Borough of Sayreville, Middlesex County, hereinafter "Board," alleges that his salary has been improperly established by the Board for 1973-74 and 1974-75. Petitioner now seeks relief in the form of moneys which he alleges are owed him for the years controverted herein. The Board denies these allegations and asserts that petitioner's salary for 1973-74 and 1974-75 was properly established.

The parties agreed to submit the matter to the Commissioner of Education for adjudication on the basis of the pleadings, a joint stipulation of facts, and respective memoranda of law.

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The emergence of the instant matter stems from an earlier decision of the Commissioner *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157. Therein, petitioner was the subject of tenure charges as certified by the Board. It is not necessary to repeat here the gravamen of those charges, except to observe that the Board did prove, in fact, its allegations against petitioner. The Commissioner, however, imposed a penalty lesser than dismissal from his tenured employment with the Board. Upon consideration of the total circumstances of that matter, the Commissioner stated:

> "***The Commissioner determines, therefore, that Robert H. Beam continue in his capacity as a teacher in the Borough of Sayreville Public Schools, Middlesex County, and further that he shall receive a reduction in salary, effective as of the date of this decision, equivalent to the last salary increment provided him by the Sayreville Board of Education. Such level of salary shall be maintained for the 1973-74 school year.***" (at p. 164)

Consistent with that holding, petitioner was reinstated to his teaching position with the Board. The parties, however, disagree with respect to the proper establishment of his salary for the years 1973-74 and 1974-75.

The Commissioner observes that petitioner's salary for 1972-73 was established at $10,800, or the seventh step of the bachelor's degree scale of the Board's then existing salary policy. (Stipulation of Facts, at p. 2) Subsequent to the issuance of the decision on the tenure charges against him, petitioner was restored to his teaching position at a salary of $10,450, or the sixth step of the bachelor's degree scale, on or about March 21, 1973. (Board's Memorandum of Law, at p. 2)

It is stipulated between the parties that petitioner remained at the sixth step of the bachelor's degree scale for the 1973-74 academic year and received the same salary, $10,450, he received upon reinstatement to his teaching position. It is also stipulated by the parties that petitioner's salary for 1974-75 was established at $12,000, or the seventh step of the bachelor's degree scale. (Stipulation of Facts, at p. 2) Finally, the Commissioner observes that for 1975-76 petitioner's salary is established at $13,150, or the eighth step of the bachelor's degree scale.

In chart form, the establishment of petitioner's salary between 1972-73 and the present academic year, 1975-76 is shown as follows:

Year	Step	Amount
1972-73 (before March 20, 1973)	7	$10,800
1972-73 (after March 20, 1973)	6	$ 10,450
1973-74	6	$ 10,450
1974-75	7	$ 12,000
1975-76	8	$ 13,150

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The Commissioner observes that the difference in salaries for step seven of the bachelor's guide between 1972-73 and 1974-75, *infra,* is due to an adjustment in the Board's salary policy.

Petitioner argues that his salary for 1973-74 was to have been determined by the amount set forth at the seventh step of the bachelor's degree scale, not the sixth step. This is so, petitioner contends, for his salary for 1972-73 was established at the rate set forth for step seven.

The Commissioner does not agree with petitioner's reasoning. While it is true that his salary for 1972-73 was established at the seventh step of the bachelor's guide prior to March 20, 1973, the date the tenure charges against him were decided, his reinstatement as of March 21, 1973, required that his salary upon reinstatement revert to the amount he received minus his last increment, or to the sixth step of the bachelor's degree scale. Furthermore, it is that salary between March 21, 1973 and June 30, 1973, that is to be carried over to the 1973-74 academic year. According to the record herein, petitioner's salary for 1973-74 was established at the sixth step of the bachelor's degree scale.

The Commissioner disagrees with the Board with respect to petitioner's salary for 1974-75 and 1975-76. 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.

Consequently, petitioner's salary for 1974-75 must be determined according to the ninth step of the then existing bachelor's scale, while for 1975-76 his salary must be determined according to the tenth step of such scale.

The Commissioner finds and determines that 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 have been improperly established.

Accordingly, the Commissioner hereby directs the Board of Education of the Borough of Sayreville, Middlesex County, to pay to Robert H. Beam the difference between his actual salary for 1974-75 compared to what he should have received on the ninth step of the bachelor's degree scale. In addition, the Board is directed to retroactively adjust to September 1, 1975, his present salary to reflect that salary set forth at the tenth step of the bachelor's degree scale of the Board's salary policy. Finally, the Board is directed to pay to Robert H. Beam such moneys as are his due at the next regularly scheduled payroll date.

COMMISSIONER OF EDUCATION

December 24, 1975

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Michele Lopez and the Madison Township Education Association,

Petitioners,

v.

Board of Education of the Township of Madison, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Robert Emmet Murray, Esq.

The Madison Township Education Association, hereinafter "Association," and Michele Lopez, hereinafter "petitioner," employed as a classroom teacher by the Madison Township Board of Education, hereinafter "Board," allege that the Board failed to provide petitioner with a fair and equitable hearing after notifying her of its determination not to renew her teaching contract for the ensuing academic year. Petitioner asserts that the Board's action violates the terms of the negotiated agreement, hereinafter "Agreement," between the Board and the Association in addition to her due process rights to the provisions of the State and Federal Constitutions. Petitioner prays that the Commissioner of Education reinstate her to her former teaching position, together with any retroactive pay to which she is entitled. The Board denies that the nonrenewal of petitioner's contract was other than a lawful exercise of its discretionary authority under the Education Law (*N.J.S.A.* 18A) and controlling New Jersey decisional law.

Petitioner and the Association initially sought to have the instant matter resolved through binding arbitration stipulated in the Agreement. (R-4) (See Article III, Section C(4), at p. 8.) However, the Board obtained an order in the Chancery Division, New Jersey Superior Court, on January 18, 1973, temporarily restraining petitioner from such action.

Thereafter, the parties agreed to have the controversy submitted to the Commissioner pursuant to *N.J.S.A.* 18A:6-9. A series of delays in the instant proceedings were occasioned by, but not limited to, court appearances by counsel, requests for additional documentation and information by the parties, and the submission of an amended Answer to the instant Petition of Appeal filed by the Board on April 2, 1975.

A hearing was conducted in this matter on May 8, 1975 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner. Thereafter, counsel to the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

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Many of the facts in this matter are not in dispute and were jointly stipulated by counsel at the time of the hearing. These facts may be succinctly set forth as follows:

Petitioner, a properly certificated teacher, was employed by the Board for the school years 1969-70, 1970-71, and 1971-72. (Tr. 5-6; R-1; R-2; R-3) On March 1, 1972, she was notified by the Board that her employment contract would not be renewed for the 1972-73 school year. (Tr. 9) Thereafter, on June 12, 1972, petitioner requested the principal to set forth the reasons for her nonrenewal of employment for the ensuing school year. (R-4, Art. III, Sect. C(5b), at p. 9; Tr. 9)

On June 13, 1972, the principal responded in writing to petitioner's request which reads, in pertinent part, as follows:

> "This letter is in compliance with your request of June 12, 1972, pertaining to reasons for dismissal. As per Article 3, Section 5B of the Agreement between the Madison Township Board of Education and the M.T.E.A. [Association], page 9, the following reasons are presented to you:
>
> "1. Poor organization resulting in a lack of classroom control.
>
> "2. Lessons were not motivating and stimulating in arousing and sustaining the interest of your pupils.
>
> "3. Lack of continuity in conducting the presentation of lessons.
>
> "4. Failure to report an incident regarding a pupil requiring the aid of a nurse. (Pencil puncture incident.) [J-3]
>
> "5. Inability to control the attention and behavior of pupils during lessons, resulting in a great deal of noise, and confusion.
>
> "6. Failure to correct the behavior of disruptive students.
>
> "7. Failure to respond and apply numerous corrective suggestions and advice of the building principal, not only prior to March 1 [1972], but also during the period between March 1 and the present day."
>
> (P-1)

By way of a letter (P-2) to the President of the Board dated June 21, 1972, an NJEA UniServ Field Representative, hereinafter "NJEA representative," acting on behalf of petitioner and the Association, requested a postponement of petitioner's grievance hearing scheduled by the Board for June 27, 1972. That letter request also provided that

> "***the presence of [the principal of the school at which petitioner teaches] ***is imperative, in order that a fair and equitable hearing be held***. ***Article III, Section C [R-4] [M]ay I remind you that 'may' is permissive and we *** insist that the principal be in attendance, to guarantee the rights of [petitioner]." (P-2)

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It is further stipulated that on August 28, 1972, petitioner's grievance hearing was conducted by the Board with six of the nine Board members in attendance. However, the principal was not present at that time, and only four of the six Board members who did attend remained for the entire hearing. (Tr. 10-11)

Petitioner avers that the reasons as set forth by the principal in his letter (P-1) of June 13, 1972, with respect to her non-reemployment, are the result of periodic written observations (J-1; J-2) by him of her classroom performance. (Tr. 21)

In this regard, petitioner testified that she was unaware that she had the right to respond to the principal's observations of her teaching performance. However, petitioner later testified that she did sign the observation reports "*** [after] I went to *** the grievance committee, and *** I realized I could have done so ***." (Tr. 24) Consequently, petitioner prepared written responses to her observation reports upon the advice of the chairperson of the Association's grievance committee, who testified that "***we suggested that she [petitioner] *** respond to the evaluations, to clarify for us and for everyone else what had been stated in the [grievance] application.***" (Tr. 31) Petitioner stated that she submitted copies of her written responses to the chairperson of the grievance committee. (Tr. 27) However, neither the Board nor the principal were given copies of the written responses. (Tr. 27) Petitioner testified that she "***read some of it [written responses to observation reports] ***" to the Board at the time of the grievance hearing "*** and then I talked to just incidents that happened and things like that.***" (Tr. 25) The purpose of this information according to petitioner was to dissuade the Board from its determination not to reemploy her. (Tr. 28)

With respect to the fairness and equitableness of petitioner's grievance hearing conducted by the Board, the NJEA representative responded to the following inquiry:

***

Q. "Why did you state [in letter of June 21 to Board President (P-2)] that it was necessary for the principal to be [at the grievance hearing]?

A. "We felt that the reasons given or not, *** borne out by the evaluations [J-1, J-2], and some of the reasons in our opinion were contradictory ***, plus the fact that the contract called for a fair and equitable hearing *** and it was our understanding that the fair and equitable concept was to provide all the facets of due process and we felt that since the charges were made by the principal that he had to answer questions that we had relative to those charges ***." (Tr. 35-36)

Moreover, petitioner asserts that the Board further demonstrated its unwillingness to provide her with a fair and equitable hearing when it convened a

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second meeting of all its members at the conclusion of her grievance hearing and at that time voted unanimously to deny her grievance.

This assertion is grounded on the following facts:

1. The second meeting was limited in attendance to Board members, the Superintendent of Schools and the principal.

2. The Board reviewed petitioner's evaluation with the principal without petitioner's presence at said meeting.

3. Neither the full Board nor a majority thereof were present throughout the entirety of petitioner's grievance hearing. Consequently, the Board members were apprised of the grievance hearing proceeding by way of notes taken by one of the Board members present throughout the grievance hearing.

4. The Board ultimately arrived at a unanimous (9-0) decision to deny petitioner's grievance on the basis of its discussion and review of petitioner's evaluations with the principal and a review of the notes taken at the grievance hearing by the Board member.

(Tr. 49-52, 64-65)

Finally, petitioner argues in her Brief that by virtue of the Agreement entered into between the Board and the Association, specifically Article III, Section C(4), she is entitled to a fair and equitable hearing before the Board which she maintains must be synonymous with a due process hearing. Petitioner avers that such a hearing must allow her the opportunity to confront her accusers, cross-examine witnesses against her, and, in effect, be afforded a *de novo* hearing on the Board's reasons for non-reemployment. In this regard, petitioner cites a series of cases in support of her position: *Ferguson v. Thomas,* 430 *F.2d* 852 (1970); *Goldberg v. Kelly,* 397 *U.S.* 254 (1970); *Greene v. McElroy,* 360 *U.S.* 474 (1959); *Tibbs v. Board of Education of Franklin Township,* 59 *N.J.* 506 (1971); *Fulcher v. Carter,* 212 *S.W.2d* 503, 509 (*Tx. Cir. App.*); *Winston v. Board of Education of the Borough of South Plainfield,* 64 *N.J.* 582 (1974); *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *Fuentes v. Shevin,* 407 *U.S.* 67 (1972).

Petitioner's Brief contends further that the application of *Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236, 320 *A.2d* 857, 858 (1974), "***though important and noteworthy, is not on point in the instant matter.***" (Petitioner's Brief, at p. 6) Nor is the recent decision of the Commissioner in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 (decided May 6, 1975) pertinent to the instant matter as an amplification of *Donaldson.*

Finally, petitioner's Brief asserts that

> "***[P]etitioners can and do base their claim of right to a due process hearing on the Constitution of the United States. This is done in addition to the previously articulated contractual claim.***"
>
> (Petitioner's Brief, at p. 8)

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One of the Board members testified that he was in attendance at all times during petitioner's grievance hearing and that he took written notes with respect to the proceedings therein. These notes were shared with the full membership of the Board at a meeting held subsequent to the conclusion of such hearing. (Tr. 50) Another Board member stated that "***[t]he position the Board took was that the contract [Agreement] prohibited the presence of administrators at grievance hearings***" (Tr. 69) and that he did not remain present during the whole time because his presence was not required and would, in fact, have been contrary to Board policy. (Tr. 69-70)

With respect to the meeting of the full Board held at the conclusion of petitioner's grievance hearing, a Board member stated that "***the full Board [nine members] met with [the principal] and the administration [Superintendent of Schools].***" (Tr. 64)

The record of this testimony continues in part as follows:

***

Q. "At this further meeting, did you examine with [the principal] his evaluations [J-1, J-2] of Petitioner Lopez?

A. "Yes, I did.

Q. "At this further hearing [meeting] of the Board of Education where all nine members were present did those members of the grievance committee report back its judgment of the hearing that Ms. Lopez was present at?

A. "Yes, they did.

Q. "At the conclusion of this meeting of the full Board of Education that you were present, was a vote taken concerning Ms. Lopez's grievance?

A. "After the discussion with [the principal] we had asked him to leave. We then discussed it further among ourselves and we took a vote, yes.

Q. "What was that vote?

A. "The vote, as I recall it, was unanimous to support [the principal].***" (Tr. 64-65)

Thereafter, by letter dated August 31, 1972 (R-5), the Board informed the Association that it had considered petitioner's grievance and decided to sustain the principal's recommendations.

Consequently, the Board was notified in writing by the Association on September 2, 1972 (P-3), that it was challenging the "fairness and equitableness" of the grievance hearing pursuant to Article III of the Agreement. (R-4)

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The Board argues in its Brief that it was not obligated to provide petitioner with a statement of reasons for a failure to renew her contract for the 1972-73 school year. Such contentions are grounded on the decision of the New Jersey Supreme Court in *Donaldson v. Board of Education of North Wildwood, supra,* as cited in *Joan Sherman v. Malcom Connor and the Board of Education of the Borough of Spotswood,* Docket No. A-2122-73 New Jersey Superior Court, Appellate Division, January 28, 1975, wherein the Court ruled that *Donaldson* would be given prospective application as of June 10, 1974, with respect to the requirement that a statement of reasons be afforded by boards of education to nontenure teachers whose employment contracts are not renewed. (Board's Brief, at pp. 7-8) The Board also rejects petitioner's claim that she was entitled to an adversary type hearing before the Board subsequent to its decision not to renew her employment contract for the 1972-73 school year, as well as petitioner's contention that such denial by the Board constitutes a violation of the grievance procedure contained within the Agreement between the Board and the Association. In this regard, the Board maintains that

> "***it can be readily seen that even though petitioner herein was provided with a statement of reasons, a hearing on those reasons, and attempted to take this dispute through the grievance procedure, these actions were in effect a nullity and an *ultra vires* act of the Board of Education which was neither mandated by statutory or case law.***" (Board's Brief, at p. 14)

(See Board's Brief, at page 14, in re *Gladys S. Rawicz v. Board of Education of the Township of Piscataway, Middlesex County,* 1973 *S.L.D.* 305, affirmed State Board of Education April 2, 1975, and currently on appeal before the New Jersey Superior Court, Appellate Division.)

In the Board's view petitioner's "good name" was not at stake when the Board refused to renew her contract at the end of the 1971-72 school year. In this regard the Board avers that petitioner's rights to respond to her evaluations by the principal were set forth in the terms of the Agreement although she failed to avail herself of such opportunities within the prescribed period of time subsequent to the receipt of her evaluation reports. However, petitioner did draft responses to these evaluations and she was permitted to present them orally to the Board at the time of her grievance hearing. The Board cites *Board of Regents of the State Colleges et al. v. Roth,* 408 *U.S.* 564; 92 *S.Ct.* 2701 (1972) to support its contentions that "***a failure to meet the level of standard for performance by a teacher is not one of the areas in which procedural due process rights must be granted.***" (Board's Brief, at pp. 20-21)

The hearing examiner has considered the facts and arguments set forth herein and finds the following:

1. The instant matter before the Commissioner is based on an action of the Board prior to *Donaldson, supra,* and therefore, petitioner was not entitled to a statement of reasons by the Board with respect to the decision not to renew her teaching contract for the 1972-73 school year. *Sherman v. Spotswood, supra; Sandra Kensicki v. Board of Education of the Passaic Regional High School District, Passaic County,* 1975 *S.L.D.* 538

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2. Petitioner, as a probationary teacher, was not entitled to a formal adversary hearing before the Board as a matter of due process procedure.

This latter finding is grounded in a prior decision of the Commissioner in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County* 1968 *S.L.D.* 7 wherein the Commissioner held:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***" (at p. 10)

The hearing examiner observes that while the Board did, in fact, enter into an Agreement during the 1971-72 school year with the Association which provided for the nonrenewal of contracts to nontenure teachers as part of the grievance procedure, the Commissioner has held in the past that the application of grievance procedures to a failure to renew employment of a probationary employee is an exercise in futility. *Florence Fitzpatrick v. Board of Education of the Borough of Wharton, Morris County*, 1970 *S.L.D.* 149 It has been further held by the Commissioner that the non-reemployment of nontenure teachers is not a proper subject for a grievance proceeding leading to arbitration. Such an issue is clearly within the purview of the discretionary authority of a local board of education.

In this regard the hearing examiner finds that the Agreement between the Board and the Association with respect to establishing the non-reemployment of nontenure teachers as a grievable issue is without force and effect and constitutes an inappropriate delegation of the Board's discretionary authority pursuant to Title 18A, Education.

Finally, the hearing examiner finds that the hearing afforded to petitioner by the Board with respect to the matter controverted herein is without merit and does not constitute sufficient reason for the Commissioner to intervene in the instant matter and set aside the Board's initial decision not to reemploy petitioner for the 1972-73 school year.

For the reasons set forth herein, the hearing examiner recommends that petitioner's prayer for relief be denied.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has read the report of the hearing examiner and the single exception filed thereto by petitioners pursuant to *N.J.A.C.* 6:24-1.16.

In the matter herein controverted, petitioner seeks a fair and equitable due process hearing before the Board with the right to confront her accusers and to cross-examine them.

In this regard the instant matter is very much the same as *Rawicz, supra.* In *Rawicz,* the board had an agreement with the teachers' association which embodied a "fair dismissal procedure" requiring, *inter alia,* a statement of reasons for nonrenewal of teachers' contracts and a "hearing." The Commissioner commented in that matter that the board's policy requiring a statement of reasons and a hearing were *ultra vires* in that a board may not adopt a rule or policy which would, in effect, nullify or amend a statute or deny the board an authority conferred by statute. Such is the matter herein. See also *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261.

At the time of the expiration of petitioner's final contract on June 30, 1972, there was no statutory or other requirement that a teacher be given a statement of reasons or a hearing concerning non-reemployment. Nor is non-reemployment a grievable issue.

Such contentions have been discussed by the Commissioner on a number of prior occasions. *Florence Fitzpatrick, supra; Henry R. Boney v. Board of Education of the City of Pleasantville and Robert F. Wendland, Superintendent of Schools, Atlantic County,* 1971 *S.L.D.* 579; *Joseph Dignan v. Board of Education of the Rumson-Fair Haven Regional High School, Monmouth County,* 1971 *S.L.D.* 336, aff'd State Board of Education September 11, 1974, aff'd Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975

In *Fitzpatrick,* the Commissioner was similarly concerned with contentions that petitioner was entitled to a statement of reasons for a non-continuation of employment and to a hearing concerned with such reasons. He also discussed in that decision the application of grievance procedures to such disputes. Specifically, in these regards, the Commissioner said:

> "*** It is well established that until tenure rights accrue, probationary employees cannot enforce a demand for a statement of reasons for non-continuation of employment or for a hearing thereon. *Zimmerman v. Newark Board of Education,* 38 *N.J.* 65, 70 (1962); *Ruch v. Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, appeal dismissed State Board of Education 11, affirmed Superior Court, Appellate Division, March 4, 1969. Termination of probationary employment is not subject to challenge unless patently arbitrary or the result of unlawful discrimination. There is no such clear showing herein.***" (at p. 151)

And,

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> "*** The Commissioner has already ruled that petitioner had no entitlement to the formal hearing she demanded. Nor, in the Commissioner's judgment, was the matter of nonrenewal of petitioner's contract as principal a grievable issue. In so holding, the Commissioner does not denigrate the validity or the importance of grievance procedures. Such accepted and understood means of settling problems which arise with respect to terms and conditions of employment are essential. But failure to renew an agreement does not fall within the ambit of a grievance procedure. Application of grievance procedures to a failure to renew the employment of a probationary employee is an exercise in futility. *Eastburn v. Newark State College et al.,* 1966 *S.L.D.* 223, 224 (State Board of Education, 1966.) Even so, respondent did grant petitioner an opportunity to be heard which petitioner refused. The Commissioner finds that although the grievance procedure was not applicable to the controversy herein, respondent did in fact permit petitioner to be heard, and her refusal to go forward was at her own peril.***" (at p. 152)

In *Henry R. Boney, supra,* the Commissioner also considered contentions similar to those raised herein, and discussed at length the employment rights of tenure and nontenure teachers and the application to such rights of grievance policies and procedures. He said, with respect to employment rights:

> "*** The applicable statute, *N.J.S.A.* 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status. *** It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements.***" (at pp. 585-586)

With respect to grievance policies, the Commissioner said:

> "*** The existence of a formal grievance policy is not to be construed as a means to circumvent the intent of the Legislature as expressed in the school laws. The Appellate Division of the Superior Court of New Jersey thoroughly reviewed and clarified the Tenure Employees Hearing Act in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County,* 93 *N.J. Super.* 404 (*App. Div.* 1965). Judge Carton, writing for the court, stated that:
>
> > '*** The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background.*** (at p. 410)
> >
> > '*** The Tenure Employees Hearing Act *** establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under *Title* 18.*** (*Id.* at p. 411)
> >
> > '*** Formerly all phases of the hearing and decision making

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> function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to 'decide *** all controversies and disputes arising under the school laws.' (*R.S.* 18:3-14) [now *N.J.S.A.* 18A:6-9] (*Id.* at p. 411)
>
> 'Now the Commissioner conducts the initial hearing and makes the decision.*** (*Id.* at p. 411)
>
> 'There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to the limited function. Thus the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.***' (*Id.* at p. 412)

"Judge Carton also stated the purpose of this legislation as follows:

> '***The main purposes of that law [L.1960, *c.* 136] were two-fold. The first was to eliminate the vice which inhered in the former practice of the board's being at one and the same time investigator, prosecutor and judge.*** (*Id.* at p. 413)
>
> '***The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which 'tears the community apart' and 'disrupts the orderly conduct of local school affairs.'*** (*Id.* at p. 414)

"In the judgment of the Commissioner, the utilization of a grievance policy for adjudication of the action taken by this local board under statutory authority creates two evils. In the first instance, this procedure would create an instant tenure status not intended by the Legislature. Next, the resort to the hearing before the local board on such a matter would create the vice of having a local hearing, which the Legislature sought to eliminate in controversies involving employees whose tenure status is threatened. In the matter of *In re Fulcomer, supra,* as was stated, *ante,* the Commissioner holds that such rights are not granted by statute and cannot be acquired by indirection through grievance procedures or agreements.***" (*Emphasis in text.*) (at pp. 586-587)

The Commissioner's decision in *Hicks, supra,* considered issues which are pertinent to the matter herein. In that decision the Commissioner quoted from *Donaldson, supra,* which for the first time on June 10, 1974, directed boards to give nontenure teachers a statement of reasons when such was requested, and,

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> "***a timely request for informal appearance before the board* should ordinarily be granted even though no formal hearing is undertaken.***" (*Emphasis supplied.*) (65 *N.J.* at 246)

Subsequently, the Court decisions in *Sherman, supra,* and *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood,* 1973 *S.L.D.* 360; affirmed Docket No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975, held that *Donaldson* was to be applied prospectively only, and that prior to June 10, 1974, teachers were not in fact entitled to a statement of reasons.

The hearing examiner's findings are, therefore, affirmed in every respect. The Commissioner also reiterates his earlier determination that non-reemployment is not a grievable issue. *Rawicz, supra* Further, in *Donaldson,* the Court commented as follows:

> "***The Commissioner first noted that the board's discretionary authority was not unlimited and that its action could be set aside if it was 'arbitrary, unreasonable, capricious or otherwise improper.' He then pointed out that the board could not resort to 'statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff' nor could it adopt employment practices 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.' 1968 *S.L.D.* at 10. He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's 'bare allegation' of arbitrariness was 'insufficient to establish grounds for action.' He declined to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith.***" (at pp. 247-248)

Therefore, when a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.), or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323, aff'd State Board of Education 327; reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974); dismissed with prejudice Commissioner of Education November 1, 1974

The Commissioner is satisfied from a review of the record and the applicable law that petitioner is not entitled to a hearing as a matter of right, nor has she demonstrated that she has been denied any element of equitable treatment prior to or subsequent to the expiration of her contract. The Commissioner determines also that the Board acted completely within its

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discretionary and statutory authority when it decided not to reemploy petitioner.

Having found no violation of petitioner's rights, nor any abuse of the Board's discretion, the Commissioner determines that the instant Petition of Appeal is without merit and it is hereby dismissed.

COMMISSIONER OF EDUCATION

December 23, 1975

Mary Maykowski,

Petitioner,

v.

Board of Education of the Borough of West Paterson, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Henry Ramer, Esq.

Petitioner, a school nurse employed by the Board of Education of the Borough of West Paterson, Passaic County, hereinafter "Board," alleges that her rates of compensation established by the Board for the academic years 1972-73 and 1973-74 were improperly determined and in violation of *N.J.S.A.* 18A:29-4.2. The Board denies the allegations set forth herein and asserts that its actions in regard to the establishment of petitioner's salary was, and is, in all respects proper and legal. The Board avers that petitioner is guilty of laches thereby waiving any rights she may have had and that she is now estopped from seeking relief.

A hearing was conducted in this matter on September 24, 1974 at the office of the Passaic County Superintendent of Schools, Paterson, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the parties filed Briefs in support of their respective positions. The report of the hearing examiner is as follows:

The following essential facts are not in dispute. Petitioner is one of three school nurses employed by the Board and is the only one not in possession of a baccalaureate degree. (Tr. 17) Petitioner does possess a standard school nurse certificate. (P-1, Tr. 11) Petitioner testified that for the past four or five years (Tr. 11) she has been employed as a supervisor on the Board's school nurse staff.

Petitioner asserts that by virtue of the passage of *N.J.S.A.* 18A:29-4.2 and the subsequent holding of the Commissioner in *Evelyn Lenahan v. Board of*

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Education of the Lakeland Regional High School District, Passaic County, 1972 *S.L.D.* 577, and by virtue of the Board's salary policies and practices for 1972-73 and 1973-74, she was and is entitled to have her salary determined according to the provisions of the Board's teachers' salary policy.

In this regard, *N.J.S.A.* 18A:29-4.2 provides, *in toto,* as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

In *Lenahan, supra,* the Commissioner held that persons employed as school nurses are, by law, teaching staff members. *N.J.S.A.* 18A:1-1 Moreover, the Commissioner pointed out that, for the benefits of *N.J.S.A.* 18A:29-4.2 to become applicable, a school nurse must be in possession of a standard school nurse certificate. The provisions of that law, the Commissioner held, required local boards of education to henceforth establish the salaries of school nurses in the same manner that it determined the salaries of all other teaching staff members.

In recognition of the fact that a school nurse may possess a standard school nurse certificate without first obtaining a baccalaureate degree, as in the instant matter, the Commissioner proffered that in instances where boards of education did not have a non-degree scale as part of its teachers' salary guide, it might, to implement the purpose of *N.J.S.A.* 18A:29-4.2, create such a scale through proper negotiation.

In the instant matter, the Board had adopted two distinct salary policies for 1972-73. One was entitled "Teachers' Salaries" (J-1), while the other was entitled "Nurses' Salaries." (J-1A) The teachers' salary policy provided three scales: bachelor's, master's, and doctoral degree. (Tr. 18-19) The nurses' salary policy provided two scales: non-degree and degree. Furthermore, on the face of the nurses' salary policy (J-1A) were two provisions incorporated into that policy and reproduced here in full:

> "The Supervisor of Nurses [petitioner herein] will receive $300.00 over the scale.
>
> "*[This nurses' salary policy is] [s]ubject to Chapter 64, Laws of 1972 (N.J.) [*N.J.S.A.* 18A:29-4.2] where applicable."

The hearing examiner observes that the salary set forth at the first step of the bachelor's scale of the teachers' salary policy (J-1) is $8,400; the first step on the degree scale of the nurses' salary policy (J-1A) is $6,442, while the first step on the non-degree nurses' salary policy is $6,070. Furthermore, the maxima attainable in each scale is as follows: $14,028 in fifteen steps for a teacher, excluding all school nurses with baccalaureates; $9,929 in twelve steps for a

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school nurse with a degree; $9,545 in twelve steps for a school nurse without a degree.

Petitioner, by virtue of her years of employment with the Board, was compensated for 1972-73 at the maximum step of the non-degree nurses' salary policy (J-1A) or $9,545. Additionally, petitioner received an extra $300 for her position as supervisor. Consequently, her total salary for 1972-73 was $9,845. (Tr. 12)

During the same 1972-73 academic year and for years prior, the Board had in its employ a non-degree classroom teaching staff member who was compensated according to the bachelor's scale of the Board's teachers' salary policy. (J-1, Tr. 21) The Board Secretary testified that that person retired June 30, 1974, but was compensated until retirement according to the bachelor's scale, even though she did not possess a degree. (Tr. 21-22)

In order to place this dispute in its proper context, the hearing examiner points out that the two school nurses in the employ of the Board who possess baccalaureate degrees, though not parties of interest herein, were compensated during the 1972-73 academic year according to the rates set forth on the degree scale of the nurses' salary policy. (J-1A, Tr. 33, 35) Thus, the Board drew a distinction between school nurses with degrees and other teaching staff personnel.

In regard to petitioner's claim of improper and illegal salary establishment by the Board for 1973-74, she asserts that by virtue of the Board continuing to compensate the other non-degree classroom teaching staff members according to the rates set forth at the bachelor's scale of the teachers' salary policy for 1973-74 (J-2), her salary, too, should have been determined according to those higher rates. Petitioner complains that her salary was determined according to the lower rates set forth in the Board's nurses' salary policy (J-2A) which for 1973-74 consisted of only a non-degree scale. Furthermore, petitioner points out that her salary for 1973-74 was established at $10,307, the maximum step on the non-degree scale and that the Board failed to compensate her the extra $300 for holding the position of supervisor. The hearing examiner points out that on the face of the Board's nurses' salary policy for 1973-74 (J-2A) are the same two provisions as are set forth in its 1972-73 nurses' salary policy (J-1A), *ante,* to wit:

> "The Supervisor of Nurses will receive $300 over the scale.
>
> "[This 1973-74 nurses' salary policy is] [S]ubject to [*N.J.S.A.* 18A:29-4.2]***." (J-2A)

Petitioner asserts that even if her claims are not upheld, she should have received the $300 stipend for 1973-74 for her position of supervisor.

The hearing examiner points out that the other two nurses who possess bachelor degrees were compensated, for 1973-74, according to the rates set forth in the Board's teachers' salary policy (J-2), bachelor's scale. It is apparent that

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the Board no longer differentiated between school nurses with degrees and other teaching staff members with degrees. (Tr. 37)

Petitioner argues that by virtue of the Board establishing a separate school nurses' salary policy for both 1972-73 and 1973-74, instead of compensating her in the same manner as it compensated other teaching staff members contravenes the provisions of *N.J.S.A.* 18A:29-4.2 and the Commissioner's holding in *Lenahan, supra.*

In this regard, testimony on behalf of the Board amply shows that the non-degree nurses' scale for 1973-74 (J-2A) was specifically adopted solely for petitioner herein. (Tr. 48-50)

The following table sets forth the financial claims against the Board by petitioner:

Year	Actual Salary	Supervisor Stipend	Salary On Bachelor's Scale	Difference
1972-73	$ 9,545	$300	$14,028	$4,183
1973-74	10,307	–0–	14,550	4,243
		Amount Allegedly Owed Petitioner		$8,426

It is pointed out by the hearing examiner that, if petitioner's claims are upheld and it is ordered that her salary be adjusted, there is no provision in the Board's teachers' salary policy for 1972-73 or 1973-74 for a $300 stipend for a nurse supervisor.

In its own defense, the Board presented testimony (Tr. 24-37) by its negotiator who is employed to work with the West Paterson Education Association, hereinafter "Association," and of which petitioner is a member, for annual agreement purposes. The negotiator testified that the Board in 1970-71 had a separate nurses' salary policy (R-1) which provided no distinction between school nurses with or without degrees. School nurses were paid according to the one scale set forth therein. (Tr. 23) For 1971-72, the negotiator testified that at the insistence of the Association, and upon a recommendation of a factfinder, the Board adopted a nurses' salary policy (R-2) which differentiated between nurses with degrees and nurses without degrees. (Tr. 26-27) Petitioner is the only nurse employed by the Board who does not possess a degree. (Tr. 33)

The negotiator testified that *N.J.S.A.* 18A:29-4.2 was called to his attention during negotiations for 1972-73. However, his position, and presumably that of the Board, was that a salary policy had already been agreed upon by the parties for 1972-73. (J-1A, Tr. 34-35) Furthermore, the negotiator testified that at no time did petitioner's representative agent, the Association, question whether she would be paid on a parity with teachers and that she was, at all times, the subject of discussion in regard to a non-degree guide. (Tr. 35)

The negotiator testified that during discussions on 1973-74 salaries the

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Association adopted the position that petitioner should "***be paid something ***" (Tr. 16) but the Association did not argue that she should be paid according to the teachers' salary policy. (Tr. 37) Consequently, the nurses' salary policy for 1973-74 (J-2A), with its non-degree scale, was specifically adopted for petitioner. (Tr. 37)

The negotiator testified that petitioner's "***demands were related to me at the negotiating table *** and her demands ***[were] always a particular salary demand.***" (Tr. 47)

The Board Secretary testified that the purpose of the $300 stipend afforded petitioner was an effort on the part of the Board to recognize her years of service in the employ of the Board. Therefore the Board established the title of supervisor and provided petitioner with the $300. (Tr. 52)

In its Brief, the Board argues that it has in all respects complied with the provisions of *N.J.S.A.* 18A:29-4.2 and *Lenahan, supra.* In regard to its compensating the non-degree classroom teaching staff member according to the bachelor's scale of its teachers' salary policies for 1972-73 and 1973-74, the Board justifies that action by contending it was in recognition of forty years of service she gave to the school district. Furthermore, the Board points out that the teacher had been paid on a degree basis "***well before the enactment of *N.J.S.A.* 18A:29-4.2***." (Board's Brief, at p. 5)

In regard to the Board's reliance on the doctrine of laches as an equitable defense herein, it asserts that petitioner remained silent for 1972-73 and nearly all of 1973-74 before she presented her demands, and cites *Long v. Hudson County Board of Chosen Freeholders,* 10 *N.J.* 380 (1952) and *Van Houghten v. City of Englewood,* 124 *N.J.L.* 425 (*Sup.Ct.* 1940). (Board's Brief, at p. 2)

The hearing examiner does not agree. It is by the Board's own testimony from its negotiator that her salary demands were made known to him. Obviously, petitioner was not satisfied with either the amount of compensation nor the method of determining her compensation because the method employed produced, in her view, a salary lower than what she believed she should receive.

Petitioner, in asserting that she is not guilty of laches, cites *Lange v. Board of Education of the Borough of Audubon,* 26 *N.J. Super.* 83 (*App. Div.* 1953) and *Boeshore v. Board of Education of North Bergen,* 1974 *S.L.D.* 805.

The Board, in support of its determination to create a non-degree guide, cites *Elizabeth Stiles and Grace Ferraioli v. Board of Education of the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 1170. The hearing examiner observes that the issue herein is not whether a board of education has the authority to create a non-degree guide by virtue of *N.J.S.A.* 18A:29-7; it clearly has such authority. To the contrary, the issue herein is whether a board, which establishes a non-degree guide for teaching staff members, may compensate a teaching staff member without a degree according to the bachelor's scale of its teachers' salary policy while compensating another teaching staff member without a degree according to the non-degree guide.

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In a more recent decision, *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975) the Commissioner held:

> "***[O]nce a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.*, non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at p. 24)

In this light, the hearing examiner finds that by virtue of the Board establishing the salary of the since retired non-degree classroom teaching staff member according to the bachelor's scale of its 1972-73 and 1973-74 salary policy it is required, by its own actions, to establish petitioner's salary in the same fashion. Consequently, the hearing examiner finds that petitioner's salary for 1972-73 should have been $14,028, and that for 1973-74 her salary should have been $14,550.

Should the Commissioner adopt these findings as his own, it is observed the Board may still adopt a non-degree scale as part of its teachers' salary policy so long as petitioner's vested right to a minimum salary of $14,550 is retained.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto filed by the Board.

In the judgment of the Commissioner, the record herein discloses clear and convincing proof that petitioner's salary for the academic years 1972-73 and 1973-74 was established by the Board contrary to the provisions of *N.J.S.A.* 18A:29-4.2. This statute provides that teaching staff members who are employed as school nurses and who possess a standard school nurse certificate shall have their salaries established according "*** to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

Petitioner is employed as a school nurse by the Board and it is clear that an individual so employed is a teaching staff member. *N.J.S.A.* 18A:1-1; *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577 Furthermore, petitioner does possess a standard school nurse certificate. (P-1) Consequently, petitioner meets the requirements necessary to receive the benefits of *N.J.S.A.* 18A:29-4.2. Those benefits have been consistently set forth in a number of prior decisions of the Commissioner. (See *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County,* 1975 *S.L.D.* 389 (decided May 19, 1975); *Passaic Education Association et al. v. Passaic Board of Education, Passaic County,* 1975 *S.L.D.* 425 (decided May 29, 1975); *Pearl Schmidt v.*

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Board of Education of the Passaic County Regional High School, Passaic County, 1975 *S.L.D.* 19 (decided January 21, 1975); *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, reversed and remanded State Board of Education June 4, 1975; *Stiles et al. v. Ringwood, supra; Julia Anne Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434; *Evelyn Lenahan, supra.*)

In *Ascough, supra, Passaic Education Association, supra, Schmidt, supra,* and *Martinsek, supra,* (upon reversal by the State Board of Education) it was determined that the boards of education had employed school nurses who did not possess degrees, but who held standard school nurse certificates. These persons were compensated according to non-degree salary scales in their respective positions. In each case the board of education had also compensated other non-degree teaching staff members according to higher rates set forth in the respective bachelor's degree salary scales. In each instance, it was held that the school nurses, as teaching staff members, were being illegally discriminated against by such action.

In the instant matter, it is established that the Board did, in fact, have in its employ another teaching staff member who did not possess a degree but, unlike petitioner, was compensated according to the higher rates set forth in its bachelor's degree scale of its salary policy. Furthermore, it is clear that the Board compensated that other non-degree teaching staff member according to the higher rates of its bachelor's degree scale *after* July 1, 1972, the effective date of *N.J.S.A.* 18A:29-4.2, while establishing petitioner's salary according to a "non-degree nurses' salary policy." This obvious and improper discrimination continued until June 30, 1974, when the other non-degree teaching staff member retired.

The Commissioner is constrained to observe that a "non-degree nurses salary policy" subsequent to the passage of *N.J.S.A.* 18A:29-4.2 has been addressed. In *Pearl Schmidt, supra,* it was held:

> "***Petitioner's objection to the creation of a non-degree nurses guide, *per se,* is a valid objection since any non-degree guide should apply uniformly to all non-degree teaching staff members.***This [the creation of non-degree guides which discriminate against teaching staff members who possess the same credentials] is clearly an inequitable arrangement and it must be set aside.***" (at p. 23)

Elsewhere, in the same decision, it was held:

> "Once a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.,* non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" ((at p. 24)

While it is clear that boards of education have the authority to adopt

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non-degree salary guides and fix salaries of teaching staff members not in possession of degrees according to the rates therein, no authority exists for a board of education to adopt a non-degree salary guide and compensate certain non-degree teaching staff members according to the generally lower rates therein while compensating other non-degree teaching staff members according to the generally higher rates of its bachelor's degree scale.

Accordingly, the Commissioner concurs with the hearing examiner's finding that petitioner's salary for 1972-73 and 1973-74 was improperly established by the Board.

In this regard, the hearing examiner reports that petitioner received a base salary of $9,545 plus a $300 supervisor stipend, for a total of $9,845 for 1972-73. This figure is consistent with petitioner's uncontradicted testimony. (Tr. 12) Petitioner's proper salary should have been $14,028. With respect to 1973-74 the hearing examiner reports that petitioner received a base salary of $10,307 but did not receive the $300 supervisor stipend. The Board, in its objections, asserts that petitioner did receive the additional $300 supervisor stipend for a total amount received of $10,607. The Commissioner has searched the record herein and finds nothing in the testimony or evidence offered that substantiates the hearing examiner's finding that petitioner did not receive the additional $300 supervisor stipend. Consequently, finding in favor of the Board on this limited point, the Commissioner determines that petitioner received $10,607 for 1973-74. Her proper salary for that year should have been $14,550. Thus, the total amount of compensation due petitioner is $8,126.

There remains the Board's objection to the hearing examiner's findings on its arguments that petitioner cannot now seek relief by virtue of laches, estoppel, and waiver, citing *Bridgeton Education Association v. Board of Education of Bridgeton,* 132 *N.J. Super.* 554 (*Chan. Div.* 1975).

After a review of the record before him, the Commissioner concurs with the hearing examiner that petitioner had made known her complaints to the Board during 1972-73 and 1973-74 and that petitioner was not dilatory in filing the instant Petition. Petitioner did not rest her complaints. There is no showing that petitioner deliberately delayed her complaints in order to place the Board in an indefensible position, nor can it be held that petitioner waived any rights she has by virtue of her accepting an improper salary for the years in question. Accordingly, the Commissioner rejects the Board's argument that petitioner is guilty of laches, that petitioner should be estopped from seeking relief, and that petitioner has waived her rights.

Accordingly, the Commissioner hereby directs the Board of Education of the Borough of West Paterson, Passaic County, to forward to Mary Maykowski the amount of $8,126 at its next regularly scheduled pay date.

COMMISSIONER OF EDUCATION

December 23, 1975

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Board of Education of the Township of North Bergen,

Petitioner,

v.

Board of Education of the Town of Guttenberg, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Brigadier and Margulies (Seymour Margulies, Esq., of Counsel)

For the Respondent, John Tomasin, Esq.

Petitioner, the Board of Education of the Township of North Bergen, hereinafter "North Bergen Board," filed a Petition of Appeal with the Commissioner of Education in December 1971 wherein it was alleged that the total sum of $229,934.60 was owed to the North Bergen Board by the Board of Education of the Town of Guttenberg, hereinafter "Guttenberg Board," in tuition costs for the education of high school pupils from Guttenberg. Such costs were alleged to have been incurred from the establishment by the North Bergen Board of low and inappropriate tuition rates during the school years 1965-66 through 1970-71. The North Bergen Board demanded that the Guttenberg Board be required to pay the total sum forthwith. The Guttenberg Board averred it had promptly paid all bills for tuition costs assessed by the North Bergen Board in the school years 1965-70 and that no further payment was due.

The dispute was submitted to the Commissioner on the pleadings, Briefs of counsel, and the record of an oral argument conducted on September 28, 1972 by a hearing examiner appointed by the Commissioner. Subsequently, on January 12, 1973, the Commissioner handed down his decision wherein he dismissed that portion of the Appeal concerned with the levy of additional tuition charges for the years 1965 through 1970-71 but held that the North Bergen Board was entitled to make an adjustment of its tuition rate for the 1971-72 year. The State Board of Education affirmed. *Board of Education of the Township of North Bergen v. Board of Education of the Town of Guttenberg,* 1973 *S.L.D.* 18, aff'd State Board of Education 1974 *S.L.D.* 1415 Subsequently, the Superior Court of New Jersey, Appellate Division, in a decision of March 17, 1975, Docket No. A-2237-73, remanded the matter to the State Board of Education with instruction to remand to the Commissioner for a plenary hearing with respect to one facet of the dispute; namely an allegation by the North Bergen Board that its Superintendent of Schools, Dr. Herman Klein, had been in conflict of interest with respect to the establishment of the controverted tuition rates and, thus, the rates had been invalid and should be set aside. The hearing examiner had not permitted proofs with respect to such allegations at the time of original case submission.

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Pursuant to the Court's instruction the State Board did remand the matter to the Commissioner and a hearing examiner appointed by the Commissioner held a conference with respective counsel on April 14, 1975 at the State Department of Education, Trenton. Subsequently, a plenary hearing was conducted by the hearing examiner on May 27 and June 2, 1975 at the office of the Hudson County Superintendent of Schools, Jersey City. Thereafter each of the parties submitted Briefs. Brief submission was completed on August 30, 1975. The report of the hearing examiner is as follows:

The primary fact around which the instant remand centers is that Dr. Herman Klein was at one and the same time Mayor of Guttenberg and Superintendent of Schools in North Bergen during the years 1965-70 when high school pupils from Guttenberg attended school in North Bergen with tuition paid by the Guttenberg Board. Such fact was not set forth in the Petition of Appeal, however, as the basis for an allegation that the Superintendent was, by virtue of his two positions, in conflict of interest or that he had improperly used his position as Superintendent to the benefit of the taxpayers of Guttenberg. An attempt by the North Bergen Board to amend its Petition to include such facts and allegation and to submit proofs pertinent thereto was originally refused by the hearing examiner. Such refusal was sanctioned by the Commissioner and the State Board but posed the principal issue for determination by the Court and constitutes the primary reason for the remand.

It is noted, however, that the Court found no conflict *per se* in the mere fact that Dr. Klein held the two positions simultaneously but found "***there does exist a potential for conflict, 'emanating from external temporary circumstances,' such financial dealing between the two municipalities in each of which Klein held an office.***" (March 17, 1975 Superior Court Decision, at p. 6) It is this "potential" for conflict which occasioned the remand and delineates the issue for current consideration. This issue, more precisely defined by the court, is related "***to the role played by Superintendent Klein in the determination of the tuition rates billed to and paid by Guttenberg.***" (*Id.* at p. 7)

At the conference of counsel on April 14, 1975, this issue received some elaboration and was set forth as follows in the context of the Court's instruction:

> "***The issue herein as determined by the hearing examiner *** is whether or not Herman Klein influenced the members of the Board of Education of North Bergen to establish tuition rates for receiving pupils from Guttenberg during the years 1965-71 which accrued to the detriment of the taxpayers of North Bergen, and, if he did, whether such influence may be adjudged as a specific conflict of interest sufficient to alter or to set aside prior decisions in this matter.***"

The plenary hearing of May and June 1975, was centered around this issue and proofs pertinent thereto were advanced in the testimony of six witnesses, seventeen exhibits and in the record of twelve depositions which were stipulated.

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All witnesses at the hearing were called by the North Bergen Board and included Dr. Herman Klein, former Superintendent of North Bergen Schools.

Dr. Klein testified that he had not participated in discussions with respect to the establishment of tuition rates for Guttenberg pupils at the North Bergen High School and that, in fact, the North Bergen Board had made the decisions wherein the rates were set. (Tr. II-20; Deposition III - 86) He further testified that his instruction from the Board with respect to tuition rates and budget matters generally in the 1965 year, and subsequent thereto, was to "***assist the Secretary of the Board and others concerned with the annual budget.***" (See R-1, at p. 8; Tr. II - 21-27; Deposition III - 70.) Dr. Klein testified that when Guttenberg pupils first attended North Bergen Schools in 1964 the tuition rate was established by the Board and its Secretary upon the basis of rates generally applicable in the "area" or "vicinity" (Tr. II-20) but that in the third or fourth year of the sending-receiving relationship such rate was established as the per pupil cost of the preceding year. (Tr. II-21) He further testified, in his deposition, that whenever his own salary or anything concerned with the tuition rate to be set for Guttenberg pupils was to be discussed by the Board at a meeting he was "excused from the meeting." (Deposition III - 62) Dr. Klein also testified, however, that he could not give any specific instance when this had occurred. (Deposition III - 65) Dr. Klein testified that he customarily had prepared a "budget analysis" for use by the Board Secretary in the establishment of tentative budgets but that such analysis had contained "mostly educational figures" related to textbook and supply needs, personnel requirements, etc. (Deposition III - 70-71, 85) Dr. Klein testified that "***[t]he secretary's office would prepare the final budget for tentative adoption by the Board of Education after which it was then adopted by the Board of School Estimate.***" (Deposition III - 70) Dr. Klein categorically denied that he had ever discussed or sought to persuade or influence anyone in North Bergen with respect to the establishment of a tuition rate for Guttenberg school pupils. (Deposition III - 92, 110-111)

Three members of the Guttenberg Board during the years 1964-70 and the Secretary of the Board during that time testified at the hearing of May 27, 1975, and in depositions taken on May 23, 1975. The testimony was, however repetitive. One of the members, Mr. Norman Glendenning, testified that the sending-receiving relationship between Guttenberg and North Bergen had begun in school year 1964-65 (Deposition III - 22) but that there was no negotiation at that time concerned with the establishment of a tuition rate. (Deposition III - 24) He further testified that the Guttenberg Board Secretary had received each year a notification from the Secretary of the North Bergen Board of the per pupil tuition rate to be charged and that an appropriate amount of money had then been budgeted by the Guttenberg Board. (Deposition III - 24) (Tr. I-64 *et seq.*) Mr. Glendenning testified that he had not engaged in negotiations with respect to the establishment of such tuition rates and was not aware of any that had been held. (Deposition III - 27) The deposition testimony of Mr. Glendenning and testimony at the hearing was essentially similar to that of other Guttenberg Board members and to the testimony of the Board Secretary. They testified they had no knowledge with respect to the influence of Dr. Klein on members of the North Bergen Board. (See Deposition testimony of Board

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Member Laborski, at p. 12, 13, 15, 16; of Board Member Jaworski, at p. 32, 37, 39; and of Board Secretary Di Vincent, at p. 50, 51, 56. Also see Tr. I-3 *et seq.*, 25 *et seq.*, 53 *et seq.*)

A total of seven North Bergen Board members were deposed prior to the hearing in this matter and these depositions were stipulated as an addition to the total record of consideration on the instant remand. Six of the members were not called as witnesses at the hearing.

North Bergen Board Member Dr. Sidney Woltz testified in deposition that the first draft of the annual school budget was prepared each year by the Secretary-Business Manager in North Bergen, together with his assistants, and that the budget was then submitted to the Board for review. (Deposition II - 5) He testified that the individual items of the budget were accepted by him as "true and accurate figures," (Deposition II - 8) and that he did not know the source from which they were obtained. (Deposition II - 11) Dr. Woltz testified that the tuition revenue estimate was originated "***from the Secretary's office." (Deposition II - 14) He testified he had never participated in the negotiation of such tuition rates (Deposition II - 14-15) and that he had never personally made a computation of what they should be. (Deposition II - 18) He also testified that he had never discussed tuition rates with Dr. Herman Klein and that the Superintendent had never tried to persuade him "***to fix some particular rate.***" (Deposition II - 30) Dr. Woltz also testified that he had never heard Dr. Klein discuss tuition rates with any other Board members.

North Bergen Board Member Frank Arena served on the Board for a three-year period until 1967 and estimated that only two school budgets had been considered by him in his official capacity. (Deposition II - 37) His recollection of the specific details of such budgets is, however, not clear. (See Deposition II, at p. 41.) He testified he could recall no conversation concerned with the establishment of tuition rates for Guttenberg pupils (Deposition II - 46-47, 56) and that he had never discussed the rates with Dr. Klein. (Deposition II - 48-49) Further, he testified he did not know in fact whether the Superintendent, or some other person, had recommended the tuition rates to be assessed. (Deposition II - 54)

North Bergen Board Member Joseph McKeon testified that the first negotiation between the North Bergen Board and the Guttenberg Board with respect to tuition rates took place in 1971, (Deposition II - 67) and that no other discussion on the subject took place, to his knowledge, prior to that year except for a conversation he had had in December 1970 with the Secretary of the North Bergen Board. In that month, he testified, he had asked the Secretary "***to check into the tuition rates***." (Deposition II-68) He testified further that he had had no conversations with Dr. Klein concerned with the tax rate in Guttenberg (Deposition II - 82) and that the tuition rate to be assessed Guttenberg pupils "***was from the Secretary's office***." (Deposition II - 83) (See also pp. 85, 94, 100.) Mr. McKeon testified that the tuition rate to be assessed was developed from a report known as the A-4 report and reflected a cost determination for education in a prior year. (Deposition II - 85) He testified he had never discussed the establishment of tuition rates for Guttenberg pupils

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with Dr. Klein and that Dr. Klein had never tried to persuade him that a particular rate should be set. (Deposition II - 114, 119) (Note: Counsel, after initial disagreement, stipulated the deposition of Board Member McKeon in letters to the hearing examiner dated June 23, and 24, 1975. See also Tr. I-70-122.)

North Bergen Board Member Aldo Gennari testified that Dr. Klein had never spoken to him about tuition rates and had not tried to persuade him to set a particular rate. (Deposition II - 129) He testified that tuition rates were set in the office of the Board Secretary. (Deposition II - 140)

North Bergen Board Member Malcolm O'Reilly served on the Board 1967-71 but was unable to clearly recall the facts with respect to annual budget preparation. (Deposition I- 13-14, 28) He testified, however, that there had never been a discussion with respect to per pupil costs as the basis for tuition charges until 1970. (Deposition I - 18-19, 30) He further testified that it was the Board Secretary who prepared the proposed annual school budget (Deposition I - 4-7) and that he had never had anything to do with negotiation of a tuition fee to be assessed for the attendance of Guttenberg pupils in the North Bergen schools. (Deposition I - 24)

North Bergen Board Member Joseph Tighe served on the Board for two periods of time including one term in the years 1962-65. (Deposition I - 31) He testified, however, that he had little or no recollection of budget preparation matters. (Deposition I - 32-35)

This concludes a summarization of the testimony of witnesses at the hearing or in depositions prior thereto.

Petitioner finds proof in such testimony, and in certain of the exhibits in evidence, that the North Bergen Board was not informed in the years 1965-70 of the facts concerned with per pupil cost and avers that it was Superintendent Klein, and not the Board Secretary, who prepared the annual budget and established the tuition rate contained in it. In particular, petitioner cites Exhibits P-6, 8 and 15.

Exhibit P-15 is a copy of the minutes of the regular meeting of the North Bergen Board held December 10, 1969. It contained the following item:

> "*NEW BUSINESS:*
>
> "*Tuition*
>
> "Dr. Klein reported that the Board is required by law to establish the tuition for the 1970-71 school year in the month of December of the preceding year. He recommended that the tuition for Guttenberg pupils attending North Bergen High School be established at $818 per pupil per year based upon the actual per capita cost of $818.87 for the 1968-69 school year.
>
> "A motion was made by Mr. Failla and recorded by Dr. Woltz that the

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recommendation by Dr. Klein be approved. Upon the call of the roll, the members voted unanimously to adopt the motion.***"

Exhibit P-8 is a copy of the minutes of a special meeting of the North Bergen Board held on January 30, 1969, and, in pertinent part, there is a recital of a complaint by the former Secretary of the Board, then a member, that the annual budget was presented to the North Bergen Board for adoption without prior discussion. In response to the complaint, the President of the Board is reported to have said that the Board had been given "a listing" of budget items approximately three weeks before "*** in accordance with past Board practice.***" The President also is quoted as saying that negotiations with staff members had delayed final budget preparation but that "***Dr. Klein and his assistants had done a terrific job in getting this budget all ready for the meeting." (Board Minutes, at p. 23)

Exhibit P-6 is a letter dated March 17, 1972 from the Secretary of the Guttenberg Board. The letter states:

"Please be advised that Dr. Herman G. Klein, Superintendent of Schools, advised the Board of Education on January 31, 1972, that he had notified you of the tuition rates adopted by the North Bergen Board of Education for the 1972-73 school year.***"

(Note: This letter postdates the specific controversy herein which is concerned with school years 1965-70. By 1972 tentative tuition rates were subject to adjustment on an annual basis to reflect actual costs for ensuing years.)

The Guttenberg Board maintains that the North Bergen Board has failed to prove that Superintendent Klein influenced the North Bergen Board any time to establish tuition rates for Guttenberg pupils which were favorable to Guttenberg. The Guttenberg Board avers that:

"***After all is said and done, the petitioner Board of Education of North Bergen has produced no evidence, no facts, and no proofs of *any* influence exerted by Superintendent Klein, much less any *decisive* influence, in the setting of said rates, even though the burden is on the *petitioner* to prove its charges. (Brief of Respondent Guttenberg Board, at p. 18) (*Emphasis in text.*)

The Guttenberg Board grounds this avowal on the testimony and deposition of Superintendent Klein and on the testimony of the other witnesses at the hearing or in depositions as summarized, *ante.*

The hearing examiner has reviewed all such argument and the testimony of witnesses in depositions or at the hearing and finds no clear and convincing evidence that Superintendent Klein exercised an influence, either direct or indirect, on members of the North Bergen Board of Education in the years 1965-70 to establish tuition rates for Guttenberg pupils which were favorable to Guttenberg. Dr. Klein testified that the establishment of such rates resulted initially each year from a recommendation of the Secretary of the Board and

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this testimony is nowhere contradicted in the record. In fact it is confirmed in the testimony of every member of the North Bergen Board who could recall the procedures of the years in question. The hearing examiner so finds.

Nor is this finding impinged by the Exhibits P-6, 8, and 15 upon which the present North Bergen Board principally relies or upon the other exhibits in evidence. These other exhibits would appear, in fact, to confirm testimony that tuition rates were established initially by the North Bergen Board as a result of a recommendation by the Board Secretary on the basis of rates assessed in neighboring communities (see P-2), but that in December 1969 the Board set a rate for the 1970-71 year based on actual costs for a preceding year. (See P-4.) The "***actual tuition cost per pupil of $818.87***" upon which the tuition rate of $818 for the 1970-71 year was grounded (P-4, 15) was clearly the kind of precise calculation customarily made by a Board Secretary and not by a Superintendent of Schools. The Superintendent's inclusion of the precise cost figure in his recommendation on December 10, 1969 (P-15, *ante*), a recommendation which may be adjudged a ministerial act, is thus in the hearing examiner's judgment some measure of confirmation and not a refutation of the Superintendent's testimony that the Board Secretary supplied this item of budget delineation each year for action by the Board. Further, the hearing examiner gives credence to, and finds eminently plausible, the testimony of Superintendent Klein with respect to the total division of authority for line item budget preparation and initial recommendation which is found at pages 70-73 of his deposition. Such testimony is a recital of a usual procedure in school affairs and the record is barren of any testimony which would indicate that the Superintendent had, in this instance, exercised such an initiative.

Finally, the hearing examiner observes that the North Bergen Board Secretary during the years 1965-70 is deceased and his testimony with respect to the preparation of budget items in those years is not available. Since this is so, however, the hearing examiner finds it significant that the North Bergen Board did not produce testimony at the hearing from subordinates of the Board Secretary or of the Superintendent during the years 1965-70 as refutation of the Superintendent's testimony with respect to budget preparation. Such subordinates were named by the Superintendent in deposition testimony at page 73 but were never deposed by the North Bergen Board. In the absence of such testimony, the testimony of the Superintendent stands alone and unchallenged with respect to this important aspect of the charge.

Accordingly, for the reasons set forth, the hearing examiner finds that the North Bergen Board has failed to prove that Superintendent Klein influenced members of the North Bergen Board to establish tuition rates in the years 1965-70 which accrued to the detriment of the taxpayers of North Bergen. The hearing examiner recommends, therefore, that the allegations of conflict of interest against Superintendent Klein be dismissed.

There remains for consideration the exceptions to the hearing examiner's initial report in this matter. Such exceptions were filed by the North Bergen Board with the State Board of Education prior to the time the State Board affirmed the Commissioner's decision of January 12, 1973, but had not been

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considered by the Commissioner prior to his decision. The Superior Court, in its Decision to Remand, ordered that such exceptions and the Briefs pertinent thereto be considered as part of the total litigation at this juncture by the Commissioner. Exceptions to the instant report may be consolidated with the prior exceptions for the Commissioner's review.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions pertinent thereto filed by the North Bergen Board. The Guttenberg Board has filed no exceptions to the report *per se* and its request to file objections to the exceptions of the North Bergen Board was deemed inappropriate by the hearing examiner. The Commissioner concurs with such judgment.

The North Bergen Board's principal exceptions may be succinctly summarized although the exceptions are lengthy. The Board avers that:

1. It was incumbent upon the hearing examiner to make a *de novo* determination with respect to the existence of an inherent conflict of interest in the occupation of the offices of Superintendent and Mayor and such determination, pertinent to the facts of this case, was not made.

2. The hearing examiner's conclusion that a conflict did not exist in this instance was one which was too narrowly grounded and which ignored a "totality of circumstance." (Exceptions of the North Bergen Board, at p. 2)

3. The factual finding that the decisions which established tuition rates were made by the North Bergen Board and not by Superintendent Klein is not supported by the testimony which is cited as authority for it.

4. At the inception of the sending-receiving relationship between the two districts there was no instruction by the North Bergen Board to its Superintendent to base tuition rates on audited costs of a prior year.

5. The testimony of North Bergen Board members was incorrectly analyzed for evidence concerned with the origin of tuition assessments and that other testimony was inaccurately summarized.

6. Certain exhibits were not used as the basis for "conclusions and inferences" which were warranted and that arguments of the parties were inaccurately set forth.

7. The hearing examiner employed a "clear and convincing" evidence standard which was erroneous and that a "preponderance of evidence" standard should have been used instead.

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8. The testimony of Superintendent Klein was not a proper basis for a finding that his inclusion of a tuition rate in budget projections was a "ministerial act" which resulted from a recommendation from the Secretary of the North Bergen Board.

9. The final budget document in each of the years in question was collated in the Superintendent's office and was his work product "***no matter where the Superintendent had obtained the information which he included in his report." (Exceptions of the North Bergen Board, at p. 9)

Finally, the North Bergen Board now requests that further testimony be taken as a "supplement to the record" from persons named by the Superintendent in deposition. Such request was not made at the time of the hearing on remand, however, and the Commissioner finds no reason to grant the request – and invite further delay – at this juncture.

The Commissioner opines that such exceptions, while numerous in number, are an obfuscation of the clear and precise issue which occasioned the instant remand by the Court. This issue, as reiterated by the hearing examiner, is concerned with the "***role played by Superintendent Klein in the determination of the tuition rates billed to and paid by Guttenberg.***" (*Id.*, at p. 7) Thus, the question for determination was in fact "narrowly grounded" – not by the hearing examiner, but by the Court. The Court knew at the time of remand that one man held the posts of Superintendent of Schools in North Bergen and Mayor of Guttenberg – the principal fact of petitioner's "totality of circumstance" – and found nothing in that fact *per se,* when standing alone, as evidence of a conflict of interest between two incompatible positions. Petitioner's Exceptions, nevertheless, as summarized *ante* still contest that finding of the Court. (See also Petitioner's Exceptions at pp. 1, 2.)

Petitioner's Exceptions further aver that the testimony of Superintendent Klein, called as petitioner's witness, with respect to the role of the Board Secretary in determining the establishment of tuition rates, which testimony was substantially affirmed by members of the North Bergen Board, is of little consequence in the context of other facts, *i.e.*, the routine nature of the annual budget preparation, the compilation of the budget document in the Superintendent's office, etc. Petitioner states that the Board Secretary is dead and a finding by the hearing examiner that the testimony is not "***contradicted by the decedent adds no probative value to the fact finding." (Petitioner's Exceptions to the Report of the Hearing Examiner, at p.) Such a statement is evidently grounded in an assumption that such a contradiction was the only possible one. The hearing examiner did not agree and the Commissioner concurs with that view. He concurs also with the other findings and conclusions of the hearing examiner and adopts them as his own.

Indeed, there is a paucity of evidence in support of the charges herein which, in the Commissioner's judgment, is quite remarkable in the context of the repeated demands of the North Bergen Board over a period of three years for

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an opportunity to prove a charge not even deemed worthy of inclusion in its original Petition of Appeal.

Accordingly, and in specific reference to the remand of the Court, the Commissioner determines that there is no basis for a finding that tuition rates were established by the North Bergen Board in the years 1965-66 through 1970-71 as the result of influence exercised by the Superintendent of Schools, in a role which was in conflict with duties he performed as Mayor of Guttenberg.

There remains for consideration that portion of the remand which directs that the Commissioner consider Exceptions filed by the North Bergen Board with the State Board of Education prior to the time in January 1973 when the State Board affirmed the Commissioner's decision. Such Exceptions by the North Bergen Board aver that the original report of the hearing examiner was in error in that there was contained therein no ruling on a constitutional question – a question concerned with whether or not North Bergen taxpayers were subject to an unequal tax burden – or that, in the alternative, the tuition transactions between the two districts involved an unlawful gift of public moneys. The North Bergen Board further averred that involvement by the Superintendent of North Bergen Schools as an advisor or in any other capacity in any aspect of the tuition relationship invalidated the relationship.

This latter exception has been the subject of proofs in the hearing on remand and the Commissioner's determination has been set forth.

The Commissioner has also considered the other Exceptions and finds no reason contained therein for an alteration of his prior decision of January 12, 1973, which was affirmed by the State Board on March 6, 1974. Accordingly, he reaffirms at this juncture the prior determinations.

COMMISSIONER OF EDUCATION

December 26, 1975

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Alice Martello,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Alice Martello, *Pro Se*

For the Respondent, *Pro Se*

Petitioner, a member of the Board of Education of the Township of Willingboro, hereinafter "Board," alleges that the election of its vice-president at a special meeting held April 3, 1975, was improper and illegal and prays that it be set aside. Although the Board does not specifically deny the allegations, it does rely on the official minutes of its special meeting held April 3, 1975, and the official minutes of its annual organization meeting conducted on March 17, 1975 to support the propriety of the controverted election.

The parties agree to refer the matter directly to the Commissioner of Education for adjudication on the pleadings and exhibits filed by the Board.

The minutes (C-1) of the organization meeting conducted by the Board on March 17, 1975, show that subsequent to the election of its President the Board received two nominations for the position of vice-president: Harper and Richardson. The roll call vote of the Board for the position of vice-president resulted in nominee Harper receiving three votes, nominee Richardson receiving four votes, with two Board members abstaining from voting.

The minutes (C-1) also show that immediately after the vote for vice-president was completed, the Board unanimously determined to postpone the election of vice-president until the latter part of the meeting when its solicitor would have been appointed. Attached to the official minutes (C-1) of the organization meeting and made part of the record herein is what appears to be a transcription (C-2) of comments and statements made by members of the Board during the entire organization meeting. The Commissioner is constrained to point out that this transcription (C-2) is not an official record of the Board's action.

The transcription (C-2) states that the Board postponed the election of its vice-president pending the appointment of counsel, which occurred at this meeting, because a question arose whether the election of a vice-president required a majority vote of its full membership or a plurality vote of those members who voted. (C-2, at pp. 2-3)

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The official minutes (C-1) disclose that subsequent to his appointment, counsel advised that nominee Harper was properly elected as vice-president "*** on the previous vote***" and that thereafter one of the two members who had originally abstained from voting decided to cast his vote for nominee Harper "***thus making the amount of votes received by Mrs. Harper 'five' ***." (C-1, at p. 17)

The Commissioner is constrained to observe that the results of the balloting for the office of vice-president, according to the Board's own official minutes (C-1), show that nominee Harper received three votes, nominee Richardson received four votes, and two members abstained from voting. The Commissioner has reviewed the transcription (C-2) of the organization meeting and finds that the result of the balloting is properly recorded in the official minutes. In the transcription, the Commissioner observes that the Board Secretary announced:

> "***4 [votes] for Mr. Richardson, 3 [votes] for Mrs. Harper and two abstentions***" (C-2, at p. 2)

Consequently, nominee Harper was not elected to the position of vice-president of the Board on this ballot, the first of two conducted by the Board.

The minutes (C-1) also show that the Board then determined by a recorded roll call vote of eight ayes and one abstention to reconsider the election of its vice-president. Once again, the nominees were Harper and Richardson. The minutes (C-1) show that nominee Harper received four votes from herself, Weiss, Martello and Baptista. Nominee Richardson received two votes from Miller and Brancaccio. Two members, Oliver and Gross, abstained. There is no indication in the minutes that Richardson voted in this second balloting.

On March 19, 1975, the Board conducted a conference session in regard to its prior action of March 17, 1975, *ante,* by which it had elected Harper as vice-president. The Commissioner has reviewed the transcription (C-3) of the conference session, as well as a three-page letter (C-4) dated March 19, 1975, addressed to the Board President from Board counsel in regard to parliamentary procedure based upon *Roberts Rules of Order Revised,* the authority used by the Board for the conduct of its meetings. Finally, the Commissioner has reviewed the three-page letter (C-5) dated March 21, 1975, addressed to the Board President from nominee Harper in which she asserts the validity of her election to the position of Board vice-president.

The Commissioner notices that the conference session conducted by the Board on March 19, 1975, centered on the question of whether it had followed appropriate parliamentary procedure at its organization meeting when it elected nominee Harper to the post of vice-president.

In any event, the Board Secretary sent a notice (C-6) dated March 25, 1975 to all Board members announcing a special meeting to be held on April 3, 1975 to elect a vice-president of the Board, *inter alia.*

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The minutes (C-7) of the special meeting held April 3, 1975 show that the Board President ruled that the election on March 17, 1975, *ante,* of nominee Harper to the post of vice-president was invalid and set aside. (at page 65) Thereafter, nominations were again received for the position of vice-president. Three members were nominated: Mrs. Harper, Mr. Richardson, and Mr. Brancaccio. After an initial vote was taken and no candidate received a majority vote of the full membership of the Board, a second vote was taken and Mr. Richardson received five votes. The Board President then declared Mr. Richardson to be the vice-president of the Board.

The Commissioner is constrained to observe that *N.J.S.A.* 18A:15-1 requires boards of education:

> "At its first regular meeting each board shall organize by electing one of its members as president and another as vice president, who shall serve for one year and until their respective successors are elected and shall qualify, but if the board shall fail to hold said meeting or to elect said officers, as prescribed by this law, the county superintendent shall appoint from among the members of the board a president and vice president."

Elsewhere, *N.J.S.A.* 18A:10-5 provides that:

> "The organization meeting shall constitute a regular meeting of the board for the transaction of business."

On prior occasions, the Commissioner addressed the issue of the number of votes necessary to elect a person to a vacancy on a board of education. In *Polonsky et al. v. Red Bank Board of Education et al.*, 1967 *S.L.D.* 93, the Commissioner held:

> "***Nowhere does the statute express or imply that a majority of the whole number of members is needed to elect. It must be concluded, therefore, that where there are more than two candidates for election to fill the vacancy under this statute, a plurality of votes is sufficient.***"
>
> (at p. 96)

While the statute of reference in *Polonsky, supra,* was with respect to the filling of board membership vacancy (*N.J.S.A.* 18A:12-15), the same rationale is applicable to the instant matter.

N.J.S.A. 18A:15-1 simply requires the board to elect from its membership a president and a vice-president. There is no requirement that the candidates for these positions be elected by a majority of the full membership of the Board. Consequently, a plurality of votes suffices for the election of the candidate. (See *Eric H. Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167.)

In the instant matter, the Commissioner notices that nominee Richardson had received four votes on the initial balloting for the position of vice-president.

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Consequently, had the Board not subsequently rescinded its action that evening, nominee Richardson would have been the Board's vice-president.

However, by virtue of the determination of the Board to postpone the election of its vice-president, after nominee Richardson received the four votes, it effectively negated his election to that post. It is well established that a board of education may rescind an earlier action so long as a vested right has not accrued to anyone by reason of that action, and so long as its rescission does not contravene existing law. *Harris v. Board of Education of Pemberton Township, Burlington County,* 1939-49 *S.L.D.* 164 (1938) and cited with affirmation in *Elizabeth Stiles and Grace Ferraioli v. Board of Education of the Borough of Ringwood, Passaic County,* 1974 *S.L.D.* 1170

Therefore, the second balloting by the Board at its organization meeting held March 17, 1975, for the post of vice-president resulted in nominee Harper receiving four (C-1) votes, nominee Richardson receiving two votes, with two members abstaining from voting. Accordingly, by reason of nominee Harper obtaining a plurality of votes cast in the second balloting by the Board for the position of vice-president, nominee Harper was elected to the position of vice-president of the Board.

The Commissioner holds that the Board President, at the special meeting conducted on April 3, 1975, improperly declared that the position of vice-president was vacant. Once a member is elected as president or vice-president consistent with the statutes, such person or persons may only be removed according to the provisions of the statutes. In this regard *N.J.S.A.* 18A:15-2 provides that:

> "A president or vice president of a board of education who shall refuse to perform a duty imposed upon him by this law may be removed by a majority vote of all of the members of the board, and in case the office of president or vice president shall become vacant the board shall, within 30 days thereafter fill the vacancy for the unexpired term. If the board shall fail to fill the vacancy within such time, the county superintendent shall fill the vacancy for the unexpired term."

Furthermore, had the Board failed to elect a vice-president at its organization meeting on March 17, 1975, *N.J.S.A.* 18A:15-1 clearly establishes that it would have lost its authority to elect at a later meeting. The statute of reference provides that if a board of education fails to elect either officer, or fails to hold an organization meeting, then the county superintendent of schools shall appoint respective board members to those positions.

Accordingly, the Commissioner hereby finds and determines that Board member Patricia Harper was duly elected to the post of vice-president of the Willingboro Board of Education on March 17, 1975, and she shall continue to serve in that capacity until her successor is elected at the next annual organization meeting conducted by the Board.

COMMISSIONER OF EDUCATION

December 31, 1975

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Long Branch Education Association and William Cook,

Petitioners,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

William Cook, hereinafter "petitioner," a teacher employed by the Board of Education of the City of Long Branch, hereinafter "Board," alleges that his contract was not renewed for the 1974-75 school year in contravention of his First Amendment rights of free speech and press. He is joined in his Appeal by the Long Branch Education Association, hereinafter "Association," by reason of a further allegation that the Board failed to follow the detailed evaluation procedure set forth in the negotiated agreement relative to nonrenewal of a teaching staff employee.

The Board denies any improper or illegal action on its part and avers that petitioner, as a nontenure teacher, had no right to continued employment when his 1974-75 contract expired by its own terms.

A plenary hearing was conducted on August 27, 1974 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education. At the end of petitioner's case, the Board moved for dismissal, which motion was reserved for action of the Commissioner. (Tr. I-55) Following the first day of hearing, it was determined by the hearing examiner that the record was deficient in that it was devoid of substantial evidence or testimony by the Superintendent or any member of the Board, which body is required by law to determine matters of employment. Accordingly, pursuant to *N.J.A.C.* 6:24-1.13, the hearing examiner ordered by letter of November 7, 1974, that affidavits be submitted by the Superintendent and three Board members setting forth the reasons why they recommended and voted for nonrenewal of petitioner's contract. This requirement was grounded on a similar case where such testimony was considered crucial by the State Board to the ultimate decision in *Patricia Meyer v. Board of Education of the Borough of Sayreville, Middlesex County,* 1970 *S.L.D.* 188; remanded State Board 192; Decision on Remand 1971 *S.L.D.* 140; reversed State Board 1972 *S.L.D.* 673.

Affidavits were submitted as required (C-1; C-2; C-3; C-4) whereupon

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petitioner moved that they be removed from the record. (C-5) This motion was procedurally denied by the hearing examiner by letter of March 26, 1975. (C-6) Opportunity for both direct and cross-examination of the signers of these affidavits was afforded at a continuation of the hearing on May 14, 1975. The report of the hearing examiner is as follows:

Petitioner was employed by the Board from October 1972 through June 1974 as a teacher of woodworking and graphic arts. In March 1974 petitioner was notified that his contract would not be renewed for the 1974-75 school year. A review of the record including the classroom observation reports and testimony of petitioner's department chairman reveals that the decision to nonrenew petitioner resulted principally from factors other than the performance of his teaching duties in the classroom. The department chairman testified that he had experienced certain problems with petitioner with respect to tardiness, plan books, absenteeism and a failure to follow proper channels. (Tr. I-163, 165, 169, 171, 177) However, he testified that on the basis of petitioner's performance as a classroom teacher, he had recommended that he be reemployed for 1974-75. (Tr. I-180) This testimony is consistent with classroom observation reports submitted by the department chairman to the principal. (P-2; P-3) This conclusion is further supported by the generally favorable evaluation reports submitted by the principal to the Superintendent from November 27, 1972 through November 20, 1973. (R-3; R-4; R-5; R-6)

On March 20, 1974, the principal advised the Superintendent in writing that he was recommending that petitioner's contract not be renewed because of the following concerns:

***

"A. Health – he has used a great deal of sick leave. (Evaluation report January 21, 1974)

"B. Late calls for substitute. (Evaluation report January 21, 1974)

"C. Plan book needs to be kept up to date. (Observation report February 12, 1974 and January 29, 1974)

"D. Wear safety goggles when working or demonstrating to students. (Evaluation report November 20, 1973)

"E. Has not started graduate work, or joined Shore Shop Teachers. (Evaluation report November 20, 1973 and May 22, 1973 and January 30, 1973)

"F. Failure to collect absence excuses in homeroom. (Note from Mr. Maggio November 26, 1973)

"G. Availability after school could be improved. (Evaluation report January 21, 1974)

"H. Sign in and student interview demonstrate lack of judgment. (My memo 3/18/74).

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"I. Improper use of gym facilities and universal gym frequently during period 9 when he has plans and record period and period 10 study (not discussed).***" (R-12)

Petitioner testified that his thirty-two absences from school during a two-year period were occasioned by an abdominal operation (Tr. I-6) and were in part the result of asthma aggravated by the malfunctioning of the heating and dust collection systems in the woodworking shop. (P-5; Tr. I-6-7, 29, 32, 97) Nine of these absences occurred after March 20, 1974. (Tr. I-108-109)

The department chairman testified that petitioner had complained to him of problems relative to such alleged malfunctioning. (Tr. I-163) He stated, however, that based on numerous visits, he did not feel that the temperature level in the classroom had been insufficient to satisfactorily educate children. (Tr. I-163, 165) He further testified that repairs were made by the janitors to the heating system within three days after petitioner's complaint, which repairs improved air temperature conditions in the woodworking shop. (Tr. I-165) He also testified that, although he designed an improvement in the dust collection system, this improvement was not totally effected until the summer of 1974. (Tr. I-175) The Department chairman stated, however, that in his opinion the dust level in the shop was no greater than that of any other shop. (Tr. I-175)

A conflict of some magnitude developed during March 1974 between petitioner and his principal when petitioner granted an interview to a reporter from the pupil newspaper, *The Trumpet*. Petitioner, who was assigned as a representative to the Student-Faculty Committee of the school (Tr. I-136), had stated at a meeting of the Committee that problems existed in the industrial arts area of the school. (Tr. I-10) A pupil reporter from *The Trumpet* thereafter appeared between classes in the wood shop and was allowed to interview both petitioner and the pupils in his seventh and eighth grade woodworking class. (Tr. I-11, 13) This interview resulted in an article for *The Trumpet* reporting opinions of both petitioner and his pupils.

This article stated, *inter alia*, that:

1. Frustrations were building in the industrial arts department.

2. The woodworking shop lacked necessary up-to-date tools, materials and facilities.

3. The shop lacked adequate heating and dust collection systems and was in desperate need of renovation.

4. The shop did not adequately serve college bound pupils. (P-1)

The principal became aware of the existence of this proposed article and summoned petitioner into his office on March 15, 1974. There he proceeded to verbally chasten petitioner for failing to submit such concerns to his superiors in writing rather than airing them in the school newspaper. (Tr. I-15-16, 38-39, 52, 90, 139) The principal further remonstrated with petitioner at that time

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concerning his having signed out on that day prior to the accepted time to do so. (Tr. I-42, 89) Finally, the principal emphatically gave instructions that the proper resolution of such problems as petitioner complained of were to be referred through the proper administrative Board channels, rather than through the school newspaper. (Tr. I-90) In a memorandum dated March 18, 1974, the principal reduced to writing such concerns as he had expressed previously on March 15 and directed petitioner to submit to him in writing a listing of whatever shortcomings he found in the shop by March 20, 1974 with a listing of whatever positive steps he himself had taken to resolve each problem. (R-1) Petitioner was given little or no opportunity to express his viewpoint to the principal on March 15, 1974. Therefore, he requested a conference at a later date. (Tr. I-44) The principal and the department chairman met with petitioner a few days later at which time the principal notified petitioner he would not be recommended for renewal of contract and suggested that he resign. (Tr. I-20, 91) This suggestion was declined by petitioner.

A careful review of the record reveals the following facts to be true relative to the concerns expressed by the principal in R-12, *ante*:

1. Petitioner did call in later than the appointed time on at least two occasions to request a substitute. (P-4) On one occasion petitioner arranged for a substitute and thereafter reported to school and was docked in pay the amount of one day of substitute's salary. (R-7)

2. Petitioner's plan books were unavailable on at least four occasions when requested by the department chairman. (Tr. I-169)

3. On at least one occasion petitioner failed to wear safety goggles when demonstrating to pupils. (R-4; Tr. I-66)

4. Petitioner did not join the Shore Shop Teachers organization, but was under no requirement to do so. (Tr. I-22)

5. Both the principal and the department chairman formed an opinion that petitioner used poor judgment on occasion in failing to go through established channels to effect change and improvement. (Tr. I-82, 145, 171)

6. Petitioner, on occasion, failed to sign in by 8:00 a.m. as required. (Tr. I-69; R-10)

7. Petitioner, on numerous occasions, "worked out" with pupils in the school gymnasium during his planning period as an attempt to establish better rapport with them. (Tr. I-30) While the principal was aware of this and disapproved, he never brought it to petitioner's attention. (Tr. I-121)

The hearing examiner finds no sufficient evidence to conclude that petitioner was or was not available to assist pupils at the end of the school day.

The Superintendent testified that in January of 1974 the principal had reported to him and to the Board on the progress of petitioner. (Tr. II-11) He further testified that he had on one occasion authorized a deduction from petitioner's pay as recommended by the principal. (See 1, *ante.*) (Tr. II-12) He testified that the principal's recommendation that petitioner not be renewed and

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his own thorough review of petitioner's personnel file (Tr. II-29,31) formed the basis for his recommendation to the Board that petitioner not be renewed. (Tr. II-15) The Superintendent testified that the principal reasons for his recommendation, which reasons he reported to the Board, were as follows:

1. Petitioner's excessive use of sick leave.

2. An apparent lack of responsibility or sense of obligation in following through established routines and procedures. (Tr. II-24)

3. Problems in maintaining his teacher's plan book. (Tr. II-24)

4. Failure to follow safety guidelines (Tr. II-24)

5. Unavailability for after-school pupil assistance. (Tr. II-25)

The Superintendent testified that, at the time he recommended to the Board that petitioner's contract be nonrenewed, he was totally unaware of the altercation or circumstances surrounding the proposed article for *The Trumpet,* ante. (Tr. II-35, 43, 68) He further testified that when he made this recommendation to the Board, that no classroom observations or written evaluations were made available by him for the perusal of the Board. (Tr. II-57, 77-78)

The corroborative testimony of members of the Board leads the hearing examiner to conclude that the principal had *not* made known to the Superintendent, and that the Superintendent neither knew of nor reported to the Board anything regarding the controverted school newspaper article prior to the time the Board determined not to renew petitioner's contract. Nor was the principal present to do so at that meeting. (Tr. II-74) Those three members of the Board who testified each stated that it was primarily the recommendation of the Superintendent and the supporting reasons he furnished that caused them to vote for nonrenewal of petitioner's contract for 1974-75. (Tr. II-73, 76, 83, 85, 92) Two members of the Board who testified denied personal knowledge of the school newspaper incident at the time of the Board's conference meeting on March 18, 1974 at which time it was determined not to offer a contract to petitioner for the ensuing year. (Tr. II-89, 98) The remaining member's testimony is silent on this subject. Grounded on the testimony of the Superintendent and the corroborative testimony of those members of the Board from whom testimony was elicited in this regard, the hearing examiner finds that the Board in making its determination was in no way aware of, motivated or influenced by those events and reactions surrounding the controverted newspaper incident. However, it is determined that the principal was in considerable measure influenced by what he believed to be petitioner's failure to follow established procedures. He was further offended by what he considered an inappropriate article. This finding is grounded on the speech pattern and emotional reaction which he displayed in this incident which occurred shortly before his recommendation for nonrenewal. (Tr. I-139, 145)

It is clear, however, that a principal has no authority to renew or

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nonrenew a teaching staff member. Nor does a Superintendent. *N.J.S.A.* 18A:27-1 *et seq.*

The Superintendent's testimony is convincing in that the principal's recommendation was an important influence in his own decision not to recommend petitioner. However, it is found that the Superintendent made his own independent review of petitioner's personnel file and, based on the contents thereof, and absent any knowledge of the intended article for *The Trumpet* made his independent assessment which he transmitted to the Board in oral fashion on March 18, 1974, unadorned by any reference to the school newspaper incident.

Petitioner argues, nevertheless, that the Superintendent's decision not to recommend petitioner was influenced and tainted by the principal's overly restrictive view of what is proper in pupil publications. He asserts that such taint was passed to the Board by the Superintendent's recommendation. Petitioner asserts that the Board failed to examine all the available evaluations and thus neglected to fullfill its statutory responsibility pursuant to *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:27-1, 4 and *N.J.S.A.* 18A:27-10. In support of this contention, petitioner cites *Ronnie Abramson v. Board of Education of Colts Neck, Monmouth County,* 1975 *S.L.D.* 418 (decided May 28, 1975). Petitioner's Memorandum of Law, at pp. 15-17)

Petitioner asserts that the Superintendent's reliance on the principal's recommendation and, in turn, the Board's reliance on that of the Superintendent were violative of petitioner's rights guaranteed by the Federal Constitution. *Perry v. Sindermann,* 408 *U.S.* 593, 92 *S. Ct.* 2694, 33 *L. Ed.* 2*d* 570 (1972); *Pickering v. Board of Education,* 391 *U.S.* 563, 88 *S. Ct.* 1731, 20 *L. Ed.* 2*d* 811 (1968); *Katz v. Board of Trustees of Gloucester County College,* 125 *N.J. Super.* 248 (*App. Div.* 1973) (Petitioner's Memorandum of Law, at pp. 10-14)

Petitioner avers that the attempt to compel his membership is likewise abhorrent to our protected freedoms. *Shelton v. Tucker,* 364 *U.S.* 479 (1960); *N.J.S.A.* 34:13A-5.3

For these reasons, petitioner avers that he is entitled to an order from the Commissioner directing the Board to reinstate him to a comparable teaching position to that which he previously held, together with back pay and other appropriate emoluments for the intervening period between June 1974 and the date of reinstatement.

Conversely, the Board, refuting petitioner's claim that his nonrenewal was violative of his constitutional rights, states that:

> "***[T]he bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions.***" *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131, 144 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974) (Respondent's Memorandum of Law, at p. 10)

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The Board asserts that the Superintendent arrived at his decision not to recommend petitioner and that the Board, thereafter, made its determination not to renew his contract with no fact known "***that would in any way prejudice, diminish, or taint its ultimate decision that Mr. Cook should not be rehired***." (Respondent's Memorandum of Law, at p. 11)

The Board maintains further that it properly and legally made its own independent judgment in consultation with its Superintendent. It avers that this determination not to reemploy petitioner was in no way violative of petitioner's statutory or constitutional rights or contrary to the cited Court opinions: *Katz, supra; Shelton, supra; Pickering, supra; Perry, supra; Street v. New York,* 396 *U.S.* 576 (1969). (Respondent's Memorandum of Law, at pp. 10, 16-19)

For these reasons the Board urges that the instant Petition of Appeal be dismissed.

In consideration of the findings of facts hereinbefore set forth, and the entire body of testimony and documentary evidence herein, the hearing examiner recommends to the Commissioner that he make the following determinations:

1. That the decision of the Superintendent not to recommend petitioner for reemployment and the determination of the Board not to renew petitioner for the 1974-75 school year were neither contrary to statute nor in violation of petitioner's constitutional rights of free speech.

2. That the aforementioned determination of the Board was properly made in good faith and that, absent a showing of illegality, arbitrariness, or capriciousness, it is entitled to a presumption of correctness.

3. That petitioner has failed to produce oral testimony or documentary evidence sufficient to support a conclusion that the evaluative processes required in the negotiated agreement were, in petitioner's case, violated.

4. That the instant Petition of Appeal is without merit and should be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has thoroughly reviewed the entire record of the herein controverted matter including the Memoranda of Law, the hearing examiner report and the exceptions filed thereto by respective counsel pursuant to *N.J.A.C.* 6:24-1.16. The requirement of the hearing examiner that affidavits be filed by the Superintendent and members of the Board, as well as the admission into evidence of testimony by these persons, was in all points proper and necessary by reason of the fact that only the Board was clothed with power to determine whether or not petitioner would be reemployed. Petitioners' Motion to strike from the record these affidavits, which Motion was procedurally denied

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by the hearing examiner, is herewith denied by the Commissioner. *Meyer, supra; N.J.A.C.* 6:24-1.13

Petitioners take exception to the finding of the hearing examiner that the Superintendent was unaware of the *Trumpet* incident when he made his recommendation to the Board that petitioner not be reemployed. The Commissioner has made a careful examination of the testimony of both the principal and the Superintendent in this regard. He concludes that the forthright testimony of the Superintendent that he was unaware of the *Trumpet* incident is to be relied upon. (Tr. II-43) In contrast the testimony of the principal is nebulous wherein he merely expressed uncertainty as to whether the Superintendent was present at part of a meeting when the matter was discussed. (Tr. I-159) The Commissioner accepts and holds for his own this finding and all other findings set forth in the report of the hearing examiner.

Petitioners aver in the exceptions that the department chairman's observation report (P-3) contained an excellent recommendation of petitioner. The Commissioner would agree only to the extent that his recommendation was that petitioner was "***doing well as a second year teacher." (P-3) The chairman, however, was not oblivious to certain shortcomings of petitioner's performance as evidenced by the fact that he recommended that he make improvement in both motivational and summation techniques. Similarly, on more than one occasion he cautioned him that it was desirable to go through channels. (Tr. I-171) Likewise, on two separate visits, he noted that petitioner's plan book was not on hand. (P-2; P-3) A review of the evaluations by the department chairman, the principal and the Superintendent reveals an intermixture of both favorable and less than favorable comments on petitioner's performance throughout the two years he taught in the Long Branch School District.

Within such a context of evaluation reports and the unfavorable recommendation of the principal, the Superintendent made his own independent evaluation of petitioner's total performance and recommended to the Board that he not be reemployed for the 1974-75 school year. The Board, taking into consideration the recommendation of its Superintendent and the previous review in January 1974 of petitioner's performance by the principal, determined not to renew his employment contract. There is no convincing evidence that the Board's determination was motivated by so much as an awareness of the principal's concern over the controverted *Trumpet* article. Being thus unaware, the Board could not conceivably have acted in reprisal in violation of petitioner's right of free speech. Therefore, no taint attaches to the Board's determination. Nor does such taint attach by reason of any influence which may have motivated the principal to recommend that petitioner not be reemployed. It is abundantly clear that the Superintendent was unaware of the conflict over the *Trumpet* article. Even assuming *arguendo,* as petitioner suggests in the exceptions, that the Superintendent had seen Memorandum No. 321 (R-1), written to petitioner by the principal, there is nothing therein to indicate that it is other than a procedural directive, devoid of emotional conflict.

The Board's determination was in no way invalidated by reprisal in

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violation of petitioner's constitutional right of free speech. The Commissioner so holds. As was said in *Winston, supra,* "***[T]he bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions.***" Nor do the facts herein support such a claim.

Petitioner's contract expired by its own terms. As a nontenured employee, petitioner had no property right to continued employment. *Perry v. Sindermann, supra; Pickering, supra; Board of Regents v. Roth,* 408 *U.S.* 564 (1972) This aspect of the matter is rendered *stare decisis* as applies to New Jersey education law by *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic City,* 1975 *S.L.D.* 699 (decided September 4, 1975) and needs no further elaboration herein.

Petitioner's further argument that the Board's attempt to compel membership in the Shore Shop Teachers Association is abhorrent within the context of *Shelton v. Tucker, supra,* is without merit. The instant matter is clearly distinguishable from *Shelton.* Therein, the Supreme Court determined that an Arkansas statute requiring that a teacher make an annual *full disclosure* of every organizational affiliation for the preceding five years was overly restrictive. The Court stated that the statute interferred with associational freedom in that it went "***far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.***" (364 *U.S.* at 490) The Shore Shop Teachers Association is a voluntary organization of shop teachers and supervisors dedicated to improvement of instruction among its membership. The organization frequently arranges for professional study courses at convenient locations without cost to its members. The Board's administrators had on a number of occasions suggested that petitioner begin graduate study and/or join the Shore Shop Teachers Association as a means of professional improvement. The Commissioner finds nothing abhorrent in such recommendations, which may be expected to contribute to efficient and viable instruction. In any event the Board appears to have placed little emphasis on this reason of the principal for recommending nonrenewal. (Tr. II-72-74, 85, 91-92) Nor did the Superintendent highlight this to the Board as a reason for his recommending that petitioner not be reemployed. (Tr. II-24-25) Rather, it is evident that the members of the Board had greatest concern about petitioner's absenteeism, his problems in following routine requirements of calling in for substitutes, irregularities attendant upon his signing in and signing out, and his reported lack of availability for pupil assistance at the end of the school day. Additionally, it is clear that the Board placed great weight on the overall recommendation of the Superintendent. (Tr. II-73, 85, 92)

At least one of the Board's reasons, that concerning petitioner's availability at the end of the school day, was not proven beyond reasonable doubt to be true in fact. However, in the matter of reemployment of a nontenure teacher, it is not incumbent upon the Board to prove its reasons as in a hearing of charges against a tenured employee. Absent a showing of bad faith, arbitrariness, capriciousness, unreasonableness, statutory or constitutional violation, sham, or frivolity on the part of the Board, its discretionary

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determination must prevail. The Commissioner so holds.

Having carefully considered the entire record herein and having weighed the arguments of counsel, the Commissioner determines that no impropriety or illegality has rendered the Board's determination *ultra vires.* The reasons for the Board's action were neither frivolous nor a sham. Nor, as previously stated, were they violative of petitioner's constitutional right of free speech. Furthermore, the record is totally barren of proof that petitioner's rights under the negotiated policy then in force were in any way violated.

Since this is so, the Board's determination is entitled to a presumption of correctness. As has been previously stated:

> "***[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.***" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948)

The New Jersey Superior Court in *Victor Porcelli v. Franklyn Titus, Superintendent, and the Newark Board of Education, Essex County,* 1968 *S.L.D.* 225, affirmed State Board of Education, April 2, 1969, affirmed 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970) stated:

> "***We endorse the principle, as did the court in *Kemp v. Beasley,* 389 *F.2d* 178, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***."
> (at p. 312)

Similarly, it was stated by the Appellate Division of the New Jersey Superior Court in the case of *Michael A. Fiore v. Board of Education of the City of Jersey City, Hudson County,* 1965 *S.L.D.* 177 that:

> "***The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, *R.S.* 18:3-14, and thereafter to the State Board, *R.S.* 18:3-15. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nomine Flechtner v. Board of Education of Hoboken,* 113 *N.J.L.* 401 (*E.&A.* 1934) Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered

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by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C.J.S., Schools and School Districts,* § 128, p. 920; *Boult v. Board of Education of Passaic,* 135 *N.J.L.* 331 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948). ***In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. *Boult, supra****"

(at p. 178)

See also *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962); *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County,* 1972 *S.L.D.* 5, 8.

In the matter herein controverted, the respondent Board has moved for dismissal of the Petition of Appeal. There being no relief which may be properly afforded to petitioner, the Motion to Dismiss is granted.

COMMISSIONER OF EDUCATION

December 31, 1975

~~Pending~~ before State Board of Education

affd 1976 S.L.D. 1150

Board of Education of the Borough of Point Pleasant,

Petitioner,

v.

Borough Council of the Borough of Point Pleasant, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Doyle and Oles (John Paul Doyle, Esq., of Counsel)

For the Respondent, Henry E. Kordes (Thomas J. Hirsch, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Point Pleasant, hereinafter "Board," appeals an action of the Borough Council of the Borough of Point Pleasant hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Ocean County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on August 25, 1975 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

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At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $3,591,944.52 by local taxation for current expenses of the school district. This item was rejected by the voters, and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Borough of Point Pleasant for the 1975-76 school year, pursuant to the mandatory obligation imposed upon Council by *N.J.S.A.* 18A:22-37.

Council did not consult with the Board; however, Council made its determinations and certified to the Ocean County Board of Taxation an amount of $3,107,044.52 for current expenses. The pertinent amount in dispute is shown as follows:

	Current Expense
Board's Proposal	$ 3,591,944.52
Council's Proposal	3,107,044.52
Amount Reduced	$ 484,900.00

The Board contends that Council's action was arbitrary, unreasonable, and capricious, and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written and oral testimony.

At a time subsequent to the filing of Council's Answer to the Board's Petition of Appeal, the Board filed a Notice of Motion which requested the Commissioner to restore its budget in full. Such Motion was grounded in an alleged arbitrary action of Council and the hearing examiner indicated at the hearing he would not recommend that a decision of the Commissioner be rendered on the Motion. At this juncture, however, the hearing examiner has reconsidered the Motion and determines that it is substantive and warrants consideration by the Commissioner.

The Superintendent of Schools, hereinafter "Superintendent" filed an affidavit in support of the Motion to Dismiss. That affidavit reads in part as follows:

***

"2. On February 3, 1975 there was a meeting between the Board of Education of Point Pleasant Borough and the Mayor and Council of that municipality. At that meeting it was indicated to the governing body that the sum needed to be raised by taxation for the school district was $4,073,173.02. This sum included current expenses, a capital outlay and indebtedness.

"3. On February 4, 1975 the governing body approved the budget and

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did indicate that the sum of $3,865,960.00 was for the school levy. This action was taken by a three to three vote with the mayor breaking the tie. Thus by their action the governing body with the assistance of the mayor did arbitrarily capriciously and wrongly reduce the amount indicated by school board as necessary for the coming fiscal year by $207,213.02.

"4. At the referendum on the school budget, the capital outlay item was approved by the people. A current expense item was defeated by ten votes.

"5. Subsequent to the narrow defeat of the budget, the governing [body] wrongfully, willfully and arbitrarily refused to meet with the Board of Education notwithstanding the provisions of N.J.S.A. 18A:22-37 which mandated such a meeting prior to the governing body reducing the school budget. Despite the failure to hold such a meeting and then consider the arguments, contentions of the school board and the needs of the school district, the governing body did by a three to two vote reduce the monies for current expenses by the sum of $484,900.00. This was accomplished by a three to two vote. Amongst the three voting in favor of this substantial budget cut were a teacher within the school district and the wife of a teacher within the school district.

"6. Prior to reducing the school budget, the council did obtain the services of a consultant who it is alleged has expertise in the field of education. The council did meet with this consultant though during the same period they did not fulfill their statutory duty to meet with the Board of Education. The consultant reported back to the governing body that in his judgment $201,675.00 should be taken from the school budget. It is to be noted that this figure was just within the $207,213.02 reduction self-imposed by the governing body even prior to the referendum. The consultant was then told to review the matter and to find further areas to cut. This was done and the number given above of $484,900.00 was arrived at."

***

After the defeat of the budget by the voters on March 11, 1975, the Board Secretary notified Council on March 12, 1975, as follows:

"Enclosed is the proposed 1975-76 school budget as approved by the county superintendent of schools together with supporting budget worksheets. A review of the totals by the Judge of elections in Polling District #2 indicates that Current Expense account has been rejected by the voters and the Capital Outlay has been approved.

"This material is forwarded to you for your action in accordance with regulations applicable to rejected school budgets. Latest information indicates that the Governing Body has fifteen days after receipt of the

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budget to take necessary action. Please consult with your attorney for more definitive information on this phase of the required action.

"The Board of Education and administration will be available, if requested, to meet at a mutually convenient time to review and confer with the Council on the provisions of the budget." (P-1)

On the same day the Borough clerk acknowledged receipt of the letter and the materials referred to (P-1) as follows:

"Received the following materials from the Point Pleasant Board of Education. Hand delivered by James Lawrence.

Letter		
1975-76 School Budget	Signature	(signed)
Budget Worksheets	Title	Boro Clerk

(P-2)

The Board Secretary testified that she has never had any communications from Council requesting a meeting prior to Council's reduction of the budget. The Board President gave similar testimony and was emphatic in stating that he had not discussed the budget with anyone from Council prior to the budget reduction; nor had there been any request made of him to meet with Council to discuss the budget. (Tr. 19)

The hearing examiner finds, therefore, that the affidavit of the Superintendent and the testimony of the Board Secretary and the Board President, clearly show that Council did not meet with the Board prior to its determination and reduction of the budget.

Council did not offer any testimony or any documentary evidence that it did in fact offer to meet with the Board.

In *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), the Court commented in part as follows:

"***Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. *That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools.* Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But *its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own

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obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant *aggregate reduction* in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. *Cf. Davis, supra,* § 16.05.***" (*Emphasis supplied.*) (at pp. 105-106)

And further,

"***As in *Booker,* the Commissioner in deciding the budget dispute here before him, will be called upon to *determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled.* Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***" (*Emphasis supplied.*)
(at p. 107)

The statute *N.J.S.A.* 18A:22-37 reads as follows:

"If the voters reject any of the items submitted at the annual school election, the governing body of the municipality or of each of the municipalities, included in the district shall, *after consultation with the Board,* and within 30 days after receipt of the proposed school budget from the board, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:

a. Current expenses of schools;
b. Vocational evening schools or classes;
c. Evening schools or classes for foreign-born residents;
d. Appropriations to capital reserve fund; or
e. Any capital project, the cost whereof is to be paid directly from such taxes;

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which amounts shall be included in the taxes to be assessed, levied and collected in such municipality or municipalities for such purposes.

"Within 20 days after the governing body of the municipality or of each of the municipalities included in the district shall make such certification to the county board of taxation, the board of education shall notify such governing body or bodies if it intends to appeal to the commissioner the amounts which said body or bodies determined to be necessary to be appropriated for each item appearing in the proposed school budget."
(*Emphasis added.*)

Thus it is required both by statute and by the interpretation of the Court that prior to the time when a governing body reduces a school budget it must "consult" with the local board of education. Such consultation is not discretionary but required in order that the determination of the governing body may be "***related to educational considerations rather than voter reactions."

In such a context the hearing examiner has assessed the facts of the instant matter and finds they attest to a conclusion that Council's action to reduce the budget of the Board was an arbitrary one and must be set aside. Council never did meet with the Board to make "educational considerations." In fact, according to testimony at the hearing, not disputed by Council, there was no consultation of any kind between Council and the Board prior to the time when Council determined the budget should be reduced by a sum total of $484,900.

Accordingly, the hearing examiner recommends that the Motion of the Board be granted and that the Commissioner grant a restoration of the total amount of $484,900 to be used for current expenses of the school district for the 1975-76 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and the exceptions filed thereto pursuant to *N.J.A.C.* 6:24-1.16.

Pursuant to a directive issued by the Assistant Commissioner in charge of Controversies and Disputes, additional testimony was presented before a hearing examiner on December 4, 1975 in the State Library, and on December 5, 1975 in the law offices of Doyle & Oles, Point Pleasant.

Subsequently, a letter from Council dated December 22, 1975, urged restoration of the entire reduction in the current expense budget. This determination of Council is consistent with the hearing examiner's recommendation.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient for the maintenance of a thorough and efficient system of public

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schools in the district. He directs, therefore, that there be added to the certification of appropriations for school purposes made by Council to the Ocean County Board of Taxation, the sum of $484,900, so that the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year shall be $3,591,944.52.

COMMISSIONER OF EDUCATION

December 31, 1975

Board of Education of the Township of Berlin,

Petitioner,

v.

Township Council of the Township of Berlin, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Edward F. Menneti, Esq.

For the Respondent, *Pro Se*

Petitioner, the Board of Education of the Township of Berlin, hereinafter "Board," appeals from an action of the Township Council of the Township of Berlin, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Camden County Board of Taxation a lesser amount of appropriations for school purposes for the 1975-76 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter have been submitted to the Commissioner of Education for Summary Judgment.

At the annual school election held March 11, 1975, the Board submitted to the electorate proposals to raise $448,860 by local taxation for current expense and $8,000 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in the Township of Berlin in the 1975-76 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Camden County Board of Taxation an amount of $428,860 for current expense and $8,000 for capital outlay. The pertinent amounts in dispute are shown as follows:

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	Current Expense
Board's Proposal	$448,860
Council's Proposal	428,860
Amount Reduced	$ 20,000

The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for the reductions recommended by Council with written testimony. Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also documents its position with written testimony. As part of its determination, Council suggested specific reductions in the aggregate of $10,000.

Council proposed that one new teacher not be employed and that the Board reduce its proposed expenditures for field trips. Specific reductions for each line item expenditure were not recommended by Council; however, the Commissioner notices that a beginning teacher's salary is $8,900. (Exhibit E) Since Council did not recommend specific reductions by line item for the remaining $10,000, that amount is hereby restored to the budget.

The Board defends its proposal for an additional teacher for its fourth grades citing the need for five rather than four teachers because of the large number of fourth grade pupils (one hundred ten). The Board offered no statement citing its need for additional funds for field trips.

The Commissioner determines, therefore, that the Board has adequately supported its need for one additional teacher; therefore, $8,900 for that line item will be restored. The remainder of the $10,000 recommended reduction will be sustained.

The Commissioner finds that reinstatement of the following curtailments recommended by Council are necessary to insure an adequate school program in the school district:

Item	Current Expense
Amount not contested by Council	$10,000
One additional teacher	8,900
Total	$18,900

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1975-76 made by Council is insufficient by an amount of $18,900 for the maintenance of a thorough and efficient system of public schools in the district. He therefore certifies the additional sum of $18,900 to the Camden County Board of Taxation, thereby

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increasing the total amount of the local tax levy for current expenses of the school district for the 1975-76 school year by such amount.

COMMISSIONER OF EDUCATION

December 31, 1975

Moses Cobb,

Petitioner,

v.

Board of Education of the City of East Orange, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Edward Stanton, Esq.

Petitioner, a nontenured principal of the Vernon L. Davey Junior High School operated by the Board of Education of the City of East Orange, hereinafter "Board," alleges that he was denied reemployment in contravention of both *N.J.S.A.* 18A:27-10 *et seq.* and the Board's own policies as set forth in both its policy manual and its negotiated agreement with the East Orange Administrators Association. He seeks an order from the Commissioner of Education directing the Board to restore him to his position with such further relief as may be appropriate.

The Board denies that it violated *N.J.S.A.* 18A:27-10 *et seq.* or any other legal requirement in its nonrenewal of petitioner's contract. While admitting certain violations of the negotiated agreement, the Board asserts that these constitute insufficient grounds to mandate his reemployment.

A plenary hearing was conducted on November 25, 1974, and December 5, 1974 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Briefs and an affidavit of the Superintendent of Schools were filed subsequent thereto. The report of the hearing examiner is as follows:

Certain undisputed facts necessary to an understanding of the matter are herewith set forth: petitioner was employed variously as an assistant principal, acting principal and principal by the Board from September 1, 1971 through June 30, 1974. (P-9) On April 30, 1974, he received written notice from the Superintendent as follows:

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"The East Orange Public School System informs you, with regret, that employment will not be offered to you for the 1974-75 school year."
(P-12)

This notice was given to petitioner on the day following the April 29, 1974 special meeting of the Board at which administrators for the 1974-75 school year were appointed. Petitioner's name was not among those appointed. The minutes of this meeting (P-7) and the minutes of the caucus session preceding the meeting (P-6) show that there was discussion relative to his non-reappointment which had been recommended by the Superintendent. (P-7) No specific resolution relative to nonrenewal of petitioner's contract was passed at that meeting or at any other time. It is this fact that gives rise to petitioner's allegation that the notice of non-reemployment (P-12) was ineffective, invalid, and illegal pursuant to *N.J.S.A.* 18A:27-10, and 11 which provide that:

"On or before April 30 in every year, every board of education in this state shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

"a. A written offer of a contract for employment for the next succeeding year***, or

"b. A written notice that such employment will not be offered."
N.J.S.A. 18A:27-10

"Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, ***then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year***."
N.J.S.A. 18A:27-11

Petitioner's allegations are grouped for purposes of this report into four principal categories which are hereafter set forth *seriatim* with the respective positions of the parties and the findings of fact and recommendations of the hearing examiner.

Allegation No. 1: The Board failed to comply with the requirements of *N.J.S.A.* 18A:27-10 *et seq.*

Allegation No. 2: The Board's special meeting of April 29, 1974, and any business transacted thereat were invalid by reason of failure to comply with the Board's own policy to provide the public with advance notice of special meetings.

Allegation No. 3: The Superintendent and the Board acted in bad faith and capriciously relative to evaluation and reappointment of petitioner.

Allegation No. 4: The Board and the Superintendent failed to comply with

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evaluative procedures required by its negotiated agreement which failure invalidates the Board's decision not to employ petitioner.

I

Petitioner charges the Board with noncompliance with *N.J.S.A.* 18A:27-10 *et seq.* Petitioner contends that the Board failed to conclusively determine his reemployment status prior to April 30, 1974, and that the Board's failure to state in its notice for the special meeting any reference to petitioner or to thereafter vote not to rehire him are fatal to the Board's case. *Stackhouse v. Clark,* 52 *N.J.L.* 291, 298 (*Sup. Ct.* 1890); *Norman A. Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.* 26; *Schults v. Board of Education of Teaneck,* 86 *N.J. Super.* 29, 46 (*App. Div.* 1964); *Wolf v. Zoning Board of Adjustment of Park Ridge,* 79 *N.J. Super.* 546, 552 (*App. Div.* 1963) (See Petitioner's Brief, at pp. 12-23.)

Conversely, the Board contends that at the special meeting of April 29, 1974, the Board, being fully aware that petitioner's name was not on the list of those administrators to be reemployed, exhibited by its action that a decision not to reemploy petitioner had been made. The Board further contends that notice was given to petitioner by the Superintendent on April 30, 1974 at the direction of the Board, in fulfillment of the requirements of *N.J.S.A.* 18A:27-10. (Respondent's Brief, at p. 5)

The hearing examiner observes that at the caucus meeting of the Board which immediately preceded the special meeting of April 29, 1974, the Board discussed a recommendation of the Superintendent that petitioner's contract not be renewed for the succeeding year. (P-6) The hearing examiner finds no evidence that a determination was made by the Board prior to the special meeting, when with full knowledge that petitioner's name was not included on the list of those principals to be reemployed the Board passed a resolution reappointing the other principals. (Tr. I-40)

The Superintendent, the Vice-President of the Board, and the Board Secretary testified that it was the practice of the Board in such matters to list by resolution only the names of those persons being reappointed and to make no listing or mention in any resolution of persons on its professional staff who were not to be reappointed. (Tr. I-65, 146; Tr. II-36-37, 39, 72) Nor did the Board, in this instance, at any time vote not to reemploy petitioner.

The evidence is clear that the Board, having considered the Superintendent's recommendation that petitioner not be reappointed and the comments of the public in previous meetings, understood that in voting on a list of administrators which did not include the name of petitioner, they were in fact not reappointing him for the ensuing school year. This is further confirmed by the testimony of the Vice-President who stated that the Board President at the Board caucus immediately following, in the presence of members of the Board, directed the Superintendent to notify those not reappointed in compliance with the statute. (Tr. II-11, 56) No record appears in the minutes relative to this directive.

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The Superintendent hand-delivered a written notice to petitioner on April 30, 1974, that he would not be employed for the 1974-75 school year. (P-12; Tr. I-125)

A clear reading of *N.J.S.A.* 18A:27-10 and 11 establishes that the statutes are silent with respect to any requirement that a resolution *not to reemploy* is requisite. Nor has the State Board of Education mandated such a requirement in the New Jersey Administrative Code. In a similar matter, the Commissioner stated in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7; dismissed State Board of Education May 1, 1968; affirmed Superior Court, Appellate Division, 1969 *S.L.D.* 202 that:

> "***[The Board] took no action with respect to petitioner's third contract nor was any called for. It simply fulfilled its obligations under the contract and took no action to continue the relationship. The Commissioner knows of no statute or rule which requires a board of education to take some formal action with regard to the nonrenewal of a probationary contract which has expired.*** Respondent was under no obligation to renew its agreement with petitioner, and in failing to take any action with respect to his reemployment it did no more than exercise the discretionary powers accorded it by statute.***" (at pp. 8-9)

See also *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93 (decided February 27, 1975).

In the light of such clear law and in consideration of the above findings, it is recommended that the Commissioner determine that the Board was in compliance with *N.J.S.A.* 18A:27-10 *et seq.* and that petitioner has failed in his proofs respecting Allegation No. 1.

II

Petitioner charges that the Board contrived to announce Monday, May 29, 1974, as the date of the special meeting, rather than the correct date of Monday, April 29, 1974, thereby preventing attendance of members of the public desiring to be present at the meeting. Petitioner argues that Board policy requires that accurate information regarding special meetings be announced to the public, and that failure to do so, in this instance, reduces to a nullity any action taken at the special meeting of April 29, 1974 by the Board. (Petitioner's Brief, at pp. 2-8)

The Board denies that the announcement of the incorrect date in the newspaper was intentional and that, faced with the April 30 deadline in *N.J.S.A.* 18A:27-10, it was required to act on April 29, 1974 to determine which contracts were to be renewed and which were not to be renewed in order to give timely notification of such determinations. The Board contends that, since neither statute nor case law requires that notice of special meetings be made to the public, its actions and the special meeting may not be considered a nullity as the result of inadvertent error. In support of this contention, the Board cites

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Gerald F. Blessing v. Board of Education of the Borough of Palisades Park et al., 1974 *S.L.D.* 1133. (Respondent's Brief, at pp. 6-7)

The Board policy relative to special board meetings (P-3) provides, *inter alia,* that:

> "***When special meetings are called in the interim between board meetings, all Board members and the public shall receive adequate notice of the time, place, and purpose of such meeting. Except in extreme emergencies, adequate notice shall consist of at least a 24-hour written notice to Board members and publication of such notice in the press at least 24 hours in advance.
>
> "All special meetings shall be open to the public and the press***."

The Board President called the special meeting of April 29, 1974. (Tr. I-23) Accurate notices thereof were sent to Board members by courier. (P-4) These notices stated that the purpose of the meeting was for the reappointment of administrators and any other business that might properly come before the Board. (P-4; Tr. I-25) Documentary evidence establishes that the newspaper announcement of this meeting erroneously stated that it was to be held on Monday, May 29, 1974. (P-5) It is found that this error was the result of the Board Secretary's office having provided incorrect copy to the newspaper which printed it as received. (Affidavit of the Superintendent) No meeting of the Board was either planned or held on May 29, 1974, which date was in fact a Wednesday rather than a Monday. (P-13; Tr. II-119)

Those announcements sent to officers of parent organizations and other community leaders on the Board's mailing list consisted only of copies of the "Report of the Secretary-Business Manager," and agendas provided by both the Board Secretary and the Superintendent for a meeting to be held on April 29, 1974. This date appears on the headings of each of these two documents but is incorrectly listed for *Tuesday,* April 29, 1974 on the Superintendent's agenda. (Affidavit of Superintendent)

The Board Secretary, the Superintendent, and the Vice-President of the Board testified that they were unaware of the error in the newspaper announcement until the first day of the hearing when a copy was introduced into evidence. (P-5) Further testimony leads the hearing examiner to conclude that forty to forty-five persons from the public attended the special meeting of April 29, 1974. (Tr. I-70) The Superintendent and the Board Vice-President testified that they and other members of the Board received numerous telephone calls from residents prior to the meeting relative to the reappointment of administrators. These included calls from the president of the Vernon L. Davey PTO, which organization later, by resolution, supported reappointment of petitioner. (P-8; Tr. II-6, 115, 117-118) Further testimony established the fact that at previous meetings the Board had heard varying views regarding the reappointment of administrators from members of the public. (Tr. II-7, 29)

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Analysis of the extensive testimony and documentary evidence relative to Allegation No. 2 supports the following conclusions:

1. Members of the Board were properly notified of April 29, 1974 special meeting.

2. Members of the public on the Board's mailing list were correctly notified of the date of the special meeting of April 29, 1974.

3. Members of the public were incorrectly notified by the newspaper announcement that the date of the special meeting was Monday, May 29, 1974.

4. Petitioner has failed to prove the allegation that the incorrect announcement was an intentional act of bad faith on the part of the Board or its agents to deliberately mislead the public as to the correct date of the meeting.

In keeping with the above findings and conclusions, it is recommended that the Commissioner determine that the Board's failure to correctly announce in the newspaper the correct date of the April 29, 1974 special meeting was an inadvertent error and provides insufficient reasons to render *ultra vires* or reduce to a nullity those actions taken by the Board on that date.

III

Petitioner charges that the Superintendent and the Board acted in bad faith and in a capricious manner relative to his evaluations in yielding to community pressure resulting from a pupil disturbance in the Vernon L. Davey Junior High School on March 28, 1974. (Tr. I-131) The Board denies this allegation.

Petitioner was evaluated by the Superintendent on March 26, 1974. This evaluation, received by petitioner on April 4, 1974 (Tr. I-127), indicated that the Superintendent was recommending petitioner for both a salary increase and increment and stated, *inter alia*, that:

> "***Mr. Cobb's 1972-73 evaluation indicated several areas in which Mr. Cobb should show marked improvement for him to be recommended to continue as a principal in the East Orange Public Schools. Most of these concerns were related to Mr. Cobb's leadership performance with teachers and students. Mr. Cobb seemed not to have shown a willingness, to the extent necessary, to take charge and make decisions. This led to certain teachers exercising more leadership and control than desirable, as well as student unrest that led to student disruptions. Significant improvement at a satisfactory level was made by Mr. Cobb in these areas of concern this year." (R-4)

On March 28 and 29, 1974, pupil disruptions occurred at the Vernon L. Davey Junior High School. (Tr. I-116; Tr. II-67) Thereafter, the Superintendent

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conferred with petitioner and, on April 25, 1974, held an evaluative conference which lasted at least four hours and resulted in several points on which petitioner and the Superintendent were in disagreement. (Tr. I-122) On April 26, 1974, the Superintendent provided petitioner with an unfavorable evaluation report in which he recommended that petitioner not be reemployed for the 1974-75 school year. (P-11) Relative to this change from his previous recommendation, the Superintendent stated that he did not yield to public pressure (Tr. II-77-78) and further testified as follows:

> "***Q. Then, what made you do the second evaluation of Mr. Cobb within three weeks of the first evaluation***?
>
> "A. And I hope no one sees this as a contradiction. In attempting to assist Mr. Cobb as a result of the disturbance to see what could be done to prevent future disturbances *** some things were revealed to me by Mr. Cobb at that time as to a number of administrative inadequacies on his part. And, as a result of these administrative inadequacies on his part, partially from my observation and partially for statements made by Mr. Cobb in the presence of others in his office and verified to be true, I made my recommendation.***" (Tr. II-80)

There is ample evidence that pupil pressure was exerted on the Board and the Superintendent as a result of the two days of pupil disturbances and that conflicting opinions were forcefully expressed by citizens and public organizations relative to the advisability of petitioner's reappointment. (R-1; R-2; R-3; P-8) The hearing examiner has carefully weighed the evidence and testimony pertinent to Allegation No. 3 and concludes that the Superintendent did not yield to community pressure nor act in a capricious manner in reversing his previous recommendation advising the Board not to reemploy petitioner. The Board was under no obligation to determine whether to reemploy petitioner prior to the April 29, 1974 special meeting and made its determination in accord with its established practice at that meeting having considered the Superintendent's recommendation. (Tr. II-58) It is the finding of the hearing examiner that petitioner has failed in his proofs to show that the Board or the Superintendent acted in bad faith or capricious manner in respect to petitioner's evaluation and non-reemployment. Accordingly, he recommends that the Commissioner dismiss Allegation No. 3.

IV

Petitioner alleges that the Board and the Superintendent violated the terms of the negotiated agreement relative to the evaluation of petitioner as set forth in Article XVII, sections A, B, C, D, E, G-1, G-2, G-4 and G-5. Article XVII, section E provides that:

> "Formal narrative statements of evaluation for non-tenure administrators shall be written at least twice each year on the forms to be provided. The first evaluation shall be completed before November 15, the second by March 15, of each school year." (P-1)

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Article XVII, sections G-1 and G-2 similarly require that the Superintendent or his representative visit each administrator several times during each school year and schedule formal evaluative interviews with each administrator at least twice each year prior to November 15 and March 15. Petitioner asserts that failure of the Board to provide the required number of evaluations invalidates its termination of his employment. (Petitioner's Brief, at pp. 8-12)

The Board, while admitting to a violation of Article XVII, Section E, *ante,* asserts that its statutory obligation to determine which of its employees it will rehire must override a violation of its own statement of policy as reflected in its negotiated agreement. The Board contends that its failure to comply, in part, with this provision of the negotiated agreement may not nullify its determinations not to reappoint petitioner. (Respondent's Brief, at pp. 6-7)

The hearing examiner finds that one such observation and interview was provided petitioner in the 1973-74 school year prior to March 15, 1974, but that none was provided prior to November 15, 1973. This finding is grounded in the Superintendent's admission to violation of Article XVII, sections E, G-1 and G-2. The hearing examiner finds insufficient evidence to support a finding that those more general provisions set forth in Article XVII, sections A, B, C, D, G-4 and G-5 were violated.

Petitioner, on May 23, 1974, invoked the grievance clause of the negotiated agreement which grievance was denied by the Superintendent (P-2) and by the Board. (Tr. I-103) It thereafter proceeded through binding arbitration. No evidence relative to the award, pertaining to the merits as set forth in this proceeding, were entered into evidence before the Commissioner.

The hearing examiner leaves to the Commissioner to determine what relief, if any, may be afforded petitioner relative to the Board's failure to provide him with one of the two evaluations prior to March 15, 1974, as required by the negotiated agreement.

It also remains for the Commissioner to determine, within the context of the entire record and the findings and recommendations of the hearing examiner, whether petitioner is entitled to the relief he seeks in the form of reinstatement to a position of employment with the Board with lost earnings and other emoluments.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by petitioner. Such exceptions advance four principal arguments against the report. Petitioner avers that *N.J.S.A.* 18A:27-10 requires an affirmative action by a local board of education with respect to the non-reemployment of a nontenure teacher and that in the matter herein the Board did not conform to two of its own policies or contractual agreements

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concerned with advertisement of meetings and with supervisory evaluations. Petitioner also avers that the Board's decision not to renew his contract of employment was improperly grounded in a trivial reason unsupported by fact.

The Commissioner has reviewed all such exceptions and the record in this matter and determines that the Board's decision not to reemploy petitioner for the 1974-75 school year was properly grounded in a subjective judgment and recommendation by the Superintendent of Schools, was timely pursuant to law (*N.J.S.A.* 18A:27-10) and may not be set aside by the Commissioner for procedural reasons. An affirmative action by local boards of education with respect to the non-reemployment of a nontenured employee is not required. *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207; *Ruch, supra* There is no requirement in the school law, Title 18A, Education, or in rules of the State Board of Education, *N.J.A.C.* 6, that local boards of education must advertise the call for a special meeting, and a failure to conform to local policy in this regard cannot invalidate the meeting. The Commissioner so holds.

Further the Commissioner holds that the validity of the Board's actions with respect to petitioner may not be impinged because certain supervisory evaluations concerned with petitioner's work were not made in accordance with a contractual agreement (P-1) that the Board had negotiated with its staff. The judgment of local boards of education, with respect to the employment or non-reemployment of nontenured teaching staff members, does not depend alone on such evaluations although they may constitute a part, even the principal part, of a total consideration. As the Court said in *Mary C. Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236 (1974):

> "***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for *there are many unrelated but nonetheless equally valid reasons why a board,* having had the benefits of observation during the probationary period, *may conclude that tenure should not be granted.* See *Association of New Jersey State College Faculties v. Dungan,* 64 *N.J.* 338, 351-352 (1973); *cf. Cammarata v. Essex County Park Commission,* 26 *N.J.* 404, 412 (1958). (*Emphasis supplied.*) (at p. 241)

There is ample evidence in the instant matter which may serve as the "valid reasons" which caused the Board to conclude that "***tenure should not be granted." (R-4, P-11, Tr. I-122, Tr. II-80) The Commissioner determines that such evidence was substantive, not "trivial" as petitioner avers, and that the Board's action grounded on such evidence provides no basis for a substitution of discretion by the Commissioner for the discretion which the Board is authorized by specific statutory authority to exercise. *N.J.S.A.* 18A:27-1, 3 As the Commissioner said in *Boult and Harris v. Passaic,* 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947); 136 *N.J.L.* 521 (*E.&A.* 1948):

> "***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their

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schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner.***"

The Commissioner finds no such abuse herein.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 31, 1975
~~Pending before~~ State Board of Education
aff'd 1976 S.L.D. 1135

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James P. Beggans, Jr., and Carol F. Beggans, individually and as parents and natural guardians of Timothy John Beggans and James P. Beggans, III,

Petitioners-Appellants,

v.

Board of Education of the Town of West Orange, Essex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decision on Motion by the Commissioner of Education, December 14, 1973.

Decided by the Commissioner of Education, September 13, 1974.

For the Petitioners-Appellants, James P. Beggans, Jr., Esq., *Pro Se*

For the Respondent-Appellee, Samuel A. Christiano, Esq.

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

February 5, 1975

James P. Beggans, Jr., and Carol F. Beggans, individually and as parents and natural guardians of Timothy John Beggans and James P. Beggans, III,

Petitioners-Appellants,

v.

Board of Education of the Town of West Orange, Essex County,

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued October 27, 1975 – Decided November 6, 1975

Before Judges Carton, Crahay and Handler.

On appeal from the New Jersey State Board of Education.

Mr. James P. Beggans, Jr., argued the cause for appellants.

Mr. Samuel A. Christiano argued the cause for respondent.

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A statement in Lieu of Brief was filed on behalf of the New Jersey State Board of Education.

PER CURIAM

This is an appeal from a decision of the State Board of Education affirming the decision of the Commissioner of Education which, on the basis of the findings and conclusions of a designated hearing examiner, dismissed an appeal by petitioners from a denial by respondent, Board of Education of the Town of West Orange, Essex County of petitioners' application for bus transportation for petitioners' two children to a local, private school.

The local Board adopted a regulation whereby transportation would be provided pupils of both public and private schools who live within two miles of the school they attend but who must travel along "hazardous highways where there are no sidewalks * * *." The Board denied the petitioners' request for transportation services since these petitioners did not live at a distance "remote" from the school attended by their children nor were their children required to travel on one of the five named "hazardous" streets in order to attend school.

The Commissioner carefully reviewed the entire record before him and determined that there was no evidence that the Board's transportation policy is arbitrary, capricious or unreasonable. The petitioners failed to show that the streets their children must travel to school present a danger equal to, or greater than, those streets designated "hazardous" by the Board. Further, the record below discloses no proof that the streets designated "hazardous" by the Board did not present significant safety dangers which justified the exercise of the Board's discretionary power to provide transportation services to non-remote school children along these routes and that in doing so it was arbitrary or discriminatory. The Commissioner also determined that there had been no showing that the petitioners were treated in any manner different from other parents in similar circumstances. Therefore, there was no basis for a finding that the Board administered its pupil transportation policy in a discriminatory manner.

We, therefore, affirm the decision below substantially for the findings, reasons and conclusions set forth in the determination of the Hearing Examiner and Commissioner of Education, as reflected and incorporated in the decision of the State Board of Education.

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Board of Education of Brick Township, a quasi-municipal corporation of the State of New Jersey,

Respondent-Appellant,

v.

James McCabe,

Petitioner-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, March 15, 1974

Decided by the State Board of Education, June 26, 1974

Submitted March 25, 1975 – Decided April 2, 1975

Before Judges Halpern, Crahay and Wood.

On appeal from New Jersey State Board of Education.

Messrs. Anton and Ward, attorneys for respondent-appellant.

Mr. Joseph N. Dempsey, attorney for petitioner-appellee.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for the State Board of Education filed a statement in lieu of brief (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the brief).

PER CURIAM.

The problem presented on this appeal is whether respondent-appellant abused its discretion in unreasonably and arbitrarily refusing to certify the charges made by James F. McCabe against C. Stephen Raciti in violation of *N.J.S.A.* 18A:6-11.

We are in accord with the determination made by the State Board of Education that respondent-appellant's refusal to certify the charges, in view of the proofs presented, was unreasonable, arbitrary and an abuse of its discretion. We affirm essentially for the reasons expressed by the Acting Commissioner of Education in his written decision of March 15, 1974.

Affirmed.

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Board of Education of the City of Burlington,

Petitioner-Appellee,

v.

Board of Education of the Township of Edgewater Park, Burlington County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 28, 1974.

For the Petitioner-Appellee, John E. Queenan, Jr., Esq.

For the Respondent-Appellant, Steven Warm, Esq.

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

March 5, 1975
Pending before Superior Court of New Jersey

Henry Butler, Hans-Ulrich Karau, Eugene Bannon and Paul McElaney,

Petitioners,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 23, 1974

For the Petitioner-Appellant Karau, Thomas F. Shebell Law Offices (Robert A. Conforti, Esq., of Counsel)

For the Cross-Appellant, William A. Massa, Esq. (Louis Serterides, Esq., of Counsel)

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

April 2, 1975
Pending before Superior Court of New Jersey

You are viewing an archived copy from the New Jersey State Library.

Central Regional Education Association,

Plaintiff-Appellant,

v.

Board of Education of the Central Regional High School District, Superintendent of Schools, Edwin L. Voll; and Principal, Spencer F. Sullivan, Jr., Ocean County,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 23, 1973

Decided by the State Board of Education, December 5, 1973

Submitted March 17, 1975 – Decided March 26, 1975

Before Judges Leonard, Seidman and Bischoff.

On appeal from judgment of the State Board of Education of the State of New Jersey.

Messrs. Manna & Kreizman, attorneys for appellant (Mr. John C. Manna, of counsel and on the brief).

Mr. Wilbert J. Martin, Jr., attorney for respondents.

Mr. William F. Hyland, Attorney General of New Jersey, filed a brief on behalf of the respondent-State Board of Education (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Ms. Mary Ann Burgess, Deputy Attorney General, on the brief).

PER CURIAM.

Appellant, the duly selected representative of the teachers employed by respondent Board of Education of the Central Regional High School District, appeals from a judgment of the State Board of Education.

The parties have, since 1969, annually negotiated master contracts. None of the contracts contained a clause imposing penalties on teachers for late appearances. After the contract for the school year 1969-1970 was signed, the respondent Board of Education on December 15, 1969, promulgated a regulation, without prior negotiation, providing for loss of one-half day's pay for three accumulated late appearances at work. This regulation was later revised to impose a $15 penalty for a fourth lateness and a $10 penalty for each subsequent lateness. Various teachers were penalized under this regulation. The Board of Education, at a grievance hearing before it, held that the adoption of the regulation was a management prerogative, not negotiable and not subject to grievance procedure.

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Plaintiff thereafter petitioned the Commissioner of Education, alleging a controversy with the respondents concerning the policy and requesting relief of various kinds. The significant relief sought was a request for a judgment declaring: (1) the promulgation of this regulation illegal and in violation of the contract existing between the parties; and (2) directing a return of the monies withheld from the teachers pursuant thereto.

Appellant contended before the Commissioner of Education that the regulation concerned "working conditions" and was required to be negotiated pursuant to *N.J.S.A.* 34: 13A-5.3. Respondent, on the other hand, argued that the regulation concerned its duty of management under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:27-4. This dispute is placed in sharp focus by the decisions in the three cases of *Board of Ed. of the City of Englewood v. Englewood Teacher's Assoc.*, 64 *N.J.* 1 (1973); *Burlington County College Faculty Assoc. v. Bd. of Trustees of Burlington County College,* 64 *N.J.* 10 (1973); *Dunellen Bd. of Ed. v. Dunellen Ed. Assoc.*, 64 *N.J.* 17 (1973).

The Commissioner of Education held the controverted rule reasonable and within the general rulemaking power of the Board of Education. However, he ruled that the regulation in question was adopted without the prior establishment of an official board policy of withholding pay for lateness and that it was, therefore, invalid. The Board was directed to repay to the teachers the earnings withheld from them pursuant to the rule.

The Commissioner then proceeded by way of *dicta* to issue a declaratory judgment stating that if the Board chose to assess a lateness penalty it could do so, after formally adopting a board policy to that effect.

On appeal to the State Board of Education, the decision of the Commissioner was affirmed for the reasons stated by him. This appeal by appellant followed.

Without any support in the record respondent in its brief mentions that after the decision of the Commissioner of Education was received, the Board of Education adopted a formal policy setting forth the same penalties for late appearances as those which existed in the regulation previously declared invalid. We have not been furnished with the details of the adoption of that policy nor with a copy of it.

Appeals are taken from judgments – "not from opinions, let alone *dicta.*" *Glaser v. Downs,* 126 *N.J. Super.* 10, 16 (App. Div. 1973), certif. den. 64 *N.J.* 513 (1974); *Hughes v. Eisner,* 8 *N.J.* 228, 229 (1951). Here, the judgment of the Board of Education was that the regulation imposing penalties for late appearances was improperly adopted and the Board of Education was directed to return to teachers the penalties imposed.

Appellant prevailed and there was no basis for any appeal by it. We see no prejudice to appellant from the judgment and, therefore, there is no issue of substance that requires a determination by us. The State Board of Education never considered the policy formally adopted by respondent Board of Education

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after the decision of the Commissioner and that policy is not properly before us. We express no opinion on the validity of the policy nor on the broader question as to whether such a policy is negotiable under *N.J.S.A.* 34:13A-5.3 or a matter reserved for management under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:27-4.

The appeal is dismissed.

Cert. denied New Jersey Supreme Court, June 12, 1975

Greta Chappell, individually and as guardian of Muriel Chappell, an infant, Lloyd S. Kelling and Helen T. Kelling, individually and as guardians of Stephen Kelling, an infant, Roger Mazzella individually and as guardian of Joyce Mazzella an infant, Jersey City Education Association, a non-profit corporation of the State of New Jersey, Hillside Education Association, a non-profit corporation of the State of New Jersey, and Plainfield Education Association, a non-profit corporation of the State of New Jersey, and Flory Naticchia,

Appellants,

v.

Commissioner of Education of New Jersey and The New Jersey State Board of Education,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, November 2, 1973

Decided by the State Board of Education, April 3, 1974

Argued: June 16, 1975 – Decided July 31, 1975

Before Judges Michels, Morgan and Milmed.

On appeal from the State Board of Education.

Mr. Emil Oxfeld, argued the cause for the appellants (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Ms. Mary Ann Burgess, Deputy Attorney General argued the cause for the respondents (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

PER CURIAM

This is an appeal from a decision of the State Board of Education dated April 3, 1974 affirming a decision of the Acting Commissioner of Education filed November 2, 1973 which upheld the validity, usefulness and reliability of

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the statewide achievement tests in reading and mathematics administered to 4th and 12th grade public school students on November 14 and 15, 1972.

The appellants are (1) parents of children attending public schools, and (2) representatives of teacher groups. They had initially commenced an action in the Chancery Division seeking to enjoin the dissemination of the results of the statewide tests. In their complaint in that action they expressed, among other things, concern "with the educational problems in areas where there has been racial unrest, polarization and charges of neglect and indifference to the school system." They contended that the release of the results of the state-wide testing would "cause further division and polarization in the communities." They charged that there was "no valid compelling interest to justify the invasion of their constitutional and statutory rights as well as their right of privacy * * *." The trial judge dismissed the complaint and at the same time enjoined the Commissioner from distributing or publishing the results of the Statewide Testing Program for a period of 10 days, the restraint being conditioned upon the plaintiffs' (appellants') "filing a proceeding" within that 10 day period with the Commissioner of Education seeking a review of the Commissioner's action in proposing to distribute and disseminating the results of the tests.

Appellants filed their petition of appeal with the Commissioner of Education in which they sought to have the Commissioner desist from disseminating the results of the November 14 and 15, 1972 tests. In that petition they expressed, among other things, "fear that dissemination of the results of the November 14th and 15th tests as presently planned by the defendant [Commissioner] will violate their constitutional, statutory and common-law rights, will cause polarization within the school communities, racial conflict, degrading stigmatization, illegal tracking classifications, interference with the right to an equal free public education, the rights to earn a livelihood, deny them due process, subject them to unfair accountability proceedings, invade their right of privacy, and delay and defeat the education goals allegedly sought to be achieved by and through these tests." Following a hearing on the merits before a hearing examiner, the Assistant Commissioner of Education reviewed the record, including the hearing examiner's report and the exceptions filed thereto, made his findings and conclusions and directed the release of the test results in accordance with rules promulgated by the State Board of Education *N.J.A.C.* 6:39-1, *et seq.* The Commissioner found that the Educational Assessment Program (E.A.P.) was "an important component of the content of an educational program." He noted that the tests "have been found to be valid, useful and reliable, and that the hearing examiner recommends the raw scores derived therefrom to be released forthwith." The Commissioner accepted that recommendation and directed "that all raw scores of the E.A.P. tests with respect to school, district, county and state level be released for district review on Nov. 20, 1973." He further directed "that the release date of Nov. 20, 1973, be followed with public release sixty (60) days thereafter, pursuant to the rules of the State Board of Education. (*N.J.A.C.* 6:39-1 *et seq.*)." By successive applications thereafter, the appellants applied for a stay of the release of the results of the tests: to the State Board of Education; to this court; to the State Supreme Court; and to the Supreme Court of the United States. They were

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unsuccessful in their efforts to stay the dissemination of the test results. On April 3, 1974, the State Board of Education affirmed the November 2, 1973 decision of the Commissioner of Education for the reasons expressed therein.

It appears that tests have also been administered in 1973 and 1974 and that although individual pupil scores were not reported for the 1972 testing program, such scores have been reported for both 1973 and 1974 in accordance with *N.J.A.C.* 6:39-1.2(a) which provides that:

> * * * individual student data shall be released only to a pupil, his parent or legal guardian, and school personnel and school officials deemed appropriate by the Commissioner.

On this appeal, the appellants contend that:

(1) The test results should not be disseminated in the manner proposed by the State Department of Education;

(2) The dissemination of the test results and the so-called "interpretive material" are not made valid by the New Jersey Right-to-Know Law (*L.* 1963, *c.* 73; *N.J.S.A.* 47:1A-1); and

(3) The procedure herein proposed by the State Department of Education violates the New Jersey Employer-Employees Act (*N.J.S.A.* 34:13A-1).

We find no merit in the first and third of these contentions and no relevant force in the second of the contentions. Appellants argue that "If the State had indeed followed the course of treating these tests as a pilot program, without making such a big to-do about a public release, and the results had been restricted for analysis by educational authorities alone, there would certainly be no objection to the program." However, an integral part of the testing program is the meaningful dissemination of the testing results. Such dissemination is governed by *N.J.A.C.* 6:39-1.2. We are in accord with the statement contained in the brief submitted by the Attorney General, *i.e.*, that these regulations "assure that the test results are accompanied by interpretive data to lessen the possibility of public misinformation which might flow from the indiscriminate and haphazard release of raw, uninterpreted test results"; and that they "also protect from public release individual student data thereby safeguarding the privacy of those taking the tests in question." The record before us strongly suggests that information provided by these "interpreted" reports will be helpful to State and local school personnel and to the public in the allocation of educational resources; in shaping educational goals; in focusing on the improvement of basic skills; and in shedding light on the functioning of the public schools.

Dissemination of the test results and interpretive materials approved by the Commissioner in accordance with *N.J.A.C.* 6:39-1.2 does not depend for its validity upon *P.L.* 1963, *c.* 73, *N.J.S.A.* 47:1A-1, *et seq.* Statutory authority for the administration of the statewide tests which are the subject of this appeal can

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be found in *N.J.S.A.* 18A:4-24, which provides that:

> The commissioner shall, by direction or with the approval of the state board, whenever it is deemed to be advisable so to do, inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries and such other information with regard thereto as the state board may require or as he shall deem proper, but nothing in this section shall affect the right of each district to prescribe its own rules for promotion.

See also *Robinson v. Cahill,* 118 *N.J. Super.* 223, 247 (Law Div. 1972), modified and aff'd as modified, 62 *N.J.* 473 (1973), *cert. den.* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L. Ed.* 2d 219 (1973). These tests were part of the Educational Assessment Program of the State Department of Education developed to continue the work of the "Our Schools" Project initiated by the Department for three principal purposes:

(1) to determine statewide goals for the educational system in New Jersey;

(2) to assess the status of education in New Jersey relative to these goals; and

(3) to recommend projects and programs which will bring New Jersey education closer to these goals.

N.J.A.C. 6:39-1.2, governing the dissemination of the testing results, is grounded in ample statutory authority. *N.J.S.A.* 18A:4-10, 18A:4-15, 18A:4-16, 18A:4-23, 18A:4-24.

There is, accordingly, no question but that the actions of the Commissioner and the State Board of Education were within their statutory authority. The decision of the administrative agency is thus

> entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. * * * * [*Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327,332 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966)].

See also *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40, 46-47 (App. Div. 1962).

From our review of the record in this case we are satisfied that no such showing has been made. The actions of the State Board and Commissioner are entirely reasonable. The Commissioner's findings and conclusions are "supported by substantial credible evidence on the whole record, allowing for agency expertise and evaluation of the credibility of witnesses." *Parkview Village Assn. v. Bor. of Collingswood,* 62 *N.J.* 21, 34 (1972). See also, *Quinlan v. Bd. of Ed.*

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of North Bergen Tp., supra. We discern no reason or justification for disturbing them. *State v. Johnson,* 42 *N.J.* 146, 162 (1964).

Although the "New Jersey Employer-Employee Relations Act," *N.J.S.A.* 34:13A-1, *et seq.*, (*P.L.* 1968, *c.* 303) provides for negotiation of terms and conditions of public employment, *N.J.S.A.* 34:13A-5.3, the public employer (here the State educational authorities) must retain and be permitted to fully exercise the essential management responsibilities vested in it by law. As pointed out by the Court in *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 *N.J.* 17 (1973):

> Surely the Legislature, in adopting the very general terms of *L.* 1968, *c.* 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies. [at 25].

Here, the initiation, and dissemination of the results, of a testing program are clearly matters of fundamental educational policy.

The decision of the State Board of Education is affirmed.

Cert. denied New Jersey Supreme Court, October 29, 1975

Greta Chappell, individually and as guardian of Muriel Chappell, an infant, Lloyd S. Kelling and Helen T. Kelling, individually and as guardians of Stephen Kelling, an infant, Roger Mazzella, individually and as guardian of Joyce Mazzella, an infant, Jersey City Education Association, Hillside Education Association, Plainfield Education Association, and Flory Naticchia,

Petitioners-Appellants,

v.

Commissioner of Education,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 30, 1974.

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

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For the Respondent-Appellee, Mary Ann Burgess, Esq., Deputy Attorney General

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

March 5, 1975
Dismissed New Jersey Superior Court, Appellate Division, January 23, 1976

Anne U. Clark,

Petitioner-Appellant,

v.

H. Francis Rosen, Superintendent of Schools, and Board of Education of the City of Margate, Atlantic County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 28, 1974.

For the Petitioner-Appellant, McGahn & Friss (Patrick T. McGahn, Jr., Esq., of Counsel)

For the Respondents-Appellees, Horn, Weinstein & Kaplan (Leonard C. Horn, Esq., of Counsel)

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

March 5, 1975
Pending before Superior Court of New Jersey

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Joseph J. Dignan,

Appellant,

v.

Board of Education of the Rumson-Fair Haven Regional High School District, Monmouth County,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by Commissioner of Education, July 29, 1971

Decided by State Board of Education, September 11, 1974

Argued September 30, 1975; Decided October 10, 1975

Before Judges Halpern, Crane and Michels

On appeal from Decision of the State Board of Education

Mr. William G. Bassler argued the cause on behalf of appellant (Messrs. Labrecque, Parsons & Bassler, attorneys).

Mr. Michael R. Leckstein argued the cause on behalf of respondent (Messrs. Zager, Fuchs, Leckstein & Kauff, attorneys).

Mrs. Susan P. Gifis, Deputy Attorney General, argued the cause on behalf of State Board of Education (Mr. William F. Hyland, Attorney General, attorney).

PER CURIAM

This is an appeal from a determination of the State Board of Education. Appellant, a tenured high school teacher, had been assigned the extra-curricular activity of faculty advisor for the student newspaper for which he was paid a modest stipend. In June 1970 appellant was advised that he would not be reassigned. His unsuccessful attempts to require the respondent Board of Education to state the reasons for his not being reassigned culminated in an adverse determination of the State Board of Education.

On this appeal it is contended that the failure to state reasons deprived him of due process of law, that the action of not reappointing him was arbitrary and capricious and that the respondent Board of Education violated fair administrative practice by refusing to permit him to have a representative of the New Jersey Education Association present during hearings.

We have carefully considered each of the issues raised by appellant and have concluded that they are without merit. *Donaldson v. Bd. of Ed. of No. Wildwood,* 65 *N.J.* 236 (1974) which held that a non-tenured teacher was

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entitled to a statement of reasons for non-retention is not apposite. While appellant has tenure in his teaching position, he had no such status with regard to his extra-curricular assignment nor was there any potentiality of tenured status in such an assignment. See *N.J.S.A.* 18A:28-5. It is presumed that the respondent Board acted within its proper administrative authority in dealing with the assignment in question; appellant has not demonstrated affirmatively that the Board's action was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Tp.,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd. 46 *N.J.* 581 (1966). Since we have concluded that appellant was not entitled to a statement of reasons for his non-reassignment, it is not necessary for us to consider whether he was entitled to have a representative of the New Jersey Education Association present at administrative hearings. We do note however that he was represented by counsel at various stages of the proceedings.

The determination of the State Board of Education is affirmed.

Board of Education of the City of Elizabeth,

Petitioner-Appellee,

v.

City Council of the City of Elizabeth, Union County,

Respondent-Appellant

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 16, 1974

For the Petitioner-Appellee, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent-Appellant, Frank P. Trocino, Esq. (John R. Weigel, Special Counsel)

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

April 2, 1975
Pending before the Superior Court of New Jersey

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Mrs. John Engle *et al.*,

Petitioners-Appellants,

v.

Board of Education of the Township of Cranford, Union County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 30, 1974

For the Petitioners-Appellants, Edward Kucharski, Esq.

For the Respondent-Appellee, Sauer and Kervick (James F. Kervick, Esq., of Counsel)

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

March 5, 1975

John Gish,

Petitioner-Appellant,

v.

Board of Education of the Borough of Paramus, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 2, 1974

For the Petitioner-Appellant, Rothbard, Harris and Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, Winne and Banta (Joseph A. Rizzi, Esq., of Counsel)

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

Mr. Bryant George, Mr. Daniel Gaby, and
Mrs. Anne S. Dillman dissented in this matter.

June 26, 1975
Pending before the Superior Court of New Jersey

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"K.K.," *et al.*,

Petitioners-Appellants,

v.

Board of Education of the Town of Westfield,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 1, 1971

Decided by the State Board of Education, August 26, 1971

Decided by the Commissioner of Education, January 18, 1973

Decided by the State Board of Education, December 5, 1973

Argued December 17, 1974 – Decided February 13, 1975

Before Judges Halpern, Crahay and Ackerman.

On appeal from the State Board of Education.

Mr. Ralph Kline argued his cause *pro se.*

Mr. William Peek argued the cause for appellee (Messrs. Nichols, Thomson & Peek, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of the State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel).

PER CURIAM

The question on this appeal is whether appellants, the parents of a handicapped school child, are entitled to recover from respondent Board of Education the costs incurred in transporting and educating the child at a private school during the academic year 1970-71.

The record before us may be kindly termed tortured and is replete with procedural predicaments and deficiencies. They need not be detailed since we have before us a final decision by the State Board of Education embracing the one basic appellate issue and deem it ripe for disposition despite the adjectival infirmities. Our review of the entire record satisfies us that in its essentials there has been no meaningful ultimate prejudice to appellants because of them. See *Pietrunti v. Board of Ed. of Brick Tp.*, 128 *N.J. Super.* 149, 161 (App. Div. 1974), certif. den. 65 *N.J.* 573 (1974).

The challenged decision alluded to the long litigation between the parties, much of it not here pertinent, and concluded that the respondent Board of

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Education had fairly complied with its statutory obligations as mandated by *N.J.S.A.* 18A:46-1 *et seq.* (Class and Facilities for Handicapped Children). Accordingly, it held that appellants were not entitled to reimbursement for their expenses in the private placement of their child in the school year 1970-71. There is ample credible evidence in the record to support this conclusion and it will not be disturbed. *Close v. Kordulak Bros.,* 44 *N.J.* 589 (1965); *State v. Johnson,* 42 *N.J.* 146 (1964).

Affirmed.

Nicholas P. Karamessinis,

Petitioner-Appellant,

v.

Board of Education of the City of Wildwood,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 27, 1973

Decided by the State Board of Education, December 5, 1973

Submitted March 11, 1975 – Decided March 24, 1975

Before Judges Carton, Crane and Kole.

On appeal from State Board of Education.

Mr. Nicholas P. Karamessinis, Petitioner-Appellant, *pro se.*

Messrs. Smith, Cook, Lambert, Knipe & Miller, attorneys for Respondent-Appellee Board of Education of the City of Wildwood (Mr. Thomas P. Cook, of counsel).

Statement in lieu of brief filed on behalf of New Jersey State Board of Education by Mr. William F. Hyland, Attorney General of New Jersey (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Respondent Board of Education terminated the employment of petitioner Karamessinis as Superintendent of Schools in its school system and relieved him of his duties. The Commissioner of Education, in a decision rendered June 27, 1973, dismissed his petition for reinstatement and granted summary judgment in favor of the local board on the ground that no material issue of fact existed.

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The Commissioner decided that the Board had properly terminated petitioner's active service in accordance with a provision in its contract of employment with him and that such action was a valid exercise of the Board's discretionary power. On appeal the State Board of Education affirmed that determination.

We affirm essentially for the reasons expressed by the Commissioner in his written opinion.

We note that, subsequent to the decision of the State Board and after submission of the briefs by the litigants in this case, the Supreme Court of New Jersey decided *Donaldson v. Bd. of Ed. of North Wildwood,* 65 *N.J.* 236 (1974). Thereafter petitioner filed a supplemental memorandum in which he claimed entitlement to a statement of reasons in accordance with the principle established in *Donaldson.*

In our view the rule articulated by the Court in *Donaldson* was not intended to be retroactive but was for future application. In *Donaldson* the Court stated that, while many boards by collective agreements have already agreed to furnish reasons, "those which have not will, under this opinion, hereafter be obliged to do so." 65 *N.J.* at 248. At no point did the Court indicate that its ruling would be applied retroactively to those teachers who in years past had not been provided with reasons for their non-retention.

Nor do we perceive any special circumstances in the present case why the principle enunciated in *Donaldson* should be applied retroactively. Here a significant period of time has elapsed from the Board's action in terminating petitioner's active service. In any event, the Board in this case did inform the petitioner of its dissatisfaction with his performance. In its answer before the Commission it stated that the members of the Board felt he was usurping the Board's duties, and had committed unprofessional and insubordinate acts, making an effective working relationship impossible. Thus, even if it were to be held that *Donaldson* should be applied retroactively, there was substantial compliance with that requirement.

We find no merit to the remaining contentions on this appeal.

Affirmed.

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Max Levenson,

Petitioner-Appellant,

v.

Board of Education of the Scotch Plains-Fanwood Regional School District, Harold Mercer, Fernand J. LaBerge, Raymond Schnitzer, Union County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 27, 1974

For the Petitioner-Appellant, Max Levenson, *Pro Se*

For the Respondents-Appellees, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel).

Petitioner-Appellant appealed to the State Board of Education, from the decision of the Commissioner of Education, by Notice of Appeal filed September 3, 1974. However, no further action having been taken by Petitioner-Appellant, the appeal is dismissed for lack of prosecution.

March 5, 1975

Board of Education, Township of Little Egg Harbor,

Appellant,

v.

Boards of Education of the Township of Galloway, City of Atlantic City, Township of Marlboro, Freehold Regional High School District and the Division of Youth and Family Services, Department of Institutions and Agencies, State of New Jersey,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 12, 1973

Decided by the State Board of Education, June 5, 1974

Argued: April 21, 1975 – Decided May 16, 1975

Before Judges Michels, Morgan and Milmed.

On appeal from the State Board of Education.

Mr. James L. Wilson argued the cause for the appellant.

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Mr. William J. Mehr argued the cause for the respondent Board of Education of the Freehold Regional High School District (Messrs. Cerrato, O'Connor, Braelow & Mehr, attorneys; Mr. Dominick A. Cerrato, on the brief).

Ms. Mary Ann Burgess, Deputy Attorney General, argued the cause for the respondents State Board of Education and Division of Youth and Family Services (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel, Ms. Burgess, on the brief).

Messrs. DeMaio & Yacker, attorneys for repsondent Marlboro Township Board of Education, submitted a brief (Mr. Vincent C. DeMaio, of counsel).

Mr. Lawrence Milton Freed, attorney for respondent Board of Education of the City of Atlantic City, submitted a statement in lieu of brief.

Mr. Walter S. Jeffries, attorney for respondent Board of Education of the Township of Galloway, submitted a statement in lieu of brief.

PER CURIAM

The Board of Education of the Township of Little Egg Harbor appeals from a final decision of the State Board of Education which affirmed a decision of the Commissioner of Education.

The basic issue involved here is whether the Board of Education of the Township of Little Egg Harbor, or one of the named respondent school districts, is responsible for the payment of tuition for A.S., a minor enrolled in a program of special education in a nonpublic residential school (The Collier School) in Marlboro Township.

The essential facts are not in dispute. In December, 1969, the minor, then almost 14 years of age, was adjudicated a juvenile delinquent by the Juvenile and Domestic Relations Court of Atlantic County. On the court's recommendation that the parents of the child cooperate with the then Bureau of Childrens Services[1] in finding suitable placement for their child they executed an agreement with the Bureau on December 18, 1969 which included their request that the Bureau place the child "in foster care or a group setting" until they could assume their full responsibility, it being understood that they were not surrendering their "parental rights". The agreement also provided that in requesting placement of the child, the parents understood that the Bureau "will assume responsibility" for the child in accordance with the provisions of *N.J.S.A.* 30:4C-1, *et seq.* The care and custody of the child were thus surrendered to the Bureau by the parents. The child was then placed by the Bureau in a foster home in Pleasantville, and enrolled in the public schools there. The child's mother resides in Atlantic City; her father in Galloway Township. On January 8, 1970, the father executed an acknowledgement of responsibility for

[1] Now known as the Division of Youth and Family Services in the Department of Institutions and Agencies.

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the support of the child agreeing to contribute $80 per month toward her care and maintenance so long as she would remain under the jurisdiction of the Bureau. *N.J.S.A.* 30:4C-29.1.

On January 22, 1970, the child was placed in a second foster home in Little Egg Harbor. The Board of Education of Little Egg Harbor operates public school facilities for grades kindergarten through six and is a sending district to the Southern Regional Junior-Senior High School which includes grades seven through twelve. The child was enrolled in the eighth grade of the Southern Regional High School District on January 26, 1970 and remained there for the balance of the 1969-70 school year. Her tuition was paid by the Board of Education of the Township of Little Egg Harbor since her foster home was located in that sending district. *N.J.S.A.* 18A:38-1(d) and *N.J.S.A.* 18A:38-19. During the summer of 1970, while the child was residing in the foster home in Little Egg Harbor, the Bureau of Childrens Services, on its own initiative, secured a psychological evaluation of her. Placement in a residential school which could provide a structured environment and therapy was indicated. On September 1, 1970 the child left the foster home without permission. She voluntarily surrendered and was placed in the Ocean County Juvenile Shelter in Toms River. While there, she was evaluated by a child study team at the request of the Bureau of Childrens Services and with the co-operation of the Little Egg Harbor School District. [2] On December 14, 1970, she was classified as emotionally disturbed and socially maladjusted and recommended for residential placement in a suitable special education program in accordance with *N.J.S.A.* Title 18A, Chapter 46. On January 4, 1971, the Bureau secured her enrollment as a ninth grade pupil in such a special education program in The Collier School, a residential, nonpublic school, in Marlboro Township. [3] She successfully completed the ninth grade and was promoted to the tenth grade on June 18, 1971. The Board of Education of the Township of Little Egg Harbor petitioned the Commissioner of Education requesting a determination as to which local school district involved with the child was responsible for her tuition at The Collier School. It contends that "According to the facts of this case, the domicile of A.S. can only be that of her father." We disagree.

N.J.S.A. 18A:46-14 states in pertinent part that

> Whenever any child shall be confined to a hospital, convalescent home, or other institution in New Jersey or an adjoining or nearby state

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[2] The Board of Education of the Township of Little Egg Harbor applied for placement by it of the child as "a Handicapped Pupil in a Non-Public School in Accordance with Chapter 46, Title 18A, New Jersey Statutes." On its application to the State Department of Education, Division of Curriculum and Instruction, Office of Special Education Services, the "School Year" is designated as "1970-71"; "Little Egg Harbor" is designated as the "Sending District" and "Collier School" as the "Receiving Non-Public School." Alongside the item "If Residential Placement – Costs Assumed by" there appears the following: "Little Egg Harbor conditionally."

[3] The Marlboro School District is a constituent of the Freehold Regional High School District and sends its pupils for grades nine through twelve to this regional school.

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> and is enrolled in an education program approved under this article, the board of education of the district in which the child is domiciled shall pay the tuition of said child in the special education program.

After reviewing relevant statutes and decisional law, the Acting Commissioner of Education determined that

> * * * domicile shall be the last local school district where the child resided for a substantial period of time with a parent, guardian, or a person acting in *loco parentis*, or in a foster home, other than a public or private residential institution, where the child was statutorily entitled to attend the public schools of the district. "Substantial" shall mean six months or more. If the child did not reside in any such district for a period of six months, the district of domicile shall be that of longest residence.

In accordance with this standard, the Commissioner found and determined that the Board of Education of the Township of Little Egg Harbor was responsible for the payment of tuition for the program of special education being received by the child under *N.J.S.A.* 18A:46-14, Little Egg Harbor school district being the last local school district in which the child had resided for a substantial period of time prior to her placement in The Collier School. The Commissioner, accordingly, ordered that the Board of Education of the Township of Little Egg Harbor "pay the 1970-71 tuition fee" for the child "forthwith, and arrange with the institution to pay the tuition fees for the school years thereafter until her special education is naturally terminated." The State Board of Education affirmed the decision of the Commissioner for the reasons expressed therein.

There is no question but that the actions of the Commissioner and the State Board of Education were within their statutory authority. *N.J.S.A.* 18A:6-9, 18A:6-27, 18A:6-28, 18A:6-29. The decision of the administrative agency is, accordingly,

> entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. * * * * [*Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966)].

See also, *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40, 46-47 (App. Div. 1962).

From our review of the record in this case we are satisfied that no such showing has been made. The actions of the State Board and Commissioner are entirely reasonable. They represent a proper application of relevant statutory provisions and sound educational policy. Appellant's suggestions to the contrary are without merit. See Annotation, "Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college," 83 *A.L.R.* 2d 497 (1962); *Worden et al. v. Mercer Cty. Bd. of Elections*, 61 *N.J.* 325 (1972); *In the Interest of G.H., a child*, 218 *N.W.* 2d 441 (N.D. Sup. Ct. 1974); *N.J.S.A.* 30:4C-26; *N.J.S.A.* 18A:1-1, 18A:38-1, 18A:38-2, 18A:46-6, *et seq.*

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We are in accord with the statement contained in the brief submitted by the Attorney General that the decision of the Commissioner of Education in this case:

> results in the selection of a jurisdiction which has the most substantial connection with the greatest interest in A.S. To have found otherwise would have resulted in a rule which would fluctuate with the vagaries of an unstable and volatile family situation which was, in fact, temporarily severed; or which would place responsibility upon a local school district which had no contact with A.S. apart from geographical involvement with the private school in which she was placed.

The decision of the State Board of Eduction is affirmed.

MORGAN, J.A.D. (dissenting)

I find myself in disagreement with my colleagues because I am unable to discern a nexus between A.S., a 13-year-old girl, and her former foster parents resident in Little Egg Harbor sufficient to characterize that municipality as the infant's domicile.

The undisputed facts establish that A.S. was placed with foster parents in Little Egg Harbor with whom she resided from January 1970 through August of 1970. During that relationship and while she was residing with her foster parents in Little Egg Harbor, she attended the Southern Regional High School at Manahawken which serves the students of Little Egg Harbor and that municipality bore the expense of her tuition in compliance with the requirements of *N.J.S.A.* 30:4C-26 which, in pertinent part, provides:

> Whenever the Bureau of Childrens Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county for all purposes, and he shall be entitled to the use and benefit of all health, educational, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in municipality and county.

The foster parent-child relation ceased, however, at the end of August 1970 when A.S. ran away from her foster parents in Little Egg Harbor. She has never returned to them. Instead, she was placed for a few months stay at the Ocean County Children's Shelter and the matter was referred to the Ocean County Juvenile and Domestic Relations Court, which conducted a hearing on October 7, 1970. On December 14, 1970, her classification as emotionally disturbed and socially maladjusted was approved on behalf of the Commissioner of Education, and on January 4, 1971, she was admitted to The Collier School, a residential school in the Township of Marlboro in the County of Monmouth, approved by the Bureau of Childrens Services and by the State Board of Education, where she was to receive special education within the meaning of Chapter 46 of Title 18A of the Laws of New Jersey. Nothing in the record

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suggests any continuing relationship of any kind between A.S. and her former foster parents or any intention on the part of the Bureau of Childrens Services, or indeed the child herself, to return to the care and custody of her former foster parents she had previously forsaken.

The statements contained in the majority opinion in Footnote 2 are susceptible of being misread since it may be inferred therefrom that it was the school district embracing Little Egg Harbor which sought placement of A.S. as a handicapped child in the Collier School. Although Little Egg Harbor did complete a form entitled "Application for Placement by a Board of Education of a Handicapped Pupil in a Non-Public School in accordance with Chapter 46, Title 18A, New Jersey Statutes," (*) it did so only to implement the decision of the Bureau to place the child in the Collier School. The "application" was completed on December 14, 1970, months after the child had fled Little Egg Harbor, after the psychological evaluation from which the decision to make this placement was derived, and reflected, by use of the word "conditional," that the Little Egg Harbor school district was protesting the imposition of the burden of tuition costs attendant to this placement. The brief of the attorney general, who has possession of the entire confidential file of A.S. which has not been revealed to us, notes that during the first half year at Collier, "tuition expenses for A.S. were paid by Little Egg Harbor, although assumption of this cost was expressly undertaken to facilitate her placement, *not* as a concession of responsibility." Within days after the entry of A.S. into the Collier School and within weeks after the application was completed, Little Egg Harbor filed its petition seeking a declaration of its non-responsibility for A.S.'s tuition at the Collier School.

Hence, the record is reasonably clear that it was the Bureau, not Little Egg Harbor, which placed A.S. in the Collier School. Moreover, the psychological evaluation of A.S. secured by Bureau of Childrens Services in August of 1970 while A.S. was still resident in Little Egg Harbor, was made, according to the decision of the State Board of Education, "in order to determine whether the best future plan for this child would be either *another* foster home placement or a residential placement with long-range therapy." Thus, even in August of 1970, Bureau of Childrens Services had apparently reached the conclusion to terminate A.S.'s placement in Little Egg Harbor in favor of "another foster home placement" or a "residential School with long-range therapy." Presumably, her adjustment to her former foster home was unsatisfactory since alternatives were then being sought, a conclusion confirmed by A.S.'s flight from the home within days after this psychological evaluation was made. All of these circumstances compel me to conclude that her foster home placement in Little Egg Harbor had permanently terminated when she fled. Nothing in the record suggests the persistence of any relationship of any kind between A.S. and her former foster parents. The fact that she was never returned to them simply confirms this conclusion.

---

*The application had been approved by the "Regional Child Study Team." At the bottom of the application is the notation that "All non-public school contracts are limited to the school year covered by approval and subject to continued legal residence of the parent or legal guardian."

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The parental ties, however, between A.S. and her natural father and mother remain intact. The agreement pursuant to which the parents relinquished custody to the Bureau of Childrens Services expressly noted that the parents were not surrendering their parental rights. In addition, the father executed an acknowledgment of responsibility for the support of his child on January 8, 1970 whereby he agreed to contribute financially to the care and maintenance of his child as long as she remained under the jurisdiction of the Bureau of Childrens Services. *N.J.S.A.* 30:4C-29.1.

The decision of the Commissioner of Education, adopted by this Court as its decision, concluded that the operative fact from which liability for A.S.'s tuition costs flowed was her domicile. *N.J.S.A.* 18A:46-14 was found by the Commissioner and the majority of this Court to be controlling:

> *** Whenever any child shall be confined to a hospital, convalescent home or other institution in New Jersey or an adjoining or nearby State and is enrolled in an education program approved under this article, the board of education of the district in which the child is domiciled shall pay the tuition of said child in the special education program.

Chapter 46 of Title 18A which makes provision for classes and facilities for "handicapped children," a term defined to include any "emotionally disturbed" or "socially maladjusted child" (*N.J.S.A.* 18A:46-2), is clearly applicable to A.S. who was diagnosed as being emotionally disturbed and socially maladjusted. *N.J.S.A.* 18A:46-14 provides that tuition costs for a specially placed handicapped child shall be borne by the "board of education of the district in which the child is domiciled." With this conclusion both the Commissioner and the majority of this court agree. So do I.

My disagreement with my colleagues is with respect to the location of A.S.'s domicile. The Commissioner and this court place A.S.'s domicile in the district in which her former foster parents reside, Little Egg Harbor, because she resided with them for over six months. This view is approved by the majority opinion as being "entirely reasonable." The "reasonableness" of this conclusion should not, however, be the governing criterion as to the validity of the State Board of Education conclusion, but rather whether it complies with statutory and decisional requirements. No authority, beyond mere expedience (and about that more later) supported the Board's conclusion, and the statutory references cited in the opinion of the majority are inapposite.

N.J.S.A. 30:4C-26 does not apply to the present problem. First, A.S. was not in residence with her former foster parents in Little Egg Harbor during the period of time in which she was attending the Collier School; she resided at the school itself in another school district. Second, *N.J.S.A.* 30:4C-26 insures to foster children the same municipal services available to all other children in the same district; Collier School, however, is not a public, but a private facility, is not located in Little Egg Harbor and is not therefore available to other children residing in that municipality.

N.J.S.A. 18A:1-1 defines "residence" to mean domicile, "unless a

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temporary residence is indicated", thus importing into the term "residence" the more traditional concepts of the term "domicile." Section 46, which both the State Board of Education and the majority opinion find controlling, does not speak in terms of "residence", the defined term, but of "domicile" as identifying the school district responsible for tuition costs. At any rate, A.S. was resident, while at the Collier School, in Marlboro Township, at least in the sense of her being present there, and *N.J.S.A.* 18A:1-1 therefore provides no support for placing tuition responsibility on a school district in which the child neither resides nor is domiciled.

N.J.S.A. 18A:38-1 and 2, also cited by the majority opinion, merely designates those persons entitled to a free public school education and includes therein those persons for whom the Bureau of Childrens Services acts as guardian. No one, not even Little Egg Harbor, disputes that A.S. is entitled to a free public education and that provision would certainly not be applicable. *N.J.S.A.* 18A:46-6 merely requires each board of education to identify and ascertain what handicapped children between the ages of 5 and 20 cannot be accommodated in the local facilities and clearly has no bearing on the problem here presented.

Ordinarily, the domicile of a child is that of the natural father. *Mansfield Township Board of Education v. State Board of Education,* 101 N.J.L. 474 (Sup. Ct. 1925). Although domicile is a flexible concept adaptable to the requirements of a particular context, see, e.g., *Worden v. Mercer County Board of Elections,* 61 N.J. 325, 344 (1972), and has occasionally been interpreted to mean "residence", research has disclosed no cases, and the majority opinion cites none, in which the domicile of a child is held to be that of a former foster parent who neither supports the child, provides the child with a place to live, nor has any responsibility with respect to the child's care, custody or control. *In Interest of G.H.,* 218 N.W. 2d 441 (N.D. Sup. Ct. 1974), cited in the majority opinion, is inapposite because decided in a totally different statutory context. The controlling statute in North Dakota "says nothing about residence. It tells only what is to be done if any school district 'has' such a handicapped child." [at 447]. Section 46 of Title 18A, on the other hand, expressly places the burden of tuition costs on the domicile of the child. Second, until the child, G.H., was placed in the residential school, she had lived with her natural parents, not with one of two foster parents as in the present case. Third, although the decision and its statutory context are unclear, it appears that the school district in question "contracted" with the special school to provide G.H. with the educational factilities it could not provide. "A contract between a school district and the Crippled Children's School does not change the residence of the child, which remains within the contracting district." The school district embracing Little Egg Harbor did not however contract with the Collier School; placement in that school was made by the Bureau of Childrens Services.

The circumstances present in this case provide no reason, compelling or otherwise, to depart from the traditional rule identifying the domicile of the child with that of her father, Galloway Township, and that municipality is required by Section 14 of Title 46 to bear the financial burden of A.S.'s special educational placement. Clearly, the nexus between the natural father and A.S.,

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born of blood and continuing family ties together with economic support, is more compelling than the severed relationship between A.S. and her former foster parents who make no contribution, financial or otherwise, even by way of providing her with a place to live.

The rule announced by the Commissioner was apparently designed to serve the convenience of the Department of Education in identifying the district properly chargeable with tuition costs for a nonresident handicapped child receiving special educational services. Apart from its questionable legality for reasons already given, it will not even serve that limited justifying purpose. The adopted rule imposes tuition costs upon the district in which the child has at any time in the past resided with a foster parent for at least six months, as long as no subsequent placement in a foster home lasted that long. What district, however, pays such expenses when the foster child has not resided in any foster home for the required period of time? What district pays when and if such former foster parents move to another district or leave the State? What district pays if the former foster parents separate, as did A.S.'s natural parents, with both or one moving out of the district or out of the State? The opinion does not say. Nor is it apparent why the district in which the father, or even the mother, is domiciled should be relieved of the responsibility it would normally bear simply because another district, at some time, provides the residence for foster parents with which the child resided for more than six months. The decision below is legally indefensible in my view as well as being arbitrary, capricious and irrational.

I would reverse and remand with instructions to enter judgment requiring the Township of Galloway to pay A.S.'s tuition at the Collier School.

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Long Branch Education Association, Inc.,

Petitioner-Appellant,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 10, 1974

For the Petitioner-Appellant, Chamlin, Schottland and Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

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

April 2, 1975

Leroy Lynch and Essex County Vocational and Technical Teachers' Association, Thomas M. Kuzik, George W. Sigmund, Paul J. Bowles, Marie V. Iadipaoli, Felix N. Villarin, Robert C. Worthing, Vincent J. Kozakiewicz, Lila R. Kantrowitz, Peter A. Swolak, and Eloise Martino Forster,

Petitioners-Appellants,

v.

Board of Education of the Essex County Vocational School District, Essex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 24, 1974

For the Petitioners-Appellants, Cole, Geaney and Yamner (John F. Fox, Esq., of Counsel)

For the Respondent-Appellee, Francis Patrick McQuade, Essex County Counsel (Maurice R. Strickland, Asst. County Counsel)

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The appeal before the State Board of Education is dismissed. We affirm the decision of the Commissioner of Education for the reasons expressed therein.

October 1, 1975

In the Matter of the Application of the Board of Education of the Borough of Manasquan for the Termination of the Sending-Receiving Relationship with the School Districts of Belmar, South Belmar, and Spring Lake, Monmouth County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 17, 1974

For the Appellant Belmar Board, Sim, Sinn, Gunning, Serpentelli & Fitzsimmons (Eugene D. Serpentelli, Esq., of Counsel)

For the Manasquan Board, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the South Belmar Board, Harold Feinberg, Esq.

For the Spring Lake Board, Daniel P. Fahy, Esq.

For the Spring Lake Heights Board, Joseph N. Dempsey, Esq.

The State Board of Education denies Belmar's Application for Stay, and affirms the decision of the Acting Commissioner of Education for the reasons expressed therein. In addition, the Commissioner is directed to move as expeditiously as possible to hearing in the Manasquan-Belmar matter.

August 6, 1975

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Louis G. Mangieri,

Petitioner-Appellant,

v.

Board of Education of the Borough of Carteret, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 17, 1974.

For the Petitioner-Appellant, John Cervase, Esq.

For the Respondent-Appellee, Johnstone & O'Dwyer (Franz J. Skok, Esq., of Counsel)

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

March 5, 1975

Shirley Martinsek,

Petitioner-Appellant,

v.

Board of Education of the Eastern Camden Regional School District, Camden County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 13, 1974

For the Petitioner-Appellant, Hartman, Schlesinger, Schlosser, & Faxon (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Shirley A. Martinsek is a school nurse who holds a standard school nurse certificate. She does not possess a bachelor's degree. Before the enactment of Assembly Bill No. 623, Chapter 29, Laws of 1972, and by unwritten salary policy, Petitioner-Appellant Martinsek was paid a salary by the Eastern Camden

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Regional Board which was $600 less than the amount shown at the appropriate level on the bachelor's scale of the salary guide.

On June 9, 1972, Assembly Bill No. 623 was signed into law. The full text of that law, now *N.J.S.A.* 18A:29-4.2 is as follows:

> "Payment of school nurse according to teachers' salary guide
>
> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

Subsequent to the enactment of *N.J.S.A.* 18A:29-4.2, the Commissioner of Education, in arriving at an adjudication of *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577, determined that the legislative intent of *N.J.S.A.* 18A:29-4.2 is as follows:

> "***a school nurse holding a standard school nurse certificate and a bachelor's degree, or an academic degree higher than a bachelor's shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.***" (at pp. 581-582)

Therefore, options for compensation of school nurses holding standard certificates, but no bachelor degrees include: (1) compensation according to the non-degree salary scale, if one exists; (2) negotiations to establish a non-degree salary scale; or (3) compensation at the level set for a teaching staff member with a bachelor's degree.

Returning to the instant matter, when the Eastern Camden Regional Board adopted its 1972-73 salary guide, the Board's unwritten policy with regard to payment of school nurses not possessing a bachelor's degree was set forth in writing as follows:

> "***Non-degree school nurses shall be paid $600 less than the amount shown at the appropriate level on the BA column.***"

Therefore, Martinsek was continued at the same salary rate, which was $600 less

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than it would have been had she been in possession of a bachelor's degree.

Petitioner-Appellant Martinsek appealed to the Commissioner of Education by Petition of Appeal filed July 23, 1973. Martinsek alleged that the Eastern Camden Board had discriminated against her and had illegally established her salary for the 1973-74 school year.

> "***The petitioner respectfully requests that the respondent Board of Education be ordered and directed to pay to her for the forthcoming year and under the collective agreement the full salary allocated to the B.A. column at level No. 8.***" (Petition of Appeal, at p. 2)

The State Board of Education determines that Petitioner-Appellant Martinsek should have been compensated at the bachelor's scale, since there was no non-degree teachers' salary scale in effect. In our judgment, the Eastern Camden Regional Board did not compensate Martinsek in accordance with the options in *Lenahan, supra.* (See options previously quoted *ante.*) The salary guide as negotiated between the Eastern Camden Board and the Education Association did not contain a non-degree scale for teaching staff members. The guide contained a separate school nurse scale.

Such a determination by the State Board, of course, does not preclude negotiations between the Education Association and the Board to establish such a non-degree salary scale in the future, so long as the non-degree scale is applied uniformly to all non-degree teaching staff members. *See Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 (decided January 21, 1975). However, under the provisions of the salary guide now in existence, and in the absence of a non-degree salary scale for teaching staff members, Martinsek should be compensated according to the bachelor's scale of the salary guide.

We reverse the decision of the Commissioner of Education, and remand this matter for the express purpose of determining the proper salary compensation for Petitioner-Appellant Martinsek. If, in the future, the Eastern Camden Regional Board and the Education Association negotiate to establish a non-degree salary scale for teaching staff members, Petitioner-Appellant's salary rights under tenure pursuant to *N.J.S.A.* 18A:6-10, and as outlined in *Schmidt, supra,* must, of course, be preserved.

June 4, 1975

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Lewis Moroze,

Petitioner-Appellant,

v.

Board of Education of the Essex County Vocational School District, Essex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 20, 1973

Remanded by the State Board of Education, June 26, 1974

Order on Remand by the Commissioner of Education, September 24, 1974

For the Petitioner-Appellant, Morton Stavis, Esq.

For the Respondent-Appellee, Francis Patrick McQuade, Essex County Counsel (Richard M. Cignarella, Esq., of Counsel)

Lewis Moroze is a nontenure teacher who was not reemployed by the Essex County Vocational Board of Education. He alleges that such non-reemployment was for discriminatory reasons arising from his teaching activities which emphasized the history, culture and contributions of black persons to American civilization. He further alleges that such reasons were arbitrary and capricious and in contravention of the Fourteenth Amendment to the U.S. Constitution. The Essex County Vocational Board denies that it engaged in any unconstitutional discrimination against Moroze and further denies each and every allegation set forth in the Petition of Appeal. In his decision of July 20, 1973, the then Commissioner of Education dismissed the Petition, determining that:

> "***petitioner has failed to carry the weight of proof necessary to overturn the presumption of correctness of the Board's action in deciding not to reemploy him. No concrete evidence appears in the findings and the total record to support a determination that his failure to be reemployed constituted a penalty or reprisal by the Board. On the contrary, the record discloses numerous instances where petitioner was deficient as a teacher. It appears that petitioner simply decided that since his purpose to introduce black studies into every aspect of his curricular responsibilities was salutary, he could abandon the prescribed curriculum guides. Efforts by the school administrators to require petitioner to adhere to a more organized planning of his lessons, based upon curricular guides, were met with adamant resistance from petitioner.***" *Lewis Moroze v. Board of Education of the Essex County Vocational School District, Essex County,* 1973 *S.L.D.* 385, 399-400

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Petitioner-Appellant Moroze appealed to the State Board of Education. In its decision of June 26, 1974, the State Board remanded this matter to the Commissioner of Education on procedural grounds, in order that opportunity be afforded the litigants to file exceptions to the report of the hearing examiner, pursuant to *N.J.A.C.* 6:24-1.16 and in accordance with *South Plainfield Education Association and Marilyn Winston v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323; affd. State Board of Education 327; revd. and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973); affd. 64 *N.J.* 582 (1974); dismissed with prejudice Commissioner of Education 1974 *S.L.D.* 999.

On remand, and after exceptions to the report of the hearing examiner were filed, the Commissioner determined that the non-reemployment of Petitioner was not a violation of Petitioner's Constitutional rights, but was for proper, good and sufficient reasons. Thereafter, Petitioner again appealed to the State Board of Education. Oral argument was heard by the State Board Law Committee on April 17, 1975. Majority and minority Law Committee Reports were forwarded to the litigants and exceptions to the Law Committee Reports were received from both parties.

Lewis Moroze came to the Essex County Vocational School District as a well-qualified, experienced educator. His first year's assignment with the system was at the Bloomfield School. There, Moroze received the following recommendations:

> "Mr. Moroze indicates all the qualities of a good teacher and in fact is rated above the average as a result. There is no question that he is a desirable teacher and should be so considered if a permanent vacancy occurs. He has been able to acquire the loyalty and respect of his students and as a teacher on a one year assignment is exceptional. His cooperation with the principal is excellent. His acceptance by others of his colleagues is more than acceptable." (Exhibit R-1A)

and,

> "Mr. Moroze has done a good job of teaching and is quite cooperative with the principal. He still needs to devote more time to the organization of the class and better housekeeping." (Exhibit R-1B)

For the school years 1969-71, Moroze was assigned to the Newark Vocational Technical School. His assignment for both years included a tenth-grade social studies course entitled Problems in Public Affairs, tenth-grade English A, Oral and Written Expression, twelfth-grade English B, a course designed to serve the general purpose that literature courses serve in the academic high school, and several developmental reading classes. In November 1969, the principal of the Newark Vocational Technical School issued Moroze an initial satisfactory teaching performance evaluation. (Exhibit R-1C)

During the years 1969-71, the Newark Vocational Technical School had in excess of 92% black and Puerto Rican pupils (some estimates range as high as

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98%). Reading test scores for those high school pupils ranged as low as third grade, four months' ability. The school library had an inadequate selection of books on the black experience in hand at any time. There was no formal offering of black nor ethnic studies in the curriculum.

Moroze borrowed thirty books from the Newark Public Library and brought in 100 of his own books. Through his efforts, the pupils chose the book, *From Slavery to Freedom,* by John Hope Franklin, as a supplementary aid to their learning experience. Moroze did not hew to the line, rigidly nor mechanically, of the monographs for the courses he was to teach; but, rather, used innovative and imaginative ways to introduce subject matter of interest to those black and Puerto Rican pupils. When the school administration discovered that Moroze was not using the monograph rigidly, and that he was using the Franklin book, the school administration expressed its disapproval. Moroze stated, and it has not been refuted, that he ceased using the Franklin book when instructed to do so. (Exceptions and Objections on Behalf of Petitioner, at pp. 60-63; Transcript of April 17, 1975, at pp. 8-9, 16-17)

Franklin's book, *From Slavery to Freedom,* has been an important part of this case, and it seems appropriate to relate the excellence of this history of black Americans which generated the disapproval of the school administration. *Book Review Digest* of 1947 lists several excerpts from highly-respected reviewing journals concerning the book, and we find such phrases as "important book," "one of the best," "style easy and flexible," "recommended for all general collections," "rich absorbing book," "forthright and honest." The *Senior High School Library Catalog,* a guide to the selection of instructional materials for high school libraries, includes it. (Parenthetically, the book was added to the Newark Vocational Technical School Library in June 1971. Tr. III-40)

As stated previously, the time period during which Lewis Moroze taught at the Newark Vocational Technical School was 1969-71. As was true of many urban areas, Newark had gone through a period of unrest and civil disturbance. The community was polarized. The school population was predominantly nonwhite. In light of all that had transpired in the Newark urban area, it seems reasonable to conclude that school personnel would seek opportunities to provide relevant instructional materials. Lewis Moroze tried to do just that. He utilized and provided instructional materials with a relevancy and a purpose befitting the educational system of which he was a part.

The State Board of Education finds that Lewis Moroze introduced relevant and excellent instructional aids in his classroom in an effort to provide an understanding of the contributions of black persons to the American social order. He came afoul of the school's administrator, who wanted him to hew to rigid, narrowly defined methods of teaching, even though those methods were failing on every hand. Lewis Moroze was not reemployed.

It is undisputed that the employment of teachers is a matter lying wholly within the discretionary authority of the board. The Essex County Vocational Board, as any school board in this State, has discretionary authority to decline

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to reemploy nontenure teachers, but this authority is not absolute. When a board's action to terminate is arbitrary, unreasonable, capricious or otherwise improper, this action can be set aside by the Commissioner of Education. See *Cullum v. North Bergen Board of Education,* 15 N.J. 285 (1954); *Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, dismissed State Board of Education May 1, 1968, affirmed by Superior Court of New Jersey, Appellate Division, March 24, 1969, reversed in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236, 247-248 (1974).

The members of the State Board of Education have diligently scrutinized the extensive record in this case in an effort to determine whether there has been an illegal, unreasonable, capricious, or arbitrary action on the part of the Essex County Vocational Board. Our review of the record leads us to conclude that the determination as to the non-reemployment of Lewis Moroze was not supported by factual credible evidence. We believe there has been an affirmative showing that the non-reemployment was not warranted by the circumstances of this case. Further, we believe that the information on which this Board acted was not substantiated.

Therefore, we reverse the decisions of the Commissioner of Education dated July 20, 1973, and September 24, 1974, and direct that Lewis Moroze be returned to a classroom within the Essex County Vocational School District without loss of time accumulated toward tenure, and with pay from the time of his non-reemployment, mitigated by earnings or compensation received during this period.

Finally, the State Board of Education is constrained to make it completely clear that this is not a case of insubordination by a teacher. Rather, it is an isolated and distinguishable case of a board's imprudence in one instance, and on that basis alone are we reversing. We recognize any board's discretionary authority to decide on non-reemployment of nontenure personnel, and we do not presume to infringe upon, or curb, that discretionary authority, unless as here, there is a showing that the action was capricious.

June 26, 1975

You are viewing an archived copy from the New Jersey State Library.

Morris School District,

Appellant,

v.

Board of Education of the Township of Harding and Board of Education of the Borough of Madison,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 29, 1974

Decided by the State Board of Education, November 6, 1974

Argued: May 19, 1975 – Decided May 28, 1975

Before Judges Michels, Morgan and Milmed.

On appeal from the State Board of Education.

Mr. Jeffrey L. Reiner argued the cause for the appellant (Messrs. Meyner, Landis & Verdon, attorneys).

Mr. John M. Mills argued the cause for the respondent Board of Education of the Township of Harding (Messrs. Mills, Doyle, Hock & Murphy, attorneys).

Mr. Thomas P. Cook argued the cause for the respondent Board of Education of the Borough of Madison (Messrs. Smith, Cook, Lambert, Knipe & Miller, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of the State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel).

PER CURIAM

Appellant, Morris School District, appeals from a decision of the State Board of Education dated November 6, 1974, affirming a decision of the Acting Commissioner of Education dated April 29, 1974, which calls for the termination of the sending-receiving relationship between the Harding Township School District and the Morris School District. The Board of Education of Harding Township had applied to the Commissioner

> to reaffirm the existing sending-receiving relationship between Harding Township and Madison Borough, and that Madison continue to be designated as the receiving district for grades 9, 10 and 11 for the school years 1973-74, and 1974-75 and thereafter, and the Morristown High School be designated for the 12th. grade through the school year 1974-75 and thereafter terminate.

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Following a hearing on the merits before a hearing examiner, the Commissioner reviewed the record, including the hearing examiner's report and the exceptions filed thereto, and made his findings and conclusions. He found "good and sufficient reason" pursuant to *N.J.S.A.* 18A:38-13 to approve the severance of the sending-receiving relationship between the Harding Township School District and the Morris School District. The sending of Harding Township students to Madison High School rather than to Morristown High School was, accordingly, sanctioned. The State Board of Education affirmed the decision of the Commissioner for the reasons expressed therein.

There is no question but that the actions of the Commissioner and the State Board of Education were within their statutory authority. *N.J.S.A.* 18A:6-9, 18A:6-27, 18A:6-28, 18A:6-29, 18A:38-13. The decision of the administrative agency is, accordingly,

> entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. * * * * [*Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966)].

See also, *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40, 46-47 (App. Div. 1962).

From our review of the record in this case we are satisfied that no such showing has been made. The actions of the State Board and Commissioner are entirely reasonable. The Commissioner's findings and conclusions are "supported by substantial credible evidence on the whole record, allowing for agency expertise and the evaluation of the credibility of witnesses." *Parkview Village Asso. v. Bor. of Collingswood*, 62 *N.J.* 21, 34 (1972). See also *Quinlan v. Bd. of Ed. of North Bergen Tp., supra.* We discern no good reason or justification for disturbing them. *State v. Johnson*, 42 *N.J.* 146, 162 (1964).

The decision of the State Board of Education is affirmed.

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Board of Education of the City of New Brunswick,

Petitioner,

v.

Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown,

Respondents.

STATE BOARD OF EDUCATION

DECISION

Order of the Commissioner of Education, August 15, 1974

For the Petitioner New Brunswick Board, Terrill M. Brenner, Esq.

For the Petitioner New Brunswick City, Gilbert L. Nelson, Esq. (Franklin F. Feld, Esq., withdrew)

For the Respondent North Brunswick Board, Borrus, Goldin & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent North Brunswick Township, Mayo, Lefkowitz & Shihar (Ralph Mayo, Esq., of Counsel)

For the Respondent Milltown Board, Russell Fleming, Jr., Esq.

For the Intervenors, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

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

March 5, 1975
Pending before Superior Court of New Jersey

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Board of Education of the City of New Brunswick,

Petitioner,

v.

Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown,

Respondents.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 25, 1974

For the Petitioner New Brunswick Board, Terrill M. Brenner, Esq.

For the Petitioner New Brunswick City, Gilbert L. Nelson, Esq. (Franklin F. Feld, Esq., withdrew)

For the Respondent North Brunswick Board, Borrus, Goldin & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent North Brunswick Township, Mayo, Lefkowitz & Shihar (Ralph Mayo, Esq., of Counsel)

For the Respondent Milltown Board, Russell Fleming, Jr., Esq.

For the Intervenors, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

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

March 5, 1975
Pending before Superior Court of New Jersey

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**In the Matter of the Tenure Hearing of Frederick J. Nittel,
School District of the Borough of Roselle Park, Union County.**

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 24, 1974

For the Petitioner-Appellee Board of Education, A. Raymond Guarriello, Esq.

For the Respondent-Appellant, Ruth Russell Gray, Attorney at Law

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

June 4, 1975

Board of Education of the Township of North Bergen, Hudson County,

Appellant,

v.

**Board of Education of the Town of Guttenberg, Hudson County,
and The State Board of Education,**

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, January 12, 1973

Decided by the State Board of Education, March 6, 1974

Argued February 3, 1975 – Decided March 17, 1975

Before Judges Michels, Morgan and Milmed

On appeal from decision of New Jersey State Board of Education.

Mr. Seymour Margulies argued the cause for appellant (Messrs. Brigadier & Margulies, attorneys).

Mr. John Tomasin argued the cause for respondent Board of Education of the Town of Guttenberg.

A statement in lieu of brief was filed by Ms. Jane Sommer, Deputy Attorney General, attorney for State Board of Education, (Mr. William F. Hyland, attorney).

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PER CURIAM

Petitioner, and appellant herein, the Board of Education of the Township of North Bergen (hereinafter North Bergen) filed a petition with the Commissioner of Education (hereinafter Commissioner) seeking recovery from the respondent Guttenberg Board of Education (hereinafter Guttenberg) in the amount of $229,934.96 representing the difference between the actual cost to North Bergen, as a receiving board of education, of educating the high school students of Guttenberg and the amount paid by Guttenberg, as the sending board of education, for the school years from 1965-66 through 1970-71. In its petition, North Bergen alleged that the annual bills sent to Guttenberg containing the per pupil rate to be paid for that year represented only the tentative rate to be paid by Guttenberg, and that although Guttenberg had paid the rates set forth on each of the annual bills, it had refused to pay the difference between the tentative rate fixed therein and the actual cost to North Bergen.

Guttenberg alleged in its answer to the petition that the rates fixed by North Bergen for the years in question and paid by Guttenberg were not estimated rates, but final ones, relied upon in good faith by Guttenberg in not seeking rates from other potential receiving districts, and that to permit present recovery of the substantial monies now claimed for years 1965 to 1971 would create serious budgetary difficulties for Guttenberg. North Bergen's counter-petition asserted that permitting Guttenberg's high school students to be educated in North Bergen at less than actual cost to North Bergen would be an unconstitutional donation of the monies and property of the taxpayers of North Bergen.

A hearing examiner was appointed and a conference of counsel for the two interested parties, held on March 1, 1972, resulted in an agreement that the matter would be submitted on the pleadings subject to the result of discovery proceedings with respect to computation of actual cost per pupil. September 28, 1972 was set as the date for oral argument.

Before oral argument and in a brief submitted to the hearing examiner, North Bergen asserted and argued the invalidity of the financial arrangements between North Bergen and Guttenberg for the years in question on the ground that they were "tainted" by a conflict of interest on the part of Herman G. Klein who was, at all pertinent times, Superintendent of Schools for North Bergen as well as Mayor of Guttenberg.

At oral argument, North Bergen moved to amend the pleadings to assert the conflict of interest issue raised in its brief and for permission to pursue discovery thereon. Following objection by Guttenberg to these applications, the hearing examiner reserved decision, heard argument on the other projected issues and, in effect, denied North Bergen's application for a plenary hearing on the conflict of interest issue by thereafter delivering his report to the Commissioner without giving a copy thereof to North Bergen. On January 12, 1973, the Commissioner handed down his decision in favor of Guttenberg, denying North Bergen recovery of the money it sought in its petition. On North Bergen's appeal

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to the State Board of Education, briefs were submitted in which North Bergen again restated its position with respect to Klein's alleged conflict of interest as invalidating all of North Bergen's challenged financial arrangements with Guttenberg.

In accordance with a recommendation by the State Board's Law Committee, commented upon by both parties, the State Board rendered its first opinion granting North Bergen fifteen days in which to file affidavits in support of its application to obtain discovery relating to the position of Superintendent Klein, and denying North Bergen's request for a remand to the Commissioner on the ground that the hearing examiner's report had not been submitted to North Bergen for comment before decision by the Commissioner. Instead, the State Board permitted North Bergen to file with the State Board exceptions to the hearing examiner's report. In accordance with the State Board opinion, North Bergen filed an affidavit relating to the conflict of interest claim containing assertions that Klein had exerted influence over North Bergen board members, in fixing tuition rates for the Guttenberg students. It also filed several exceptions to the hearing examiner's report.

On March 6, 1974, the State Board of Education delivered an opinion affirming the action of the Commissioner. North Bergen appeals.

For reasons which will become later apparent, we deal first with North Bergen's contention that the hearing examiner mistakenly exercised his discretion in refusing to permit North Bergen to amend its pleadings to assert Superintendent Klein's conflict of interest position as invalidating the challenged financial arrangements made with Guttenberg. North Bergen asserts its right to have been permitted discovery with respect to this issue and to have submitted evidence in a plenary hearing directed to this issue. We agree.

The doctrine that a person cannot hold two incompatible public offices is a development of the common law. *Schear v. Elizabeth,* 41 N.J. 321, 325 (1964); *Ahto v. Weaver,* 39 N.J. 418 (1963). Incompatibility exists when there is a conflict or inconsistency in the functions of the two offices "inviting the incumbent to prefer one obligation to another." *Reilly v. Ozzard,* 33 N.J. 529, 543 (1960); *Ahto v. Weaver, supra* at 422. A distinction has been drawn between duties associated with incompatible offices and the duty that may arise when a holder of two not incompatible offices is confronted with a specific situation wherein conflicting duties result. Where the offices are incompatible, "a clash of *duties* inheres in the very relationship of one office to the other and is contemplated by the scheme of governmental activities." *Reilly v. Ozzard, supra* at 549. Where the offices are not incompatible, a clash of interest may nonetheless arise out of a conflict "emanating from external temporary circumstances involving a personal or pecuniary interest of the officeholder, or divided loyalties between the two offices. Such conflicts may be regarded as peculiar operational incidents of the duality of the office holding. Where a conflict of interests arises, the dual officeholder is disqualified to act in the particular matter and must withdraw from the scene. No other choice is open to him." *Schear v. Elizabeth, supra* at 326-328.

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The judiciary is competent to determine when a conflict of interests exists within a given context, and when found to exist, adjudication of the invalidity of the challenged official act would follow. *Schear v. Elizabeth, supra* at 328.

In the present case, although there is no necessary incompatibility between the office of Superintendent of Schools of one municipality with Mayor of another, there does exist a potential for conflict "emanating from external temporary circumstances," such as financial dealing between the two municipalities in each of which Klein held an office.

North Bergen argues, with some plausibility, that in his role as Mayor of Guttenberg, Klein would have been obligated to and interested in holding down costs to the taxpayers of Guttenberg; while as Superintendent of Schools for North Bergen, he would be obligated to and interested in securing for North Bergen full recompense for services rendered students received from Guttenberg. It was suggested that, apart from the possible clash of duties created by this external situation, additional conflict, or the appearance thereof, resulted from the personal desire of the Mayor, an elected official, to minimize municipal expenditures as an aid to his re-election. Guttenberg, on the other hand, points out that Klein did not have a vote on the North Bergen Board of Education, could not and did not vote on the matter of tuition rates to be paid by Guttenberg, a matter committed to decision by the members of the Board, and thus could not be regarded as having a conflict position. But see *Ahto v. Weaver, supra.* The affidavit submitted by North Bergen to the State Board of Education, however, asserts that Klein recommended what tuition rates should be charged to Guttenberg and that the Board accepted his recommendation. If it were shown and found as a fact that Klein exerted a decisive influence over the members of the North Bergen Board of Education, then it may become necessary to invalidate those actions resulting from this influence.

This issue cannot, however, be resolved without factual development on a plenary hearing. We, therefore, remand this matter to the State Board of Education with instructions to remand to the Commissioner for a plenary hearing relating to the role played by Superintendent Klein in the determination of the tuition rates billed to and paid by Guttenberg. If the matter is heard by a hearing examiner, his recommended findings of facts and conclusions of law should be submitted to the parties for their comments before final decision by the Commissioner. *Winston v. Bd. Ed. So. Plainfield,* 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974). The final decision of the Commissioner should be reviewed by the State Board of Education if such a review is requested by either party.

Since this matter is being remanded, the Commissioner or hearing examiner should take into consideration all exceptions filed by North Bergen with the State Board of Education in order to determine whether its prior decisions on other issues are affected thereby. *Winston V. Bd. Ed. So. Plainfield, supra.* (*)

* We do not, however, infer that we think the decision appealed from should be altered or in any way modified. We take no position with respect to final disposition of any issues in this case.

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All proceedings on remand should be completed and all findings of facts and conclusions of law filed with this court within ninety (90) days from the date of this decision.

We retain jurisdiction.

Board of Education of the Township of North Bergen,

Petitioner-Appellant,

v.

Board of Education of the Town of Guttenberg, Hudson County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 12, 1973

Decided by the State Board of Education, March 6, 1974

Remanded by Superior Court, Appellate Division (March 17, 1975) Docket No. A-2237-73

For the Petitioner-Appellant, Seymour Margulies, Esq., (Messrs. Brigadier & Margulies, Attorneys)

For the Respondent-Appellee, John Tomasin, Esq.

Pursuant to the decision of the Superior Court, Appellate Division, Docket No. A-2237-73, this matter is remanded to the Commissioner of Education.

April 2, 1975

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In the Matter of the Special School Election Held in the School District of Ocean Township, Ocean County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 31, 1974

For the Petitioners-Appellants, Kelly and Butensky (Howard Butensky, Esq., of Counsel)

For the Respondent-Appellee, Haines, Schuman & Butz (Thomas P. Butz, Esq., of Counsel)

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

May 7, 1975
Pending before Superior Court of New Jersey

Nancy Oxfeld, by her parent and natural guardian, Emil Oxfeld,

Petitioner-Appellant,

And

**Jeffrey Goodman, by his parent and natural guardian, Samuel Goodman;
Donald Strauss, by his parent and natural guardian, Dr. F. Strauss;
Daniel Lippman, by his parent and natural guardian, Dr. H. E. Lippman;
Kenneth Schachat, by his parent and natural guardian, Herbert Schachat;
Gina Novendstern, by her parent and natural guardian, Leon Novendstern;
Jill Kessler, by her parent and natural guardian, Edward Kessler;
Peter Shapiro, by his parent and natural guardian, Dr. Myron J. Shapiro,**

Petitioners,

v.

**New Jersey State Board of Education and
Board of Education of South Orange-Maplewood, Essex County,**

Respondents-Respondents.

SUPREME COURT OF NEW JERSEY

Decided by the Commissioner of Education, June 18, 1969 and March 12, 1971

Decided by the State Board of Education, March 1, 1972

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Argued September 26, 1973.

Reargued November 4, 1974. Decided September 16, 1975

On appeal from the Superior Court, Appellate Division.

Mr. Lewis M. Holland argued the cause for appellant (*Messrs. Chasan, Leyner, Holland and Tarleton*, attorneys).

Mrs. Joyce Usiskin and *Miss Mary Ann Burgess*, Deputy Attorneys General, argued the cause for respondent New Jersey State Board of Education (*Mr. George F. Kugler, Jr.*, and *Mr. William F. Hyland*, Attorneys General, attorneys; *Mr. Stephen Skillman*, Assistant Attorney General, of Counsel; *Mrs. Usiskin*, on the Brief).

Mr. David Samson argued the cause for respondent Board of Education of South Orange-Maplewood (*Messrs. Lieb, Wolff & Samson*, attorneys; *Mr. Samson*, on the Brief).

PER CURIAM

These proceedings challenge the constitutionality of a school regulation governing student distribution of pamphlets and leaflets on school grounds. Out of deference to our dissenting colleagues we withheld announcement of our decision in the case, it being anticipated that some guidance to those who felt obliged to address the merits might be forthcoming from the United States Supreme Court. While this case was pending here, the Supreme Court heard argument in *Bd. of School Comm'rs, Indianapolis v. Jacobs,* *U.S.* , 43 *L.Ed.*2d 74 (1975), wherein students sought to enjoin enforcement of certain rules imposing restraints prior to distribution on school grounds of a student publication. The issue below had been whether the students' First and Fourteenth Amendment rights were violated by the regulations, and the students had prevailed on the merits in the District Court, *Jacobs v. Bd. of School Comm'rs, Indianapolis,* 349 *F.Supp.* 605 (S.D.Ind.1972), and in the Court of Appeals, 490 *F.*2d 601 (7th Cir.1973). However, the Supreme Court did not reach the merits of the case, but rather determined that the matter had become moot.

This case presents substantially the same issues on federal and state constitutional grounds. It puts in question the validity of a literature-distribution regulation or "guidelines" promulgated at Columbia High School, within the jurisdiction of the Board of Education of South Orange-Maplewood. The Commissioner of Education approved the regulation and the State Board of Education affirmed that determination.

Petitioner Oxfeld appealed, and the Appellate Division affirmed unanimously in an unreported opinion which observed that "the present appeal may be moot, since it is questionable whether it asserts a justiciable claim for relief." Nevertheless the case was there disposed of on the merits by an affirmance for the reasons given by the tribunals which had heard the case

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below. Petitioner's appeal to this Court is based upon a substantial constitutional issue, *R.* 2:2-1(a) (1).

The case is indeed moot, as it was when decided in the Appellate Division. Neither the petitioner-appellant nor any of the other original named petitioners is any longer a student at Columbia High School. They are not now nor have they for some time been subject to the regulations's force. Further, we do not view this case as presenting any issue of great public importance compelling definitive resolution despite mootness,[1] see, *e.g.*, *Roe v. Wade*, 410 *U.S.* 113, 35 *L.Ed.*2d 147 (1973); *John F. Kennedy Memorial Hosp. v. Heston*, 58 *N.J.* 576 (1971); *Busik v. Levine*, 63 *N.J.* 351, appeal dismissed, 414 *U.S.* 1106, 38 *L.Ed.*2d 733 (1973); *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n.*, 64 *N.J.* 17 (1973).

Under the circumstances we decline to review the decision of the educational authorities and the tribunal below. The appeal is:

Dismissed. No costs.

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[1] Nor are the circumstances such that we should save this case from its obvious mootness by recognizing it as a class action. Designating a clause in the pleadings a class action, as petitioners did here, does not make it one, see 3B *J. Moore, Federal Practice*, ¶ 23.02-2, at 152 (2d ed.1974); at some point a court must determine whether a class action may be maintained, *R.* 4:32-2 (a). That has never been done in this case. While relief was sought, in the original petition, not only on behalf of certain students who had been suspended and, "with regard to the chilling effect of the said regulation, on behalf of all students at Columbia High School," the plain fact of the matter is that no one concerned with this litigation has treated it as having any "class" character since the original pleadings were filed. Significantly, petitioners have never mentioned, let alone stressed, the "class" nature of the litigation during the administrative or judicial proceedings, including their presentation before this Court. *Cf. Danner v. Phillips Petroleum Co.*, 447 *F.2d* 159, 164 (5th Cir.1971). With the case at bar in this posture we neither confront any issue nor ground any determination in the context of a class action.

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Sharon Ann Pinkham,

Petitioner-Appellant,

v.

Board of Education of the Borough of South River, Middlesex County; Alfred E. Losiewicz, as Principal of South River High School; Juanita Fieseler, as Physical Education Instructor, South River High School,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 27, 1974

For the Petitioner-Appellant, Rutgers Legal Aid Clinic (Joseph E. Buckley, Jr., and Timothy Weeks, Esqs., of Counsel)

For the Respondents-Appellees, Golden, Shore and Paley (Philip H. Shore, Esq., of Counsel)

In June 1974, at the time Sharon Ann Pinkham's Petition of Appeal was filed with the Commissioner of Education, there were no relevant State Board rules with respect to equality in educational programs. This is no longer the case. *N.J.A.C.* 6:4-1.1 *et seq.* became effective May 20, 1975. Ergo, every board of education shall comply with these regulations, which require equal educational treatment for males and females.

At this point in time, the State Board of Education is concerned with Sharon Ann Pinkham's permanent high school record which contains a failing grade in physical education. Miss Pinkham has since earned a passing physical education grade in summer school. In lieu of that fact, we cannot allow the failing grade to remain. The South River Borough Board of Education is ordered to expunge the record of the failing grade in physical education.

In all other respects, we affirm the decision of the Commissioner of Education wherein he declares the Petition has been rendered moot by circumstance.

June 26, 1975

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In the Matter of the Tenure Hearing of Ronald Puorro, School District of the Township of Hillside, Union County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 20, 1974

Decision on Motion by the State Board of Education, November 6, 1974

For the Complainant Board of Education, Goldhor, Meskin & Ziegler (Sanford A. Meskin, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

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

March 5, 1975

"R.L.," a minor by his mother and natural guardian, "M.L.L.,"

Petitioner-Appellant,

v.

Board of Education of the Penns Grove-Upper Penns Neck Regional School District, Salem County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 31, 1974

For the Petitioner-Appellant, Camden Regional Legal Services, Inc. (Robert D. Pitt, Esq., of Counsel)

For the Respondent-Appellee, Gerard J. DiNicola, Esq.

The appeal from the decision of the Commissioner of Education dated January 31, 1974, be and the same is hereby dismissed without prejudice.

January 8, 1975

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Gladys S. Rawicz and Piscataway Township Education Association,

Petitioners-Appellants,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decision of the Commissioner of Education, May 29, 1973

Remand of the State Board of Education, June 5, 1974

Clarification of Remand of the State Board of Education, September 11, 1974

Order of the Commissioner of Education, December 13, 1974

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld,) Esq., of Counsel)

For the Respondent-Appellee, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

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

April 2, 1975
Pending before Superior Court of New Jersey

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Kenneth Robinson, an infant, by his parent and guardian *ad litem*, Ernestine Robinson, *et al.*

Plaintiffs-Respondents,

v.

William T. Cahill, Governor of the State of New Jersey, *et al.*

Defendants-Appellants.

SUPREME COURT OF NEW JERSEY

Argued March 18, 1975 – Decided May 23, 1975

On appeal from Superior Court, Law Division; on rehearing as to remedy.

The opinion of the Court was delivered by

HUGHES, C. J.

The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, [1] we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved.

The compulsion upon the Court to act in the present state of affairs is evident:

> The people's constitutional reposition of power always carries with it a mandate for the full and responsible use of that power. When the organic law reposes legislative power in that branch, for instance, it is expected that such power will be used, lest it wither and leave the vacuum of a constitutional exigency, requiring another branch (however reluctantly) to exercise, or project the exercise of, that unused power for the necessary vindication of the constitutional rights of the people. *Robinson v. Cahill,* 62 *N.J.* 473 (1973), *cert.* den. *sub nom. Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.* 2d 219; *Jackman v. Bodine,* 43 *N.J.* 453 (1964); *Asbury Park Press, Inc. v. Woolley,* 33 *N.J.* 1 (1960). [*American Trial Lawyers v. N.J. Supreme Ct.,* 66 *N.J.* 258, 263]

In *Robinson v. Cahill,* 62 *N.J.* 473 (1973), we held violative of the Education Clause of the Constitution the existing system of education provided public school children in this State. We construed the Constitution basically to

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1 "The Legislature shall provide for the maintenance and support of a thorough and efficient system for free public schools for the instruction of all school children in the state ***." [*N.J. Const.* (1947), Art. VIII, § 4, ¶ 1; see *N.J. Const.* (1844), Art. IV, § 7, ¶ 6, as amended, effective Sept. 28, 1875]

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command that the State afford "an equal educational opportunity for children" (*Id.* at 513), however the burden of doing so would be distributed and borne,[2] and we agreed with the determination of Judge Botter (118 *N.J. Super.* 223, 119 *N.J. Super.* 40 (Law Div. 1972)) that "the constitutional demand had not been met *** " on the basis of gross "discrepancies in dollar input [expenditure] per pupil." 62 *N.J.* at 515. We so ruled because dollar input "was plainly relevant and because we [had] been shown no other viable criterion for measuring compliance with the constitutional mandate." *Id.* at 515-16.[3]

Thus we considered as the principal cause of the constitutional deficiency the substantial reliance (under our present system of financing education) upon local taxation, entailing as it does "discordant correlations between the educational needs of the school districts and their respective tax bases." *Id.* at 520.

Nevertheless, although we expressed doubt that the Constitution could be satisfied "by reliance upon local taxation" (*Id.* at 520), we did not foreclose that possibility. We indicated that the State could meet its obligation by financing education either on a statewide basis, with funds provided by the State, or, in whole or in part, by delegating the fiscal obligation to local taxation. *Id.* at 509-13. Should it choose the latter alternative, however, it would be incumbent upon the State, either legislatively or administratively "to define *** the educational obligation and *** *compel* the local school districts to raise the money necessary to provide that [equal educational] opportunity." *Id.* at 519 (emphasis in the original). If local government fails in that endeavor "the State must itself meet its continuing obligation." *Id.* at 513. The State aid plan under

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2 " *** [I]t cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be maintained and supported 'a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years' can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation." [*Robinson v. Cahill, supra* at 513]

3 While we recognized "that there is a significant connection between the sums expended and the quality of the educational opportunity" (62 *N.J.* at 481), the record of this case and the material furnished us in preparation for argument demonstrate that a multitude of other factors play a vital role in the educational result—to name a few, individual and group disadvantages, use of compensatory techniques for the disadvantaged and handicapped, variation in availability of qualified teachers in different areas, effectiveness in teaching methods and evaluation thereof, professionalism at every level of the system, meaningful curricula, exercise of authority and discipline, and adequacy of overall goals fixed at the policy level. Hence while funding is an undeniable pragmatic consideration, it is not the overriding answer to the educational problem, whatever the constitutional solution ultimately required.

Moreover, while we dealt with the constitutional problem in terms of dollar input per pupil, we recognized the legitimacy of permitting any school district wishing to do so to spend more on its educational program through local effort (local "leeway") provided such did not become "a device for diluting the State's mandated responsibility."
[62 *N.J.* at 520]

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the current statute, *N.J.S.A.* 18A:58-4 (*L.* 1970, *c.* 234, hereafter the 1970 Act), was found inadequate because "not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the *** [Constitution] mandates." *Id.* at 519.

We concluded our opinion by ruling that relief would be prospective in nature, and we invited argument as to whether, pending legislative action, the judiciary could properly order redistribution of "minimum support" and "save-harmless" aid, *infra,* differently from the provisions of existing law, in furtherance of the constitutional imperative as the trial court had directed. *Id.* at 520-21; see 118 *N.J. Super.* at 280-81.

After hearing the parties and the *amici* (and pausing in deference to the doctrine of separation of powers in government), we decided that the statutory scheme would not be disturbed unless the Legislature failed by December 31, 1974, to enact legislation compatible with the Constitution and to be effective as of July 1, 1975. *Robinson v. Cahill,* 63 *N.J.* 196, 198 (1973). We withheld a ruling as to whether, if such legislation were not adopted, "the Court [might] order the distribution of appropriated moneys toward a constitutional objective notwithstanding the legislative directions." *Id.*

Despite considerable efforts by both the Executive and Legislative Branches, no legislation was adopted by December 31, 1974, nor has been to date, although such efforts, it is asserted, continue.

Numerous motions for intervention and for relief and directions by the Court were filed by various parties both before and after December 31, 1974. On January 23, 1975, we entered an order denying all motions for relief or directions and making appropriate provision for hearing certain petitioners for intervention as *amici curiae.* We decided that in view of the time-exigency (and with continued deference to the separation of powers, we must note) the Court would not disturb the present statutory scheme for the school year 1975-76 but would receive further briefs and hear argument on March 18, 1975, concerning appropriate remedial action by the Court in various suggested particulars in relation to the school year 1976-1977 and subsequent years, looking to a "final determination as to remedies" by the Court in sufficient time to apprise each district by October 1, 1975, what the "state aid situation will be as to it, as far as practicable, for the school year 1976-77."

We have received and carefully considered numerous briefs and exhibits and have heard extensive arguments. It is unnecessary for purposes of our present disposition of the matter to outline in any detail all the positions taken. They range from pleas by representatives of the General Assembly and the Senate that the Court continue to stay its hand, on the postulate that a solution of the constitutional problem is exclusively for the Legislature and will one day be achieved by it, to diverse proposals for the present adjudication by this Court of all the substantive components of a thorough and efficient education and the financing thereof. They include proposals (which are somewhat varied in nature) by plaintiffs and by the Governor of the State for redistribution of existing State

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aid for at least the school year 1976-77 (in furtherance of the constitutional objective) pending legislative action. And they variously support or criticize guidelines proposed by the State Department of Education and recently published in 7 *New Jersey Register* 132 (April 1975), for the attainment by school districts of the goals of a thorough and efficient education.

Much of the material submitted by the parties and *amici* has been helpful to the Court, and was invited by the broad terms of the order of January 23, 1975. However, upon thorough deliberation on the matter, we have concluded that our present disposition should not extend beyond the delineation of a provisional remedy for the school year 1976-1977 should the other Branches of government fail to devise and enact a constitutional system of education in time for its effectuation for that school year.[4]

We do not now go further for several reasons. We continue to be hesitant in our intrusion into the legislative process, forced only so far as demonstrably required to meet the constitutional exigency. As well, it would be premature and inappropriate for the Court at the present posture of this complex matter to undertake, *a priori,* a comprehensive blueprint for "thorough and efficient" education, and seek to impose it upon the other Branches of government. Courts customarily forbear the specification of legislative detail, as distinguished from their obligation to judge the constitutionality thereof, until after promulgation by the appropriate authority. *Morrissey v. Brewer,* 408 *U.S.* 471, 92 *S.Ct.* 2593, 33 *L.Ed.* 2d 484 (1972). We have been as explicit as we reasonably could as to the nature of the constitutional deficiencies seen to exist in the present system. There is no responsible dissent from the view that implementation of the constitutional command is peculiarly a matter for the judgment of the Legislature and the expertise of the Executive Department. In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system, at least if that can in any way be avoided. We have measured and found wanting the existing scheme. No other is yet before us for adjudication.

Nor can we adjudicate on a piecemeal or hypothetical basis. The validity of the tentative guidelines recently published by the Department of Education cannot now be passed upon, inchoate and hortatory in nature as they are. They would have to be considered in context with such legislative provision as may be enacted for their fiscal implementation, unless the judgment of this Court is likewise to be only hortatory and futile in that sense.

Moreover, as already indicated, our opinion in *Robinson,* 62 *N.J. supra,*

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4 We do not at this juncture assume such a timely plan will not be forthcoming. Progress in that direction has already been made by the Department of Education and effort continues in the Legislature. If implementing legislation for financing and the attendant administrative process is completed before October 1, 1975, but not in time to permit review thereof by the Court by that date, the Court will then, in the light of the nature of the entire plan submitted, consider whether it may be permitted to go into effect for 1976-1977, with or without terms, or be deferred to subsequent years if ultimately sustained by the Court.

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noted the broad options open to the Legislature in discharging the constitutional requirement. Subject to the caveats there noted and here repeated, the selection of the means to be employed belongs to the other Branches of government, unimpeachable so long as compatible with the Constitution. *See, A. & B. Auto Stores of Jones St., Inc. v. Newark,* 59 *N.J.* 5 (1971); *Ind. Elec. Assoc. of N.J. v. N.J. Bd. of Exam.,* 54 *N.J.* 466 (1969); *Burton v. Sills,* 53 *N.J.* 86 (1968); *N.J. Chapt., Am. I.P. v. N.J. State Bd. of Prof. Planners,* 48 *N.J.* 581 (1967); *Two Guys from Harrison, Inc. v. Furman,* 32 *N.J.* 199 (1960).

We take this occasion to state our approval of the ongoing efforts of the Department of Education to establish the components of a thorough and efficient system of education by formulation of standards, goals and guidelines by which the school districts and the Department may in collaboration improve the quality of the educational opportunity offered all school children. We assume that these efforts will move forward through the administrative process to a finality, and that the State, through the Commissioner of Education, will see to the prompt implementation of the standards, so determined, in the field. We would further expect that any problem attendant upon undue burdens on particular districts, in conforming to such standards, will have legislative attention. But by these comments we intend no present implication that any method of financing for the purposes stated, which would leave the present system of defraying the expense of education substantially unaltered, could fulfill the "thorough and efficient" constitutional norm.

What we have already said is not, of course, to imply that the provisional remedy for the year 1976-1977 we hereinafter order represents our concept of the full reach of our power, duty or responsibility in effectuating the promise of the Constitution to the school children of the State should the other Branches delay action beyond availability of a remedy in time for the school year 1977-1978. Nor does it all imply compliance by itself with the constitutional standards. We reserve such questions for the appropriate occasion, which hopefully will not occur.

We thus turn to the question of an appropriate contingent or provisional remedy for at least the school year 1976-1977. We forthwith reject the submission that we should do nothing. It is past three years since the system was held unconstitutional in the Law Division. Our position that the court would act at least for 1976-1977 was implicit in the January 23, 1975, order. The need for immediate and affirmative judicial action at this juncture is apparent, when one considers the confrontation existing between legislative action, or inaction, and constitutional right. When there occurs such a legislative transgression of a "right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or ignore, or to waive it." *Asbury Park Press, Inc. v. Woolley,* 33 *N.J.* 1, 12 (1960). We have mentioned inaction as well as action in importing constitutional violation, for as stated by Justice Proctor in *Cooper v. Nutley Sun Printing Co., Inc.,* 36 *N.J.* 189, 196

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(1961) (adverting to the opinion of Chief Justice Marshall in *Marbury v. Madison,* 1 *Cranch* 137, 163, 2 *L.Ed.* 60, 69 (1803)):

> *** [J]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence. *** The Judicial obligation to protect the rights of individuals is as old as this country. [36 *N.J.* at 196; citations omitted]

If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must "afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper." *Cooper v. Nutley Sun Printing Co., Inc., supra,* at 197.

We have given serious consideration to the idea of enjoining all State aid under the present unconstitutional system. That recourse would simplify the weighty problem of judicial power, as there is a concession by all that the Court may, and ordinarily should, enjoin the administration of a patently unconstitutional plan. But we are convinced that so radical a curtailment of obviously essential State assistance to the school districts and its consequent harmful impact on vital educational programs, even if only for one provisional year, is not justified at this time in the light of all pertinent considerations.

The provisional remedy for the school year 1976-1977 we have decided upon follows, in principle if not in scope, the proposal for redistribution of State aid funds advocated before us by the Governor. The Governor's plan, presented as "the appropriate next step in this significant interchange between coordinate branches," would enjoin the present statutory distribution and distribute to the school districts more conformably to the constitutional norm the following categories of State aid funds:

1. Minimum support aid (*N.J.S.A.* 18A:58-5a) ($234,000,000 as of 1974-1975);
2. Save-harmless funds (*N.J.S.A.* 18A:58-18.1) ($7,600,000 as of 1974-1975);
3. Building aid, foundation program (*N.J.S.A.* 18A:58-23, 24) ($27,000,000 as of 1974-1975);
4. Atypical pupils aid (*N.J.S.A.* 18A:58-6) ($64,000,000 as of 1974-1975);
5. Transportation aid (*N.J.S.A.* 18A:58-7) ($46,000,000 as of 1974-1975);
6. Pension fund contributions by the State (*N.J.S.A.* 18A:66-1, *et seq.*) ($172,000,000 as of 1974-1975).

These items aggregate about $550,000,000 at the 1974-1975 level of

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appropriations. Under the proposed State budget for 1975-1976 those items would, for that year, total about $585,000,000. What they will amount to for 1976-1977 is not yet known. Minimum support aid provided in 1975-1976 $150 per resident weighted pupil in operating districts. Save-harmless aid assures every district no less aid for current expenses and building costs than it received in the school year 1972-1973. The titles of the other aid categories are self-explanatory. It is estimated that minimum support aid for 1976-1977 would approximate $165 per pupil.

The Governor proposes redistribution of all such funds in accordance with the incentive equalization aid formula of the relevant sections of the 1970 Act (*N.J.S.A.* 18A:58-5b, 6.3), the operation of which was described in our prior opinion. 62 *N.J.* at 517-18. Essentially, that formula fixes a "guaranteed" equalized assessed valuation per weighted pupil (currently $43,000), and if the school district's *actual* corresponding valuations per pupil multiplied by the number of pupils there resident is less than the *guaranteed* valuations per pupil multiplied by the same number, the district receives State aid to the extent of the difference, multiplied by the net operating school tax rate. If the actual valuations are more than the guaranteed valuations no formula aid is given.

The Governor's position (and to this extent plaintiffs agree) is that the six categories of State aid enumerated, as presently distributed, are not compatible with the *Robinson* criterion of equality of educational resources for the pupils, whereas the incentive equalization formula is. He therefore urges that the whole be redistributed solely on the basis of the latter formula. Rough calculations offered on his behalf prior to argument purported to indicate that if applied for the year 1975-1976, this would have lifted the guaranteed valuation rate per pupil from the then existing $43,000, to a figure ranging from $66,000 to $72,000, depending upon the amount of appropriations for that year. If applied for the year 1976-1977 the figure would be larger because of increasing budgets and equalized valuations.

We are in accord with the Governor and plaintiffs as to the effect of redistribution of minimum support and save-harmless aid in accordance with the 1970 incentive equalization aid formula in tending to subserve the goal of equality of educational opportunity. The two named items leave existing arbitrary ratios of tax resources per pupil unaffected. The formula, on the other hand, in effect places all districts whose actual equalized valuations are below the guarantee-level on the same per-pupil basis in respect of supporting tax resources. The higher the guarantee-level the more districts come under the umbrella of such equality. Since reallocating minimum support and save-harmless funds to formula aid purposes does lift the guarantee-level, equality of supporting resources per-pupil is fostered in that way.

We think, however, that the merits of the attack upon the relevance of items 3, 4 and 5 mentioned above to permissible constitutional standards is not as manifest, if sustainable at all, as in the case of minimum support and save-harmless aid. As to pension contribution aid, while this shares the asserted and justified characterization of the last mentioned items, we conclude that redistribution thereof at this juncture would be inadvisable. We believe there

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would be substantial legal and administrative confusion as to where responsibility would lie for raising employers' pension contributions under existing legislation if the legislative appropriations for that purpose were enjoined, not to mention risks to the solvency of the Teachers' Pension and Annuity Fund. Teacher and pensioner morale is a pertinent factor for consideration.

It is our order, consequently, that for the school year 1976-1977, in the contingency aforestated, minimum support aid and save-harmless funds shall not be disbursed as provided under the existing statutes, but shall be distributed in accordance with the incentive equalization aid formula of the 1970 Act. It is estimated these funds will approximate $290,000,000. According to calculations furnished us by the Department of Education, this should result, for the year stated, in guaranteed equalized valuations per weighted pupil of about $67,000.

We are not insensitive to the earnest pleas of those municipalities which will be disadvantaged by the redistribution here ordered because they have actual equalized valuations per pupil exceeding the prospective guaranteed valuations, yet are burdened by school populations requiring more than average expenditures per pupil and perhaps some degree of extraordinary non-school burden (municipal overburden). The Department of Education has furnished us and the parties with a schedule of the respective gains and losses for 1976-1977 of the redistribution here ordered, and we have carefully weighed its effect. We have given consideration to a variety of possible adjustment factors, such as for municipal overburden, which might be applied to render this redistribution more theoretically equitable. Having regard to the urgent necessity of announcing our disposition at the earliest date possible, and the debatability, complexity and uncertainty in effect of any adjustment factor which might be so considered, we have foregone efforts at refinement of the approach selected.

Study of the figures discloses a broad range of correlation between the gaining districts and districts having higher than statewide average school and general tax rates (equalized); *vice versa* as to the losing districts. (Concededly, these correlations are not invariably uniform.) Similarly, the gaining districts are generally the more urban areas, particularly afflicted by municipal overburden, and the rural districts, obviously ratables-poor. The remedy we apply is only for one year, and however short of a perfect plan, is at least attainable and a positive step toward the end result of full constitutional compliance. In any case, it is to be kept constantly in mind that our order may be averted by timely and adequate legislative and administrative action.

In sum, the present disposition represents our best present judgment as to an appropriate provisional and interim accommodation of the interests of the other Branches in their right to try to achieve accomplishment of the mutually desired constitutional remedy, of the interests of the school districts in providing adequate education in the meantime for their pupils, and of the solemn duty of this Court to enforce the Constitution.

In opposition to such action by the Court as thus ordered, it has been urged upon us on behalf of the Senate that the "judicial power of the State does

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not encompass within it the power to redistribute funds appropriated by law even if in furtherance of a constitutional objective." This conclusion is erected upon the subordinate hypotheses (a) that under the literal terms of the Education Clause it is the Legislature and only the Legislature which has the power and right to provide for a system of thorough and efficient education; and (b) Art. VIII, § 2, ¶ 2 provides that "no money shall be drawn from the State Treasury but for appropriations made by law" and that "[a]ll moneys for the support of State Government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriations law covering one and the same fiscal year *** ."

The first premise is unacceptable on its face. The people in 1875 ordained the Legislature to be their agent to effectuate an educational system but did not intend to tolerate an unconstitutional vacuum should the Legislature default in seeing to their specification that the system be thorough and efficient. See *Asbury Park Press, Inc. v. Woolley, supra.* We have adjudicated such a default. Under emerging modern concepts as to judicial responsibility to enforce constitutional right there has been no paucity of examples of affirmative judicial action toward such ends. *Jackman v. Bodine,* 43 *N.J.* 453 (1964); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 *U.S.* 1, 91 *S.Ct.* 1267, 28 *L.Ed.* 2d 554 (1971); *Griffin v. School Bd. of Prince Edward County,* 377 *U.S.* 218, 233-34, 84 *S.Ct.* 1226, 12 *L.Ed.* 2d 256, 266-67 (1964); *Hawkins v. Shaw, Mississippi,* 437 *F.* 2d 1286 (5th Cir. 1971); *Kennedy Park Homes Ass'n v. Lackawanna, N.Y.,* 436 *F.* 2d 108 (2d Cir. 1970), *cert.* den. 401 *U.S.* 1010, 91 *S.Ct.* 1256, 28 *L.Ed.* 2d (1971); *Mills v. Bd. of Educ.,* 348 *F. Supp.* 866 (D.D.C. 1972).

In the *Mills* case, *supra,* the Court held that constitutional right, *inter alia,* dictated that handicapped children were entitled to publicly supported education and that if funds, appropriated by Congress for general education only, were insufficient to encompass the special need, there would have to be an equitable reallocation of the available funds toward that constitutional imperative. Thus, in order to enforce the Constitution, the judicial branch of the federal government reallocated funds differently from the appropriation thereof by the co-equal legislative branch of the same sovereignty. 348 *F.Supp.* at 876. The principle announced is directly apposite here.

In the *Jackman* case, *supra,* notwithstanding that our Constitution, as construed, authorized the Legislature to initiate the machinery for constitutional reformation of the system of legislative representation, and it would ordinarily be patently improper for the Court to do so, the judicial power was nevertheless invoked in the circumstances there obtaining. Legislative systems of representation of the people like New Jersey's having been held by the federal courts in violation of equal protection, a new system was required to be devised. The Court said:

> The duty to comply with the equal protection clause rests upon the three branches of State Government and upon the people of the State as well. The question is what part must be played by each.

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> We think it clear that the judiciary should not itself devise a plan except as a last resort *** . [43 *N.J.* at 473]

The Court fixed time limits for effectuation by the Legislature of a temporary plan for a constitutional system of legislative representation to meet the exigency of imminent elections, and plainly implied it would itself adopt and enforce a plan if the Legislature did not do so in time. *Jackman v. Bodine,* 44 *N.J.* 312, at 316-17. See also *Asbury Park Press, Inc. v. Woolley, supra,* and particularly the concurring opinion of Justices Proctor and Schettino, 33 *N.J.* at 22, expressing a willingness to entertain an application for the court itself to order a reallocation of county representation in the General Assembly if the Legislature failed to do so, where population changes in the counties had made the existing allocation unconstitutional.

As to the Senate's reliance upon Art. VIII, § 2, ¶ 2, the argument assumes there is a clash with the Education Clause, and the contention is that the former provision controls. We doubt the premise. The order we are making as to use of a portion of the State aid moneys in 1976-1977 does not call for the expenditure of appropriations not made by law. The finds, *ex hypothesi,* will be appropriated by the Legislature. They will still be used for educational purposes, but in a manner we have concluded to be an essential and minimal interim step in the enforcement of the Education Clause. If there remains a theoretical conflict between the strictures of the Appropriations Clause and the mandate of the Education Clause, we hold the latter to be controlling in these circumstances.

The argument is recast in terms of the doctrine of separation of powers, purportedly precluding judicial direction for expenditure of State moneys, that being exclusively for the judgment of the other Branches. Cited are such decisions as *Willis v. Dep't of Cons. & Ec. Dev.,* 55 *N.J.* 534, 536 (1970) and *Fitzgerald v. Palmer,* 47 *N.J.* 106, 108 (1966). These decisions essentially dealt with the extent of the judicial power to award or enforce money judgments or claims against the State or State agencies out of unappropriated moneys. They have limited pertinence here. The interest here at stake transcends that of an ordinary individual claimant against the State. It is that of all the school children of the State, guaranteed by the constitutional voice of the sovereign people equality of educational opportunity.

This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government. *Powell v. McCormack,* 395 *U.S.* 486, 89 *S.Ct.* 1944, 23 *L.Ed.* 2d 491 (1969). And while the court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived.

So clearly does our constitutional duty bespeak the present obligation of affirmative judicial action, that we have no doubt that the order we now make is constitutionally minimal, necessary and proper.

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The State Treasurer, the State Commissioner of Education and any other State officers concerned with the receipt or disbursement of moneys to be appropriated by the Legislature for local educational purposes for the school year 1976-1977 are hereby enjoined from disbursing minimum support and save-harmless funds designated by this opinion in accordance with existing law, and are directed to distribute and disburse said funds in accordance with the incentive equalization aid formula of *N.J.S.A.* 18A:58-5b, 6.3. These directions of course are subject to the contingency set forth in this opinion, namely the possible eventuation of timely and constitutionally appropriate legislative action.

So ordered; supplemental directions or relief may be applied for on notice. We retain jurisdiction.

PASHMAN, J. (concurring in part only and dissenting)

Two years ago, when in *Robinson v. Cahill,* 62 *N.J.* 473 (1973) (*Robinson I*) this Court held the system of school finance presently in operation in New Jersey violative of the education clause of the Constitution of 1947, *N.J. Const.* (1947), Art. VIII, § I, ¶ 1, it chose to postpone imposition of a remedial order until January 1, 1975 so as to give the Legislature a reasonable period in which to satisfy the mandates of the Constitution. *Robinson v. Cahill,* 63 *N.J.* 196 (1973) (*Robinson II*). Earlier this term the Court again declined to impose an immediate remedial order in the expectation that the Legislature would perform its constitutional duties. *Robinson v. Cahill,* 67 *N.J.* 35 (1975) (*Robinson III*). The effect of this exercise of judicial self-restraint (which I considered unwarranted even at the time, *see Robinson III, supra* at 40 (Pashman, J. dissenting)) has been to delay implementation of any substantial relief until the 1976-77 school year, at the earliest.

By its terms, the education clause imposes on the Legislature the primary duty "to provide for the maintenance and support of a thorough and efficient system of free public schools." In permitting the grave constitutional violations recognized in the first *Robinson* decision to pass unremedied for so long, the Court has sought to render every possible deference to the primacy in this field granted to the Legislature by the Constitution. The Legislature, however, has not acted. We have long since reached the point beyond which continued toleration by this Court of the *status quo* would implicate the Court itself in these constitutional violations, *see Robinson III, supra* at 42-44 (Pashman, J. dissenting), for the judicial branch has an affirmative duty to act to protect the rights of citizens which are guaranteed by the Constitution, even – perhaps especially – in the face of the legislative inaction. *Cooper v. Nutley Sun Publishing Co.,* 36 *N.J.* 189, 196-97 (1961); *King v. South Jersey National Bank,* 66 *N.J.* 161, 177 (1974) (dictum); *see Asbury Park Press, Inc. v. Wooley,* 33 *N.J.* 1 (1960).

Some may have construed the Court's reluctance to impose a remedial order as abandonment of the constitutional principles announced in *Robinson I.* Such a construction would mistake judicial respect for the spirit of the constitutional principle of separation of powers for loss of judicial will to vindicate rights guaranteed by the Constitution. No error could be greater.

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Today's decision, despite its other shortcomings, is evidence that this Court remains resolved to exert its remedial powers to rectify the violations of the education clause identified in *Robinson I.* To fail to do so would involve a profound abdication by the Court of its constitutional responsibilities.

Necessarily, this course will carry the Court into hitherto unexplored territories in the realms of constitutional law and equitable remedies. It is a course, however, which was implicit and foreseen in our prior decisions in this matter. *See Robinson I, supra* at 520-21; *Robinson II, supra* at 198; *Robinson III, supra* 37-38. The fact that such a course requires investigation of novel and difficult questions of law, *see, e.g., Jackman v. Bodine,* 43 *N.J.* 453 (1964); *Asbury Park Press, Inc. v. Wooley, supra,* or that it may require the Court to make controversial or unpopular decisions, *Ridgefield Park v. Bergen County Board of Taxation,* 31 *N.J.* 420, 431 (1960); *cf. Cooper v. Aaron,* 358 *U.S.* 1 (1958), is no grounds for turning aside.

I concur in the general decision of the Court to order some form of relief for the 1976-77 school year and in its determination that it has the power to enjoin the distribution of "save-harmless aid" and of "minimum pupil aid" under the Bateman-Tanzman Act, *N.J.S.A.* 18A:58-1 *et seq.*, and to order redistribution of those moneys in accordance with the more equalizing "incentive-equalization" formula contained in *N.J.S.A.* 18A:58-5(b), as a first step toward remedying present violations of the education clause.

In my opinion, however, this remedy, while within the powers of the Court and adopted with a proper spirit of commitment to ultimate implementation of the education clause, is not commensurate with the magnitude and importance of the wrong. I would order relief both broader in scope and calculated to more directly implement the mandates of the education clause as construed by our prior decisions in this case.

I

This case concerns the inequality of educational opportunity that has resulted from the wide disparities in resources devoted to educational purposes in the various local school districts in New Jersey. In *Robinson I, supra,* the Court did not hold that disparate educational expenditures were *ipso facto* unconstitutional as a matter of constitutional equal protection. 62 *N.J.* at 482-501; *cf. West Morris Regional Bd. of Education v. Sills,* 58 *N.J.* 477 (1971), *cert.* denied 404 *U.S.* 986 (1971). Rather the Court found that *N.J. Const.* (1947), Art. VIII, § I, ¶ 1 imposed upon the State the duty to insure that a certain minimum level of educational opportunity is provided every student. [1]

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[1] This is, of course, only one possible definition of equality of educational opportunity. *See generally* McDermott & Klein, "The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference," 38 *Law & Contemp.Prob.* 415, 416-23 (1974); Wise, "Legal Challenges to Public School Finance," 82 *School Rev.* 1, 15-19 (1973). The use of this definition by the Court throughout this litigation should not be understood as foreclosing the possibility that other definitions may be more appropriate to other circumstances to which the education clause applies.

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62 *N.J.* at 513-15. It held that while the State may delegate the actual administration of the public schools to local school districts, it cannot delegate the ultimate responsibility for "maintain[ing] a thorough and efficient system of public schools." *N.J. Const.* (1947), Art. VIII, § I, ¶ 1. The fundamental constitutional defect in the present system of school finance was identified by the Court as abdication by the State of this responsibility.

> [I]f the State chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must *compel* the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity. Nor has the State *required* the school districts to raise moneys needed to achieve that unstated standard. Nor is the State aid program designed to compensate for local failures to reach that level. * * *
>
> [62 *N.J.* at 519; emphasis in the original].

Thus the education clause requires that the State, having chosen to delegate administration of public schools to local school districts, must prescribe statewide standards for the operation of those schools so as to insure that all children are guaranteed an opportunity for an education of a certain minimum quality. It must also establish a mechanism for compelling local compliance with such standards, and where, for financial reasons, a local school district cannot comply, it must provide a means for supplementing local resources. 62 *N.J.* at 513, 519.

In the present case, the failure of the State to promulgate and enforce such standards for educational quality has permitted the development of great disparities in the amount of resources devoted in the various local school districts to education – disparities which appear to have no educational justification and which are not responsive to the constitutional mandate of the maintenance of a "thorough and efficient" system of schools throughout the State but rather are merely a reflection of the great disparities in relative wealth of the various school districts. 62 *N.J.* at 515-20.

The ultimate object of any relief ordered by this Court must be to compel the State to assume these duties, which, to the grave injury of many children in this State, have gone long neglected. Until the State has at least adopted proper statewide standards, it is impossible for this Court to even determine to what degree the present disparities are resulting in inadequate education in some districts, although the findings of the trial court put it beyond question that lack of sufficient expenditures for education is seriously harming students in at least some school districts. *Robinson v. Cahill,* 118 *N.J. Super.* 223, 246-68 (Law Div.

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1972).[2] In the interim, the Court must move to eradicate at least the grossest disparities.

The redistribution of State "save-harmless" and "minimum pupil" aid ordered today is a step, albeit a small one, toward the accomplishment of such interim relief. Regrettably, the Court has not gone farther and redistributed all State aid to education and has chosen to rely exclusively upon the so-called "incentive equalization" formula, *N.J.S.A.* 18A:58-5(b), as its mechanism for reallocation of those funds which it does redistribute, without attempting to remedy the substantial shortcomings of that formula itself. More regrettably still, the Court has failed in today's decision to deal with ultimate constitutional violations at issue here. It has not acted at all to compel the promulgation of statewide standards of educational quality, an essential first step in remedying those violations, but has merely contented itself with interim relief, dealing only with the grossest symptoms of the failure of the State to meet its obligations and even with those only for a single year.

II

The education clause imposes initial responsibility for formulation of statewide standards of educational quality upon the Legislature and, by implication, upon administrative agencies to which the Legislature properly delegates its authority. *N.J. Const.* (1947), Art. VIII, § I, ¶ 1. These bodies have broad discretion in defining those standards. It is not appropriate for the judiciary, which has no special expertise in matters of educational policy, to interfere with the exercise of this discretion except where the executive and legislative branches have altogether failed to establish standards or where the standards which have been established are plainly insufficient to meet the requirements of the Constitution.

The Legislature has expressly delegated the responsibility for supervision of the quality of the public schools to the State Board of Education and its administrative officer, the Commissioner of Education. *N.J.S.A.* 18A:4-10, 18A:4-15, 18A:4-23, 18A:4-24. The Board and Commissioner are expressly authorized to inquire into the "thoroughness and efficiency" of any public school and to conduct any necessary tests and examinations:

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[2] The Court accepted the finding of the trial court that as a result of the disparities among districts in resources devoted to education, the State had failed to fulfill its obligation to provide a "thorough and efficient" system of education for all pupils. *Robinson I, supra* at 515-16. The relationship between expenditures on education and the quality of education provided has been a much mooted question among educators. *See, e.g.,* McDermott & Klein, "The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?" 38 *Law & Contemp.Prob.* 415 (1974); Mosteller & Moynihan, eds. *On Equality of Education* (1972); Guthrie, Kleindorfer, Levin & Stout, *Schools & Inequality* (1971); Coleman, *Equality of Educational Opportunity* (1966). There can hardly be any doubt, however, that adequate financing is a necessary condition for an effective educational system, even if not a sufficient one. *Cf.* McDermott & Klein, *supra* at 429-30.

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N.J.S.A. 18A:4-24.

> The commissioner shall, by direction or with the approval of the state board, whenever it is deemed to be advisable so to do, inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries and such other information with regard thereto as the state board may require or as he shall deem proper, but nothing in this section shall affect the right of each district to prescribe its own rules for promotion.

The Board is also expressly authorized to promulgate, *N.J.S.A.* 18A:4-15, and the Commissioner to enforce, *N.J.S.A.* 18A:4-23, rules and regulations implementing the education clause of the State Constitution. The powers of the Board and Commissioner under these statutes have in the past been construed very broadly. *See Jenkins v. Morris Tp. School District,* 58 *N.J.* 483 (1971); *East Brunswick Tp. School Board v. East Brunswick Tp.,* 48 *N.J.* 94 (1966); *cf. State Bd. of Education v. Netcong Bd. of Education,* 108 *N.J. Super.* 564, 571-73 (Ch.Div. 1970), aff'd 57 *N.J.* 172 (1970), *cert.* den. 401 *U.S.* 1013 (1971). The Board and Commissioner are thus statutorily empowered to formulate statewide standards of educational quality as well as being uniquely qualified to do so.

Therefore, while retaining jurisdiction in this Court, I would remand the case in part to the State Board of Education to formulate statewide standards for educational quality and to evaluate each school district to determine whether it is in compliance with those standards[3] and, if not in compliance, whether the district has the financial ability to comply without further State assistance.[4]

The type of standards required by the education clause may be inferred

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[3] This determination would necessarily involve an evaluation of the cost of achieving a "thorough and efficient" standard in each district and in the State as a whole.

[4] The doctrine of primary jurisdiction may demand that issues concerning the substantive educational standards required by the education clause arising in the course of this case be decided initially by the Board. *Glenn View Development Corp. v. Public Service Elec. & Gas Co.,* 57 *N.J.* 304 (1970); *Woodside Homes, Inc. v. Morristown,* 26 *N.J.* 529 (1958).

> "Primary jurisdiction," applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. * * * [*United States v. Western Pacific R.R. Co.,* 352 *U.S.* 59, 63-64 (1956)].

This doctrine is, of course, merely one of priority of jurisdiction and operates to give the Court the benefit of the expert judgment of the Board and Commissioner. It does not relieve the Court of its ultimate responsibility to interpret and enforce the education clause. *Federal Maritime Bd. v. Isbrandtsen Co.,* 356 *U.S.* 481 (1958); 3 *Davis, Administrative Law,* § 1901 at 3-6 (1958).

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from the language of that clause and the cases interpreting it. "Thoroughness" and "efficiency" are ultimately measures of the effectiveness of the public school system in performing its function – educating the children who attend it. The former Supreme Court characterized the significance of the education clause in the following terms:

> Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship. ***
>
> [*Landis v. Ashworth,* 57 *N.J.L.* 509, 512 (Sup. Ct. 1895)]

Similarly, in *Robinson I,* we said:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market. [62 *N.J.* at 515].

The statewide standards[5] must, therefore, be cast in terms of the quality of education which the local school districts are actually providing to the students who attend them.[6]

That this type of standard is mandated by the constitution implies neither that other types of standards may not also be useful nor that the process of formulating and enforcing proper standards will be convenient and free of difficulties. Indeed the Commissioner has urged upon the Court the practical and theoretical obstacles to adopting and enforcing standards focused directly upon

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[5] The promulgation of statewide standards does not necessarily mean that all school systems must conform to a single rigid pattern. It does mean that the State may not permit diversity to be accompanied by a dilution in the quality of education provided.

[6] The parties have briefed and argued at considerable length the merits of "input," "output" and "process" standards. *See* Tractenberg, "Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way," 27 *Rutgers L.Rev.* 365, 421-22, nn. 276, 277 (1974). The distinctions among these types of standards may in application be more illusory than real. Ultimately a well-conceived educational system requires that educational goals be formulated, that decisions be made as to what inputs of human and material resources are required, that the resources be properly allocated among students according to their needs in light of the goals, and finally that the success of the system in achieving its educational goals be evaluated and, based upon that evaluation, the choice of educational goals, the decision as to resource needs, and the process of allocating resources to students be revised. *Cf.* Levin, "A Conceptual Framework for Accountability in Education," 82 *School Rev.* 363 (1974). *N.J. Const.* (1947), Art. VIII, § I, ¶ 1 does not require either "input," "output," or "process" standards in the abstract. It does require that the State adopt educational goals which implement the constitutional requirement that the system be designed to equip each child for his role as a citizen and a competitor in the labor market and that the State adopt standards which focus upon the success of each school district in reaching those goals.

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the question of whether public schools are in fact educating the students who attend them.[7] Nevertheless, that question is precisely the one that is of most importance to children, their parents, and, ultimately, to society as a whole.[8]

The product of such a remand would be both a set of standards and an evaluation of how much additional money would be needed to establish a "thorough and efficient" system of public schools in all school districts. I would set a timetable for the remand so as to enable the Court to hear any appeals from the decisions of the Board and to take any steps necessary to compel implementation of the Board's decisions (with modifications by the Court, if any) for the 1976-77 school year. I would expect the Board to fully comply with the mandate of the Court upon such a remand in time for implementation of the Board's decisions in the 1976-77 school year.

At that time, it would be proper for the Court to consider what would be the most appropriate mode of exercising its power to compel provision of any additional resources needed to implement the mandates of the education clause if the Legislature had not acted in the meantime. *See generally Robinson III, supra,* 67 *N.J.* at 40-41 (Pashman, J. dissenting).

Such a remand, designed to lead to implementation of the mandates of the education clause beginning in the 1976-77 school year rather than at some indeterminate future date, seems to me both fully within the practical capacities of the State Board of Education and better calculated to fully remedy the constitutional violations identified in *Robinson I* than does imposition of mere interim relief.

III

Had the Court chosen to order a remand of the type outlined above, we would in all likelihood not now be faced with the awkward problem of attempting on an *ad hoc* basis to eradicate the grossest disparities in educational

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[7] It should be noted that the State has already established a statewide educational assessment program. *N.J.A.C.* 6:39-1.1 *et seq.*; see Ascher, "Educational Assessment," *N.J.E.A. Journal* 22 (Nov. 1972). While the adequacy of existing standardized tests to evaluate educational accomplishment is open to serious doubt, *see, e.g., McDermott & Klein, supra* at 424-428; *cf. Larry P. v. Riles,* 343 *F.Supp.* 1306 (N.D.Cal. 1972); Note, "Legal Implications of the Use of Standardized Tests in Employment & Education," 68 *Colum.L.Rev.*, 691 (1968); *but see, Berkelman v. San Francisco Unified School District,* 501 *F.*2d 1264 (9 Cir. 1974), the establishment of a statewide assessment program is a necessary first step toward implementing standards of the type demanded by the education clause.

[8] The Board has announced its intention to promulgate regulations implementing the education clause. Proposed Rules for Thorough and Efficient Education, 7 *N.J. Reg.* 132(a) *et seq.* (April 10, 1975). Since these regulations have not yet been promulgated in their final form it would be inappropriate to comment upon them in any detail. Before this Court, the Board and Commission have declared that their intention is to issue regulations which establish "process" standards. They define the "process" approach as "an educational system focusing on the delivery of resources to students in the most effective way, 'effective' being defined in terms of whatever works best for each individual learner." If this is indeed the thrust of the regulations to be issued, then they would not comply with the constitutional requirements.

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expenditures. Nevertheless, since the majority has chosen to follow that route, the method it has adopted seems to me to call for some comment.

I have no doubt as to the Court's power to redistribute existing State aid for education so as to reduce disparities among the various school districts in the resources available for educational purposes. The arguments to the contrary are considered and properly disposed of in the opinion of the majority. *Ante* at (slip opinion at 13-17).

The education clause, of course, does not require the State to subsidize local inefficiency or waste. Rather the State has a duty to insure that moneys granted to a local school district are in fact properly used by that district to provide a "thorough and efficient" education for its pupils.

Even if I could approve the majority decision to order only interim relief, I would see no justification for proceeding as gingerly as does the Court today. The net effect of redistributing "save-harmless' and "minimum pupil" aid under the "incentive-equalization" formula is disturbingly small. The Commissioner of Education estimates that those categories of aid will total only $303 million[9] in 1976-77 out of a total expenditure for public schools from all sources of $3.03 billion. Only $101 million of the money will actually be shifted from well-to-do districts to poorer ones. Thus we are effecting only about a 3% change in the overall allocation of educational resources.

The majority chooses not to redistribute State pension contributions to the Teachers' Pension and Annuity Fund, *N.J.S.A.* 18A:66-33; atypical pupil aid, *N.J.S.A.* 18A:58-6; building aid, foundation program, *N.J.S.A.* 18A:58-23, 24 or transportation aid, *N.J.S.A.* 18A:58-7, categories of state education aid which totaled approximately $309 million in 1974-75. At best these aid programs fail to respond to the problem of disparities in educational expenditures among districts which result from the gross interdistrict differences in resources available for educational purposes, thus diluting the small equalizing effect which the remedy ordered by the Court may have. Some of these programs seem to have the effect of actually magnifying those disparities. Transportation aid and atypical pupil aid are distributed to districts on the basis of actual costs, regardless of the differing ability of the various districts to obtain funds for these special services from local revenue sources. State pension contributions are made to all districts, regardless of district wealth, and may be even higher in wealthy districts, which offer higher teacher salaries, than in poorer districts. Distribution of building aid is somewhat better correlated with the relative wealth of the various districts, but the variation in aid among districts is not nearly so great as the disparities in their resources would require. All of these types of aid contribute more to the problem of disparities in educational expenditure than they do to its solution.[10]

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[9] This estimate assumes that the Bateman-Tanzman Act will continue to be fully funded.

[10] The situation in this case is thus very different from the one presented in *Gautreaux v. Romney*, 457 *F.*2d 124 (7 Cir. 1972), where the proposal that funding of wholly unobjectionable programs be enjoined so as to stimulate correction of constitutional defects in other programs was rejected.

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The majority accepts as grounds for not redistributing these categories of aid, and most especially for not redistributing State pension contributions, the argument that including them in the remedial order would lead to "administrative confusion." One might expect that this argument, which has been dusted off, polished up, and put on display by the advocates of the *status quo* at every stage of this all too prolonged litigation, *see, e.g., Robinson III, supra,* would have begun to lose its allure.[11] Mere injunction and redistribution of these forms of aid need have no effect on bona fide obligations local districts have to teachers, special students, students needing transportation, or any one else. The sole effect is to shift the burden of financing these obligations from the State to local school districts, which may use any available source of revenue including redistributed State aid. There is no reason to believe that in the full year between now and July 1, 1976, administrative problems in making this shift could not be solved and the feared "confusion" mastered. Mere administrative inconvenience is paltry grounds indeed for failing to forcefully vindicate rights guaranteed by the Constitution. *Cf. Cleveland Board of Education v. La Fleur,* 414 *U.S.* 632, 646 (1974); *Frontierro v. Richardson,* 411 *U.S.* 677, 690 (1973).

Nor am I satisfied that the Court has acted wisely in choosing to employ the "incentive-equalization" formula contained in *N.J.S.A.* 18A:58-5(b) without significant modification as the mechanism for redistributing the State aid which is covered by its order.

The "incentive-equalization" formula is an example of what is sometimes described as "district power equalizing" formula. *See, e.g., Coons, Clune & Sugarman, Private Wealth & Public Education,* 202 (1970). Recognizing that a district with a small property tax base cannot provide adequate revenues for education even if it taxes itself very heavily, the "incentive-equalization" formula augments the power of the district to raise revenues by guaranteeing a certain minimum valuation per pupil. Thus, the State grants aid to the district

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11 The majority fears that the grant of any affirmative relief for this school year would create chaos in the budgetary process in local school districts. It is undeniable that a grant of affirmative relief by the Court for this school year would complicate the process of approval of local school budgets this spring. That process is governed by the various provisions of *N.J.S.A.* 18A:22, which sets out a timetable for formulation and adoption of these budgets. The Legislature, however, has already pushed the timetable back for this year. *L.* 1974, *c.* 191. Even this revised schedule is not so tight as to preclude further compression, either by the Legislature, or, in the absence of legislative action, by the Court itself. Oral arguments could be scheduled in mid-February and a decision announced shortly thereafter.

A certain amount of confusion and a great deal of dissatisfaction would undoubtedly result. The first can be ameliorated by diligence on the part of State and local officials. The second, the inevitable, discordant accompaniment to possible change, should play no part in our decision.

The real question is: Can this Court, consistently with its obligations to uphold and to enforce the Constitution, trade the constitutionally guaranteed rights of hundreds of thousands of children to an equal educational opportunity for the possibility of avoiding some difficulties in meeting local budget-making deadlines. I do not see how this question can be answered in any way but in the negative.

[*Robinson III, supra* at 42-43 (Pashman, J. dissenting; footnotes omitted].

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equal to the amount the district would have raised by applying its school tax rate to the difference between the guaranteed valuation per pupil and the actual (equalized) valuation per pupil.

The "incentive-equalization" formula is not a pure district power equalizing formula because it also seeks to take into account the fact that the cost of education is not the same for all students. The cost of high school education per pupil is greater than the cost of kindergarten education. A district, many of whose students fall into categories with high per pupil educational costs, may be unable to raise sufficient revenues to meet its educational needs even though another district with the same property tax base and same number of pupils, but whose pupils fall into categories with lower per pupil educational costs, could do so.

Therefore under the "incentive-equalization" formula, pupils are placed into different categories depending on the relative per pupil cost of educating them and pupils are "weighted" in the formula depending upon what category they fall into. *N.J.S.A.* 18A:58-2. Thus elementary school pupils are given a weighting of 1, kindergarteners are given a weighting of .75 and high school students are given a weighting of 1.3. Rather than providing a guaranteed valuation per pupil, the State under the "incentive-equalization" formula provides a guaranteed valuation per *weighted* pupil. In particular, the Legislature recognized that some pupils because of cultural, social and economic circumstances, may require more costly compensatory programs, and gave an additional .75 weighting for each child in the district receiving welfare (AFDC) benefits. *See generally, State Aid to School Districts Study Commission, A State School Support Prgram for New Jersey,* 39-40 (1968) (Bateman Report).

There is a third reason why a district, even though it taxes itself heavily, might not be able to raise enough revenues to meet its educational needs. Some areas, particularly urban areas, have exceptionally high non-educational expenses which must be financed through property taxes. Expenses which are exceptionally high in urban areas include county and municipal welfare, police and fire protection, and sanitation. In these areas, revenues raised by property taxes which might otherwise be used for education, must be diverted to non-educational purposes. In addition, a substantial number of municipalities because of their size, density, and special social problems, have quite properly become involved in developing a broad range of public services, particularly in the area of human health and welfare, not provided by other smaller and more affluent communities. This, too, has contributed to the staggering rise in city expenditures, further eroding the one and the same tax base – local real estate ratables.

Hence a district situated in an area which has a heavy burden of non-education expenses may not be able to meet its educational needs, even though another district with the same property tax base, the same number of weighted pupils, and the same heavy tax rate could do so. The effects of this problem, which has been labeled "municipal overburden," on the ability of some urban areas to meet their educational needs is now well documented. *See, e.g.,*

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Robinson v. Cahill, 118 *N.J. Super.* 223, 273 (Law Div. 1972). *Berke, Answers to Inequity,* 82-86 (1974); Grubb & Michelson, "Public School Finance in a Post-Serrano World," 8 *Harv.Civ.Rights – Civ.Lib.L.Rev.* 550, 564-66 (1973); Note, "A Statistical Analysis of the School Finance Decisions: On Winning Battles & Losing Wars," 81 *Yale L.J.* 1303, 1314-15 (1972); *Coons, Clune & Sugarman, Private Wealth & Public Education,* 233-36 (1970). Indeed, the State Aid to School Districts Study Commission (Bateman Commission), which drafted what subsequently became the Bateman-Tanzman Act, took express note of the problem in its report. *Bateman Report, supra* at 9, 42-43, 55, 97-99. The Bateman Commission, however, expressly chose not to deal with this problem in devising an aid formula and no provision was made for this problem in the Bateman-Tanzman Act. *Bateman Report, supra,* 8-9, 42-43, 54-55, a fact that was noted in *Robinson I, supra* at 519. Recent attempts to reform school finance in New Jersey have consistently treated the problem of municipal overburden as an important defect in the present system to be remedied. *See, e.g.,* Special Message by Governor Byrne to the Legislature, *A Plan for Education and Tax Reform in New Jersey,* 21-25 (June 13, 1974).

The majority concedes the significance of the municipal overburden problem but declines to deal with the impact of this problem on disparities in resources available for education in many local school districts because (a) many districts suffering most from the effects of municipal overburden will receive increased aid anyway under the Court's order and (b) the problem is too complicated to be dealt with by the Court. *Ante* at (Slip opinion at 19-20). Neither of these asserted reasons is well-founded.

As described above, the "incentive-equalization" formula contained in *N.J.S.A.* 18A:58-5(b) was designed to deal with two sources of disparity among local school districts in ability to finance education: differences in local property tax bases and differences in per-pupil education costs. The third source of disparity, municipal overburden, is wholly independent of the other two problems; even if those problems were completely solved, that of municipal overburden would remain. The "incentive-equalization" formula was not designed to deal with the problem of municipal overburden. That some districts that suffer from municipal overburden also suffer from insufficient tax bases and high per-pupil costs and, so, benefit from increased use of the incentive equalization formula is pure happenstance.[12]

To measure with perfect accuracy the impact of municipal overburden on the ability of urban areas to provide resources for education is an admittedly

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[12] In general large cities do not suffer from inadequate tax bases but do suffer badly from municipal overburden. Hence use of a district power equalizing formula ordinarily tends to cause these cities to lose state aid rather than gain it. This has been one of the principle defects of the use of that approach. *Berke, supra* 83, 104-5; Grubb & Michelson, *supra* 564-66. That major New Jersey cities benefit from use of a power equalizing formula is a measure of the desperate condition of our cities, for it indicates that they suffer from low property values as well as municipal overburden. Jersey City (553), Paterson (560), Hoboken (562), Trenton (566), Newark (572) and Camden (575) all rank among the 30 lowest of the 578 operating school districts in equalized valuation per weighted pupil.

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formidable task, *cf. Bateman Report, supra* at 55 (urging further study), but there are a number of simple ways of adequately approximating it.[13] The "incentive-equalization" formula can be adjusted to compensate in a rough way for municipal overburden without great difficulty.[14] The failure of the Court to attempt to do so simply buries the cities of New Jersey a little deeper in social and financial difficulties.

IV.

I regret that I am unable to concur more fully in the majority opinion. This case, born in controversy and reared in criticism, is one of rare importance for the people of New Jersey. It would be better if we could speak with a single voice. The relief ordered by the Court is a step forward and is welcome evidence of proper judicial commitment to ultimate implementation of the education clause, but it is only a very small step and not nearly adequate to the circumstances. It does incomplete justice at best.

It is the State's obligation to rectify any breach of the education clause. "If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation." *Robinson v. Cahill I*, 62 *N.J.* at 513.

That obligation is not met by unsuccessful efforts by the legislative and executive branches to devise a plan to achieve the results demanded by the Constitution, however arduous and bona fide those efforts may have been. To the children of New Jersey it matters not at all whether the State's failure to provide the educational opportunities guaranteed by the Constitution is the

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[13] Usable measures of the relative degree of municipal overburden include (1) the ratio of local revenues per capita used for non-school expenses to the statewide average of local revenues per capita used for non-school expenditures, Grubb & Michelson, *supra* at 565 & n.39; (2) the ratio of the percentage of local revenues used for school purposes to the statewide average percentage of local revenues used for school purposes, *id.*; and (3) ratio of the local non-school tax rate to the statewide average local non-school tax rate. *See Bateman Report, supra* at 97.

[14] With suitable restrictions and adjustments any of the measures described in the previous footnote can be used to modify the value for the local property tax base used in the "incentive-equalization" formula so as to reflect the fact that in some districts much of the ostensible property tax base is unavailable for education purposes because of disproportionate non-educational demands upon it. In other words, rather than the formula providing that the State will grant aid equal to that which would be raised by applying the local tax rate to the difference between the guaranteed valuation and the local property tax base, the formula would provide that the State would grant aid equal to that which would be raised by applying the local tax rate to the difference between the guaranteed valuation and a figure more truly representative of the portion of the local property tax base which is actually available for educational purposes.

Thus, for example, the equalized valuation might be replaced in the "incentive-equalization" formula by the equalized valuation multiplied by the ratio of the percentage of local revenues used for school purposes to the statewide average percentage of local revenues used for school purposes (a measure of relative municipal overburden). *See, e.g., Bateman Report, supra* at 97-98; Grubb & Michelson, *supra* at 562-63; *Mich.Comp.Laws Ann.* § 388.1279 *et seq.* discussed in Grubb, "The First Round of Legislative Reforms in the Post-Serrano World," 38 *Law & Contemp.Prob.* 459, 484 (1974).

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consequence of a deliberate policy of intransigence or merely the by-product of deadlock within the coordinate branches of government.

It has been suggested that the Legislature cannot reasonably be expected to act while the present depressed economic conditions continue. The dimensions of constitutional rights and duties, however, do not fluctuate with the rise and fall of the stock market; nor are those obligations of the State contingent upon the passing political expediency of raising revenues to comply. Economic claustrophobia cannot be permitted to overcome constitutional mandates. Obedience by the State to its organic charter is a perpetual duty – not one to be deferred to some more propitious future date. Government must observe the law scrupulously. It cannot be a law-breaker.

This Court may not put its imprimatur on the consequences of the existing stalemate within the Executive and Legislature. We, too, are bound by the mandates of the Constitution. It would undoubtedly be more convenient to endure constitutional violations than to take the grave steps necessary to prevent or correct them. But if we long permit the guaranteed rights of the children of this State to be negated by governmental inaction, then we have failed to live up to our own constitutional obligations.

The Court has the power to go even farther in ordering relief than I have urged in this opinion. It has the inherent power to completely remedy the profound constitutional wrongs identified in *Robinson 1, supra.* Delays, which are greeted with sighs of relief, are no substitute for action. We should not fear unpopularity. Any further delay or inaction is not to be tolerated. It is no longer enough for this Court to make ripples. To vindicate the rights guaranteed by the education clause we must make great breakers, and, if need be, tidal waves.

Despite the order the Court issues today, hundreds of thousands more children will be obligated to pass through inadequate school systems in this State without receiving the quality education to which they are entitled. I cannot concur in such a result.

MOUNTAIN and CLIFFORD, JJ. (dissenting).

Today's decision marks the Court's entrance into the business of financing public education. There seems to be at least tacit agreement among us all that by reason of both constitutional law and the complexities of the subject matter, the judiciary is conspicuously unsuited for shouldering the burdens of that business, more appropriately left to the Legislature as unmistakably provided by the 1875 amendment to the 1844 Constitution, *Article* IV, § 7, ¶ 6, carried over to the 1947 Constitution in *Article* VIII, § 4, ¶ 1. Since the most meticulous search of our Constitution fails to disclose any textual warrant for the unprecedented step taken by the majority, justification for this acknowledged judicial encroachment on the legislative preserve must be sought elsewhere. And so the majority discovers "a legislative transgression of a 'right guaranteed to a citizen,' " *ante* at (slip opinion p. 14), in turn evoking a judicial "response to a constitutional mandate," *ante* at (slip opinion p. 25) – presumably the "mandate" of

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Article VIII, § 4, ¶ 1 referred to above, directed solely to the *legislative* branch, since no other mandate is or possibly could be identified. By such diaphanous thread hangs the justification – indeed, the asserted necessity – for the Court's action.

Because we find ourselves in substantial accord with many of the majority's views, and because we recognize the desirability of as much unanimity as may be mustered in support of so significant a decision as today's, it is with some reluctance that we register our dissent. Few cases receive the exhaustive treatment, both by way of opportunity afforded any interested party to present his views and by way of frequent exchange of ideas among members of the Court, as has been accorded this one. The opinions of our colleagues are entitled to and do receive our profound respect. But so firm is our conviction concerning the proper scope of the judicial function at this juncture that we feel obliged to express our disagreement with the remedy here invoked. That disagreement focuses on the majority's conclusion that school aid funds appropriated or to be appropriated by the Legislature should be reapportioned by this Court in a manner which will allegedly attain a closer approximation of the kind of funding believed to be required to support "a thorough and efficient" education. We think the Court should rather stay its hand.

Initially it should be emphasized that in wrestling with this difficult problem it is of the utmost importance to bear in mind that as of this moment no one has defined what is meant by "a thorough and efficient" education. As the majority correctly points out, it is not the function of this Court to establish the components of a thorough and efficient education. It is rather its duty to "appraise [the] compliance" of an educational system presented for judicial review as to constitutional sufficiency. We note with approval, as does the majority, that the State Commissioner of Education has prepared and published rules and regulations looking to this end. 7 *N.J.Reg.* 132 (April 1975). We are likewise aware that in each house of the Legislature bills have been introduced bearing directly upon the same subject matter.

In our view there has clearly been delegated to the Commissioner of Education the power, as there has also been allocated to him the responsibility, to take whatever steps may be necessary to define the meaning of the constitutional term "thorough and efficient," to lay down guidelines for the implementation of a program that will give it reality, and to see to it that the school districts of the State actually meet these requirements. *Bd. of Educ. of Twp. of E. Brunswick v. Twp. Council of E. Brunswick,* 48 *N.J.* 94 (1966); *Bd. of Educ. of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 501 (1970); *Jenkins v. Twp. of Morris School Dist.,* 58 *N.J.* 483 (1971). A clear if unstated effect of our earlier opinion in this case, *Robinson v. Cahill,* 62 *N.J.* 473 (1973), was to lay upon the Commissioner an immediate obligation to formulate rules designed to make precise the nature of the constitutional mandate and to provide for its implementation.

While we think it clear that as the law now stands the Commissioner of Education has both the power and the obligation to define what is meant by "a thorough and efficient" education and to see that our public school system

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meets prescribed standards, we are very conscious that in exercising such functions he is acting more or less as an agent of the Legislature. The latter is at any time completely at liberty to change or revoke his powers or to supersede them by the passage of legislation immediately directed to the issue. Some of the bills that have been introduced seem to have a close textual correlation with the Commissioner's proposed rules, suggesting that there is here a commendable cooperative effort being made by the two political branches of government.

Thus far we are in general agreement with the majority. When, however, it comes to the proposed reallocation of appropriated funds, as we have said, we take a different view. The problem rests in the concept commonly referred to as the doctrine of the separation of powers. It finds explicit expression in the New Jersey Constitution:

> The powers of the government shall be divided among three district branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution. [*Art.* III, ¶ 1.]

The doctrine has not enjoyed a consistent development; it has been praised and it has been criticized. The uneven history of the concept may be noted but need not detain us here. The Supreme Court of the United States once said that all powers of government are divided into the executive, the legislative, and the judicial; and that it is "essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn v. Thompson,* 103 *U.S.* 168, 191, 26 *L.Ed.* 377, 387 (1881). Professor Kenneth Culp Davis believes that probably no more extreme statement of the theory of separation of powers can be found in Supreme Court opinions. 1 *Davis, Administrative Law Treatise,* § 1.09, at 64 (1958). Some years later, although in dissent, Justice Holmes suggested a somewhat different and rather more modern view:

> It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires. [*Springer v. Government of Philippine Islands,* 277 *U.S.* 189, 211, 72 *L.Ed.* 845, 853 (1928).]

The most significant challenge to the doctrine of the separation of powers came with the birth and lusty growth of administrative law. The story has been often told and needs no repeating. In modern times Congress and state legislatures have created regulatory agencies that have quite generally possessed legislative, judicial and executive powers. Thirty or forty years ago administrative agencies were attacked as being flagrant examples of a violation of the doctrine of the separation of powers, but the positive needs of government

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supported by flexible constitutional interpretation won the day. *Landis, The Administrative Process* 1-5 (1938); 1 *Davis, supra,* § 1.09; 1 *Cooper, State Administrative Law* 15 *et seq.* (1965).

Clearly today the doctrine of the separation of powers cannot be said to require a complete compartmentalization along triadic lines. More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, *but only so long as checks and balances are present to guard against abuses.* This was the view adopted by this Court in *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 *N.J.* 356, 362-65 (1949).[1]

As this Court more recently observed:

> The doctrine of separation of powers must * * * be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of *unchecked* power in the hands of any one branch.
> [*David v. Vesta Co.*, 45 *N.J.* 301, 326 (1965) (emphasis in original).]

Professor Davis is also of the view that

> * * * the true principle that should guide the allocation of power within the general framework is not the principle of separation of the three kinds of power but is the principle of check.
>
> The danger is not blended power. The danger is unchecked power.
> [1 *Davis, supra,* ¶ 1.09, at 68.]

Two examples may help to illustrate the point we make. It would probably be generally conceded that when the Legislature bestows judicial and executive powers upon an agency of its creation, there is a departure from the doctrine of the separation of powers, at least as seen in its most simplistic and restricted sense. So too, when judges make law in the process of deciding cases, it can properly be said that they are indulging in legislation and that this is theoretically repugnant to the doctrine of the separation of powers. Each of these practices, however, is now completely accepted and has indeed become commonplace. Significantly, however, in each of these instances the power being exerted by the branch of government to which that power is not intrinsically inherent is not unchecked. In the first example given, it will be noted that the

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[1] In the course of his opinion for the Court, Chief Justice Vanderbilt had this to say:

> The doctrine [separation of powers] * * * has not only been accepted as a cardinal principle of American constitutional law but has been relied upon from our earliest days as a nation as a fundamental and indispensable bulwark against despotism.* * * Lord Acton's aphorism merits quotation at this point: "Power tends to corrupt and absolute power corrupts absolutely." *Acton: Essays on Freedom and Power* (1948). The doctrine of the separation of powers is the great contribution of Anglo-American lawyers to the prevention of absolutism and the preservation of the rights of the individual against the state. [2 *N.J.* at 363-64.]

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various powers bestowed upon a judicial agency are all subject to judicial review. In the second example the judicial legislation undertaken by a court in the exercise of its adjudicatory function is immediately subject to the will of the legislature. The latter has the last word; by appropriate legislation the rule of law laid down by the court can be at once changed or annulled.

But what of the power that we are considering here? We assume it would not be disputed that the power of appropriating public funds is commonly understood to be a legislative function. If the Court undertakes to reallocate funds the ultimate disposition of which has been fixed by the Legislature pursuant to the exercise of its acknowledged power of appropriation, how is this new-found power of the Court to be controlled? How can it be checked? We discern no way that this can be done. The power to appropriate is *singularly* and *peculiarly* the province of the Legislature. It is commonly thought of as an adjunct to the taxing power. If the courts are at liberty, for whatever reason, to reallocate appropriated funds in some particular case, why may not the courts do so in other cases as well? Who is to stay the judicial hand and what law is to guide its exercise? There are no discernible boundaries or limits beyond which the power might not be exerted provided only that the Court were made to feel that the exigency of the moment was sufficiently serious to justify the action. It seems to us that the exercise of such a power by the courts is indeed unchecked, and that it cannot be said to fall within any relaxation of the doctrine of the separation of powers that has thus far been countenanced. See generally Gibbons, "The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers," 5 *Seton Hall L.Rev.* 435 (1974); Wright, "The Role of the Supreme Court In A Democratic Society – Judicial Activism or Restraint?," 54 *Cornell L.Rev.* 1 (1968).

Quite apart from these compelling doctrinal considerations which work against the majority's remedy, we would point out that the federal decisions relied upon to support the existence (much less the exercise) of the judicial power to redistribute and *de facto* appropriate funds, *ante* at are not in point. The separation of powers is an intra-governmental concept, not an inter-governmental one. It refers to the allocation of power within a particular sovereignty or government, whether state or federal. *Cf. Baker v. Carr,* 369 *U.S.* 186, 210, 7 *L.Ed.* 2d 663, 681-82 (1962). But the federal cases cited in the majority opinion all concern evaluations of the deeds or practices of another governmental entity not on the same level with the federal judiciary, *i.e.*, a state or subdivision thereof.[2] In not one case cited by the majority did affirmative

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[2] The Court's reliance on *Mills v. Bd. of Educ.*, 348 *F.Supp.* 866 (D.D.C. 1972) is misplaced. In *Mills* the District Court found a violation of equal protection in the school district's failure to provide an education for mentally handicapped children. The Board of Education asserted that no funds had been appropriated by Congress for that purpose. We suggest that the court was not persuaded by that contention because it was obvious that Congress intended no such restricted use of the appropriated funds and the Board was simply misinterpreting the appropriation law. However, even assuming the majority's interpretation of *Mills* is correct, we take notice of the fact the defendants there were not the executive and legislative branches of the federal government, but rather the Board of Education and the Commissioner of the District of Columbia. And they were directed merely to redistribute the funds made available to them.

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conduct or idleness of a co-ordinate, co-equal branch confront the federal courts. The restraint normally imposed on the exercise of judicial power by the separation of powers doctrine is thus lacking in those instances. The sole decision mentioned by the majority involving this Court and a co-ordinate branch of government, *Jackman v. Bodine,* 43 *N.J.* 453 (1964), simply reiterates the "one-man,one-vote" principle etched into the law by the Supreme Court in *Baker v. Carr, supra,* and *Reynolds v. Sims,* 377 *U.S.* 533, 12 *L.Ed.*2d 506 (1964). Measuring the consistency of state activity against the command of the federal Constitution does not raise the spectre of the separation of powers. Nor were what Mr. Justice Stewart has characterized as the "intractable economic, social, and even philosophical problems" of a remedy, *Dandridge v. Williams,* 397 *U.S.* 471, 487, 25 *L.Ed.*2d 491, 503 (1970), so intense in *Jackman* as the problems generated by this Court's act of reallocating funds in the case at bar. And if the cited authorities represent what the majority characterizes as "emerging modern concepts as to judicial responsibility to enforce constitutional right," *ante* at we suggest those concepts should for now be permitted to remain in their "emerging" stage rather than receive further nourishment from imprudent and untimely judicial activism.

Moreover, as the majority opinion points out, there is a second provision of the New Jersey Constitution which is also applicable. *Article* VIII, § 2, ¶ 2, in pertinent part reads as follows:

> No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; * * *.

Again, we face a specific and explicit constitutional prohibition standing in the way of the action sought to be undertaken.

We recognize that it is difficult to deal in terms of constitutional absolutes. Constitutional interpretation is a delicate, sensitive and flexible process. Yet we cannot at the present time foresee a state of affairs or set of circumstances which would justify this proposed encroachment upon the prerogative of another branch of government.

Other reasons as well suggest that the Court should exercise self-restraint. Since this Court's decision several years ago there has been no lack of energetic and thoughtful attention given to the problem we are considering. It has been the almost constant concern and preoccupation of the Legislature and of the Commissioner of Education. While these considerable efforts have thus far been unsuccessful, we should nevertheless await their fruition. At the very least the step here contemplated should not be taken before anyone yet knows what is meant by "a thorough and efficient" education. The elusive concept has many ingredients of which fiscal considerations are but one. No one knows today which school districts in the State may or may not be fully meeting their constitutional obligations. This point is made clear in the thoughtful and penetrating editorial entitled "Courts Cannot Encroach upon the Powers

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Belonging to the Executive or Legislative Branches of Government" appearing in the New Jersey Law Journal on April 24, 1975. (98 *N.J.L.J.* 356.) Surely, all constitutional restraints aside, as to any particular school district, there should first be a determination of legitimate fiscal insufficiency before supplying a judicially granted increase in state aid beyond the amount set by the Legislature, just as there should be a finding of overabundance of funds before invoking a judicially-mandated decrease.

Finally, we acknowledge that our position of restraint may very well be at odds with what may be seen as the most expeditious and efficient method of achieving final resolution of this troublesome case: exercise of the Court's presumed power itself to undertake, as the majority does today, the necessary financing. But restraint derived from a perceived limitation on the judicial power at this moment does maintain some semblance of a working balance between our three branches of government. Mr. Justice Brandeis once observed:

> The doctrine of the separation of powers was adopted * * * not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.
> [*Myers v. United States,* 272 *U.S.* 52, 293, 71 *L.Ed.* 160, 242-43 (1926) (dissenting opinion).]

This doctrine deserves more than the ceremonial bow given it by the majority en route to its discovery of the requisite authority to act. This power it draws *not* from the Constitution but from a conviction that since it must act, it must therefore also have the power to act. The present circumstances do not yet compel us to find that we must, out of sheer necessity, have that power. While ours is an imperfect resolution, it better preserves for the future the integrity of the institutions of this government.

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Elizabeth H. Rogers,

Petitioner-Appellant,

v.

Board of Education of the Northern Burlington Regional School District et al., Burlington County,

Respondent-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 24, 1974

For the Petitioner-Appellant, Rogers & Smith, Esqs. (Robert F. Rogers, Esq., of Counsel)

For the Respondent-Appellees, Parker, McCoy and Criscuolo (Richard J. Dill, Esq., of Counsel)

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

April 2, 1975

Board of Education of the Regional School District of Scotch Plains-Fanwood in the County of Union,

Petitioner,

v.

Mayor and Council of the Township of Scotch Plains, and Mayor and Council of the Borough of Fanwood in the County of Union,

Respondents.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 13, 1974

The Respondents Mayor and Council of the Township of Scotch Plains and Mayor and Council of the Borough of Fanwood having appealed to the State Board of Education from the entire decision of the Commissioner of Education rendered December 13, 1974, which appeal is now pending before the State

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Board of Education, and the parties subsequently having been able through discussion and negotiation to settle and resolve the matters in dispute;

It is hereby stipulated and agreed by and between the parties hereto that there shall be added to the tax levy previously certified by the Respondents on March 5, 1974 to the Union County Board of Taxation, the sum of $534,260.00 for the operation of the school system in the district for the 1974-1975 school year, which sum shall supersede the amount determined by the Commissioner of Education; and

It is further stipulated and agreed that said appeal shall be dismissed with prejudice, such dismissal having been authorized by appropriate resolutions duly adopted by the Board of Education of the Scotch Plains-Fanwood Regional School District, the Council of the Township of Scotch Plains and the Council of the Borough of Fanwood, which resolutions authorize the attorneys for the respective parties to execute and file the within Stipulation.

March 21, 1975

Joseph F. Shanahan,

Appellant,

v.

State Board of Education, Edward W. Kilpatrick, Acting Commissioner of Education,

Respondents,

and

Robert J. Cornell,

Appellant,

v.

State Board of Education, Edward W. Kilpatrick, Acting Commissioner of Education,

Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, June 29, 1973

[In the Matter of the Annual School Elections Held in the School District of the City of Lambertville and in the South Hunterdon Regional High School District, Hunterdon County]

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Decided by the State Board of Education, March 6, 1974

Argued January 28, 1975 -- Decided March 13, 1975

Before Judges Matthews, Fritz and Botter.

On appeal from the decision of the State Board of Education.

Mr. Joseph F. Shanahan argued the cause *pro se* and for appellant Cornell.

Miss Jane Sommer, Deputy Attorney General, argued the cause for respondents (Mr. William F. Hyland, Attorney General, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel).

A statement in lieu of brief was filed by Mr. Robert J. T. Mooney, attorney for Board of Education, Borough of Watchung (Messrs. Buttermore and Mooney, attorneys).

PER CURIAM

These are consolidated appeals from decisions of the State Board of Education in the matters of the annual school elections held in the school district of Lambertville, Hunterdon County, and the school districts of the Borough of Watchung and the Watchung Hills Regional High School, Somerset County, affirming decisions of the Commissioner of Education which overruled his prior decision which had directed that any list of voters' names compiled by challengers in school district elections should be destroyed to prevent their further use after the closing of the polls.

On February 13, 1973, a school election was held in the City of Lambertville school district in which appellant Shanahan is a resident and taxpayer. On February 22, 1973, Shanahan filed a letter of complaint with the Commissioner of Education charging that certain challengers employed at the polls in that election had left the polling places without destroying or disposing of the informal poll lists they had compiled. He requested the Commissioner to determine whether such lists had been kept by the challengers and, if so, to order them destroyed. He did not challenge the results of the election.

A hearing was held on Shanahan's petition before a hearing officer designated by the Commissioner. The hearing officer found that although the challengers who testified admitted that they had compiled informal polling lists during the election, there was no evidence either that they had removed their lists from the polling place or that such lists were still in existence at the time of the hearing. He therefore recommended that in the absence of any proof of Shanahan's allegation of election irregularities, his petition should be dismissed.

The Commissioner noted in his decision that the question raised by appellants had been considered previously in his decision, *In the Matter of the Annual School Election in the School District of the Borough of Watchung, Somerset County,* rendered May 11, 1972, which was affirmed by the State Board of Education. In that opinion the Commissioner found that it would not be improper for a challenger to prepare an informal poll list. However, he noted

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that by statute formal poll lists must be prepared (*N.J.S.A.* 18A:14-28), and that within five days of the election these lists together with other specified election materials must be forwarded in a sealed package to the county superintendent to be preserved for one year. (*N.J.S.A.* 18A:14-62). Therefore he concluded that even though challengers' informal lists are not subject to the requirements of *N.J.S.A.* 18A:14-62, they should be destroyed following an election.

In reviewing Shanahan's petition, the Commissioner re-considered his May 11, 1972 decision and overruled it insofar as it required destruction of informal poll lists, because: (1) the requirement had proven unenforceable; and (2) the list compiled by a challenger is an informal one reflecting only his observation of who has voted, while the official poll list which is the subject of statutory protection is an official compilation of voters' signatures used by election officials for purposes of comparison with the signature copy register to determine voters' eligibility to receive a ballot. *N.J.S.A.* 18A:14-51. Shanahan's petition was therefore dismissed.

Shanahan appealed the decision to the State Board of Education insofar as it overruled the 1972 Watchung holding. The State Board affirmed. It concluded that since, pursuant to *N.J.S.A.* 19:31-18.1, any voter, including a challenger, may purchase a copy of the voters' registry list from the County Clerk, it was proper for a challenger to prepare an unofficial poll list by checking off names of voters on his own copy of the registry list, and thereafter retain and remove it from the polling place without legal impediment. The State Board further concluded that *N.J.S.A.* 18A:14-62, which requires sealing and protection of official poll lists, does not apply to unofficial lists informally compiled by challengers.

In the second action, appellant Cornell filed a letter complaint with the Commissioner claiming that in a statement issued to the public on January 18, 1973 the Board of Education of the school district of the Borough of Watchung had indicated that it did not intend to require that challengers' informal poll lists be destroyed following the approaching school election. A hearing was held on that complaint before a hearing examiner designated by the Commissioner on the same day that the annual school election was held in the district.

Subsequently, Cornell filed complaints with the Commissioner charging that in the school district elections for both the Watchung Hills Regional and Watchung Borough districts, election officials were advised by their respective school board secretaries that challengers could prepare lists of people voting and could retain those lists, contrary to the Commissioner's decision in the 1972 Watchung case which required destruction of challengers' lists. Cornell petitioned the Commissioner to investigate these alleged irregularities and to take appropriate action, should irregularities be found. He did not challenge the results of the elections.

A hearing was held on both complaints before a hearing examiner designated by the Commissioner. The Commissioner rendered a decision covering both complaints in which he overruled his earlier determination in the 1972 *Watchung* decision requiring destruction of challengers' informal poll lists

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for the same reasons set forth in his decision on Shanahan's petition. Accordingly, he dismissed both of Cornell's complaints.

Cornell appealed from this decision to the State Board of Education, which on March 6, 1974 affirmed the Commissioner's decision for the same reasons given in its affirmance of dismissal of Shanahan's petition on the same issue.

Both Shanahan and Cornell now appeal from the State Board's decisions. We consolidated the appeals by consent order.

The issue in each of the consolidated matters before us is whether *N.J.S.A.* 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, imposes upon the State Board of Education by implication the duty to require that informal challengers' lists be prepared during the same election be destroyed or otherwise kept from the public for one year. The issue may best be understood by reference to the statutory scheme establishing the school election process and the significance of poll lists within that process.

N.J.S.A. 18A:14-48 requires the designated clerk of a school district election to keep an official poll list at each polling place which is to be "arranged * * * in such manner that each voter voting in the polling place at the election may sign his name and state his address therein and the number of his official ballot may be indicated opposite the signature."

Each voter who enters the polling place during the election must give his name and address to the election official in charge of the signature copy register. *N.J.S.A.* 18A:14-49. That register is the same signature copy book used in general elections and is provided for comparison purposes only to the school district by the commissioner of registration of the county. *N.J.S.A.* 18A:14-47; 18A:14-51. Before receiving a ballot, a voter must sign his name on the official poll list, *N.J.S.A.* 18A:14-50, and that signature must be compared with the voter's signature in the signature copy register. *N.J.S.A.* 18A:14-51.

Immediately after the election, the official poll list, the tally sheets and ballots are placed in a sealed package and delivered by the inspector of election at each polling place to the secretary of the local board of education, *N.J.S.A.* 18A:14-61, who, in turn, "within five days after the date of the election, [shall] forward a sealed package containing a statement of the canvass of the votes in the school district, the ballots, including the irregular ballots, the poll lists and the tally sheets to the county superintendent who shall preserve them for one year." *N.J.S.A.* 18A:14-62.

Thus, public inspection of official poll lists is barred for one year after a school election unless a charge of irregularity is made.

A challenger's right to make an informal list of voters' names was established by the Commissioner and the State Board in the May 1972 *Watchung*

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decision, above, and is not at issue here. Appellants argue, however, that *N.J.S.A.* 18A:14-62 represents an attempt by the Legislature to keep the identity of voters at a school election concealed from the general public, at least until the following election. They suggest that if voters' identities are not so concealed, the integrity of the election process is somehow harmed. They do not suggest that the outcome of either of the elections out of which these appeals arise was improperly affected, nor have they shown that the integrity of the election processes in either election has been harmed by the claimed availability of challengers' lists after the elections were concluded.

We find nothing in the statutory language or the statutory scheme to suggest that the sealing of the official poll lists for one year was intended to do any more than protect them as documentation of one school election for one year. Certainly, we find no indication that the requirement that those lists be sealed was designed to keep the identity of voters in one election secret until after the next ensuing election.

It is apparent that the official poll list required to be kept under *N.J.S.A.* 18A:14-48 is a perishable document easily susceptible to mutilation, destruction or alteration, compared, for example, to the official signature copy register required to be maintained under the general election laws. The legislative concern for the integrity of the school district election process by requiring the immediate sealing and depositing of such election records is more readily understandable when that fact is considered. We have recently recognized that concern in our determination that the provisions of *N.J.S.A.* 18A:14-61 and 62 are exceptions to *N.J.S.A.* 47:1A-1 *et seq.,* the Right To Know Law. *Shanahan v. N.J. State Bd. of Education,* 118 *N.J. Super.* 212 (App. Div. 1972). We do not read our opinion in *Shanahan* to suggest that the provisions of *N.J.S.A.* 18A:14-61 and 62 are designed to hide from the electorate the identity of the individual voters who cast their ballots in the most recent school district election. Rather, we recognized the legislative purpose of keeping the official election records, including the official poll lists, *physically* protected for the period of one year absent a question of election irregularity.

Finally, we find no merit to appellants' arguments that the decision of the State Board of Education is arbitrary and capricious in that it failed to consider the integrity of the school election processes which is described as the basic issue raised, and that the structure of the appeals system of the Department of Education is such that it denied procedural due process to them.

Affirmed.

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Leslie M. Shenkler,

Petitioner-Appellant,

v.

Board of Education of the Borough of Ho-Ho-Kus, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 27, 1974

For the Petitioner-Appellant, Leslie M. Shenkler, *Pro Se*

For the Respondent-Appellee, Carpenter, Bennett & Morrissey (Arthur M. Lizza, Esq., of Counsel)

For the New Jersey School Boards Association, *Amicus Curiae,* Allan P. Dzwilewski, Esq.

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

April 2, 1975

Joan Sherman,

Petitioner-Appellant,

v.

Malcolm Connor, individually and as Acting Superintendent of Schools of Borough of Spotswood and Board of Education of the Borough of Spotswood,

Respondents-Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, January 26, 1973

Decided by the State Board of Education, March 6, 1974

Argued: December 17, 1974 – Decided: January 28, 1975

Before Judges Kolovsky, Lynch and Allcorn.

On appeal from the New Jersey State Board of Education.

Mr. Jack Wysoker argued for appellant (Messrs. Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, attorneys).

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Mr. Abraham J. Zager argued for respondent Malcolm Connor (Messrs. Zager, Fuchs, Leckstein & Kauff, attorneys; Mr. Michael R. Leckstein on the brief).

Mr. Philip H. Shore argued for respondent Board of Education of the Borough of Spotswood (Messrs. Golden, Shore & Paley, attorneys).

Mr. William F. Hyland, Attorney General, Submitted a Statement in Lieu of Brief on behalf of State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel).

Appellant (hereafter petitioner), a nontenured teacher employed by respondent Board of Education of the Borough of Spotswood (Board), signed a resignation from her position on October 20, 1970, which resignation was accepted by the Board on October 21, 1970. In an action in lieu of prerogative writ appellant alleged that her resignation was obtained under duress; that it amounted to a discharge without 30 days prior notice thereof as required by her contract of employment; that she was entitled to and had requested the reasons for her termination but that they were refused, and that her discharge was discriminatory, being based, at least in part, on the fact that she was of the Jewish faith. Upon motion by the respondents petitioner was ordered to pursue her administrative remedies with the Commissioner of Education pursuant to *N.J.S.A.* 18:6-9 *et seq.* She filed a petition with the Commissioner and a hearing was held.

Ultimately, on June 21, 1972, the Commissioner rendered his decision holding that: (1) the resignation of October 20, 1970 was given under duress and was therefore a nullity; (2) her employment was illegally terminated on October 21, 1970; (3) petitioner, as a nontenured teacher, was not entitled to the reasons for her termination, relying on *Zimmerman v. Newark Board of Education,* 38 *N.J.* 65, 70 (1962); (4) petitioner, by virtue of the 30 day notice provision of her contract, was entitled to be paid for the 30 day period from October 20, 1970 to November 20, 1970; (5) petitioner's mere allegations of religious discrimination were insufficient to justify the granting of discovery rights, but he allowed her ten days to amend her petition and submit an offer of proof that there was such a case of religious discrimination.

Subsequently, petitioner filed an amended petition, alleging that the Board had failed to renew the contracts of two other nontenured Jewish teachers. Petitioner appended an affidavit in which she averred: "I recognize that the foregoing offer of proof may not be sufficient to establish discrimination based on my being a member of the Jewish faith." However she sought a right of discovery to support that claim. The amended petition also alleged that petitioner had acquired tenure under *N.J.S.A.* 18A:28-5(c), reiterated her claim that she was entitled to the reasons for her termination and the opportunity to respond to them, and further alleged a denial of due process. Respondent Board moved to dismiss the amended petition and filed affidavits denying religious discrimination. By decision of January 26, 1973 the Commissioner held that a prima facie case of religious discrimination had not been made out, and that petitioner had not been deprived of her "liberty" or any "property right" under

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the due process clause; consequently he granted the motion to dismiss the amended petition.

On appeal the State Board of Education affirmed the decision of the Commissioner for the reasons expressed therein. This appeal followed.

We, too, affirm substantially for the reasons given by the Commissioner in his decisions of June 21, 1972 and January 26, 1973, with the following additional comments.

Subsequent to the filing of petitioner's brief on this appeal the Supreme Court decided *Donaldson v. Bd. of Ed. of No. Wildwood,* 65 *N.J.* 236 (1974). Petitioner thereupon filed a reply brief with this court, relying on *Donaldson* as to her request for the reasons for her termination, and also urging that she is entitled to a hearing regarding the sufficiency of those reasons.

As to the effect of *Donaldson,* it clearly holds that a nontenured teacher whose contract is not renewed is entitled to a statement of reasons as to why she was not retained. There remains the question whether the rule in *Donaldson,* pronounced June 10, 1974, should be applied retrospectively to petitioner's termination on October 21, 1970, and thus be read to impose on respondent Board a duty which no prior law or administrative practice required.

The court in *Donaldson,* in pronouncing the rule mandating giving of reasons to a terminated nontenured teacher, said:

> Many boards by collective contracts under *N.J.S.A.* 34:13A-1 *et seq.,* have already agreed to furnish reasons and those which have not will, under this opinion, ***hereafter*** be obliged to do so. [65 *N.J.* at 248; emphasis added].

We consider the foregoing as an indication that *Donaldson* be given only prospective application. To give it retrospective application so as to impose an obligation on Boards of Education as to terminations prior to *Donaldson,* which neither law, administrative policy or labor contracts imposed on them would, in our opinion, be unwise. We therefore conclude that Donaldson is to be applied only prospectively and petitioner, in this case, is not entitled to a statement of reasons. Since that is so, we do not reach the question as to whether she is entitled to a hearing.

The decision of the State Board of Education is therefore affirmed.

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**In the Matter of the Tenure Hearing of Anna Simmons,
School District of the Borough of Eatontown, Monmouth County,**

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 21, 1974

Decision on Motion by the State Board of Education, October 2, 1974

For the Petitioner-Appellee Anna Simmons, Stafford W. Thompson, Esq.

For the Respondent-Appellant Eatontown Board, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel)

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

March 5, 1975

Veronica Smith and Sayreville Education Association,

Petitioners-Appellants,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 21, 1974

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Casper P. Boehm, Jr., Esq.

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

April 2, 1975

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In the Matter of "T" by her parents and natural guardians,

Petitioners-Appellants,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 24, 1974

For the Petitioners-Appellants, Capone, Gittleman & Anastasi (Melvin Gittleman, Esq., of Counsel)

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

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the following directive: Should T be reevaluated by the Tenafly Child Study Team, the Team's report and recommendations shall be referred to the Bureau of Special Education and Pupil Personnel Services, State Department of Education, for review and approval prior to its implementation.

Reverend Bryant George abstained.
March 5, 1975

Board of Education of the City of Trenton,

Petitioner-Appellant,

v.

City Council of the City of Trenton and the Commissioner of Education,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 15, 1974

For the Petitioner-Appellant, Merlino and Andrew (Michael A. Andrew, Jr., Esq., of Counsel)

For the Respondent-Appellee Commissioner of Education, Jane Sommer, Deputy Attorney General

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

April 2, 1975

Eugene Vigna *et al.*,

Petitioners,

v.

Board of Education of the Township of Lakewood, Ocean County,

Respondent.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 21, 1974

For the Petitioners, Bathgate, Wegener and Sacks (Richard K. Sacks, Esq., of Counsel)

For the Lakewood Board, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

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

March 5, 1975

Sally Williams,

Respondent-Appellant,

v.

Board of Education of Union Township, Union County,

Petitioner-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, October 10, 1973

Decided by the State Board of Education, February 6, 1974

Argued December 10, 1974 – Decided January 15, 1975

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Before Judges Carton, Crane and Kole.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. Howard Schwartz argued the cause for respondent, Board of Education (Messrs. Simone and Schwartz, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent New Jersey State Board of Education, filed a statement in lieu of brief; Ms. Mary Ann Burgess, Deputy Attorney General, of counsel.

The opinion of the court was delivered by CARTON, P.J.A.D.

Sally Williams, a teacher under tenure, appeals from a determination of the New Jersey State Board of Education affirming the decision of the Commissioner of Education in dismissing her from her position as a teacher of special education. The Commissioner sustained eight of fourteen charges certified to him by the Board of Education of Union Township.

The Commissioner found that the entire record disclosed

> * * * a pattern of conduct * * * which is unprofessional and constitutes unbecoming conduct for a teacher. Specifically [the teacher] has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore [the teacher] must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

The argument advanced by appellant for reversal is that the Commissioner's determination was based on "totally incompetent evidence." The thesis is that, because some of the charges against the teacher were partially supported by testimony of parents and other teachers, which testimony included statements made to them by pupils in her class, the determination cannot stand.

The children taught by appellant comprise a special class of mentally retarded children who cannot be classified as educable but who are considered trainable. Their classification is specified by statute. *N.J.S.A.* 18A:46-1 defines a handicapped child 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 or multiply handicapped.

N.J.S.A. 18A:46-8 requires that all handicapped children be classified under one of the above-named categories. A subcategory of mentally retarded

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children is that of "trainable mentally retarded children," defined in *N.J.S.A.* 18A:46-9 as

> so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self-help, of communicating satisfactorily, of participating in groups, of directing their behavior so as not to be dangerous to themselves or others and of achieving with training some degree of personal independence and social and economic usefulness within sheltered environments.

The class being taught by appellant consisted of a group of about ten pupils, fourteen years of age and older. These pupils were described as having an I.Q. level ranging from 20 to 50. The evidence indicated that the I.Q. levels of some of the pupils in appellant's class were so low that they could not be measured.

The Commissioner's decision appears to have been based upon the cumulative instances of unfavorable conduct. *Cf. Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), aff'd 131 *N.J.L.* 326 (E.&A. 1944). Five of the eight charges sustained were unaffected by the challenged evidence. Charges 4 and 11 charge the teacher with leaving her class unsupervised and without permission. Charges 6 and 7 charge insubordination toward Frank A. Moretti, Director of Student Personnel Services for appellee Board, in that the teacher entered Moretti's office, threatened him and made derogatory remarks (Charge 6) and refused to meet with parents in Moretti's presence (Charge 7). Charge number 10 charged the teacher with making a remark to the class that one of the pupils should have stayed home. With respect to Charges 4 and 11, Director Moretti testified that all teachers, especially those of special education, were never permitted to leave their classes unattended. Each of these five charges was supported by substantial credible evidence.

In their totality, and without regard to the three charges on which the evidence was challenged, the proof was sufficient to justify the determination of the Commissioner. Therefore the determination appealed from must be affirmed. See *Atkinson v. Parsekian,* 37 *N.J.* 143, 149 (1962); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 22-23 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974).

The evidence which appellant criticizes on this appeal as being inadmissible relates to episodes which were the subject of the first, second and eighth charges. In Charge 1 appellant was charged with striking a pupil named Charles Moore. In Charge 2 she was charged with intimidating and threatening pupils in her classroom. In Charge 8 she was charged with striking a pupil named Renee Bojorquez.

The general character of the evidence objected to is similar as to each of these charges. Reference to the evidence on the first charge will be sufficient to illustrate its nature.

Charles Moore's mother testified that in May 1971 Charles told her that

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appellant had hit him. She said he had marks on his body. The next day Mrs. Moore asked the children on the school bus who was hitting her child. Three or four of the pupils stated it was the teacher.

The physical education teacher testified that one afternoon in the Spring of 1971 he noticed Charles crying in the boys' gym. When he asked Charles what was wrong the boy did not reply, but another pupil said the teacher struck Charles. Three other teachers and the Director of Student Personnel Services gave testimony concerning an incident in which they noticed Charles crying but could get no response from him. Two students told one of the teachers named Hassard that the teacher struck Charles. When Charles motioned with his hands to his body, Hassard raised the boy's shirt and observed a discoloration of the skin under the armpit.

Immediately after the incident the Director of Student Personnel Services spoke to appellant but she denied having struck the boy. She also denied other allegations when questioned by Charles' parents the next day. The parents of two other pupils of the class also testified that their children had mentioned this episode several months after it occurred, one of them saying that appellant had hit Charles hard.

Appellant testified that Charles is unable to talk, and claimed that she asked Charles who hit him, telling him to point to the person who did so, but Charles did not respond. Another teacher testified that Charles was able to communicate his needs.

It seems agreed by the parties and accepted as true by the Commissioner that none of these pupils was able to give competent testimony at the hearing. It does not necessarily follow that no consideration whatsoever can be given to their communications. The evidence at the hearing indicated that the pupils in this class were able to communicate, at least to some degree, their feelings and reactions. Indeed, the Director of Student Personnel Services, in describing the pupils in this class, stated that although these pupils are trainable they cannot think abstractly and tell deliberate lies because of their inability to fabricate them.

An analysis of this evidence indicates that it falls into three categories. The first includes the statements made by Charles to his mother and the statements made by other students to the gym teachers. These were made within a reasonable proximity to the event described, the alleged striking of Charles by appellant. As such they are admissible as exceptions to the hearsay rule as excited utterances under *Evid. R.* 63(4). That rule provides:

> A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the declarant was under the stress or nervous excitement caused by such perception, in reasonable proximity to the event and without opportunity to deliberate or fabricate.

In determining whether evidence of this character should be admitted, the

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crucial question is always whether the circumstances negate the possibility that the declarant fabricated or contrived a misrepresentation. The temporal proximity of these statements to the event described might itself be sufficient to conclude that the evidence was trustworthy. Coupled with the testimony that these declarants, "trainable" children, lacked the mental capacity either to fabricate an untruth or to conspire to tell the same untruth, they are clearly admissible. The circumstance that several sets of parents and four teachers and administrators testified to similar statements by the children lends further support to the trustworthiness of this evidence.

Nor is it significant that the declarants themselves might be incompetent to be called as witnesses. See *State v. Simmons,* 52 *N.J.* 538, 542 (1968), where the older brother of a mentally deficient 16-year-old deaf mute rape victim was permitted to relate her actions and gestures in identifying her assailant.

The second category of evidence includes the testimony of the two gym teachers concerning their observations of Charles shortly after the alleged striking. One teacher reported that he had observed Charles crying. The other said that in response to Charles' gestures he raised the boy's shirt and discovered a discoloration of the skin under the armpit. This is circumstantial evidence relevant to the charge and based on the personal knowledge of the witnesses. As such it is clearly admissible.

The third category includes the statements made by unnamed students on Charles' school bus to Charles' mother. This constitutes hearsay evidence which would not ordinarily be admissible in a court of law. However, it is well-settled that administrative agencies may, under some circumstances, receive hearsay evidence in their hearings. See *State v. Weston,* 60 *N.J.* 36, 51 (1952), where it was held:

> *** Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantive rights of a party, there must be a residuum of legal and competent evidence in the record to support it. ***

Contrary to appellant's contention, the record contains a substantial residuum of competent evidence to support the charges. The excited utterances of the children and the circumstantial evidence of the gym teachers constitute legally competent and admissible evidence. In these circumstances reliance on the hearsay evidence of the children on the bus as corroborations of competent proof was proper.

Viewing the evidence in the record in its entirety, we conclude that it amply justifies the determination of the Board in sustaining the Commissioner's decision as to all charges.

Affirmed.

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Cert. denied Supreme Court of New Jersey, March 11, 1975
Cert. denied Supreme Court of the United States, October 6, 1975

Frank W. Zimmermann, *et al.*,

Plaintiffs-Appellants,

v.

Board of Education of Southern Regional High School District, Ocean County,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, December 28, 1973

Decided by the State Board of Education, June 26, 1974

Submitted February 18, 1975 – Decided March 18, 1975

Before Judges Collester, Lora and Handler.

On appeal from the Commissioner, State Department of Education.

A brief was filed on behalf of Mr. Frank W. Zimmermann pro se.

Messrs. Berry, Summerill, Rinck & Berry, attorneys for respondent (Ms. Jane Rinck on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for State Board of Education (Mr. John F. Shoosmith, Jr., Deputy Attorney General filed a statement in lieu of brief).

PER CURIAM

We affirm the decision essentially for the reasons set forth in the opinion of the Acting Commissioner of the Department of Education.

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

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