SCHOOL LAW DECISIONS

OF

Commissioner of Education

AND

State Board of Education

1938

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SCHOOL LAW DECISIONS

ISSUING OF BONDS IN CITY DISTRICT

THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD,

Appellant,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF WILDWOOD,

Respondent.

For the Appellant, Henry S. Alvord.
For the Respondent, Mr. Hand.

DECISION OF THE COMMISSIONER OF EDUCATION

In this case it appears that the Board of Education of the City of Wildwood, at a meeting held on the 7th day of October, 1914, regularly certified to the Board of School Estimate of the City of Wildwood a requisition for an appropriation of $100,000, to be raised by the issue of bonds by said city, for the purpose of purchasing a lot of land and erecting thereon a school building. The Board of School Estimate granted, by unanimous vote, the request of the Board of Education and certified regularly to the Board of Commissioners, the duly authorized governing body of said city, the fact that it had approved the raising of $100,000 by a bond issue, for the purpose of purchasing a lot and the erection of a school building thereon. The Board of Commissioners, by ordinance, proceeded to take action to carry into effect the issuing of the bonds. This ordinance failed of passage on third reading, the Board of Commissioners holding that it was within its province to reject the proposition.

A petition and answer were filed with the Commissioner of Education, setting forth the facts as above stated, whereupon a hearing was granted and held in the City of Wildwood on the 8th day of June, 1915. Both parties to the issue appeared through counsel and agreed to the statement of facts as above set forth. The main question submitted at the hearing was as to the application of a decision by the Court of Errors and Appeals, given in the case of the Board of Education *vs.* the Common Council of the City of Lambertville. The Court held in this case that the petition of the Board of Education was defective because it set forth as the propositions, the purchase of a lot and the erection and equipment of a school building thereon, and

repairs to existing school buildings. The Court held that the amount to be expended for repairs should be separated in the petition from the amount to be expended for the purchase of a lot and the erection of a school building. The Court did not appear to rule on the question of separating the amount of money to be expended for lot and that to be expended for building. By the text of the decision, it is plain that two purposes were in the mind of the Court, namely, repairs to old buildings, on the one hand, and the purchase of a lot and the erection of a building thereon, on the other, for the Court stated that the whole sum appropriated might be expended for repairs alone.

I am of the opinion that the decision of the Court in the Lambertville case does not here apply.

Statements were also made at the hearing by members of the Board of Education, the Board of School Estimate, the Board of Commissioners, and the Mayor, agreeing that there was immediate necessity for more school room.

Therefore, it is ordered hereby that the City Commissioners of the City of Wildwood immediately take such action as will furnish to the Board of Education of the City of Wildwood the $100,000 which was determined to be necessary by the Board of School Estimate.

June 15, 1915.

PROCEDURE FOR THE ISSUE OF BONDS BY A DISTRICT ACTING UNDER ARTICLE VII

WILLIAM B. KRUG AND BENJAMIN F. ELLISON,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,
Respondent.

Ephraim Cutter, for the Appellant.
J. H. Thayer Martin, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The complainants allege that the proceedings had at a meeting of the legal voters of the School District of the Township of Woodbridge, held on the nineteenth day of March, 1912, were illegal, so far as said proceedings relate to the selection of a lot, the erection of a schoolhouse, and the issuing of bonds, for the following reasons:

First. Because the said resolutions were not introduced at said meeting, and no motion was made to adopt them;

Second. Because no motion was made at the said meeting to adopt the said resolutions or any of them, and there was no such motion before the meeting to be voted on;

Third. Because there were no such resolutions before the said meeting to be voted on;

Fourth. Because the said resolutions, and each of them, were not legally adopted at the said meeting;

Fifth. Because proper ballot boxes were not used at the said meeting;

Sixth. Because the first resolution does not state of whom certain lots are to be purchased, and does not properly describe the said lots.

Seventh. Because the first resolution authorizes the Board of Education to accept certain lots, as well as to purchase certain other lots, all of the lots forming one plot to be used for the erection of a schoolhouse.

Eighth. Because in the second resolution it is not specified what amount is to be expended for the erection of a schoolhouse, and what amount for the purchase of school furniture and equipment.

Ninth. Because the polls at said meeting were kept open longer than the time provided by law.

The first four reasons may be considered together.

There is nothing in the law which prescribes the method of conducting a school district meeting, other than the provision for the election of a chairman and secretary, the appointment of tellers, that the vote shall be by ballot, and the minimum time the polls shall be open. The complaints contend that the resolutions must be introduced at the meeting and a motion made to adopt them, and that in the absence of such introduction and motion the resolutions are not before the meeting. If this contention is sound it would be possible for the voters present at the time the resolutions were introduced to refuse by a *viva voce* vote to consider them and thus prevent persons who were not present at the opening of the meeting from voting. If the contention of the complainants is simply that the resolutions should be presented and a motion made to adopt them, and that the polls should immediately be declared open, without any action on the motion, such motion would be absolutely meaningless. The notices state the purpose for which the meeting is called and the resolutions which will be acted on. Any voter who presents himself during the time the polls are open has the right to cast his ballot for or against any proposition stated in the notices. He may not alter any resolution, except by reducing the amount of money to be appropriated for the purpose named in the resolution. A school district meeting is an election and not a meeting in the ordinary meaning of that word, and it is not necessary that the resolutions be offered at the meeting, or that any motion be made to adopt them.

The fifth objection is that proper ballot boxes were not used at the meeting. The law does not prescribe the kind of ballot box which shall be used at a school district meeting. In the absence of any such provision any box may be used.

The sixth objection is that the resolution does not state from whom the lots are to be purchased and does not properly describe said lots. If the voters desire to purchase a certain plot for school purposes they may direct the Board of Education to purchase it; provided, such plan has been described in the notices. It is immaterial, so far as the voters are concerned, who is the owner of the plot. Any description in the notices which will enable the voters to locate the plot is sufficient. The description of the plot now under consideration was stated in the notices and on the ballots as follows:

> "Plot about seven hundred feet west of Avenel Railroad Station on Cedar Street containing lots numbered 19, 20, 21, 22, 23, 24 and 25, for the sum of Five Hundred Dollars and to accept for the same purpose adjoining lots on the north side of Avenel Street numbered 1, 2, 3, 4, 5 and 6, from Mr. J. Blanchard Edgar, making in all a plot one hundred and fifty feet fronting on Avenel Street by two hundred feet in depth by one hundred and eighty feet on Cedar Street in the rear."

Witnesses produced on behalf of the complainants testified that they had never heard of Cedar Street, and that there was no street about two hundred feet north of it, and parallel with, Avenel Street, but Mr. Cutter testified that he had found in the office of the County Clerk a map on which Cedar Street was shown and the property west of the railroad and along said street laid out in lots. It is also in evidence that the distance from the railroad to the first street running at right angles to Avenel Street is about fifteen hundred feet. The plot proposed to be purchased is about half way between the railroad and this street. The description of the plot as it appears in the notices and on the ballots, complies with the statute and was sufficient to enable the voters to act intelligently.

The seventh objection is that the resolution authorizes the Board of Education to accept a donation of certain lots as a part of the plot on which to erect a schoolhouse. I know of no provision of law which prohibits a school district from accepting a gift of land for school purposes.

The eighth objection is that the amount to be expended for the building and the amount to be expended for furniture and equipment were not separately stated. In the case of Stackhouse *vs.* Clark, 23 Vr. 291, the Supreme Court held that a "resolution to raise a single sum for building and furnishing a schoolhouse is not bad for uncertainty because the amount to be used for building and the amount for furnishing are not separately stated." In the case of Chamberlain *vs.* Cranbury, 29 Vr. 347, the Court of Errors held that bonds could not legally be issued for the purchase of school furniture. The law in force at the time the later decision was rendered authorized the issue of bonds for the purchase of lands and the erection or improvement of school buildings, but made no reference to the purchase of furniture, and the court decided that bonds could be issued only for the purposes designated in the law. The law now provides that bonds may be issued for the erection of a schoolhouse and for the purpose of school furniture and other necessary equipment. I think that the decision in the Chamberlain case is not in conflict with the decision in the Stackhouse case. The resolu-

tion is not bad because it fails to state separately the amount appropriated for the building and the amount appropriated for furniture.

The ninth objection is that the polls were kept open longer than the time provided by law. The law does not fix the maximum time the polls shall be kept open, it simply provides that they "shall remain open one hour and as much longer as may be necessary to enable the legal voters present to cast their ballots." The evidence is that the polls closed about four-thirty, and that votes were cast after four o'clock. As the meeting did not convene until three o'clock and some time must have been consumed in selecting the officers, the polls would not have been open one hour had they been closed at four o'clock.

The appeal is dismissed.

June 11, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Assistant Commissioner sustaining the validity of a school meeting held in the Township of Woodbridge on March 19, 1912. On that day, by a vote of 218 out of a total of 258, the Board of Education was authorized to acquire a site, to erect a building, to purchase furniture and to issue bonds in the sum of sixteen thousand ($16,000) dollars.

The Appellants disputed the validity of such authorization and urged that the resolutions were not formally introduced and a motion made to adopt them, that the site to be acquired was not sufficiently described, that authority could not be given to acquire a site which in part was dependent on a gift, and that the resolutions did not state separately the amount to be expended for the erection of the building, and the amount to be expended for the purchase of furniture and equipment.

In the School Law are set forth certain requirements for the conduct of a school meeting called to authorize an issue of bonds. Where the Legislature has undertaken to specify the procedure to be followed at such a meeting we cannot assume that something which it has not specified is essential to its validity. The Legislature has not enacted that the resolutions which are to be voted must be read. The failure to formally read at the meeting the resolutions which were printed on the ballots, did not therefore, in our opinion, affect the validity of the proceedings. If the law were otherwise, the validity of many issues of bonds would be open to question.

For years past, the Department of Public Instruction has issued in connection with the School Law, a Code of forms and instructions which are and have been generally followed. The twenty-fourth subdivision is entitled "Order of business at a district school meeting." The reading of the notice calling a meeting is set forth in this subdivision, but no mention is made about the reading of the resolutions. At the meeting in question, the notice was read and in the notice was contained a clear and precise statement of the substance of the resolutions. The objection, therefore, that the resolutions were not read at length, in our opinion was properly overruled.

With regard to the site described in the notice and resolutions, we cannot find that there was any misconception on the part of the voters. Upon the arguments it was admitted that this entire dispute exists because the Appellants and others preferred another site. The very fact that there was a controversy about two sites is in itself a clear indication that their locations were known.

Objection is also made that the voters could not authorize the Board to couple the acquisition of seven lots by purchase, with the acceptance of a gift of six adjoining lots. In the resolution it was stated that the thirteen lots would make a plot and the resolution concluded that "the cost of said plot shall not exceed the sum of five hundred ($500) dollars." The voters authorized the acquisition of the entire plot of thirteen lots for five hundred ($500) dollars and the Board could not disburse the five hundred ($500) dollars unless it received title to the thirteen lots. That title might be acquired by two deeds, one for six purporting to be a gift and the other for seven purporting to be a sale, seems to us a matter of form rather than substance.

The remaining objection is that in the resolution the amount to be expended for the erection of a building was not stated separately from the amount to be expended for the purchase of furniture and equipment. In the law under which the meeting was held, it was provided that the voters by a vote of the majority of those present, may authorize the Board of Education to issue bonds of the district for the purpose of building a schoolhouse and of purchasing school furniture and other necessary equipment. We do not find any provision that the amount necessary for a complete school, that is for a building and furnishings, must be split up into items. It is not for us to read into the law something which is not in it.

June 9, 1912.

The Supreme Court at the November term, 1912, denied the application for a writ of certiorari.

LEGALITY OF AUTHORIZATION FOR BOND ISSUE IN ARTICLE VII SCHOOL DISTRICT

STEPHEN LITTLE,

Appellant,

vs.

BOARD OF EDUCATION OF MORRISTOWN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On February 7, 1928, a special bonding election was held in the School District of Morristown at which the Board of Education was authorized to purchase a tract of land for school purposes at a cost not to exceed the sum of $15,000 and to erect and equip an addition to the high school building at a cost

not to exceed $385,000. The above named Appellant thereupon presented this appeal as a taxpayer and resident in order to protest against any action being taken by the Morristown Board of Education under the authorization of the voters on the ground that the Board accepts some three hundred non-resident pupils and that a school district has no legal right to erect school buildings to accommodate the pupils of other districts.

It was agreed by both parties to this controversy to submit the case for decision upon briefs as an issue of law rather than of fact.

It is true that Section 193 of the School Law does specifically require each school district to "provide school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein." In the Commissioner's opinion, however, this section, while imposing a clear and definite obligation upon the Board of Education of each district as to the facilities to be provided for the pupils of its own district, contains no prohibition whatever as to the extending of these facilities to the pupils of other districts as well. It frequently happens that a school board, anticipating rapid growth in its own schools or feeling that better grading can be accomplished and the interests of its own pupils can be generally better served by the provision of school facilities which are extensive and commodious, proceeds to place such a proposition before the legal voters and thus upon securing their authorization to erect a school building in which there proves to be plenty of room for outside pupils. That the Legislature contemplated just such a situation is shown by the provisions of Section 180 of the School Law which states that:

> "Non-residents of a school district if otherwise competent, may be admitted to the schools of said district with the consent of the Board of Education upon such terms as said Board may prescribe;" and when it further provided in Section 9 that the State Board of Education may "require any district having the necessary accommodations to receive pupils from other districts at rates agreed upon or which it may fix in the event of disagreement."

It is also very evident that the Legislature did not contemplate that every school district would maintain a school of higher grade of its own but rather that high school facilities would be secured by the pupils of districts lacking such high schools through the instrumentality of districts having the necessary accommodations, when it provided in Section 183 that:

> "Any child who shall have completed the course of study pursued in the schools in the district in which he or she shall reside may, with the consent of the Board of Education of said district and the Board of Education of a district in which he or she shall desire to attend school be admitted to a school of higher grade in said last mentioned district."

The Commissioner cannot agree with Appellant's contention that according to the Towner *vs.* Mansfield decision of the Supreme Court (p. 606, School Law), a pupil must reside in the district in which he or she actually attends school. The Court decision was merely to the effect that the pupil must through his or

her parents or legal custodians reside in the district at whose expense he or she is provided with school facilities, and this whether these facilities be provided within or outside such district. In fact, in the Towner case itself the Mansfield Township School District, in which the Court held the pupil must be a resident in order to be entitled to free high school facilities, was engaged in sending its high school pupils to Hackettstown.

Neither can the Commissioner agree that the other cases cited by Appellant namely, The State, Baldwin et al., Prosecutors, *vs.* Fuller, 10 Vroom 576, and Taylor *vs.* Smith, 21 Vroom 101, are in point. While it is rightly held in these cases that the taxing power of political divisions "is for the sole purpose of enabling them to exercise the powers of government conferred upon them within their locality" and that "the assessment of one school district for the benefit of another would be a palpable trespass upon the rights of private property," it is the Commissioner's opinion that no application can be made of these principles to the present case. A school district cannot be said to be assessed for the benefit of other districts by a law which authorizes it to receive pupils from other districts upon such terms as it may impose. The district is thus authorized to charge and, as in the case of Morristown, does charge what it considers to be a proper tuition rate for the pupils it receives.

In the Commissioner's opinion therefore the statutory obligation of boards of education to provide adequate school facilities for all the pupils of school age in their own districts in no way precludes the providing of facilities which may be ample for the purpose of accommodating pupils of other districts "upon such terms as the Board of Education may prescribe." Neither the authorization of the Morristown School District voters nor any action which the Board of Education may take in accordance therewith is in the Commissioner's opinion illegal, and the appeal is accordingly hereby dismissed.

March 23, 1928.

Decision of the State Board of Education

The Appellant, a taxpayer of Morristown, contends that the citizens of that city had no power to vote to issue bonds to the sum of $400,000 for an addition to the High School Building, and seeks to restrain the Board of Education from proceeding with the undertaking on the ground that some three hundred or more pupils from other districts attend the High School, and that if they are refused admission no new building is necessary.

It is true that the law requires each school district to provide school facilities for each child of school age in the district but it does not prohibit accommodating children from other districts and to infer such a prohibition would nullify the statute by which the Legislature has provided for the sending of pupils to High Schools in districts other than those in which they reside.

It is provided by law (Sec. 180 of the School Laws, 1925 Edition) that the legal voters of any school district may at a regular or special election by a majority vote authorize the Board of Education to issue bonds for the purpose of acquiring land and erecting schoolhouses for such sums as are directed by a majority of the votes cast. No limitation on the power of the voters

is to be found in the statute and we can find no authority for interfering with the action taken at the Morristown election. In our opinion the voters of that city were the sole judges of the question presented to them by the Board of Education, acting as we find it did, according to law.

It is therefore recommended that the Commissioner's decision be affirmed.

May 5, 1928.

DECISION OF THE SUPREME COURT

The Board of Education of Morristown submitted to the electorate in February, 1928, a proposition for the enlargement of school facilities, which was passed by a large majority of a very small total vote. No copy of the ballot is before me, but I gather from other papers in the case that the proposal was to enlarge the present High School by the addition of a wing for a "Junior High School" at a total expense not to exceed $400,000. The Prosecutor objected, and appealed to the Commissioner of Education, who refused to interfere, and he appealed further to the State Board of Education, with the same result: and on application to me as Justice of this Court, a writ was allowed.

The argument throughout has been that the imposition of this large additional burden on the taxpayers is useless and unnecessary, and takes their property without warrant of law, because the proceeds of the local Board are limited to the reasonable educational needs of the school district, and the High School needs no enlargement as it already accommodates all the local pupils and 320 from outside, who should be discharged to make room for local pupils and thereby obviate the necessity of building additional accommodations at this time. It may be noted at this point that all the out-of-town pupils are in the High School.

The fallacy of the argument as I see it, is that the proposed building is not designed to enlarge the High School, but to enlarge the common school facilities. In the explanatory pamphlet submitted to the voters and made a part of this case, it appears that the Board of Education asked for a building to take care of grammar school pupils of the two highest grades, those that are in a sense out of the grammar school class without being in the high school class. For such there is no provision except in the grammar schools, which are now practically full, whose pupils increased by 316 in the last two years, and which in two or three years more will be clearly inadequate. Some present provision to meet this imminent condition is plainly reasonable and proper: and apparently the Board, instead of adding to the present grammar schools, proposed to provide the room by taking the older pupils out of the grammar schools and collecting them into a higher grammar school or an inferior high school, as we may choose to call it. The plan seems to present certain educational advantages: but be this as it may, I can see in it no more than a timely enlargement of the general school facilities of the district, to meet fairly anticipated requirements of the immediate future.

These considerations lead in my judgment to a dismissal of the writ, without reference to the ground taken in the opinions of the Commissioner and the State Board.

June 15, 1928.

BALANCES OF BOND ISSUES IN DISTRICT ORGANIZED UNDER ARTICLE VI

THE BOARD OF EDUCATION OF ATLANTIC CITY,

Petitioner,

vs.

ALBERT BEYER, CUSTODIAN OF SCHOOL FUNDS FOR THE DISTRICT OF ATLANTIC CITY,

Respondent.

James H. Hayes, Jr., for Petitioner.

Theodore W. Schimpf, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

During the years 1910 and 1911 the Board of School Estimate delivered to the Common Council of Atlantic City certain certificates appropriating moneys for the purchase of land and the erection of school buildings in the School District of Atlantic City, and, upon the receipt of said certificates, said Common Council adopted ordinances authorizing the issue of bonds, to be known as school bonds, for the amounts stated in said certificates. Said bonds were sold and the moneys were deposited with the Custodian of School Moneys. The cost of the land and buildings, to defray which the issue of bonds was authorized, was less than the amounts stated in the certificates of the Board of School Estimate, and there is a balance of the amount received from the sale of the said bonds now in the hands of the Custodian of School Moneys.

On August 22, 1913, the Petitioner adopted a resolution directing the Respondent "to deposit to the credit of the Building and Repair Account of the School District the balances remaining to the credit of the several Bond Issues of the District."

The Respondent has refused to make such transfer. The Petitioner asks that an order be made directing the Respondent to comply with the resolution of August 22, 1913, quoted above.

Section 185 of the General School Law, as amended by Chapter 285, P. L. 1912, provides that "the custodian of the moneys belonging to the municipality in which the school district shall be situate, or the collector when designated

by the Board of Education, shall be the custodian of the school moneys of such district, and shall receive such compensation as the Board of Education of such municipality shall determine, which compensation shall be paid by said Board of Education from the funds of said Board. * * * Nothing in this article shall be construed as giving to the township committee, common council or other governing body of any municipality any control over moneys belonging to the school district in the hands of the custodian of school moneys of said district, but said moneys shall be held by said custodian in trust, and shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the Board of Education."

It is very evident from the above quotation that the offices of City Treasurer and Custodian of School Moneys are separate and distinct offices, although held by the same person, and as the Common Council or other governing body of the municipality in which the school district is situate is prohibited from controlling, or attempting to control, the funds of the school district, that the Custodian is under the control and direction of the Board of Education. A school district is a municipal corporation separate from the municipality in which it is situate (Landis *vs.* School District, etc., 28 Vr. 509). The Custodian of School Moneys holds an office created by the School Law, and not by any provision contained in the charter of the city, and as such officer must be governed solely by the provisions of the School Law.

Control of the finances of a school district could be given to the city only by some provision of law, and the School Law not only does not contain any such provision, but expressly prohibits it.

The intent of the Legislature to make it impossible for the city to have any control over the finances of the school district is further shown by Section 186 of the School Law, which makes it the duty of "the collector or treasurer of each municipality in which a school district shall be situate to pay to the custodian of the school moneys of such school district the amount ordered to be assessed, levied and collected in such municipality for the use of the public schools therein, exclusive of the State school tax, on the requisition or requisitions of the Board of Education." No action by the governing body is necessary, the sole authority for such transfer being the requisition of the Board of Education. This section emphasizes the dual offices for it directs the treasurer to transfer to himself, as custodian, moneys raised for school purposes.

Section 76 of the School Law prescribes the method of raising moneys for the purchase of land and the erection of buildings in a city school district, and provides that when bonds are issued for such purposes "the proceeds of the sale of such bonds shall be deposited with the custodian of school moneys of such school district and shall be paid out only on the warrants or orders of the Board of Education."

It is clear from the above quotation that the entire proceeds of the sale of bonds, including premium, shall be placed to the credit of the school district. No action by the governing body of the city is required. The proceeds of the sale of school bonds become automatically a part of moneys of the school district as soon as received.

The Respondent claims that the balance of the proceeds of the sale of bonds issued for the purchase of land and the erection of school buildings can be used only to liquidate the debt incurred in excess of the cost of such grounds and buildings.

Section 76 of the School Law prescribes the method of raising money for the payment of principal and interest falling due on bonds issued for school purposes in a city. The burden of raising such money is cast upon the city and not upon the school district. Bonds are an indebtedness of the city and not of the school district and school moneys cannot be used to pay any part of the principal or interest due on school bonds. As soon as school bonds are sold the proceeds become school moneys, and as such can be paid out only on orders signed by the president and secretary of the Board of Education. School moneys can be paid out only on orders or warrants signed by the president and secretary of the Board of Education, and there is nothing in the law which authorizes such president and secretary to issue an order or warrant for the payment of principal or interest due on school bonds. The Respondent further claims that his powers are prescribed by the Act of 1902, directing the City Treasurer to receive all moneys belonging to the city and disburse the same according to law. He appears to have lost sight of the fact that the Act of 1902 refers solely to his powers as City Treasurer, and that it cannot in anywise affect his duties as Custodian of School Moneys. Even if the Act of 1902 could be construed as originally applying to his duties as Custodian of School Moneys, its provisions, so far as they relate to school moneys, were repealed by Section 246 of the General School Law of 1903, which reads as follows: "All school districts shall hereafter be governed solely by the provisions of this act and all acts and parts of acts, general, special or local, so far as they are inconsistent with the provisions of this act, are hereby repealed."

As has heretofore been shown, the balance of the proceeds of the sale of school bonds is not available for the payment of any part of the principal or interest of such bonds, the question as to what disposition can be made of said balance, therefore, remains to be considered. It is inconceivable that the Legislature intended that moneys received from the sale of bonds, remaining to the credit of the school district, after the payment of all indebtedness incurred for the purchase of land and the erection of the buildings, should be unavailable for any purpose. There is nothing in the law which prescribes what disposition shall be made of such balances, and in the absence of such provision, the power to transfer the balance to other school purposes must be found in the general powers possessed by municipal corporations. It is the common practice in all municipal bodies to transfer moneys from one account to another as occasion demands, and in very few instances is this power granted by express provision of law. The Petitioner was acting well within its legal powers when it adopted the resolution of May 21, 1913, directing the Respondent to transfer to the credit of the Building and Repair Account the balances remaining to the credit of the several bond issues of the district.

The Custodian is not responsible for the application the Board of Education has made of school moneys (Zimmerman *vs.* Mathe, 20 Vr. 45) and he cannot refuse to honor an order of the Board of Education on the plea that he or his bondsmen may legally be liable for a misappropriation of school moneys.

It is ordered that the Respondent transfer to the Building and Repair Account the balances now in his hands from the sale of school bonds issued for the purchase of land and the erection of buildings for the Massachusetts Avenue School, the Richmond Avenue School, and the Texas Avenue School.

May 11, 1914.

Affirmed by the STATE BOARD OF EDUCATION Nov. 7, 1914.

INTENTION TO ESTABLISH RESIDENCE WITHOUT PHYSICAL PRESENCE DOES NOT CONSTITUTE LEGAL RESIDENCE

RAYMOND F. ARMSTRONG,

Appellant,

vs.

RICHARD M. ALTLAND,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The eligibility of Richard M. Altland to membership on the Board of Education of Haddon Township at the annual school election held in that district is contested by appellant upon the ground that he has not been a legal citizen and resident of the district for three years prior to the first Monday in April, the annual date upon which newly organized Boards begin to function in Article VII districts.

Section 83, Chapter 1, P. L. 1903, S. S. provides:

> "A member of the Board of Education shall be a citizen and resident of the territory contained in said school district and shall have been such citizen and resident for at least three years immediately preceding his or her becoming a member of such Board."

The testimony taken at a hearing held in the Camden County Court House, March 30, 1932, discloses that appellant on December 21, 1928, signed an agreement to purchase a residence in the Township of Haddon and that because of the inability of the owner to transfer title, the payment on the purchase of such residence was returned to respondent during the latter part of April, 1929. Upon the return of the deposit on the property, Mr. Altland visited several real estate brokers in Haddon Township or nearby vicinities with intention to pur-

chase a home. While most of the properties were in Haddon Township, some were in Oaklyn or other adjacent municipalities. On May 22, 1929, Mr. Altland rented a residence in Haddon Township and moved there on June 6, 1929. Since that date he has continued to be a resident of the School District of the Township of Haddon.

Attorney for respondent contends that the signing of an agreement to purchase property in Haddon Township in December, 1928, and the subsequent renting of the property shows clearly the intention of respondent to be a resident of that district for more than three years prior to the first Monday in April; and with the intention of becoming a resident under such conditions, he becomes a resident in fact.

Even if persistent intention to become a resident of a district without having actually resided there could be held to be legal residence, the respondent could not qualify as he admits in his testimony that during the latter part of April and until May 22, 1929, he had not decided definitely to locate within the territorial limits of the Township of Haddon, but that he desired a residence in that locality.

The law clearly states that three years of residence and citizenship are required to qualify a person to serve on a Board of Education in this State. The testimony shows that neither from actual residence nor intention established by supporting facts does the respondent meet the qualifications as to residence prescribed in the statute.

Since Mr. Altland is ineligible to membership on the Board of Education of the School District of the Township of Haddon, a vacancy exists in said Board which it is empowered to fill until the next annual school election.

March 31, 1932.

RESIDENCE OF PERSON PRESUMED TO BE WHERE HE ALLEGES IT TO BE UNLESS THE CONTRARY IS PROVEN

JOSEPH G. BAIER,

Appellant,

vs.

JOHN AMSLER,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Petition is made to the Commissioner of Education by Joseph G. Baier, who was an unsuccessful candidate for membership on the Franklin Township (Somerset County) Board of Education, to set aside the election of John Amsler, who was declared elected to such membership at the annual school election held in that district February 10, 1931, and to name appellant as the duly elected candidate as being one of the three eligible candidates receiving the highest number of votes.

The election of respondent is contested on the grounds that he will not have been a citizen and resident of the district for three years immediately preceding the time when the term of office of members begins in Article VII districts, namely, on the first Monday in April as provided by Sections 83 and 85, Chapter 1, P. L. 1903, Special Session.

The testimony of respondent, which was unrefuted, discloses that he purchased a property in Franklin Township on December 25, 1925, which he sold and of which he delivered possession September 7, 1926, when he moved with his family to the home of his father-in-law in New Brunswick. In December, 1927, he contracted for another property in Franklin Township and received a deed for it February 15, 1928. On March 1st, he completed a garage on the property and moved the larger part of his house furnishings into the garage, which he made his home after that date, although his wife continued to live in her father's home in New Brunswick until the latter part of May, when the house was completed. He continued his residence in this house until the latter part of September, 1929, when he sold the property to a Mr. Maltese, who permitted him to store his furniture in the attic of his home until Mr. Amsler completed the building of another house to which he and his wife moved their furniture about December 1, 1929, and where they have since resided. During the time between the vacating of the property sold to Mr. Maltese and that of moving into his present home, Mr. Amsler and his wife boarded with friends in Highland Park, a nearby community.

Certified copies of Mr. Amsler's driver's license and registration of his automobile for the years 1928 and 1929 and sworn to by him in December, 1927, and December, 1928, show his residence as that of his father-in-law in New Brunswick.

Respondent claims that from March 1, 1928, to the present time his residence has been in Franklin Township. He testifies that he has not registered to vote nor has he voted elsewhere during that time, and no evidence was submitted to disprove his testimony in this particular.

In a situation similar to the testimony in this case where affidavits indicated another residence than the one claimed by the respondent in this instance, the Commissioner of Education held:

> Edsall *vs.* Graves, p. 26, 1928, Compilation of New Jersey School Law Decisions:
>
> "Domicile, according to legal definition, is always entirely a question of residence and intent and must be established from all the facts in the case. In the opinion of the Commissioner the acts of the respondent in contracting for the purchase of a home to be completed by February 2, 1920, in the Borough of Palisades Park and his actually residing in such district from that date until the present time clearly establish his residence and his intention of permanent residence in the district aforesaid. A mere statement contained in a deed signed by respondent in February, 1920, in which he describes himself as a resident of the Borough of Brooklyn is not sufficient to overcome the fact of respondent's actual residence in Palisades Park, as established by various acts on his part. Legal rulings are to the

effect that 'declarations are of no avail when not borne out by the party's acts.' (Cyc. p. 865, Note 29.)

"The Commissioner cannot agree with appellant's contention supported by a line of cases of limited application only to the effect that a change of domicile cannot be accomplished until such time as one's family is actually removed to the place of changed abode. According to Cyc. page 855, 'When it is evident by unequivocal acts that the intention to remove existed, the change of domicile is complete although the family may remain temporarily in the place of former abode,' and this ruling is supported by the following cases: Wells *vs.* People, 44 Ill. 40; Cambridge *vs.* Charleston, 13 Mass. 501, and Lankford *vs.* Gebhardt, 130 Mo. 621. The acts of respondent and his family plainly indicate an intention to change their abode to Palisades Park as of February 2, 1920, but the circumstances of the uncompleted house account for Mr. Graves' family remaining temporarily in the place of former abode."

Counsel for both appellant and respondent quote from Cadwalader *vs.* Howell, 18 N. J. L. 128. At page 145 the Court said:

"The place where a man is commorant, may perhaps be properly considered as prima facie, the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leaves his original residence, *animo non revertendi,* and adopt another (for a space of time, however brief, if it be done) *animo manendi,* his first residence is lost. But if in leaving his original residence, he does so, *animo revertendi,* such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense."

The Court in the case of Dabaghian *vs.* Kaffafian, 71 N. J. L. 115, following the Cadwalader *vs.* Howell case, supra held:

"The plaintiff's residence will be presumed to be where he alleges it to be, unless the contrary appear."

Counsel for respondent quotes Snyder *vs.* Callahan, 3 N. J. Misc. Rep. 269, at page 271 as follows:

"The general rule in respect to the acquisition of a new domicile is, that after a person has abandoned his domicile of origin, or his acquired domicile, his domicile will be considered to be in that place, in which he has voluntarily fixed his habitation, not for a special or temporary purpose, but with a present intention of making it his home, unless, or until, something which is uncertain or unexpected should happen to induce him to adopt some other permanent home."

It is the sworn testimony of respondent that since March 1, 1928, he has either actually resided in Franklin Township or when absent for short periods

has intended to return there, and as the testimony has not been successfully challenged, respondent in accordance with the above citations is legally qualified to serve as a member of the Board of Education of Franklin Township for the term of three years.

April 2, 1931.

RESIDENCE QUALIFICATION FOR MEMBERSHIP ON BOARD OF EDUCATION

JOHN G. EDSALL,

Appellant,

vs.

HORACE C. GRAVES,

Respondent.

Warner M. Westervelt, for Appellant.
William B. Mackey, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

A petition has been filed with this department by the above named Appellant protesting against the holding of a membership on the Palisades Park Borough Board of Education by Horace C. Graves who was elected such member on February 13, 1923, on the ground that the Respondent had not been for three years immediately preceding his becoming a member of such Board of Education a citizen and resident of the district in accordance with the requirements of the School Law.

The Respondent, Horace C. Graves, in his answer denied the alleged lack of statutory qualifications for membership on the Palisades Park Board of Education, and contended that not only had he been for three years preceding his taking oath of office as a member of such board a citizen and resident of the district, but that even at the time of his election, February 13, 1923, he had then been for more than three years such a citizen and resident, having actually resided in Palisades Park continuously since February 2, 1920.

A hearing in this case was conducted by the Assistant Commissioner of Education on May 28, 1923, at the Court House in Hackensack, at which hearing the testimony of witnesses on both sides was heard.

From the evidence in this matter, it appears that the Respondent, Horace C. Graves, had entered on January 17, 1920, into a contract for the purchase of property in Palisades Park, including a house to be used as a residence by Respondent, and that by the terms of such contract the house, which had been under construction since October, 1919, was to have been completed on or before February 2, 1920. It further appears that although such house was not completed on the contract date, on February 2, 1920, Respondent nevertheless at once took up his residence therein for the purpose of hastening the construction work on the building, and continued to reside there until March

15, 1920, when by means of an exchange he moved to another house in Palisades Park in which he has continued to reside until the present date.

Section 117, Article VII of the 1921 Edition of the School Law requires, as has above been stated, that a Board of Education member shall have been for three years preceding becoming a member of the board a citizen and resident of the district. Residence or domicile as used in this statute has been legally determined to mean a place of fixed or permanent abode.

Domicile, according to legal definition, is always entirely a question of residence and intent and must be established from all the facts in the case. In the opinion of the Commissioner the acts of the Respondent in contracting for the purchase of a home to be completed by February 2, 1920, in the Borough of Palisades Park and his actually residing in such district from that date until the present time clearly establish his residence and his intention of permanent residence in the district aforesaid. A mere statement contained in a deed signed by Respondent in February, 1920, in which he describes himself as a resident of the Borough of Brooklyn is not sufficient to overcome the fact of Respondent's actual residence in Palisades Park, as established by various acts on his part. Legal rulings are to the effect that "declarations are of no avail when not born out by the party's acts." (Cyc., page 865, Note 29.)

The Commissioner cannot agree with Appellant's contention supported by a line of cases of limited application only to the effect that a change of domicile cannot be accomplished until such time as one's family is actually removed to the place of changed abode. According to Cyc., page 855, "When it is evident by unequivocal acts that the intention to remove existed, the change of domicile is complete although the family may remain temporarily in the place of former abode," and this ruling is supported by the following cases: Wells *vs.* People, 44 Ill. 40; Cambridge *vs.* Charleston, 13 Mass. 501 and Lankford *vs.* Gebhardt, 130 Mo. 621. The facts of Respondent and his family plainly indicate an intention of change of abode to Palisades Park as of February 2, 1920, but the circumstances of the uncompleted house account for Mr. Graves' family remaining temporarily at the place of former abode.

In view of all the facts in the case, therefore, it is the opinion of the Commissioner of Education that Horace C. Graves was fully qualified under the statute to be a member of the Palisades Park Board of Education at the time of taking the oath of office in 1923, and even at the time of his election to such office, February 13, 1923, having been since February 2, 1920, a citizen and resident of the district within the meaning of the law.

The appeal is accordingly hereby dismissed.

June 27, 1923.

FAILURE TO VOTE NOT CONCLUSIVE PROOF OF LACK OF RESIDENCE

ISAIAH B. HOPKINS,

Petitioner,

vs.

WILLIAM McINTYRE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Isaiah B. Hopkins, a citizen and taxpayer of Liberty Township, Warren County, petitions the Commissioner to declare William McIntyre ineligible to serve as a member of the Board of Education of that school district. It is Petitioner's contention that on the first Monday in April, 1936, the Respondent had not been a resident and citizen of the district for three years immediately preceding that date as required by Sections 83 and 85 of Chapter 1, P. L. 1903, S. S. In support of his contention Mr. Hopkins submitted a general election registry list which shows that in May, 1933, Mr. McIntyre was not registered to vote in Liberty Township, and further submitted a copy of his automobile registration card showing a change of post office address from Parlin, Middlesex County, to Oxford, Warren County, on August 20, 1934.

Mr. McIntyre testified that he purchased the property where he now resides in Liberty Township in February, 1929, with the purpose of making it his home; that in April, 1931, he moved a part of his furniture from Parlin to his new residence and thereafter he and his wife lived about one-half of the time in his Liberty Township home until the spring of 1934 when he moved the remainder of his furniture and made his Liberty Township home his only domicile; that he last voted in Parlin in the year 1932 and did not vote again until the fall of 1934 when he voted in Liberty Township; and that even though his registration card shows the change of address as of August 20, 1934, he received most of his mail at Oxford after April, 1931.

While the Liberty Township registry list for the year 1933 does not contain Mr. McIntyre's name, there was no testimony presented to show that he voted elsewhere during that year. Therefore, the only evidence to indicate that he was not a resident of Liberty Township on April 1, 1933, is the automobile registration card which shows the change of address in 1934. This card in itself cannot be considered sufficient to discredit the respondent's testimony that he claimed Liberty Township (Post Office, Oxford, New Jersey) as his home and legal residence for all purposes after 1932. It is true that until 1934 respondent maintained two homes and his statement that he made Liberty Township his legal residence after 1932 is not inconsistent with the evidence.

In the case of Edsall *vs.* Graves, 1928 Compilation of New Jersey School Law Decisions, page 26, the Commissioner said:

"Domicile, according to legal definition, is always entirely a question of residence and intent and must be established from all the facts in the case. In the opinion of the Commissioner the acts of the respondent in contracting for the purchase of a home to be completed by February 2, 1920, in the Borough of Palisades Park and his actually residing in such district from that date until the present time clearly establish his residence and his intention of permanent residence in the district aforesaid. A mere statement contained in a deed signed by respondent in February, 1920, in which he described himself as a resident of the Borough of Brooklyn is not sufficient to overcome the fact of respondent's actual residence in Palisades Park, as established by various acts on his part. Legal rulings are to the effect that 'declarations are of no avail when not borne out by the party's acts.' (Cyc., page 865, Note 29.)

"The Commissioner cannot agree with appellant's contention supported by a line of cases of limited application only to the effect that a change of domicile cannot be accomplished until such time as one's family is actually removed to the place of changed abode. According to Cyc., page 855, 'When it is evident by unequivocal acts that the intention to remove existed, the change of domicile is complete although the family may remain temporarily in the place of former abode,' and this ruling is supported by the following cases: Wells *vs.* People, 44 Ill. 40; Cambridge *vs.* Charleston, 13 Mass. 501; and Lankford *vs.* Gebhardt, 130 Mo. 621. The acts of respondent and his family plainly indicate an intention to change their abode to Palisades Park as of February 2, 1920, but the circumstances of the uncompleted house account for Mr. Graves' family remaining temporarily in the place of former abode."

and the Supreme Court in Dabaghian *vs.* Kaffafian, 71 N. J. L. 115, held:

"The plaintiff's residence will be presumed to be where he alleges it to be, unless the contrary appear."

Since the testimony presented by Mr. Hopkins is insufficient to refute the sworn statements of Mr. McIntyre to the effect that on April 6, 1936, he had been a resident of Liberty Township for a period of three years, the petition is dismissed.

May 22, 1936.

ELECTION OF A CITIZEN, WHO IS NOT A RESIDENT OF A DISTRICT FOR THREE YEARS PRIOR TO THE DATE WHEN THE TERM OF OFFICE BEGINS, IS VOID

LEIGH W. KIMBALL,

Appellant,

vs.

GEORGE BAXTER,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At the annual school election held in Franklin Township, Somerset County, February 10, 1931, there was a vacancy to be filled in the Board of Education for an unexpired term of one year. George Baxter received the highest number of votes and Leigh W. Kimball received the second highest number of votes for the one-year term. At the conclusion of the election, George Baxter was declared elected.

Mr. Kimball asks that the election of Mr. Baxter be declared void for the reason that in his opinion respondent fails to meet the statutory qualifications for membership on a Board of Education, and petitions the Commissioner to declare appellant to be the duly elected candidate for the reason that he received the highest number of votes cast for eligible candidates for membership on the Board for the one-year term.

Section 83, Chapter 1, P. L. 1903, S. S. reads as follows:

> "A member of a board of education shall be a citizen and resident of the territory contained in said school district, and shall have been such citizen and resident for at least three years immediately preceding his or her becoming a member of such board, and shall be able to read and write. He shall not be interested, directly or indirectly, in any contract with nor claim against said board."

While it is contended by counsel for appellant that respondent cannot claim to be legally qualified for membership on the Board of Education until June 28, 1931, three years from the date he moved into the district, it is not necessary to decide from what date he can legally claim to have been a citizen and resident of the district as it is admitted by respondent that he did not become a resident of Franklin Township prior to April 21, 1928. Mr. Baxter therefore by his own admission could not have been a resident and citizen of the district for three years before April 21, 1931.

Section 85, Chapter 1, P. L. 1903, S. S. provides:

> "Each board of education created under the provisions of this article shall organize annually on or before the first Monday in April.

Members who are elected for the full term take office on the first Monday in April. While they may meet to organize before that date, their terms begin the first Monday in April which is the end of the terms of their predecessors in office. Members of a Board of Education must therefore possess the specified qualifications upon that date and a person who is not duly qualified at that time is not entitled to membership on a Board of Education.

Since this election was to fill a vacancy which could have been previously filled by the Board only until the date of the election (Section 86, Chapter 1, P. L. 1903, S. S.) it is probable that the candidates to fill the vacancy were required to be qualified for membership on the date of the election, but in this case respondent fails to qualify even at the time when members elected for full terms must take office.

George Baxter, not having been a citizen and resident of the district for three years preceding the date when the term of office begins, is not legally qualified to serve on the Board of Education of the Township of Franklin.

The Commissioner cannot agree with the argument of counsel for appellant, that upon the failure of Mr. Baxter to qualify, he (Mr. Kimball) is legally entitled to the office. A citizen was elected, who could at least qualify as a *de facto* member of the Board. His failure to qualify will make a vacancy in the Board. It was not a failure on the part of the voters to elect.

It was held by the Commissioner in the case of Frome *vs.* Meyers, reported on page 34, 1928 Comp. of School Law Decisions:

> "It appears that in March, 1912, a Mr. Frome was elected a member of the Board of Education of Oxford Township, but that he has not qualified and has declined to do so, and that at a meeting of said Board of Education on May 6th the Board elected a Mr. Axman to fill the vacancy. It is contended that this appointment is illegal and that the vacancy should have been filled by an appointment by the County Superintendent of Schools. The County Superintendent is only authorized to fill a vacancy in the Board of Education in case there is a failure to elect a member. Vacancies in a Board of Education arising from other causes than failure to elect are to be filled by the Board. There was no failure to elect in this case, but simply a failure on the part of the person elected to qualify. Under these conditions the action of the Board in appointing a person to fill the vacancy was legal."

and the State Board of Education in affirming the decision said:

> "We infer that it was assumed that Mr. Frome's refusal to qualify was substantially the same as if the resignation of a member who had qualified was accepted and a vacancy thereby created. Inasmuch as the vacancy was not caused by a failure to elect, the Board of Education had authority to appoint some one to serve until the next election.'

The election of George Baxter is hereby declared invalid. A vacancy legally exists in the membership of the board which it is authorized (Section 86, P. L. 1903, S. S.) to fill provided *quo warranto* proceedings are not first made necessary by an attempt of respondent to qualify.

April 2, 1931.

LEGAL RESIDENCE NOT LOST BY TEMPORARY RESIDENCE ELSEWHERE

HAROLD KING,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant has for a number of years owned a residence in Ocean Township. About five years ago he sold the house where he had resided and built another which until the present year he has rented during the summer months, and this year it is being occupied during the winter season under a month to month tenancy. Mr. King has reserved a room and the attic for most of his household goods. During the past seven years he has been employed as a caretaker on an estate situate in the City of Long Branch, and because of the preference of his employer, he has with his family resided in a building on that estate. About three years ago he lived during one winter in his own house, but since then has stayed only two or three nights in his Ocean Township residence.

The appellant voted in Ocean Township until a few years ago, when he testifies that he was told he should vote in Long Branch, and accordingly he and his wife registered and voted there. During 1930 there was a question raised about the education of his children and he decided to re-establish his voting residence in Ocean Township. At the time of the primary election in May, 1931, the members of the election board in Ocean Township refused Mr. and Mrs. King the privilege of voting and they were required to take an affidavit as to their residence. The evidence is to the effect that he was directed to state in the affidavit where he was residing and he, therefore, gave the Long Branch address. He testified that he gave that city as the place where he actually resided, but not as the place where he claimed his residence. After much discussion between challengers and the election board, Mr. and Mrs. King were permitted to cast their ballots under protest. In November, 1931, they cast their ballots in Ocean Township and at this election their eligibility was not challenged.

The legal residence of appellant has been locally argued during the past two years, so that when Mr. King desired to have his son attend the Asbury Park High School (which is one of the designated schools for the high school pupils of Ocean Township) the Board of Education, believing the legal residence of appellant to be in Long Branch, refused to pay the tuition. Appellant contends the action of the Board of Education is illegal since he is a resident of Ocean Township and as such his children are entitled to educational facilities provided by that Board of Education.

While the evidence shows the voting registration changed several times, appellant and his wife both testified that their homes in Ocean Township have

constituted a continuous residence from which they have been away only because of the requirement of appellant's employment; and that they have never left their home with an intention of establishing a residence elsewhere, but always with the intention of returning to it when the condition of employment made their return possible.

According to 14 Cyc., page 51

> "*All the conditions* which are required to constitute the domicile in the given place must be transferred to the new place. When this is done the domicile is changed, and until this is done the domicile is not changed. It follows as a corollary, therefore, that there must exist a fixed intent to abandon the former domicile, for where there is a purpose either secret or open to return, no change will result."

It was even held in the case of Estley *vs.* Capron, 89 Ind. 167, that

> "Domicile is not lost by removing therefrom and locating in a new place with possible purpose to make the latter a permanent home at some future time. The intent must be present and fixed, not ultimate."

In the case of Snyder *vs.* Callahan, 3 N. J. Misc. Rep. 269, at page 271, the court held:

> "The general rule in respect to the acquisition of a new domicile is, that after a person has abandoned his domicile of origin, or his acquired domicile, his domicile will be considered to be in that place, in which he has voluntarily fixed his habitation, not for *a special* or temporary purpose, but with a present intention of making it his home, unless, or until, something which is uncertain or unexpected should happen to induce him to adopt some other permanent home."

In accordance with the above cited authorities, Mr. King's domicile in Ocean Township is not lost because he occupies a residence upon his employer's property in the City of Long Branch, when it is clearly shown that it is his intention not to abandon the Ocean Township residence, but to re-occupy it whenever the terms of his employment will permit him to return. Since Mr. King is a legal resident of Ocean Township, the Board of Education of that district is required to provide school facilities for his children.

December 21, 1931.

IN ABSENCE OF CONCLUSIVE PROOF TO THE CONTRARY A PERSON'S RESIDENCE IS WHERE HE ALLEGES IT TO BE

HOWER T. MARSTELLER,

Appellant,

vs.

R. ROSTIN WHITE,

Respondent.

For the Petitioner, Edison Hedges.
For the Respondent, William H. Smathers.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, a citizen and taxpayer of the City of Somers Point, contests the right of Dr. R. Rostin White to serve as a member of the Board of Education of that city under appointment of February 1, 1934, on the grounds that Dr. White is not qualified for membership in that he was not a resident and citizen for three years previous to his becoming a member of the board.

The testimony shows that Dr. White came to the Atlantic Shore Hospital in Somers Point March 1, 1929, and as a part of his compensation was assigned a room which he furnished and claimed as his home and legal residence. Dr. White was subsequently married, and on May 13, 1934, rented a furnished home at 108 North Trenton Avenue, Atlantic City, in which he resided with his wife until November 11, 1933, when he moved to 644 Shore Road, Somers Point, and transferred to that address the furniture from his hospital room. The petitioner submitted receipts showing the renting of the Atlantic City property, the occupancy of which is admitted by the respondent, and also receipts for the use of gas and electricity during the time of such occupancy. The records of the Motor Vehicle Department were also submitted showing that in applications for automobile licenses, both Dr. and Mrs. White gave their residence as 108 North Trenton Avenue, Atlantic City.

It is contended by counsel for appellant that while Dr. White claims Somers Point as his residence since March 1, 1929, the foregoing show definite intentions to establish a legal residence in Atlantic City, and that his declaration of continuing his residence in Somers Point is of no avail since it is not borne out by his acts.

Respondent, however, testifies that it was not only his intention to retain his legal residence in Somers Point, but his acts are in accord with such intention. He shows that between March 1, 1929, and November 11, 1933, he frequently stayed at the hospital room which he furnished, that he not only claimed the right to vote in Somers Point but voted at every election held in that city since March 1, 1929, that he is a member of a fire company in Somers Point, that he contributes toward the support of two different churches in that city, that he has always claimed Somers Point as his legal residence, and that his Atlantic City address was a matter of business convenience without any intention to abandon his Somers Point residence.

In the case of Cadwalader *vs.* Howell, 18 N. J. L. 128, the Court said:

> "The place where a man is commorant, may perhaps be properly considered as *prima facie,* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leaves his original residence, *animo non revertendi,* and adopt another (for a space of time, however brief, if it be done) *animo manendi,* his first residence is lost. But if in leaving his original residence, he does so, *animo revertendi,* such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense."

and in Snyder *vs.* Callahan, 3 N. J. Misc. Rep. 269, it was held:

> "The general rule in respect to the acquisition of a new domicile is, that after a person has abandoned his domicile of origin, or his acquired domicile, his domicile will be considered to be in that place, in which he has voluntarily fixed his habitation, not for a special or temporary purpose, but with a present intention of making it his home, unless, or until, something which is uncertain or unexpected should happen to induce him to adopt some other permanent home."

Since Dr. White's declaration of intention to maintain a legal residence in Somers Point since March 1, 1929, is supported by the fact that he continually voted in that city, maintained a room and furnishings there, and had interests in the fire company and churches, his residence must be presumed to be where he alleges it to be. Dabaghian *vs.* **Kaffafian, 71 N. J. L. 115.**

Dr. R. Rostin White, is, therefore, declared to be a legal resident of the City of Somers Point and the petition of Hower T. Marsteller is accordingly hereby dismissed.

January 21, 1935.

Decision of the State Board of Education

Before the Commissioner of Education, the appellant contested the right of the respondent to serve as a member of the Board of Education of Somers Point under appointment of February 1, 1934, on the ground that the respondent was not a citizen and resident of Somers Point for three years previous to his becoming a member of the board, and was therefore not qualified. Evidence was introduced before the Assistant Commissioner by both parties to the controversy, the appellant relying upon proof that Dr. White had for a time occupied a home in Atlantic City, and in applying for automobile licenses both he and his wife had given as their residence an address in Atlantic City. The respondent showed that he had for over three years prior to 1934 declared his intention to maintain his legal residence in Somers Point, that he frequently occupied a room in the hospital there, with which he was connected, that he was a member of the Somers Point Fire Company, that he contributed toward the support of two churches in that city, that he had voted in Somers Point

at every election held there since March 1, 1929, and that his Atlantic City address was a matter of business convenience used by him without any intention to abandon his legal residence in Somers Point.

The Commissioner has held that Dr. White's declaration of intention to maintain his residence in Somers Point was supported by the evidence, and that he was, under the law as announced in the decisions of the Courts of this State, a legal resident of Somers Point and entitled to serve on the Board of Education. We agree with the conclusion of the Commissioner and recommend that his decision be affirmed.

February 1, 1936.

RESIDENCE OF MEMBER OF BOARD OF EDUCATION

FRANK H. O'BRIEN,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,
Respondent.

For the Appellant, Francis B. McCauley.
For the Respondent, Mark A. Sullivan.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant was elected a member of the Board of Education of West New York for a term of three years from the first Monday in April, 1911, and served as such member until March 30, 1912. On that date the following preamble and resolutions were adopted by said Board of Education:

> "WHEREAS, It has been brought to the notice of the Board of Education of the School District of West New York that Frank H. O'Brien has ceased to be a resident of the territory contained in the School District of the Town of West New York, and has thereby ceased to be a member of the Board of Education of said School District; now therefore,
>
> *"Be it Resolved,* That a vacancy exists in the membership of said Board of Education, and be it further
>
> *"Resolved,* That Louis Wagner be and he is appointed a member of the Board of Education of the Town of West New York, in the County of Hudson, to take place of said Frank H. O'Brien, and to fill the vacancy caused by the non-residence of said Frank H. O'Brien."

O'Brien attended a regular meeting of the Board on Monday, March 25, 1912. This meeting was adjourned until the Thursday following, and again adjourned to Saturday, March 30, when the preamble and resolutions above

quoted were adopted. O'Brien attempted to attend the meeting of March 28, but was prevented by illness. He had no knowledge of the meeting of March 30, nor had he any knowledge that there was any question as to his being a resident of West New York. In fact, he received on the very day the resolution was adopted a notice of a meeting of the Board of Education to be held the following Monday. There is nothing in the evidence to show that the question as to his residence had been before the Board at any time prior to March 30. There was no evidence presented at that meeting, and the action appears to have been based on statements made by O'Brien that he would not be able to attend all the meetings of the Board for the reason that, owing to ill health, he was temporarily living with his wife's mother at Newburgh, New York, and for the further reason that he had broken up his home in West New York and shipped his household effects to Newburgh.

It is very clear from the evidence that O'Brien did not leave West New York with the intent of establishing a residence elsewhere, but that he fully expected to return as soon as his health would permit. The counsel for the Respondent very ingeniously argued that the residence of a member of a board of education contemplated by section eighty-three of the School Law, is not his legal domicile, but his actual place of residence, and that a member of a board of education ceases to be a "resident of the territory contained in the school district" when he actually ceases to reside there, even though it is his intention to return. In many of our towns there are members of boards of education who have summer residences in the mountains or at the shore. The interpretation advanced by the counsel for the Respondent would create vacancies in such boards whenever members left the districts for their summer homes, and in some cases might result in leaving the boards with less than a quorum, and possibly leave a district without any board. I think that the word "resident" in section eighty-three must be construed as meaning domicile. Adopting this construction O'Brien has not ceased to be a resident of the School District of West New York.

But had I reached the conclusion that he had ceased to be a resident of the School District, I am of the opinion that he is still a member of the Board of Education. A public officer having been duly elected cannot be deprived of his office except by due process of law. A member of a board of education must not only be a resident of the district at the time of his election, but must continue to be a resident during the term for which he was elected. If he loses his residence he ceases to be a *de jure* member, but continues as a *de facto* member until his office has been declared vacant in the manner provided by law.

The only provision in the School Law giving to a board of education power to remove one of its members is contained in section ninety-two. This section confines the power to remove to a case when a member fails to attend three consecutive regular meetings of the Board without a good cause. It is not contended that O'Brien is subject to removal for this cause.

The question as to whether or not a member of a board of education has ceased to possess the qualifications prescribed by law for membership in the Board is a controversy arising under the School Law, and the Board of Educa-

tion of the Town of West New York had no power to decide such controversy. O'Brien has never ceased to be a member of said Board of Education, and the action of the Board in ousting him, and in appointing a person to fill the vacancy thus created, was illegal, null and void.

June 13, 1912.

Decision of the State Board of Education

In March, 1911, Frank H. O'Brien was elected a member of the Board of Education of the Town of West New York in the County of Hudson for a term of three (3) years. On March 30, 1912, the Board declared that it had been brought to its notice that he had ceased to be a resident of West New York, and it thereupon resolved that he thereby ceased to be a member of the Board, and it elected Louis Wagner in his place. Mr. O'Brien was not present at this meeting. No notice was given to him that the Board contemplated declaring that he had forfeited his membership and no evidence was adduced at the meeting upon the question of his residence.

Mr. O'Brien appealed to the Commissioner of Education and from a decision in his favor the Board of Education of the Town of West New York appealed to the State Board of Education.

Though considerable testimony was taken, the facts are simple. Mr. O'Brien became a resident of West New York in 1898, and that he was such until March, 1912, is not disputed. For some time prior to March, 1912, his health was bad. At times he was unable to work and his physician advised him to go to Saranac Lake. At the end of February, 1912, to use his own expression, he broke up his home. His wife and child went to Newburgh to the home of her mother. His furniture was also shipped there to save, as he says, storage charges. Mr. O'Brien's mother, brothers and sisters, however, lived in an apartment in West New York. To that apartment he took all his clothing, and he and his brothers testified that after March 1 he resided therein. Prior to March, instead of going to Saranac, he spent some time with his wife's relatives in Newburgh. During March he spent part of his time at his mother's apartment in West New York, and part at the residence of his wife's mother in Newburgh. On March 25 the Board of Education of the Town of West New York held a regular meeting which Mr. O'Brien attended. At its conclusion, an adjournment was taken to the 28th. On the 28th he was at the home of his mother. He attempted to attend the meeting but his physical condition was such that he had to abandon the attempt. At the close of the meeting another adjournment was taken to the 30th. No notice was given to him of this adjourned meeting, but a few hours before the time fixed for it he received at the home of his mother written notice that on April 1 the new Board would meet to organize.

At four o'clock in the afternoon of the 30th the Board met and adjourned to 8:15 P. M. It was at this adjourned meeting that the Board resolved that Mr. O'Brien had forfeited his membership. No question has been raised as to the legality of this meeting, which commenced after 8 P. M., contrary to law, and in view of the conclusion which we have read, it is necessary for us to

rule on it. Needless to say, if a board can convene at four and then lawfully take a recess until 8:15, there would seem to be no reason why it could not do so until 9:15, 10:15, 11:15, or even midnight, and the spirit, if not the letter, of the law would be just as clearly broken if a meeting was called for any such hours. The law is very clear. Meetings of the Board of Education shall be public, and shall commence not later than 8 P. M. The object of the law, viz., full publicity, can be defeated almost as well by holding meetings when the great majority of the public is asleep as by a star chamber proceeding. We believe, however, that in this case the adjournment to 8:15, rather than to 8:00, was due to inadvertence.

No evidence was taken upon the subject of the resolution, and each member in voting in favor of it did so because of information which he had gleaned from conversations with Mr. O'Brien, with other members of the Board, and from residents of the district. This information, in brief, was that Mrs. O'Brien and child had gone to Newburgh, that their furniture had been shipped there, that Mr. O'Brien at times stated that he had come from Newburgh, at other times that he intended to return to Newburgh, at other times that he was not sure that he could attend all the meetings of the Board and that he had requested the Secretary to send notices to him at Newburgh. In addition to such information some of the members of the Board believed that his mother's apartment was crowded and that he could not be accommodated in it. His mother's apartment, however, was visited by two members of the Board during the very week when the resolution was adopted, and they found him there. No evidence was offered in any way tending to show that in Newburgh Mr. O'Brien had started business or that he had established a home for his family or that he had ever registered or voted, or that he had paid taxes or purchased property. We do not understand the counsel for the Board to contend that he had abandoned his citizenship in New Jersey or that he ceased to be domiciled in West New York.

The law provides that a member of a board of education shall be a citizen and resident of the territory contained in the school district. The Appellant Board contends that if a member ceases to be an actual as distinguished from a constructive resident of a school district he forfeits his membership. Many men live in cities except during summer. They are residents of the cities, vote and pay taxes in them, and when they return after the summer, do not always return to the same house. If any such goes to the mountains or to the seashore for a month or for the whole summer, would he, thereby, if a member of a board of education, cease to be one? Would a man, who because of business or illness temporarily leaves his district, forfeit his office? Such men are actually residing wherever they happen to be, but they are still constructive residents of some districts in this State. We cannot agree with the Appellant Board. Though enough has been written on citizenship, residence and domicile to fill a library, we think it is generally accepted that where a statute requires a candidate for public office to be a resident of the district or locality to be represented, the word "residence" is deemed to be identical and synonymous with "domicile." (People *vs.* Platt, 50 Hun, 454. Affirmed 117 N. Y. 159.)

In that case it was vigorously contended that the expression "residence" in a statute prescribing a qualification of residence for office meant actual physical presence. Very many authorities were cited and examined and the Court ruled that where residence is used in such a statute it must be taken to be the equivalent of domicile. It was pointed out that throughout the country it is established that the only place where a citizen can vote is at his domicile and the Court said:

> "It would be absurd to say that more permanence was required in the voter than in the local officer voted for. If, by statute, one must be a resident of a town in order to vote, and by statute, also one must be a resident of the town to hold office therein, then if residence in the voter's case means domicile, so it means, also in the case of the officers. The two subjects are cognate, and the word 'residence' is used with like meaning in respect to each."

For fourteen years prior to March, 1912, Mr. O'Brien was domiciled in and an actual resident of West New York. It was there that he voted and exercised his political rights. That domicile is presumed to continue until a change is shown, and the burden of proof is on him who alleges the change. That burden the Board of Education of the Town of West New York in our opinion has not sustained. Indeed, we do not understand its counsel to even claim that Mr. O'Brien has changed his domicile to Newburgh. A change of domicile is dependent upon two things—fact and intent. We cannot find as a fact that on March 30, 1912, Mr. O'Brien's residence was at the home of his wife's mother in Newburgh rather than at the home of his own mother in West New York. Neither can we find that on March 30 he had formed any intention of abandoning West New York. He testified subsequently to that date in the proceedings before the Commissioner that when he is able to support his wife and child he intends to take them back to West New York.

The record is not such that we can disbelieve him.

We find that on March 30, 1912, Mr. O'Brien was a resident of the school district of West New York within the meaning of the statute, and that the resolution of the Board of Education of that town adopted on that day wherein his office as a member was declared vacant was without foundation.

Aside from the foregoing, it is not clear that the Board of Education of the Town of West New York could oust Mr. O'Brien from membership without giving notice, and affording him an opportunity to be heard, or that it had any authority whatever to determine that he abandoned his office, except for a failure to attend three consecutive regular meetings without good cause.

The members of the Board in voting against him, we believe, acted as they thought proper, and as they thought for the best interests of the district. We cannot find, however, that their resolution has any sound foundation. The decision of the Commissioner is affirmed.

December 9, 1912.

ELIGIBILITY OF BOARD MEMBER NOT AFFECTED BY ILLEGAL ACTION DURING PREVIOUS TERM

WILLIAM A. DONAGHY,

Appellant,

vs.

LEONARD R. BAKER,

Respondent.

For the Appellant, Raymond Saltzman.

For the Respondent, Bleakley, Stockwell & Burling.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant asks for the removal of the respondent, who is president of the Palmyra Board of Education, for the reason that on, and prior to November 17, 1933, certain purchases were made by the Board of Education of Palmyra from the firm of Baker-Flick Company, Camden, New Jersey, of which firm the respondent is president. Appellant contends that these purchases were made in violation of sections 29 and 30 of "An Act for the punishment of crimes (Revision of 1898)" and of sections 83 and 152 of "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three.

At a hearing held June 15, 1934, it was admitted by respondent that purchases were made by the Palmyra Board of Education from Baker-Flick Company, and counsel for the Petitioner admitted that no purchases have subsequently been made by the Board of Education from that firm, that Mr. Baker was re-elected to the Board of Education the second Tuesday in February, 1934, and began service on a new term on the first Monday in April, and that the Commissioner has no jurisdiction over violations of the provisions of "An Act for the punishment of crimes (Revision of 1898)."

Section 152 of Chapter 1, P. L. 1903, S. S., provides that any person officially connected with the public schools, who is in any way pecuniarily or beneficially interested in the sale of textbooks, maps, charts, school apparatus or supplies of any kind, may be punishable by removal from office. The statute does not state by whom the official may be removed. In the absence of designated authority, the removal of a public official may be effected only by the Supreme Court under *quo warranto* proceedings and, therefore, the Commissioner is without power to grant the prayer of the Petitioner, even if the Respondent were found guilty.

In the case of DuFour *et als. vs.* State Superintendent of Public Instruction, 72 N. J. L., page 371, Justice Garretson in expressing the opinion of the Court said:

> "It was also held in that case (referring to Buren *vs.* Albertson, 25 Vroom 72) 'Even though the right to the office of school trustee is to be ultimately determined by *quo warranto,* there is no impropriety in it being passed upon for immediate purposes by such instrumentalities as the Legislature may appoint. * * *'"

The Commissioner may, therefore, render an opinion upon the status of the Respondent as it is affected by the testimony before him.

It was held by the State Board of Education in the case of Park *vs.* Hearon, page 309, 1928 Compilation of School Law Decisions, that section 152 of Chapter 1, P. L. 1903, S. S., has no application to the type of purchases set forth in the instant case. Even if it had, the Commissioner is of the opinion that Respondent could not be removed from office for an infraction of a statute which occurred during a prior term, and this opinion is supported in the case of State *vs.* Jersey City, 25 N. J. L. 536, cited by counsel for the Respondent.

Section 83 of Chapter 1, P. L. 1903, S. S., in reciting the qualifications of a member of a board of education, provides:

> "He shall not be interested directly, or indirectly, in any contract with, nor claim against said board."

Neither on the first Monday in April, 1934 (the time of taking office for the new term), nor since that time has Leonard R. Baker been directly, or indirectly, interested in any contract with, nor claim against the Board of Education of Palmyra. Even though unintentionally, or intentionally the law was violated in these sales made by the Baker-Flick Company during Respondent's previous term of office, there is no evidence before the Commissioner to disqualify the Respondent for the term of office which he is now serving.

July 6, 1934.

LOCAL BOARD OF EDUCATION NOT AUTHORIZED TO PASS UPON QUALIFICATIONS OF ITS MEMBERS

FRANK KREJCI and JULIA SCIOLI,
Petitioners,
vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, and "JOHN" CARLSON, First Name Being Unknown and Fictitious, and ABRAHAM MAVUS, Who Allege Themselves to be members of the Board of Education of the Township of South Hackensack, Bergen County,
Respondents.

For the Petitioners, LeRoy VanderBurgh (I. William Aronsohn, of Counsel).

For the Respondents, James H. White.

DECISION OF THE COMMISSIONER OF EDUCATION

The Petitioners were candidates for membership on the Board of Education of the Township of South Hackensack. Mr. Krejci was elected by having his name written on the ballot, no nominating petition or petitions having been filed in his behalf whereby he would have been entitled to have his name printed. Petitioners received a majority of the votes cast and were declared elected by the election officials. They, with other members, were notified by the district clerk that the organization meeting, provision for which is made by section 85, Chapter 1, P. L. 1903, S. S., would be held on April 6, 1936, at 7:00 P. M., and that a regular meeting would be conducted at 8:00 P. M. Mr. Krejci admitted receiving such notice on April 4, but Mrs. Scioli testified that she did not receive the notice until 7:30 P. M. on April 6, although it may have been in the mail box prior to that time.

It appears that for a number of years prior to 1936, it had been the custom for the district clerk to administer the oath of office to new members. With knowledge of this fact, Mr. Krejci went to the home of the clerk about 6:00 P. M. on April 6, 1936, and upon asking that the oath of office be administered was advised by the clerk that she had been recently informed that she was not authorized to execute the oath. Mr. Krejci then requested two oath forms, one of which he gave to Mrs. Scioli and the other he took to Hackensack where it was duly executed about 7:00 P. M. He returned to the schoolhouse about 8:15 P. M., and in the meantime Mrs. Scioli went to Little Ferry to have her affidavit taken and testified that she returned to the schoolhouse at South Hackensack about 8:10 P. M. Petitioners testified that when they arrived, they found the building in darkness.

The president and district clerk of the Board testified that there were not sufficient members present at the 7:00 P. M. meeting to effect the organization and that those attending waited until 8:00 P. M. to call the regular meeting to order, at which time business was transacted for about fifteen minutes and that they left the building at 8:20 P. M.

The County Superintendent of Schools was notified that due to the fact that there was not a quorum present on April 6, the Board was unable to organize. Accordingly, under the provisions of section 85, Chapter 1, P. L. 1903, S. S., the County Superintendent appointed a president and vice-president and he further notified the clerk that since Mr. Krejci and Mrs. Scioli did not file their oaths of office prior to or at the organization meeting on April 6, they should not be considered as members. After receipt of the County Superintendent's advice, a meeting of the Board was called on April 7, notice of which was not sent to Petitioners, and at that meeting of the Board "John" Carlson and Abraham Mavus were appointed by the Board to fill the alleged vacancies until the next election. Petitioners did not file their oaths of office with the district clerk until April 11, 1936—five days after the date of the organization meeting, and thereafter when attending the next regular meeting of the Board, their recognition as members was refused.

Petitioners ask that they be declared to be the lawful members of the Board of Education to which positions the Respondents contend they are not entitled for the alleged reason that Mr. Krejci did not file a petition to have his name placed upon the ballot and was, therefore, illegally declared elected, and for the further reason that since neither Mr. Krejci nor Mrs. Scioli filed the oath of office at or prior to the time of the organization meeting, they were automatically disqualified to serve as members of the Board of Education of the Township of South Hackensack.

Chapter 211, P. L. 1922, section 9, which prescribes the directions to be placed upon the ballot at annual school elections, reads in part as follows:

> "Immediately after the space allotted to the names of the candidates there shall be as many ruled blank spaces as there are members to be voted for. Immediately to the left and on the same line with the name of each candidate and blank space, there shall be printed a square the same size of type in which the name of the candidate is printed, * * *"

Section 9 illustrates the form of ballot in compliance with the foregoing requirement. In elections held throughout the State since 1922, the blank spaces provided on ballots have been uniformly considered to be for personal choice purposes in which names have been written or pasted, and candidates receiving the highest number of votes have been held to be elected regardless of whether their names were printed upon the ballot or written or pasted in the personal choice space. Mr. Krejci whose name was written in the personal choice space was, therefore, legally elected. Shearn *vs.* Middlesex Borough, 1932 Compilation of School Law Decisions, 971; Layton *vs.* Bedminster, Id. 968.

The statutes applicable to the present case are to be found in Chapter 1, P. L. 1903, S. S., as follows:

(1) *Qualifying by oath.* "85. A member of such Board of Education shall, before entering upon the duties of his office, take and subscribe an oath, before any officer authorized by law to administer oaths, that he possesses the qualifications to be a member of said Board prescribed therefor in this article, and that he will faithfully discharge the duties of said office. Said oath shall be filed with the district clerk of said Board."

(2) *Removal of a member.* "92. A member of a board of education elected under the provisions of this article who shall fail to attend three consecutive regular meetings of said board, without good cause, may be removed by said board, and the vacancy thus created shall be filled in the same manner as other vacancies in the board of education shall be filled."

(3) *Filling of vacancies.* "86. The board of education shall have power: I. To appoint a person to fill a vacancy in the Board of Education except a vacancy caused by a failure to elect, but the person so appointed shall serve only until the next election for members of the Board of Education."

In addition to vacancies caused through the death or resignation of an incumbent, the Legislature has authorized a board of education to declare a vacancy where a member has been absent from three consecutive meetings without cause, but under the last mentioned situation, the courts have held that the incumbent has a right to be heard on the question of good cause before the vacancy can be legally declared. Even where a member moves from the district, or otherwise appears to have abandoned his position, there is no authority for the board's declaring the vacancy until after the member has been absent for three consecutive regular meetings.

The petitioners were duly elected and even between April 6, when they took the oath, and April 11, when it was filed with the district clerk, they were at least *de facto* officers. The other members of the board of education may be only *de facto* members since from the testimony it appears they have not taken the oath of office before an official competent to administer it. Counsel for respondent cites cases holding that the filing of an oath is a prerequisite to the investiture in office. This, of course, is admitted, but it is another matter to say that because of the failure to file the oath on the date of organization, the right to office is lost.

In the case of Murphy *vs.* Board of Chosen Freeholders of the County of Hudson, 92 N. J. L. at page 247, Justice Black in delivering the opinion of the Court in ruling upon the right of a board of freeholders to remove a county counsel whose term is fixed by law, said:

"Our answer to this question must be 'No' both on principle and authority. It is a well established principle in the law of municipal corporations that they have only such powers of government as are expressly granted to them or such as are necessary to carry into effect those that are granted. * * * Removal of an officer of a municipal corporation appointed for a fixed term can be exercised legally only by virtue of expressed power."

and quotes with approval from Blumstead *vs.* Blair, 73 N. J. L. 378, as follows:

> "The necessity for the interposition of some tribunal to declare the default is inherent. * * * In the absence of statutory provision the only mode in which an office can be deemed and taken to be vacant is by proceedings in the nature of *quo warranto.*"

and from Hallgreen *vs.* Campbell, 82 Mich. 255:

> "We have not found any case where an officer who is appointed for a fixed term has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer he is entitled to notice and a chance to defend."

Counsel for respondents in arguing that the petitioners are merely *de facto* officers at best and, accordingly, have no rights to contest the title to office of Carlson and Mavus, cites the case of Beattie *vs.* Passaic County Board of Taxation, 96 N. J. L. 72. No court has determined that the Petitioners in this case are not *de jure* officers, and since the petitioners' title to office has not been legally determined, there has been no ruling of authority for holding them to be ineligible to contest their right to membership on the South Hackensack Board of Education.

Controversies relative to the acts of boards of education come within the jurisdiction of the Commissioner of Education. A board of education is not given authority to pass upon the qualifications of its members. Even the right of the Commissioner to pass upon the title to office is subject to a resort to *quo warranto* for final adjudication. Burlew *vs.* Bowne, 87 Atl. Rep. 702; Koven *vs.* Stanley, 84 N. J. L. 446. Moreover, petitioners are not asking the Commissioner to oust Mr. Carlson and Mr. Mavus, but to declare illegal the action of the Board in determining that vacancies existed in the positions to which the petitioners were elected and in appointing to fill such vacancies.

The Board of Education of the Township of South Hackensack exceeded its legal authority in holding petitioners disqualified as members, in declaring vacancies, and in appointing the corespondents. Petitioners, having been duly elected at the annual meeting and having taken and filed their oaths of office, are legally entitled to membership on the Board of Education of the Township of South Hackensack.

August 19, 1936.

REMOVAL OF MEMBER OF BOARD OF EDUCATION FOR NOT ATTENDING MEETINGS

GEORGE W. MEAD,

Appellant,

vs.

THE BOARD OF EDUCATION OF PEQUANNOCK TOWNSHIP,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

If a member of a board of education is absent from the district for a long period of time consecutively, and absent from the State, so that it is impossible to notify him, I think that notice would not be necessary. But where a man is living in the district, and can be served with a notice, notice should be given for the reason that the Board must be able to show that the member is removed for cause. It may be that a member of a board of education through indifference fails to attend, but that is not within the official knowledge of the members of the Board.

In this case notice should have been given before action was taken.

April 7, 1913.

REMOVAL OF PRESIDENT OF BOARD OF EDUCATION BY THE BOARD

JOSEPH WILLIAMSON,

Appellant,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, HUNTERDON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Joseph Williamson, the appellant in this case, was duly elected president of the Board of Education of Union Township, Hunterdon County, at its annual meeting in April, 1920. At a special meeting of the Board of Education held on August 2, 1920, appellant was removed from the presidency of the Board by a majority vote of the members thereof. Appellant was not present at the meeting when such action was taken.

A hearing in this case before the Commissioner of Education took place on October 27 at Flemington, and at this hearing it was developed that the charge upon which appellant was removed was to the effect that he had refused to perform the duties of his office; more specifically, that he had refused to sign orders for the payment of teachers' salaries and other orders. At the hearing appellant testified that he had refused to sign orders for

teachers' salaries and other orders at the close of the school year 1920, because there was not sufficient money on hand with which to pay the orders. This was admitted by the members of the Board of Education who had voted to depose appellant as president.

It appeared further at the hearing that at a meeting of the Board of Education on July 28, 1920, a resolution was passed providing for the borrowing of the amount of deficit for the year 1919-20, from taxes in the hands of the custodian which had been voted for the year 1920-21. Appellant claimed that the Board of Education had no authority to borrow money from any source to make up the deficit without first submitting the question to the voters for their sanction at a meeting legally called for that purpose. Such a meeting had been called for August 5, but the action taken by the Board of Education on July 28 authorizing the borrowing of the money from this year's budget was in anticipation of what the voters were expected to do on August 5.

The appellant, Joseph Williamson, was therefore deposed before the voters had authorized the borrowing of the money.

The practice of meeting a deficit in the current expense funds of the district by borrowing money from funds which had been voted for the following year is a bad one, and if continued year after year would finally lead to a large amount of indebtedness to be carried indefinitely as a debt upon the district.

Mr. Williamson's action in refusing to sign orders for the payment of money when he knew there was a deficit is one for which he cannot be blamed because he was holding strictly to the legal requirements in such cases.

In addition to this, the way in which appellant was deposed as president of the Board of Education must be considered. This was done at a special meeting of the Board, which was called, as shown in the testimony, for the purpose of determining how much money was on hand. Mr. Williamson himself ordered the meeting, and as he states, it was for the above purpose. The district clerk who called the meeting states that the notice, which was an oral one, did not state the business to be transacted at the meeting.

At this meeting the appellant, without being present himself, was by a majority vote of the Board of Education removed as president of the Board, and removed without any knowledge that such action was contemplated and without opportunity to present a defense to the charges against him.

After reviewing all the facts in the case the Commissioner is of the opinion that the charges preferred against the appellant, Joseph Williamson, were inadequate and that not only was appellant justified but should be commended for refusing to sign orders on the custodian for moneys that were not in the custodian's hands.

The Commissioner is further of the opinion that to remove a man from office without giving him an opportunity to meet the charges against him is contrary to all usage and fairness in such matters.

It is therefore hereby ordered that the appellant, Joseph Williamson, be reinstated in his office as president of the Board of Education of Union Township from this date.

November 18, 1920.

SUPPLIES FURNISHED BY BOARD MEMBERS

FREDERICK W. PARK,
Appellant,

vs.

HUGH HEARON,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case was submitted on written complaint and answer, and without formal hearing. The complainant, Frederick W. Park, of Cranford, preferred charges against Hugh Hearon, president of the Board of Education of the school district of Cranford, as having violated article 14, section 183, of the School Law, inasmuch as he had furnished supplies, printing and advertising for the Board of Education, and the bills were paid by the Board, of which he was a member. The appellant demands that the said Hugh Hearon be removed from his office as a member of the Board of Education, pursuant to the law as found in the section above mentioned.

The undisputed facts in the case are that between June 1, 1914, and April 27, 1916, the said Hugh Hearon was the publisher and one of the owners of a newspaper called the Cranford Chronicle and that while part owner of this paper and printing business there were furnished certain printing and advertising to the Board of Education of the district of Cranford, of which Mr. Hearon was a member. Bills for this printing and advertising were paid by the said Board.

The question which is important to consider is the character of the printing, advertising and supplies furnished, in order to determine whether they come under the provisions of article 14, section 183, as the appellant claims. This article in the School Law was enacted in 1903. Section 181 of this article provides that "textbooks and school supplies shall be furnished free of cost for use by all pupils in the public schools." Section 183 of the same article provides that "it shall be unlawful for any county superintendent of schools, member of a board of education, teacher or any person officially connected with the public schools to be agent for or to be in any way pecuniarly or beneficially interested in the sale of any textbooks, maps, charts, school apparatus or supplies of any kind or to receive compensation or reward of any kind for any such sale or for unlawfully promoting or favoring the same. A violation of the provisions of this section shall be punishable by removal from office or by revocation of certificate to teach." It will be noted that there is a penalty attached to a violation of this law. The question is as to whether the things furnished the Board of Education by the Cranford Chronicle Company were supplies in the meaning of the statute invoked by the appellant. The supplies mentioned in section 181, article 14, are provided for

the use of pupils just as the textbooks and the maps and the charts mentioned are provided for the use of pupils. An examination of the itemized bills that were paid by the Board of Education to the Chronicle Company reveals that only advertising and printing matter made up the items in the bills. The appellant does not claim that the material furnished by Mr. Hearon was for the use of pupils, but claims they were supplies within the meaning of the section quoted in the law.

Article 7, section 106, of the School Law, in giving a definition of the term "current expenses," states that they shall include among other things textbooks, school supplies, flags, insurance and incidental expenses of the schools. The question to determine, then, is whether the printing furnished in this case would come under the head of incidental expenses or under the head of school supplies. The supplies mentioned in article 14, section 183, are the kind that are intended for the use of pupils, just as the textbooks are intended for the use of pupils, and the printing and advertising the Chronicle Company furnished are not within the meaning of the words "school supplies," but come under the title of incidental expenses for running the schools. It is not shown in the charges made that Mr. Hearon had any interest in the "sale" of textbooks or supplies as comprehended in the meaning of the statute. The things he furnished the Board of Education were not sold to the Board; they were ordered by the Board.

It is common business practice to sell to boards of education through agents of book companies and school supply houses textbooks and school supplies. The law prohibits teachers, county superintendents and school board members from acting as agents for the "sale" of these things, or to receive compensation or reward for promoting the "sale" of them. A violation of this section by a teacher is punishable by revocation of his certificate to teach. A county superintendent or school board member is punished by removal from office.

The Chronicle Company, therefore, not having furnished school supplies for the use of pupils, Mr. Hearon had no pecuniary or beneficial interest in promoting or favoring their "sale." Hence, there was no violation of the provisions of section 183 of the School Law.

Inasmuch as Mr. Hearon in his answer to the charges pleaded justification because of an opinion of the Attorney General that he claims was given to a committee of the Board of Education who visited Trenton to discuss the matter, it is well to consider the case under section 32 of the crimes act as found in section 430 of the School Law. Here the law is as follows:

> "Any member of any board of education in any school district who shall be directly or indirectly concerned in any agreement or contract, or directly or indirectly interested in furnishing any goods, chattels or supplies or property of any kind whatsoever to the school district, the expense or consideration of which is paid by the board of which such member is a part, shall be guilty of a misdemeanor."

In the case of the State *vs.* Keuhnle it is held that to justify conviction under this section of the crimes act the concern of the member of the body must be corrupt and that there must be proof of corrupt intent to justify con-

viction. It is held in that case that a member of a board of education may be interested or concerned in a claim against the board of which he is a member even though he may not be criminally liable because of the absence of corrupt intent. Justice Swayze, speaking for the Court of Errors and Appeals, uses the following language:

> "That the owner of a controlling interest in a corporation may often be as much concerned in its contracts as if they were his own is obvious and that although the interest of a holder of a single share of a great corporation like the United States Steel Corporation or the Pennsylvania Railroad may be slight as to be imperceptible no harm can come from holding that he too is concerned within the meaning of the statute, since he cannot be criminally liable unless these is a corrupt intent. Upon the proof of corrupt intent the said stockholder's interest becomes important and may become controlling."

This is evidently the case to which Mr. Hearon refers in justification of his being interested in claims against the Board of which he is a member.

Sworn statements submitted in this case by members of the Board of Education show beyond any question that Mr. Hearon could in no way be accused of any corrupt intent in connection with the business transactions he had with the Board of Education of which he was a member.

Article 7, section 94, of the School Law provides as follows:

> "He [member of the board of education] shall not be interested directly or indirectly in any contract with nor claim against said board."

This clearly sets forth that it is unlawful for any member of a board of education to have any claim against the board of which he is a member.

It has been shown by the appellant and admitted by the respondent that there was an interest on the part of Mr. Hearon in claims against the Board of which he was a member. To be interested in any such claim is a plain violation of this section of the school law, even though there is no corrupt intent. While there is no penalty attached, yet Mr. Hearon should not permit any claim in which he has a financial interest to come before the Board for payment while he is a member of the Board.

July 8, 1916.

Decision of the State Board of Education

The evidence offered in this case shows:

1. That Hugh Hearon, the Respondent-Appellee, was elected a member of the Board of Education of the school district of Cranford, in April, 1914.

2. That three months thereafter the said Hugh Hearon became the half owner by purchase of a newspaper and printing business known as the Cranford Chronicle, and also became its business manager.

3. That the Cranford Chronicle was one of two papers published in the School district, between which the necessary school advertising and printing were divided.

4. That the said Hugh Hearon upon becoming a member of the School Board, advised with other members of the Board, as to whether the share of school advertising and printing formerly given to the Cranford Chronicle should be continued; that some advice was received by himself and the district clerk from some one in the Attorney General's office at Trenton, to the effect that such action would not be illegal; that he and the School Board acted upon that advice; and that advertising and printing continued to be given to the Cranford Chronicle until May, 1915, when the said Hugh Hearon, hearing of public complaint against such action, refused further orders until March, 1916, when upon direct appeal from the district clerk he inserted a five-dollar advertisement of a pending school meeting. Since then there appears to have been no business of any kind given the Cranford Chronicle.

5. Upon these facts Frederick W. Park, the Complainant-Appellant, avers that the said Hugh Hearon has violated Article XIV, section 183, of the School Law, and insists that in consequence thereof the said Hugh Hearon shall be removed from office.

Section 183 of Article XIV reads as follows:

> "It shall be unlawful for any county superintendent of schools, member of a board of education, teacher, or any person officially connected with the public school, to be agent for or to be in any way pecuniarily or beneficially interested in the sale of any textbooks, maps, charts, school apparatus or supplies of any kind, or to receive compensation or reward of any kind for any such sales or for unlawfully promoting or favoring the same. A violation of the provisions of this section shall be punishable by removal from office or by revocation of certificate to teach."

Interpretation of this section—183—must be made by considering its relation to the other sections in Article XIV. Article XIV itself relates to textbooks and school supplies furnished *for the use of pupils in the public schools* as shown by section 181, the first section of the article. We are of the opinion that nothing in this article applies, or can be made to apply to supplies of any kind furnished to school boards. The case does not constitute a dispute or controversy arising under the School Law, and, consequently, neither the Commissioner of Education nor the State Board of Education has jurisdiction in the matter.

The appeal is dismissed.

September 9, 1916.

BOARD MAY APPOINT ATTENDANCE OFFICERS AND TRANSPORTATION DRIVERS WHO ARE WIVES OR EMANCIPATED CHILDREN OF MEMBERS. MEMBER OF BOARD SERVING AS CUSTODIAN OF SCHOOL MONEYS IS INELIGIBLE TO COMPENSATION

O. B. NICHOLS, HENRY R. WALTON,
Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON,
Respondent.

For the Appellant, Herbert Killie.

For the Respondent, Palmer & Powell.

DECISION OF THE COMMISSIONER OF EDUCATION

The Pemberton Township Board of Education at a meeting held May 12, 1932, awarded contracts as follows:

(a) Driver of the board's school bus, on what is known as the Magnolia Route, to Charles Bush, son of Victor Bush, president of the board of education, at $80 per month;

(b) Driver of the board's school bus, on what is known as the Birmingham Route, to Mrs. Florence Mantel, wife of Louis Mantel, a member of the board of education, at a compensation of $75 per school month;

(c) Attendance officer for the school district, to Mrs. Marian McClintock, wife of James McClintock, a member of the school board, at the sum of $175.00 per year.

The board fixed a salary of $100 per year for Arthur Reeves, who is custodian of school moneys. Mr. Reeves is a member of the board of education.

The appellants, who are citizens and taxpayers of the school district, contend that the board cannot legally pay for services under the above contracts or appointments and ask that such contracts, appointments or payments of transportation drivers, attendance officer, and custodian of school moneys be declared illegal.

Counsel for appellants cites Section 926 of the 1931 Compilation of the School Law which he holds makes payments under such contracts and employments a misdemeanor; while it is the contention of counsel for respondent that the Commissioner has no jurisdiction in this case.

Section 926 of the School Law Compilation is Chapter 124, P. L. 1907, an amendment to an act entitled, "An act for the punishment of crimes." The Commissioner agrees with counsel for respondent that any action against board

members under this statute lies in the Civil Courts. The jurisdiction of the Commissioner is to be found in various statutes and court decisions including Chapter 1, P. L. 1903, S. S., Section 10; Thompson *vs.* Board of Education, 28 Vr. 628; DuFour *vs.* State Superintendent, 43 Vr. 371; and the further provisions of Section 83, Chapter 1, P. L. 1903. The portion of the latter section with particular application to the case under consideration is:

> "He *shall not be interested directly or indirectly, in any contract with nor claim against said board.*"

This provision has remained in the statutes since the revision of 1900, and although several extensive revisions of the School Law have been made since that time, this particular qualification of a member of a board of education remains unchanged.

In reference to this part of Section 83, the Commissioner in the case of Stoothoff *vs.* Davies, decided May 29, 1930, and affirmed by the State Board of Education, held:

> "It is evident in the legislative plan for the administration of public education that citizens should accept the important position of board membership because of a desire to render public service rather than for the reason of financial remuneration. To further assure unselfish service there was added the prohibition of direct or indirect interest in contracts or claims against the board. It is only reasonable to conclude that a person not disposed to render unselfish service might seek membership on a board of education to profit directly or indirectly by such membership. Without this prohibition a woman member could aid in securing transportation contracts for her husband, teaching or janitorial positions for her dependent children, and personal contracts for services or supplies. Not only might such salaries or remuneration under such contracts be increased because of her membership upon the board, but her presence at the meeting with her interest in the contract might act to deter other members from expressing their views upon any inferior services or supplies furnished under the contracts in which she was directly or indirectly interested."

The illegality of contracts in which a member of a board of education is directly or indirectly interested is shown by the case of Ames *vs.* Board of Education of Montclair reported in 97 Equity 60, which holds where a board of education contracts for the purchase of land in which one of the members of the board has an indirect interest, such contract will not be enforced in Equity even though the motives and purposes of the member be honest.

In the case of Sturr *vs.* Borough of Elmer, 75 N. J. L. 443, the court set aside a resolution authorizing the purchase of property in which a member of the borough council was indirectly interested.

Under a statute of Idaho providing that "No trustees shall be pecuniarily interested in any contract made in the board of trustees of which he is a member," it was held that a contract employing the wife of one of the trustees as a teacher in his district was void. The Court said:

> "Was the husband of Mrs. Young pecuniarily interested in the contract? We think he was. Under the laws of this State the earnings of the wife constitute a part of the community property. The husband has the control and management of the community property and he may use it and is a part owner of it, and hence is pecuniarily interested in it." Muckols *vs.* Lyle et al., 8 Idaho 589, Pacific 401.

In the case of Engle *vs.* Passaic Township Board of Education, page 266, 1928 Compilation of School Law Decisions, the Commissioner held to be illegal a contract between the board of education and the husband of a member of the board, as a wife has a right to share in the earnings of her husband.

The statutes of New Jersey, however, differ from those of Idaho in that the husband has no control over his wife's earnings and cannot therefore legally have a pecuniary interest in them. Neither has a parent a legal interest in the earnings of an emancipated child.

If Charles Bush is not emancipated, the contract between him and the board is illegal; otherwise, the contract so far as interest of board members is concerned, is valid.

While the practice of awarding contracts to wives of board members is to be condemned, such awards are not illegal, since the husband according to law is not pecuniarily interested in such contracts. The employment of Mrs. Florence Mantel as transportation driver and the appointment of Mrs. Marian McClintock as attendance officer are sustained.

Section 91, Chapter 1, P. L. 1903, S. S. specifically provides that a member of a board of education may serve as district clerk and thereby receive compensation. There is no other statute providing remuneration for board members. The law states that the collector or treasurer shall be custodian of school moneys. If a person desires to be the collector or treasurer of a municipality and at the same time a member of the board of education, he should serve as custodian without compensation. On the other hand, if he desires to receive compensation as custodian, he should resign from membership and thereafter have his salary fixed by the board. As board member and custodian, he is directly interested in the amount of his claim or contract as custodian.

The payment of salary to Mr. Reeves while he continues to be a member of the Pemberton Township Board of Education is, therefore, declared to be illegal.

August 8, 1932.

Decision of the State Board of Education

The petition of the appellants, citizens and taxpayers of the Pemberton School District, to the Commissioner asked that certain acts of the board of education be declared illegal. The facts are stated in the opinion of the Com-

missioner and need not be repeated. He held that while some of the acts complained of, namely, the awarding of contracts to relatives of the board members, is to be condemned, such acts are not illegal.

The petition also complained of the appointment by the board of one of its members as custodian of school moneys at a salary. The Commissioner held that the payment of a salary while the appointee continued to be a member of the board was illegal.

We think the conclusions of the Commissioner are correct and recommend that his opinion be affirmed.

November 5, 1932.

POWER OF BOARD OF EDUCATION TO BIND SUBSEQUENT BOARD

SERENA M. BROWN,
Appellant,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case, Serena M. Brown, entered into a contract with the Board of Education of the Borough of Oakland on August 22, 1918, to serve for one year as principal of the Oakland schools at a salary of $950.

The contract was executed in accordance with the statute requirements and contained a clause providing for its termination by either party upon giving to the other thirty days' notice. The Appellant continued to teach under the terms of this agreement until April 1, 1919. At a meeting of the Oakland Board of Education on Tuesday evening, April 1, Miss Brown appeared before the Board and handed in her resignation. Following is an extract from the minutes of the Board at its meeting on that date:

> "Communication from Miss Serena M. Brown was read, and it was then moved by Romaine and seconded by Wheeler that the communication be received, and that her request to waive the thirty days' clause contained in the contract between Miss Serena M. Brown, Principal, and the Board of Education of the Borough of Oakland, dated August 22, 1918, be granted, and her resignation accepted, to take effect at once. Motion carried, eight yeas."

Thus there was a vacancy created by agreement between Miss Brown and the Board of Education, and it was not a vacancy made in accordance with the contract under which she was teaching, for not only was there not a thirty days' notice given but no notice at all that could be considered as one giving the Board an opportunity to fill the vacancy in the school, which would appear on the following morning when the children assembled.

At the same meeting of the Board and immediately after the acceptance of the Appellant's resignation an attempt was made by the Board to fill the vacancy, which by agreement with Miss Brown it had brought about. The Board ordered that a new contract be executed with Miss Brown at a salary of $1,150 per year for a period of three years from the second day of April, 1919. Thus, the two parties who agreed to create a vacancy again agreed to fill the vacancy that had existed only for a few hours. The new agreement contained two changes: one was the increase in salary to begin at once and the other was in the term of service, which was to extend for three years.

From the testimony taken in the case there is no evidence to show that there was any prior agreement between the Appellant and the Board of Education as to the conditions of the new contract, and yet, when the facts in the case are considered and carefully weighed, credulity is greatly strained to believe that there had been no conversation or agreement with the Board prior to the meeting on the evening of April 1, 1919. It is unthinkable that a board of education would agree to create a vacancy in its school, so that on the following morning when the children assembled the teacher for whose services the board had contracted would not be present to take charge of the school.

Under the law there was an election for members of the Board of Education on the fourth Tuesday in February, 1919, and this new Board was organized on the first Monday in April, which was April 7, 1919. The old Board of Education went out of office at the incoming of the new Board, and thus on April 1 there was a contract made for the services of a teacher that would bind the new Board for a term of three years.

The vital point involved in this case therefore is this: has a Board of Education the right to bind a succeeding Board by an appointment for a term of years beyond its own official life, and furthermore, has such Board of Education the right by such appointment to deprive the succeeding Board of the right to fill an office which would logically have become vacant during its term.

The courts throughout the country appear with a few exceptions to hold that a Board of Education whose term of office is about to expire cannot legally bind a succeeding Board by an appointment of a teacher for a term to extend beyond the life of the expiring Board. In C. C. Cross *vs.* School Directors, 24 Illinois App. 191, the court held that:

> "Directors cannot be permitted five days before the current school year expires, to hire a teacher, perhaps obnoxious to the people of the district, to teach a term of school extending three months or nearly so into the ensuing school year," and that the "contract entered into on the 12th day of April, engaging the plaintiff to teach for a term of three months thereafter, when the election for directors of the district would occur under the statute on the 17th of the same month, and a new organization of the Board of Directors would then take place, was such an evident attempt upon the part of the outgoing Board to control the school for three months of the ensuing school year, irrespective of the wishes of the people that might be expressed at the election, or the desires of the new Board of Directors, then to be provided for, as to render it voidable by the incoming Board, under the authority of the cases of Stevenson *vs.* School Directors, 87 Ill. 255, and Davis *vs.* School Directors, 92 Ill. 293."

In the case at hand the incoming Board of Education was to be organized as stated above on April 7, 1919, while the appointment of Appellant was made by the expiring Board on April 1 to bind succeeding Boards for a term of three years. This action of the outgoing Board of Education was given further emphasis by the fact that had the Appellant not resigned on April 1, but continued until the end of her contract, which would have expired on August 22, 1919, the appointment of her successor would have rested with the incoming board about to organize on April 7 as aforesaid.

In view, therefore, of the decisions holding that Boards of Education cannot by appointments for terms of years beyond their own official life bind succeeding Boards, and in view of the fact that the expiration of Appellant's original contract on August 22, 1919, would have given the Board of Education to be organized on April 7 of that year the right to appoint Appellant's successor, of which right it was deprived by the resignation of Appellant and her reappointment for three years by the outgoing Board on April 1, it is the opinion of the Commissioner of Education that such three-year contract was voidable by the incoming Board of Education and that its action in terminating such contract on June 27, 1919, was entirely legal and justifiable.

It is also the opinion of the Commissioner that the Board of Education which came into existence on April 7, 1919, cannot be said to have ratified the three-year contract made with Appellant by the old Board on April 1 by reason of its having paid her salary for April, May and June in accordance with the terms of the three-year agreement, since it has been held by the courts that "an act or contract with a school district through its Board or officers, which is illegal and void in its inception, as from want of power to execute it, cannot be ratified," and the three-year contract the Commissioner holds to have been illegal.

The question as to whether Appellant could be legally dismissed under a notice clause which appears in the three-year agreement entered into by the expiring Board on April 1 the Commissioner does not feel it necessary to decide, since such three-year agreement is illegal for the reasons above stated and is therefore voidable by the incoming Board on those grounds.

The appeal is accordingly hereby dismissed.

September 13, 1920.

Affirmed by the STATE BOARD OF EDUCATION.

DECISION OF THE SUPREME COURT

This writ of certiorari is to review the determination and decision of the State Board of Education in sustaining the action of the Board of Education of the Borough of Oakland in its dismissal of the prosecutrix, Miss Brown, a school teacher. She was engaged as principal on August 22, 1918, by the Oakland Board, and a contract was executed for the term of one school year at a salary of $950. This contract, like many earlier contracts that the prosecutrix had made, contained a provision for its termination by either party upon thirty days' notice.

The prosecutrix served under the contract for seven months when, on April 1, 1919, she terminated it by personally presenting to the Board a communication requesting that the thirty days' notice clause be waived, and her resignation accepted, to take effect at once. She resigned, apparently, to take a better position at Milburn. Thereupon the chairman of the teachers' committee suggested that she be re-engaged for a period of years at an increased salary. A motion was then made that she be re-engaged as principal for a term of three years beginning April 2, 1919, at a compensation of $1,150 per year.

The prosecutrix herself prepared the written contract and made three copies of it. The contract contains the following clause: "It is hereby agreed that either of said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving to the other party notice in writing of its election to so terminate the same."

On June 3, 1919, at a regular meeting of the Board, a resolution was adopted terminating that contract on June 29, 1919. The prosecutrix was present at the meeting and made no protest, and admitted that she received formal notice of the action of the Board.

The prosecutrix now claims that it was the intention of the Board to make the contract non-terminable, and she offered testimony to that end.

But we think that cannot be done. The contract was drawn by the lady herself and speaks for itself. It permitted termination and it was terminated. It is unambiguous and parol testimony will not be permitted to alter, vary, add to or contradict it.

Naumberg *vs.* Young, 44 N. J. L. 331.

The action of the Board under review will be affirmed, with costs.

Decided November 3, 1921.

POWERS OF A COMMITTEE OF A BOARD OF EDUCATION

IN THE MATTER OF THE APPLICATION OF WILSON TAYLOR, A CITIZEN AND TAXPAYER OF THE CITY OF HOBOKEN, AND A MEMBER OF THE BOARD OF EDUCATION OF THE CITY OF HOBOKEN, TO SET ASIDE CERTAIN RESOLUTIONS PASSED BY A BODY ASSUMING TO ACT AS A BOARD OF EDUCATION OF THE CITY OF HOBOKEN.

Merritt Lane, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At a meeting of the Board of Education of the City of Hoboken, held June 24, 1912, the following resolution was adopted:

"Resolved, That the president appoint a committee of three, to be known as the Committee on Schools, to which committee the president of the Board of Education, until otherwise directed, may refer for examination and consideration matters concerning schools and school affairs; and, in conjunction with the president, shall have the power to act summarily in the interest of the public schools in cases of emergency. Said committee to report to the Board at its regular meetings."

This resolution gives to a committee the power to act summarily in case of emergency, and leaves to the committee, or the president, the right to decide as to the emergency. It is true that the resolution directs the committee to report to the board, but there is nothing to show that the action of the committee is not final, or that the report to the board is for any purpose except as a matter of information. In certain matters a vote of a majority of all the members of a Board of Education is required, and in all other matters the vote of a majority of a quorum is necessary. All business must be transacted in open meetings of the Board, regularly called. A committee can only consider matters referred to it and report its conclusions thereon to the board. The resolution under consideration attempts to give to a committee full power to act in certain cases and is, therefore, illegal.

August *22,* 1912.

POWERS OF A COMMITTEE OF A BOARD OF EDUCATION

IN THE MATTER OF THE APPLICATION OF WILSON TAYLOR, A CITIZEN AND TAXPAYER OF THE CITY OF HOBOKEN, TO SET ASIDE CERTAIN RESOLUTIONS PASSED BY A BODY ASSUMING TO ACT AS A BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY, NEW JERSEY.

Merritt Lane, for the Appellant.
John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At a meeting of the Board of Education held June 17, 1912, the following resolution was adopted:

"Resolved, That the President appoint a committee of three to whom shall be referred the bids which may be submitted at this meeting; said committee to report thereon at next regular meeting, and said committee, until otherwise ordered, shall transact all other business in the supervision of school affairs."

The Petitioner asks that his resolution be set aside.

The resolution is clearly illegal. It attempts to confer upon a committee power to transact all the business of the board. Such power cannot be delegated to a committee.

The Petitioner also asks that the election of George W. Lankering as president of the Board be set aside.

This question has been decided in the "Matter of the application of Wilson Taylor to review certain proceedings of the Mayor of the City of Hoboken, and of persons assuming to act as members of the Board of Education of the City of Hoboken," decided this day.

August 22, 1912.

BOARD OF EDUCATION CANNOT TRANSFER TO SUPERINTENDENT AUTHORITY IMPOSED BY STATUTE UPON IT

WALLACE M. NIXON,
Appellant,
vs.
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE,
Respondent.

For the Appellant, Charles Bertman.
For the Respondent, Harry Souchal.

DECISION OF THE COMMISSIONER OF EDUCATION

James M. Nixon, the son of Appellant, attended the Decatur Avenue School in Pleasantville the first few days that the schools were open in September when, apparently, it was learned that he was not vaccinated. Thereupon he was excluded by the principal of that building either under instructions of the superintendent or her interpretation of the resolution of the Board of Education which reads as follows:

> "Be it resolved by this Board of Education that the Superintendent of Schools is hereby authorized to require that all pupils entering the Pleasantville schools shall have been vaccinated before they are enrolled to enter the same."

Since his exclusion, James Nixon has daily presented himself at school and has, at all times, been refused admission.

Counsel for appellant holds that the exclusion is illegal for the reasons that the resolution of the Board confers upon the superintendent a power imposed by statute upon the Board of Education and that the application of such rule is discriminatory.

Counsel for respondent in his brief misquotes the resolution as follows:

> "The superintendent of public schools has no discretion as to the admittance of pupils whether or not vaccinated, because the resolutions specifically state *'all pupils entering Pleasantville schools shall have been vaccinated before they are enrolled to enter same.'*"

The rule reads:

> "Be it resolved by this Board of Education that *the superintendent of schools is hereby authorized to require,* etc."

Counsel for appellant calls attention to the definition of the word "authorize." Webster's dictionary defines it "to clothe with authority, to give a right to act; to empower." It, therefore, appears that the respondent by its resolution empowered the superintendent to determine whether pupils should be excluded. While it is argued by counsel for the respondent that the rule is applied as he quotes it and that all children who have never attended school must be vaccinated before they are admitted, the rule speaks for itself.

Chapter 104, P. L. 1906, reads in part as follows:

> "A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination; provided, that in any district having a medical inspector appointed by the board of education the certificate hereinafter provided for shall be furnished by such medical inspector."

The above statute provides *"A board of education may exclude"* and, therefore, if the board of education intended to exclude all unvaccinated entrants, the rule should have read "The superintendent of schools is required to exclude, etc.," rather than "The superintendent of schools is authorized to require."

Under the resolution, children who enrolled before its adoption may continue throughout their school life without vaccination; whereas, new entrants are required to be vaccinated immediately. While the Commissioner entertains serious doubts as to the validity of a health rule which does not have general application to all pupils of a school system, it is not necessary in this instance to rule upon the discriminatory phase of the resolution, since it attempts to confer upon the superintendent authority imposed by statute upon the board of education, and is, therefore, void.

The rule being invalid, James M. Nixon has been illegally excluded from the public schools of Pleasantville under its provisions.

March 15, 1934.

LEGALITY OF APPOINTMENT OF BOARD MEMBER BY COUNTY SUPERINTENDENT AS RESULT OF TIE VOTE

C. Roy Cramer,

Appellant,

vs.

Washington Township, Burlington County, Board of Education,

Respondent.

Decision of the Commissioner of Education

C. Roy Cramer appeals to the Commissioner of Education for a review of the annual school election of Washington Township, held February 13, 1929, for the following reasons:

That a review of said ballots, including those rejected, will probably cause a change in the results.

That certain persons, who were candidates, could not qualify as members of said Board and therefore had no right to be candidates.

That the judges of election erred in declaring a tie and that, accordingly, appellant was duly elected a member of the said Board of Education.

That the County Superintendent of Burlington County exceeded his right and authority in appointing Mrs. Hattie K. Ford as a member of said Board of Education as there was not a failure to elect.

A hearing was conducted in the office of the County Superintendent of Schools at Mount Holly on Saturday, March 23, 1929.

A recount of the ballots confirmed the official count except in one case, where George Thomas, candidate for the three-year term received one more vote, which did not affect the election results as declared by the officials on February 13, as follows:

J. B. Maxwell and George Thomas, who received 15 votes and 9 votes respectively, were declared elected for the three-year term, and since C. Roy Cramer and Garfield Alloway each received 8 votes for the three-year term, there was a failure to elect the third member for that term.

Counsel for appellant objected to the counting of ballot No. 2 where a name was written in a blank space and then crossed off and a cross placed opposite the names of three other candidates, and to the refusal of the Assistant Commissioner to count ballots numbers one, three, four and five, where the voters placed crosses or plusses before the names of four or more candidates for the three-year term with but three to be elected and with directions on the ballot "vote for three."

Counsel also objected to the writing of any names in the blank spaces, contending that there is no provision in the School Law for personal choice candidates.

Evidence was submitted to show that Garfield Alloway is now and has been since the beginning of the school year transporting pupils for the Board of Education of Washington Township and holds that since the statutes provide (Section 124, p. 85, 1928, Compilation of School Law).

> "A member of a board of education shall be a citizen and resident of the territory contained in said school district, and shall have been such citizen and resident for at least three years immediately preceding his or her becoming a member of such board, and shall be able to read and write. He shall not be interested directly or indirectly, in any contract with nor claim against said board."

Garfield Alloway cannot qualify and therefore votes cast for him were not legal votes and should not be counted which elects his opponent, C. Roy Cramer, with whom said Alloway was tied for the three-year term.

The Commissioner cannot agree with counsel that the School Law does not provide for the casting of ballots for others than those names appearing on the ballots. Section 120, paragraph 9, of the 1928 Compilation of the School Law, reads in part as follows:

> "Immediately after the space allotted to the names of candidates there shall be as many ruled blank spaces as there are members to be voted for. Immediately to the left and on the same line with the name of each candidate and blank space there shall be printed a square the same size of type in which the name of the candidate is printed, which type shall, in no case, be larger than twenty-four point."

It appears that the Legislature made very definite provision for the casting of personal choice ballots. Decisions of the Commissioner counting ballots for personal choice candidates have been affirmed by the State Board of Education.

Neither can the Commissioner agree that Section 124, above cited, makes Garfield Alloway ineligible to membership on the Board because he is employed in transporting pupils.

It is not necessary for the Commissioner to decide whether a candidate declared to be elected who has a contract with the Board must terminate the contract before he takes the oath of office or at the time of assuming office. As a member, he shall not be interested in a contract with nor claim against the Board. The holding of the contract by a candidate does not make votes cast for him illegal. The application of the law is a matter subsequent to election, regardless of its effect upon membership on the Board. The result of the election as determined by the officials is hereby affirmed and the County Superintendent is accordingly authorized to fill the vacancy caused by the tie vote, resulting in a failure to elect.

The appeal is dismissed.

March 25, 1929.

Affirmed by the State Board of Education without written opinion, June 3, 1929.

RETIRING BOARD MEMBER MAY RESIGN AND LATER ACCEPT APPOINTMENT UNTIL NEXT ANNUAL SCHOOL ELECTION

ARTHUR W. KOPP,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY, AND GLEN S. REEVES,

Respondents.

Chandless, Weller & Selser for Petitioner.
Herman Vanderwart, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Respondent, Glen S. Reeves, was one of three members elected to the Board of Education of the Borough of Hasbrouck Heights whose term expired on the first Monday in April, 1936. He was a candidate for re-election for a full term of three years at the annual meeting in February, 1936, and was defeated since he received the fourth highest number of votes with but three candidates to be elected.

It appears that following the election one William E. Welsh, a member of the board whose term was to run for another year, told Mr. Reeves that he (Mr. Reeves) was more valuable to the board and suggested that he (Mr. Welsh) resign so that Mr. Reeves could be appointed until the next annual election. It further appears that this suggestion was discussed and informally agreed to by some members of the board. Accordingly, at the regular meeting on March 30, 1936, Mr. Welsh tendered his resignation which was accepted, and later, at the same meeting, Mr. Reeves also tendered his resignation which was likewise accepted. Thereupon Mr. Reeves was appointed to fill the vacancy created by Mr. Welsh's resignation until the next annual school meeting. (Chapter 1, P. L. 1903, S. S. Section 86.)

It is contended by the petitioner that a member of a board cannot continue his membership for a period longer than that for which he is elected by the device of resigning and being appointed for the unexpired term of some other member; and it is contended by the respondent that the appointment is legal but that the Commissioner is without jurisdiction to render a decision in the matter.

While a public officer can be ousted only under *quo warranto* proceedings in the Supreme Court, that Court has held in the case of Du Four *vs.* State Superintendent, 72 N. J. L. 372, that even though the right to the office of school trustee is to be determined by *quo warranto*, there is no impropriety in passing upon it for immediate purposes through such instrumentalities as the State Legislature may appoint; and in the case of Burlew *vs.* Bowne, 87 Atl.

Rep. 702, the Court held that the right of the Superintendent and State Board of Education to render decisions is not unconstitutional as preventing a resort to *quo warranto* to test the right to office of a member of a township board of education since it does not prevent resort to that remedy but only postpones it.

The principal question to be decided in this case is raised by the contention of the petitioner, whose counsel in support of his allegation that the appointment of respondent was illegal as against public policy cites Bird *vs.* Johnson, 59 N. J. L. 59, and Reeves *vs.* Ferguson, 31 N. J. L. 107, but neither of these cases is in point with the one at issue. The former relates to an incumbent attempting to extend his term by being a candidate for an office for a term which covers a part of his tenure without first resigning from the position, and the latter to a refusal of an overseer of the highway to continue in service pending the acceptance of his resignation by competent authority.

In the instant case the respondent tendered his resignation to the authority competent to accept it and it was duly and legally accepted, and by so doing, he became qualified for reappointment. He did not continue to hold his membership until he had been appointed for the extended period. A person may resign in order to become eligible for reappointment, but cannot wait until he has been elected to the office for a term which includes his present tenure before resigning. The board made no binding agreement to appoint respondent if he did resign, even though there might have been a general understanding to that effect. It could, in spite of the understanding, have appointed a person other than the respondent. The respondent's term was about to expire and he released the bird in hand with a chance of securing a better one from the bush. With the right to have only one bird at a time, he did not hold on to the first until he was sure of the second. He qualified himself to have a right to the second, but without certainty of securing it. This case is in line with that of Greene *vs.* Board of Chosen Freeholders of Hudson County, 44 N. J. L. 398, in which the Supreme Court held to be legal the reappointment of some sixty-eight employees who resigned their respective positions just prior to the expiration of the terms of the then existing board of freeholders. While holding that the appointments were valid, the Court ruled that since there was no term fixed by statute for these employees, the appointments were subject to the power of the incoming board who had the statutory right to fix the terms and compensation of its agents and employees. In the instant case, the Legislature has given authority to a board of education to fill a vacancy until the next annual election, and since Mr. Reeves' appointment was made after the annual school meeting in February, 1936, it was effective by statute until the annual meeting in February, 1937.

The Commissioner cannot see anything in this case as against public policy. Even if there were factions on the board of education, the person who resigned to make way for the appointment of another must have belonged to the same faction. The control of any group of the board was not changed whether Mr. Welsh continued or Mr. Reeves succeeded him. It is not necessary that a public officer state a reason for his resignation if the body or person authorized to accept it does so without demanding a reason. There is no indication in this case of an attempt to make a change in the board mem-

bership for other purposes than for the greater efficiency of the board. One man who has a right offers to relinquish it with the hope that another whose services he believes to be of greater value to the board will serve in his stead; but even if there had been an ulterior motive, the actions taken by the board in accepting the resignations and making the appointment were within its legal right.

Since the Board of Education functioning in the Borough of Hasbrouck Heights on March 30, 1936, had a legal right to accept the resignations which were tendered at that time, and also had a right to fill any vacancies then in existence until the next annual meeting, the appointment of Mr. Glen S. Reeves to fill the vacancy caused by the resignation of Mr. William E. Welsh until the next election is valid. The petition is dismissed.

August 3, 1936.

CONDITIONAL RESIGNATION OF BOARD MEMBER CAN BE ACCEPTED ONLY UNDER THE TERMS OF THE CONDITION

ERNEST W. MANDEVILLE,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

For the Appellant, Quinn, Parsons & Doremus.
For the Respondent, Florence E. Forgotson.

DECISION OF THE COMMISSIONER OF EDUCATION

The latter part of the minutes of the regular monthly meeting of the respondent board held on June 14, 1934, reads as follows:

> "Mr. Mandeville spoke stating that he could not remain a member of this Board of Education if it continues to sign checks and sign contracts without authorization; hereby submitting his resignation. He said if that sort of thing is going to continue he did not see how anyone can remain under these conditions. Mrs. Moffat remarked that the resolution authorizes signing a contract. Mr. Mandeville stated that the same thing occurred with the selection of the supervising principal, stating that he did not know the man. He remarked that if these things go on he could not remain a member under these conditions.
>
> "Motion was made by Mr. Williams that we rescind the contract, call a special meeting, and follow out the original plan to consider both programs and that both programs be sent in writing to the members. Sec-

onded by Mr. Mandeville. President called for a vote on his motion. Mr. Williams, yes; Mr. Walling, yes; Mrs. Moffat, no; Mr. Mandeville, yes; Mr. Thompson, yes; Mr. Friedlander, yes; Mr. Roop, yes; Mr. Lindenstruth, no; Mr. Spencer, yes. 7 for—2 against, motion carried.

"President asked when the members wanted the special meeting called. Mr. Williams remarked that we did not have a program from the Social Service yet, we would have to wait for this.

"Motion made by Mr. Williams, seconded by Mr. Walling, that meeting be adjourned. Carried.

Respectfully submitted,

Signed, W. M. PETINGALE,
Secretary."

The first part of the minutes of a meeting on Tuesday evening, June 19, 1934, reads:

"Pursuant to notices sent to each member, an adjourned meeting of the Board of Education was held in the Auditorium of the Leonardo Grade School, on Tuesday evening, June 19th, at 8:00 P. M."

Then follows the names of those present and the statement:

"Mr. Mandeville was the only absent member."

Immediately after the meeting convened, a motion was passed to dispense with the regular order of business, and Mr. Friedlander then moved the adoption of a resolution prefaced with several preambles which included charges that Mr. Mandeville failed to attend many special meetings of the board; assumed the attitude that all acts of the board at meetings when he was not present were as a matter of course unwise, irregular, illegal and dishonest; alleged that the action of the President in signing certain contracts was dishonest, and threatened certain members with his resignation. The resolution follows:

"*Resolved,* That considering his previous threats to resign, the Board must construe his explicit statement at the meeting of June 14th as expressing his definite desire, and it is therefore recommended that his resignation be accepted to take effect at once, and that the adoption of this resolution constitute such acceptance."

Following the resolution, the records show:

"Motion was seconded by Mr. Lindenstruth and carried with Mr. Williams and Mr. Walling opposed. Mr. Spencer did not arrive at the meeting until after this motion was passed. Mr. Williams asked to speak but was not granted this permission since the motion was carried."

Immediately thereafter, by a vote of 5 to 2, Mr. H. O. Leach was elected to fill the vacancy thus created.

Mr. Mandeville testified that just before the close of the meeting on June 14th, he asked the President if he might be excused on account of the lateness of the hour. He thereupon left the room and alleges he did not receive a notice of the meeting of June 19th until about an hour prior thereto. Appellant admits that on or about June 22nd, he received a letter from the Secretary of the Board, which reads:

> "I have been instructed by the Board to notify you that at a regular meeting of the Board held on June 19th, your resignation as a member of the Board of Education of Middletown Township was acted upon and accepted by the members, which took effect immediately."

After receiving the above letter, Mr. Mandeville denied the resignation in an open letter to certain newspapers of the county. During the early part of August, application was made by interested citizens to the New Jersey Supreme Court for leave to file information in the nature of *quo warranto* to determine appellant's status, which application was denied without prejudice, pending an opinion from the State educational authorities. Mr. Mandeville did not inform the respondent until approximately August 22nd that it was not his intention to resign and this information was reiterated in a communication dated September 13th. In these communications he demanded that the minutes of the board since June 14th be sent to him and that he be properly notified of all board meetings. He attended the meeting on November 10th without receiving a notice from the district clerk, but his name was neither called nor was he permitted to participate in the business before the Board.

On September 12, 1934, Mr. Gordon, one of the original parties to the Supreme Court proceedings, filed a petition with the Commissioner of Education asking that Mr. Mandeville's removal be declared illegal and void, and that the board be required to reinstate him. Respondent's counsel objected to the institution of proceedings by Mr. Gordon, and a further petition was filed with the Commissioner of Education on October 15th, making Mr. Mandeville a party thereto. At the hearing in the case on November 20th, the motion to dismiss the petition of Mr. Gordon was granted, and Mr. Mandeville became the sole appellant.

The question before the Commissioner is whether the statement made by Mr. Mandeville at the regular meeting on June 14th constitutes an unconditional resignation and, if so, whether the removal action on June 19th was valid.

While the June 14th minutes, above cited, do not record the exact words of Mr. Mandeville in reference to the resignation, numerous witnesses were presented by both sides to the controversy in an attempt to establish his statements. Miss Simpson, who made a stenographic record of the meeting, testified as follows:

> "These are the words spoken by Mr. Mandeville at the June 14th meeting: 'I cannot remain a member of this board of education if it continues

> to sign checks and sign contracts without authorization. I hereby submit my resignation. If that sort of thing is to continue, I do not see how anyone can remain if these things go on. I cannot remain a member under these conditions.'"

When questioned by attorney for appellant, Miss Simpson admitted that her punctuation might be in error and that Mr. Mandeville might have said:

> "I hereby submit my resignation if that sort of thing is to continue."

Mr. Mandeville testified that he said:

> "If the board is to continue to perform such irregular acts in the future, I feel that I cannot in honesty remain a member of the board."

The testimony of board members is not in agreement as to whether or not the statement of Mr. Mandeville constituted a resignation. A number of people present at the meeting testified that in their opinion Mr. Mandeville had not resigned, and it was stipulated at the hearing that several others would so testify. Mr. Smith, County Superintendent of Schools, stated that it was his impression that Mr. Mandeville had resigned, but no other witnesses except certain board members so testified. With the exception of Miss Simpson, all of the witnesses testifying as to Mr. Mandeville's statements admitted that they made no written memoranda at that time or subsequently, and that they were depending solely on memory for their testimony. The interpretation of unofficial by-standers can be given little weight even though the amount of such testimony might appear to constitute a preponderance of evidence. Since Miss Simpson recorded the statement of Mr. Mandeville at the time it was made, her transcription is the most authentic record before the Commissioner. The interpretation of what was said depends upon the punctuation and, therefore, Mr. Mandeville may have said either of the following:

> "I hereby submit my resignation. If that sort of thing is to continue, I do not see how anyone can remain if these things go on." or "I hereby submit my resignation if that sort of thing is to continue. I do not see how anyone can remain if these things go on."

The punctuation depends upon the inflection of the voice and the time intervening between certain words. There is no testimony as to the rapidity with which the statements were made. It is admitted that there was considerable confusion in the room and that it was difficult to understand what was said and how it was inflected. Under the first punctuation, there was a definite resignation which was subject to immediate unconditional acceptance; whereas, the latter is conditional and subject to acceptance only upon the terms therein expressed.

An oral statement of a public officer in reference to resignation should leave no doubt in the mind of a reasonable person as to whether it constitutes an unconditional or conditional resignation. A written resignation can be analyzed

to show the intention of the person submitting it: whereas, an oral resignation recorded in the minutes is the interpretation of the official making the entry. When a resignation statement is indefinite, it should be construed in favor of the official, and especially so when he testifies that it was not his intention to resign.

While counsel for respondent contends that Mr. Mandeville's leaving the meeting of June 14th prior to its adjournment supports the theory that his statement constituted a resignation, the minutes show that he participated in discussions following his statement and that he seconded the motion and voted on the next succeeding resolution. The minutes which followed the resignation statement and appellant's explanation of the circumstances surrounding his leaving the meeting prior to its adjournment do not support the contention that he intended to resign.

Counsel for appellant holds that even if a valid, unqualified resignation had been made on June 14th, the board of education was without authority to accept it on June 19th, since the meeting on the latter date was not a continuation of the former, but, in fact, a special meeting. While the secretary sent out notices that an adjourned meeting of the board would be held on June 19th, and testimony of several members of the board indicates that they so considered it, the minutes show that the meeting of June 14th was not adjourned to any other date and Mr. Williams, who made the motion, testified that it was properly recorded. Members may have been placed on notice by the secretary's characterization of the meeting as "adjourned," but the fact remains that the meeting was not an adjourned meeting as interpreted by the Supreme Court in the case of stiles *vs.* City of Lambertville, 73 N. J. L. 90. The minutes immediately preceding the motion to adjourn further support the contention of appellant's counsel that a special meeting was not contemplated at the time of adjournment. The resignation of a board of education member may be accepted at a regular meeting, or at a special meeting if the notice indicates that it is a matter of business coming before the board at that time.

Respondent's counsel asks that the case be dismissed on the ground of laches. While the Commissioner and State Board of Education have held in a number of cases that immediate action should be taken by those who believe they are deprived of rights under the School Law, the facts in this case are not such as would justify dismissal of it.

There is a reasonable doubt as to whether Mr. Mandeville's resignation was conditional or unconditional. It was accepted as an unconditional resignation at a meeting called as an adjourned meeting but which was, in fact, special without notice to the members that the resignation would be before the board for consideration. Under these conditions the resolutions of the Middletown Township Board of Education ousting appellant and appointing Mr. H. G. Leach as his successor are invalid.

December 21, 1934

DE FACTO MAYOR CANNOT APPOINT DE JURE BOARD MEMBERS

ROBERT C. PERINA, FRANK T. FLINN AND MEYER L. SAKIN,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, AND CARLTON ROWAND, MAURICE BAKER AND GEORGE SHAW,

Respondents.

Counsel for Petitioners, John R. DiNona.

Counsel for Respondents, Edward V. Martino, Walter S. Anderson (Firmin Michel of counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

On May 14, 1935, a commission government election was held in the City of Camden to elect the members of the Board of Commissioners for the ensuing four years. While on the evening of the election it appeared that Frank J. Hartmann, Jr., and Frank J. Leonard received the same number of votes, the City Clerk, after canvassing the returns, reported the election of Mr. Leonard, Frederick von Neida, Mary Walsh Kobus, Harold W. Bennett and George E. Brunner, who on May 21, 1935, organized by the election of Frederick von Neida as mayor. At the same meeting several city officers were duly appointed and subsequently on May 28th appointments to other city offices were made.

Mr. Hartmann, who on the night of the election appeared to have the same number of votes as Mr. Leonard, immediately contested the election and the Supreme Court during August, 1935, determined that Frank J. Hartmann, Jr., and not Mr. Leonard had been elected. Accordingly, a certificate of election was issued to Mr. Hartmann and that previously issued to Mr. Leonard was revoked. This change in membership also transferred the balance of power and immediately following the decision of the Supreme Court, the commissioners reorganized by the election of George E. Brunner as mayor, and on the same evening officers were appointed to displace several of those who had been appointed by the board as organized on May 21. Pending a review by the Supreme Court of the resolutions and acts of the Commission at the organization meeting of August, 1935, the court issued an order restraining from functioning Mayor Brunner and the officers who were appointed on that date, and thereby continued in office Mayor von Neida and persons appointed during his administration.

On April 17, 1936, the Supreme Court (116 N. J. L. 320, made a ruling adverse to the appointees of Mayor Brunner. After this decision the re-

spondents in *certiorari,* with the various cases still consolidated, took an appeal to the Court of Errors and Appeals, which on October 20, 1936 (117 N. J. L. 231) reversed the Supreme Court and invalidated the appointments to municipal offices made under the administration of Mayor von Neida. Thereafter Mayor Brunner assumed the office which had then (on or about November 2, 1936) been relinquished by the former Mayor, Mr. von Neida.

During the administration of Mayor von Neida, Robert C. Perina, Frank T. Flinn, and Meyer L. Sakin were appointed to membership on the Board of Education of the City of Camden, on January 15, for a three-year term effective February 1, 1936. These appointments were made in conformity with the provisions of Chapter 9, P. L. 1921, and pursuant thereto the appointees took office as members of the Board of Education of the City of Camden and continued to serve until on or about November 2, 1936, when Mayor Brunner declared their offices vacant and forthwith appointed Carlton Rowand, Maurice Baker and George Shaw.

In order to avoid confusion in the business of the Board, the former members, who are petitioners in this case, discontinued participation in the meetings; but claiming valid title to membership on the Board of Education, they appealed to the Commissioner of Education to declare that they were illegally and improperly deprived of their offices.

The Court of Errors and Appeals in the von Neida case (117 N. J. L. 231) holds that a *de facto* body cannot create a *de jure* officer. Justice Perskie, in delivering the opinion of the Court, which reversed the previous rulings of the Court of Errors and Appeals in the case of Brinkerhoff *vs.* Jersey City, 64 N. J. L. 255, and which held that a *de facto* board may appoint a *de jure* officer, said:

> "It is true that there is some conflict of authority on the subject. But we are free to adopt the view which we think finds greater support in right, reason, fairness and justice. We think that when a rule of law becomes subject, and correctly so, to the observation, especially by an appellate court, that there is something to be said against its 'apparent unfairness' the time is ripe for the extirpation of that rule of law from our great body of legal jurisprudence. It is the aid of all those dedicated to the science of formulating and construing rules of law that each rule and construction thereof shall have for its foundation the elementary but indispensable attributes of righteousness, fairness and justice. When a rule of law is based on such a foundation it cannot be subject to the justifiable observation that there is something to be said against its 'apparent unfairness.'
>
> "Here we find a striking illustration of the unfairness and the injustice of the rule as laid down in the Brinkerhoff case. It has nothing in right, reason, fairness or justice to support it. It merely tends to lend color to the false philosophy that might is right. We are in accord with the sound reasoning of Chief Justice Beasley in the Erwin case (Erwin *vs.* Jersey City, 59 N. J. L. 282—80 N. J. L. 141). It warrants repetition. He said (at pp. 284, 285):

"'On the argument it was contended that he is in this proceeding to be regarded as an officer *de jure,* but I have found no semblance of strength in that position. We have seen that the Board, from which he derives his title, was illegally constituted, and in his election it acted as a *de facto* and not as a *de jure* body. Can the appointee of such a board prevail in a court of law when he sets up that he has a legal title to the office so illegitimately conferred?

"'* * * The doctrine that legal validity attaches to the acts of public officers who, having an official semblance, are, in fact, destitute of all authentic title, is true only within certain limits, for it exists only so far as there is a public necessity for its prevalence, and no further * * *

"'In the light of this view it becomes conspicuous that the general rule, acknowledged on all sides, that gives efficacy to the acts of the officer *de facto,* cannot have the effect of investing the appointees of *de facto* boards with *de jure* titles. I have failed to see a single reason for perpetuating the wrong done by such an appointment, while the evils of such a principle are serious and multiform, its immediate result being to offer a strong incentive to usurpation, and to prevent the public from having a voice in the selection of its own officials. * * * The doctrine in respect to officers *de facto* only applies to and in favor of third parties, and to protect innocent parties who have trusted to the apparent title of an officer.'

"In the case of In re George Ringler & Co., 204 N. Y. 44, 97 N. E. 593 (1912), the Court of Appeals of New York, after reviewing the Brinkerhoff case and other cases and authors on the subject, said:

"'* * * It is in terms a paradox to say that one who owes his election or appointment to an unlawful usurpation of power by another holds his appointment or election *de jure.* As between themselves, the appointer and the appointee stand upon the same footing. If the former is merely an officer *de facto,* the latter falls into the same class. That does not give either of them a good title to office. The classification, as we have seen, is merely a legal fiction which the law invokes for the protection of third persons and the public. So far as their own rights are concerned, both appointer and appointee are mere intruders, subject to deposition in the proper proceeding.'"

Counsel for petitioners contends that the statute requiring the appointment of Board members between the second and fifteenth days of January places these appointments in a class different from those ruled upon in the von Neida case. He holds that since these appointments were required to be made within a specified period, an ulterior motive to deprive another from making such appointments could not be inferred. The Commissioner can see no virtue in this contention. Regardless of motive, a *de facto* officer appointed the petitioners in this case and the appointees were, in accordance with the von Neida decision, *de facto* and not *de jure* appointees and have no valid claim to membership on the Board of Education. Mayor Brunner, having been determined

to be the mayor *de jure,* the defendant Board members in this case became *de jure* appointees. The petition is dismissed.

March 30, 1937.

VACANCY IN BOARD OF EDUCATION ORGANIZED UNDER ARTICLE VI

ALBERT LEULY ET AL.,

Appellants,

vs.

HENRY RITTER ET AL.,

Respondents.

William C. Asper, for Appellants.
Francis H. McCauley, for Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

Prior to 1910, the School District of the Township of Weehawken was governed by the provisions contained in Article VII of the General School Law passed at the second special session of the Legislature in 1903, and three members of the Board of Education were elected annually on the third Tuesday in March, and took office on the first Monday in April following their election. At the general election held in 1910, this district adopted the provisions of Article VI of the School Law, as authorized by Section 243. Section 38 of the School Law, being a part of Article VI, provided for a Board of Education of nine members, appointed by the mayor, and Section 39 provided for a board of nine members elected by the people. Section 40, however, provided that until the provisions of either Section 38 or 39 had been adopted, at a regular election, the members of the Board of Education should continue to be selected in the same manner as such members had previously been selected. As the School District of Weehawken never adopted the method prescribed by either Section 38 or 39, the members of the Board of Education continued to be elected at a school election held on the third Tuesday in March, the term of office being three years.

Chapter 233, P. L. 1911, provided for a Board of Education in each district acting under Article VI, such Board to consist of nine members appointed by the mayor. The act further provided that the terms of office of all members of boards of education affected by the act should expire January 31, 1912. A Board of Education was appointed in Weehawken in accordance with the provisions of this act. Later, in the case of Koven *vs. Stanley,* the Supreme Court declared the act unconstitutional and decided that Ritter, O'Hara and Stanley, the only members of the old Board who were parties to the suit, were members of the Board of Education by virtue of their election on the third Tuesday in March.

Chapter 370, P. L. 1912, provides for a Board of Education in each district acting under Article VI, the members of such Board to be appointed between the second and fifteenth days of January, to take office on the first day of February following their respective appointments. In a district having a population of less than 45,000, five members constitute the Board. In a district having a population of 45,000 or over, the Board consists of nine members. The act further provides that the members of a Board then in office should continue to serve for the terms for which they were severally elected, and until the first day of February then next ensuing.

By virtue of this last mentioned provision, Ritter and O'Hara were continued in office until February 1, 1915, they having taken office on the first Monday in April, 1911, and Stanley was continued in office until February 1, 1914, he having taken office on the first Monday in April, 1910. In the case of Lasher and Briesen *vs.* Board of Education of Weehawken, recently decided by me, it was held that said Lasher and Briesen were members of the Board of Education of Weehawken, they having taken office on the first Monday in April, 1910. Up to February 1, 1914, the Board of Education consisted of Ritter and O'Hara, whose respective terms of office would not expire until February 1, 1915, and Stanley, Lasher and Briesen, whose terms would expire February 1, 1914. The petitioners claim that Stanley was not a member of the Board, for the reason that he was a member of the Township Committee of Weehawken and that the offices of member of the Board of Education and Township Committee are incompatible. It is unnecessary to pass on the question as to the incompatibility of these offices, for the reason that Stanley's term has expired. Stanley had acted as a member of the Board since 1910, and, therefore, was at least a *de facto* member, and was entitled to act until removed by the Court.

At a meeting of the Board held January 31, a resolution was adopted removing John Koelin from his office as member of the Board of Education, and appointing William J. Cadwallader to fill the vacancy thus created. It is admitted by the respondent that Koelin was not a resident of the School District of Weehawken on January 31. Section 41 of the School Law reads, in part, as follows: "A member of a Board of Education in a city school district shall be a citizen and resident of the territory contained in said school district and shall have been such resident for at least three years immediately preceding his or her becoming a member of such Board." It is evident from the above quotation that as soon as a member of a Board of Education ceases to be a resident in the district, he ceases to be a member of the Board of Education. The resolution, therefore, so far as it relates to the removal of Koelin, is without force or effect. The appointment of Cadwallader is likewise without force or effect, for the reason that Chapter 370, P. L. 1912, expressly provides that "any vacancy in such Board of Education shall be forthwith reported by the secretary of said Board to the mayor or other chief executive officer, who shall within thirty days thereafter appoint a person to fill such vacancy for the unexpired term." If a vacancy existed in the Board, it could only be filled by appointment by the mayor; the Board of Education was without power in the premsies. As a matter of fact, however, there was no

vacancy in the Board on January 31. Chapter 370, above referred to, contains the following proviso: "provided further, that first appointment under this supplement may be for less than full terms, if necessary; it being the intention to provide hereby that when this supplement shall take effect in a school district there shall be an immediate increase, if necessary, to five members or to nine members, according to the population of the school district, as above provided, and the gradual reduction to the prescribed membership as terms expire." The right of Koelin to retain his membership was a personal right. As soon as he ceased to be a member, the number of members in the Board was reduced to five, the legal number for this district, and there was no power, other than the Legislature, which could again increase it.

The respondents contend that the mayor was without authority to appoint three members to take office on the first of February, for the reason that the appointments were made on the fourteenth of January, and that there is no evidence that Koelin had lost his membership in the Board on that date. It is admitted that Koelin was not a resident on January 31, and, as heretofore stated, he ceased to be a member of the Board as soon as he ceased to be a resident of the district. There is no doubt, therefore, that at the time of the organization of the Board on February 2, there were three vacancies and that there were three persons holding certificates of appointment signed by the mayor. I am of the opinion that the fact, if it be a fact, that Koelin was a member of the Board on January 14, will not affect the case. The only point is whether or not there were three vacancies in the Board of Education at the time the certificates issued by the mayor became operative.

As heretofore stated, Ritter, O'Hara, Stanley, Lasher and Briesen constituted the Board of Education of Weehawken prior to February 1, 1914. On that date the terms of office of Stanley, Lasher and Briesen expired, leaving three vacancies to be filled by the mayor in the manner provided in Chapter 370, P. L. 1912. In accordance with the authority conferred upon him, the mayor did, on the 14th day of January, 1914, fill such vacancies by his appointment of John McFadden for the term of three years; George Liss, for the term of four years, and Albert Leuly, for the term of five years. The persons so appointed have taken the prescribed oath of office and have filed the same with the township clerk as required by Section 42 of the School Law. The Board of Education now consists of Ritter and O'Hara, whose terms will expire February 1, 1915; McFadden, whose term will expire February 1, 1917; Liss, whose term will expire February 1, 1918, and Leuly, whose term will expire February 1, 1919.

Chapter 370, above referred to, provides that the Board of Education shall organize on February 1, unless such date falls on Sunday, in which case the organization shall be effected on the following day. As February 1, this year, fell on Sunday, the Board was required to meet for organization on February 2. It is admitted that Ritter and O'Hara were notified of the time and place of this meeting on February 2, and that they refused to attend. The meeting, having been legally called, and a quorum being present, the election of Albert Leuly as president and George Liss as vice-president was in accordance with the provisions of the statute.

It is difficult to believe that it was intended that the resolution directing the secretary to post notices for an election for members of the Board of Education on the third Tuesday in March should be taken seriously. In order to make such an election legal, a decision by the Court declaring Chapter 370 of the Laws of 1912 unconstitutional would be necessary. Until such a decision is rendered, said chapter must be deemed to be in full force and effect, and the members of the Board of Education must be selected as directed therein.

I am unable to decide at this time as to the legality of the appointment of Hurley as secretary at the meeting held on January 9, 1914, the action taken at the meeting held January 28, in appointing Ritter and O'Hara as members of the Board of School Estimate, and the action taken at the meeting of February 2, appointing Briesen as secretary, for the reason that the evidence does not disclose whether the meetings of January 9 and 28 were regular or special meetings of the Board, and, if they were special meetings, whether all the members of the Board were notified of the time and place of the meetings and the purposes for which they were called. An early date will be fixed on which to take testimony covering these points.

February 24, 1914.

Affirmed by the STATE BOARD OF EDUCATION May 3, 1914.

VACANCY IN BOARD OF EDUCATION ACTING UNDER ARTICLE VII

IN THE MATTER OF THE APPEAL OF J. C. MYERS IN THE CASE OF A VACANCY IN THE BOARD OF EDUCATION OF OXFORD TOWNSHIP, WARREN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

It appears that in March, 1912, a Mr. Frome was elected a member of the Board of Education of Oxford Township, but that he has not qualified and has declined to do so, and that at a meeting of said Board of Education on May 6 the Board elected a Mr. Axman to fill the vacancy. It is contended that this appointment is illegal and that the vacancy should have been filled by an appointment by the County Superintendent of Schools. The County Superintendent is only authorized to fill a vacancy in the Board of Education in case there is a failure to elect a member. Vacancies in a Board of Education arising from other causes than failure to elect are to be filled by the Board. There was no failure to elect in this case, but simply a failure on the part of the person elected to qualify. Under these conditions the action of the Board in appointing a person to fill the vacancy was legal.

July 24, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

In March last an annual school meeting was held in Oxford Township at which Mr. James Frome was elected a member of the Board of Education for a term of three years from the 1st day of April, 1912. The Board organized on the 1st of April, but Mr. Frome did not attend. He declined to qualify and to serve as a member of the Board. On the 6th of May, the Board appointed Mr. Axman in his place. Contesting such appointment, Mr. J. C. Myers, one of the members, appealed to the Commissioner of Education on the ground that under the circumstances the power to appoint a member was conferred by statute upon the County Superintendent, and not upon the local Board. From the decision of the Commissioner overruling his contention, he appealed to this Board. Mr. Myers, the Oxford Board and the Commissioner assumed that a vacancy existed in the Board because of the refusal of Mr. Frome to qualify and to serve.

Section 95 of the School Law provides that township Boards shall have power "I. To appoint a person to fill a vacancy in the Board of Education, except a vacancy caused by a failure to elect, but the person so appointed shall serve only until the next election for members of the Board of Education."

Subd. 4 of Section 30 provides that a County Superintendent shall have power to appoint members of the Board of Education for any school district under his supervision which shall fail to elect members at the regular time, and that such appointees shall serve only until the next election in the district for members of the Board of Education.

Mr. Myers urges that as Mr. Frome could not serve as a member of the Oxford Board until he qualified, his election was not complete until he had so done. He, therefore, argues that the result was the same as if no election had been held.

What was the legal situation when, after Mr. Frome was duly elected, he refused to qualify and to serve?

In 15 Cyc. 392, it is said:

> "It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the State when they are required, and persons are liable to indictment if they refuse to take the oath and qualify themselves as public officers after having been regularly elected or duly appointed. * * * Mandamus will lie to compel one who has been duly elected to a municipal office to accept and serve in the same."

In State *vs.* Ferguson, 31 N. J. L. 107, mandamus proceedings were instituted against William Ferguson, Jr., one of the Overseers of the Highways of the Township of Upper Alloway Creek in the County of Salem, to compel him to put in good order for public use and travel a certain part of a road.

In the course of the opinion of the Supreme Court, the Chief Justice considered at some length the right of a party elected to refuse to qualify and the right after qualification to resign at pleasure. He wrote:

> "First, as to the officer's power to resign. It was insisted on the part of the defendant that an overseer of the highways has the right, in law, to resign at will, and that the mere notification of the fact that he resigns discharges him from office.
>
> "If he possess this power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he cannot be compelled to accept the office. But the books seem to furnish no warrant for his doctrine.
>
> "To refuse an office in a public corporation connected with local jurisdiction, was a common law offence and punishable by indictment. * * * So uniformly is this doctrine maintained by an extensive series of decisions that we find it stated as the unquestionable law by all the text writers. * * * I think it undeniable, therefore, that upon general principles of law as contained in judicial decisions of the highest authority, the refusal of an office of the class to which the one under consideration belongs, was an offence punishable by proceeding in behalf of the public.
>
> "Regarding then this doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled by force of the sanctions of the criminal law to accept the office, cannot afterwards resign it *ex mero motu*. If this recusancy to accept can be punished, it cannot be that he can accept and immediately afterwards, at his pleasure, lay down the office. The law is far too practical to admit of such a frustration of one of its regulations, designed for the protection of the public interest."

From such authorities, it is clear that the taking of the oath of office is no part of the election. Unless the school meeting at which Mr. Frome was elected was not conducted in accordance with law, or unless he could point to some statute or judicial authority which would relieve him from the necessity of accepting the office, it seems as though the Oxford Township school district had the right, if it so desired, to compel him to accept. There was, therefore, no such failure to elect as would justify an appointment by the County Superintendent. The record submitted to us is very meager, but as far as we understand the facts, no attempt was made to force Mr. Frome to qualify as a member of the Board of Education, and the district acquiesced in his refusal to do so. We infer that it was assumed that Mr. Frome's refusal to qualify was substantially the same as if the resignation of a member who had qualified was accepted and a vacancy thereby created. Inasmuch as the vacancy was not caused by a failure to elect, the Board of Education had authority to appoint some one to serve until the next election.

The decision of the Commissioner is affirmed.

August, 1912.

TERM OF DISTRICT CLERK HELD TO BE COTERMINUS WITH LIFE OF APPOINTING BOARD

MATTHEW BARR,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON,

Respondent.

For the Appellant, William W. Wimmer.

For the Respondent, Bruck & Bigel.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant, an exempt fireman, was employed as district clerk by the respondent at its organization meeting held on Monday, April 3, 1933. The resolution reads: "There being no further nominations, the clerk called the roll. Mr. Barr was elected by a vote of three to two at a salary of $." His salary was subsequently fixed and he continued to serve as clerk until July 2, 1934, when at a regular meeting, the Board appointed another person as clerk who has since held that position.

Mr. Barr claims the protection afforded by Chapter 212, P. L. 1911, which reads in part as follows:

> "No person now holding a position or office under the government of this State, or the government of any county, city, town, township, or other municipality of this State, or who may hereafter be appointed to any such position, *whose term of office is not fixed by law,* * * * who is an exempt fireman, * * * shall be removed from such position or office except for good cause shown after a fair and impartial hearing. * * *"

Counsel for respondent contends: first, appellant's term was actually fixed by law; and secondly, even if it were not so fixed, the Exempt Firemen's Act does not afford tenure protection to a person holding an office under the authority of any board of education of the State. If the first contention of counsel is true, then it is not necessary to consider the application of the Exempt Firemen's Tenure Act.

Chapter 332, P. L. 1921, provides:

> "Each board of education created under the provisions of this article shall organize annually on or before the first Monday in April. * * *"

It is held by the Supreme Court in the case of Skladzien *vs.* Board of Education of the City of Bayonne, 173 Atl. 600, that since each board of education must organize annually it is a non-continuous body. Respondent holds that where the governmental body making the appointment is non-continuous, the term of appointment must, of necessity, be coterminus with its life. The Commissioner cannot agree that all appointments of a board are limited to the life of the board, since the Supreme Court in the case of Bidgood *vs.* Bayonne, 168 Atl. 162, held that a chauffeur employed by the Board of Education of that city was protected in his position by the Veterans' Tenure of Office Act. Furthermore, the Supreme Court in the case of Young *vs.* Stafford, 86 N. J. L. 422, specifically points out that all appointments are not so limited. Justice Garrison in delivering the opinion, said:

> "This case (referring to Burgan *vs.* Civil Service, 84 N. J. L. 219) does not, as has been argued to us, lay down the broad rule that all appointments are limited to the life of the body or officer that makes the appointment. Indeed, such argument loses sight of the phraseology of the statute that was construed in the Burgan case, viz, 'Each board shall upon organization * * * have power to employ a secretary.'"

Chapter 164, P. L. 1928, reads in part as follows:

> *"Every board of education* organized under the provisions of this article *shall,* by the majority vote of all the members of said board, *appoint a district clerk* * * *."

Counsel for respondent holds that appointments under this statute are controlled by the cases of Burgan *vs.* Civil Service, 84 N. J. L. 219, Hayes *vs.* Mobius, 96 N. J. L. 88, where the statutes authorizing the appointment of a clerk are almost identical with those providing for the appointment of a district clerk under the statute above quoted.

Chapter 120, P. L. 1906, provides for the establishment in each county of a board for the equalization, revision, review and enforcement of taxes, Section 3 of which reads in part as follows:

> *"Each board,* shall, upon organization, elect from among their number a president, and *shall have power to employ a secretary* and fix his compensation * * *."

In determining whether a secretary appointed under the provisions of the above statute is protected by Civil Service, the Supreme Court in the Burgan case ruled as follows:

> "The statute clearly implies the employment of a secretary by the board, for the term of one year, that is during the life of a board which is limited to one year, or otherwise the provision for the organization of the board annually, and the election from their number (including the new member) of a president, and with power to employ a secretary would be rendered senseless. *We think that the term of the secretary is as*

definitely fixed by law for one year, by the statute, as if the act had in express terms stated that the term of employment of the secretary shall be one year."

Section 400, Chapter 45, of the Laws of 1907, providing for a municipal board of fire and police commissioners, reads in part as follows:

"*The* said *board shall have power to appoint a clerk* and to fix his compensation which shall be paid monthly * * *."

In ruling upon the tenure of the clerk appointed in accordance with the above statute, the Supreme Court in Hayes *vs.* Mobius, 96 N. J. L. 88, held that the term of office of the clerk was limited to the period of legal existence of the board as laid down by the Supreme Court in Burgan *vs.* Civil Service Commission, 84 N. J. L. 219, and Young *vs.* Stafford, 86 Id. 422.

In accordance with the above cited decisions of the Supreme Court, the term of a district clerk is coterminus with the life of the appointing board and, therefore, the term of each district clerk ends on the first Monday of April next following his appointment.

Appellant was without legal claim to the position of district clerk in the schools of North Arlington after April 2, 1934. The appeal is dismissed.

October 22, 1934.

DISTRICT CLERK MAY BE ELECTED BY NEW BOARD TO BEGIN SERVICE AT ANY TIME SUBSEQUENT TO ITS ORGANIZATION

IN THE MATTER OF THE CLERKSHIP TO THE BOARD OF EDUCATION OF THE BOROUGH OF VERONA.

For Appellant, Waugh, Torppy and Hoffman.
For Respondent, John B. Brown.

DECISION OF THE COMMISSIONER OF EDUCATION

A controversy having arisen as to the validity of the appointment of a district clerk by the Verona Board of Education, issue is joined between the present Board organized on March 25, 1935, and Jonathan Chatellier, district clerk, appointed by that Board on March 29, 1935, on one side, and Frank F. Moore, who until June 30, 1935, had been the clerk for a number of years and claims title to that position.

On March 25, 1935, there was an organization meeting of members of the Board of Education elected at the annual meeting in February preceding and those whose terms did not expire in the year 1935, at which time a president and vice-president were elected. There was some discussion at this meeting about the election of a district clerk, and due to a difference of opinion as to

whether the newly organized Board could legally appoint to that office, action was deferred to a later meeting.

Within the next two days, the newly elected president, Mr. Culp, told the district clerk, Frank F. Moore, to notify the members of a meeting to be held March 29, 1935, the purpose of which is as set forth in the testimony of Mr. Moore as follows:

> "I think it is true that Mr. Culp mentioned the meeting was for a district clerk. I think it is perfectly clear that he mentioned that to me, and I think it is also clear that the members understood that the meeting was for that purpose."

There were present at this meeting all members of the newly organized Board except Mr. Zingg, who was notified either on the day of the meeting or the day preceding. While it was stated at the hearing that his absence from the Board meeting was due to insufficient notice, Mr. Zingg was neither present at the hearing nor did he file any objection against the meeting on this or other grounds.

At this special meeting John Chatellier was nominated and elected clerk. The minutes also set forth the following:

> "Mr. Culp stated that it was understood that Mr. Chatellier could not take office before July 1, 1935, as the present clerk must serve until then and make his annual report."

Mr. Moore, who was first appointed in February, 1919, served continuously until June 30, 1935, his last appointment being in March, 1934. On July 1, 1935, the Board of Education refused to recognize him as clerk and served upon him a written demand to turn over to his successor, Jonathan Chatellier, the books and records of the Board.

Chapter 1, P. L. 1903, S. S., providing for the election of a district clerk (Sec. 91) is almost identical with that providing for the appointment of a medical inspector (Sec. 229). The former reads: "Every board * * * shall * * * appoint a district clerk * * *," and the latter "Every board * * * shall employ a * * * medical inspector."

In ruling upon the appointment of a medical inspector in Board of Education of Cedar Grove *vs.* State Board of Education and George W. Davies, 178 Atl. 208, and also in Skladzien *vs.* Board of Education of Bayonne, 173 Atl. 600, the Supreme Court held that since each board has a right to elect a medical inspector, a retiring board cannot deprive its successor of the prerogative of terminating his services. Due to the similarity of Sections 91 and 229, the Supreme Court ruling must be held to likewise apply to the former.

Mr. Moore claims title to the office upon the allegation that his election in March, 1934, was indeterminate and he has not been removed subsequently by a majority vote of the Board. Mr. Moore knew that the newly organized Board of Education had appointed Mr. Chatellier as district clerk to begin service July 1, 1935, and, furthermore, that his (Mr. Moore's) services were definitely refused on July 1, 1935. Since the Board had the right on July 1,

1935, by a majority vote to terminate the services of the district clerk, the notification that his services would not thereafter be accepted leaves him without legal right to the position.

The question remaining is whether Mr. Chatellier is under all the conditions involved in this case a *de facto* or *de jure* district clerk.

Section 77, Chapter 1, P. L. 1903, S. S., which has not been amended, provides that members of a board of education "shall hold office for the term of three years."

Section 85, Chapter 1, P. L. 1903, S. S., as amended by Chapter 119 P. L. 1907, reads in part as follows:

> "Every board of education created under the provisions of this article shall organize annually on the first Monday in April by the election of one of its members as president and another as vice-president * * *."

Since members of a board of education under the above statute organized *on the first Monday in April,* their terms began on that date, and since they were elected to hold office for three years, their terms did not expire until the first Monday in April three years subsequent to the date upon which they took office.

Section 85 was amended by Chapter 332, P. L. 1921, to read as follows:

> "Every board of education created under the provisions of this article shall organize annually on or before the first Monday in April or on such other day as such board may agree upon prior to the first Monday in April by the election of one of its members as president and another as vice-president * * *."

It is to be noted that in changing the date for the organization of the board under the latter statute, no provision was included which affected the term of office of board members. Therefore, without legislative action, those elected for a three year term beginning the first Monday in April continue to hold office for three full years from that time. If the Legislature had intended that the terms of the newly elected members should begin upon the date of organization (if they took advantage of the provision whereby they may organize *before the first Monday in April*) then it would have said that the terms expiring the next succeeding first Monday in April should terminate upon the organization of the new board. We must, therefore, conclude that while the Legislature gave a new board the right to organize prior to the first Monday in April, it did not intend that the new members supplant those whose terms were then expiring.

The right of a duly elected board member to continue in office throughout his term, except as such term may be modified by legislative action, was sustained by the Supreme Court in the case of Koven *vs.* Stanley, 84 N. J. L. 446.

In Kimball *vs.* Baxter, decided by the Commissioner of Education and reported in 1932 Compilation of School Law Decisions, p. 970, the Commissioner said:

> "Members who are elected for the full term take office on the first Monday in April. While they may meet to organize before that date, their terms begin the first Monday of April which is the end of the terms of their predecessors in office."

Since from 1907 until 1921 terms of members began and ended on the first Monday in April, and there has been no subsequent legislation affecting such terms, boards of education organized under the 1921 statute begin to function the first Monday in April as under the act of 1907, regardless of whether they organize on or before that date; and prior thereto the board which organized the preceding year cannot be deprived of its right to function in relation to any matters pertaining to the current school year.

Section 91, Chapter 1, P. L. 1903, S. S., as amended by Chapter 11, P. L. 1909, reads in part as follows:

> "Every board of education organized under the provisions of this act shall by a majority vote of all the members of said board appoint a district clerk * * *."

While this section has been subsequently amended, the above provision has not been affected.

In Stoothoff *vs.* Blood, 1932 Compilation of School Law Decisions, p. 998, the Commissioner in a decision which was affirmed by the State Board of Education held:

> "The election of a district clerk at a special meeting called for organization of the board without notice to the members that other business would be transacted or without a full attendance of all members of the board of education at the time the motion was made is null and void * * *."

While prior to the first Monday in April a newly organized board cannot transact business over which the old board has control by law, it is not illegal for the new board when called for that purpose to elect a district clerk to begin service the next succeeding July first. The election of Mr. Chatellier as district clerk by the Verona Board of Education at its meeting of March 29, 1935, to begin service on July 1, 1935, is valid.

October 18, 1935.

LEGALITY OF ENLARGEMENT OF DUTIES OF DISTRICT CLERK

FRED C. GASKILL ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Testimony taken at the hearing before the Assistant Commissioner of Education at the Court House in New Brunswick on December 1, 1926, revealed the following to be the facts in this case:

For many years Everett C. Marshall has been employed by the Piscataway Township Board of Education in the capacity of district clerk at a salary which up to the school year 1925-26 at no time exceeded $1,000. For the school year 1925-26 and again for the year 1926-27 Mr. Marshall was appointed full-time district clerk at an annual salary of $3,000. On August 17, 1926, however, the Board passed a resolution limiting the duties of district clerk to those clearly defined in the law and reducing the salary of such office to $1,000, but at the same time creating the office of business manager with various enumerated duties at a salary of $1,500 per year. On August 31, 1926, the resolution of August 17 above referred to was rescinded and a resolution adopted adding to the duties of district clerk the checking up and supervising of all supplies, looking after the business of the schools generally and the supervising of school janitors, buildings, grounds, equipment, etc. The resolution also provided that the district clerk was to act as truant officer and that his salary as district clerk with its various duties was to be $2,500 per year.

Appellants, as taxpayers of the district, contest the validity of the action of the Piscataway Township Board of Education in enlarging the duties of the district clerk beyond those prescribed by law and in employing and compensating Everett Marshall, a Board member, as clerk with power to perform such duties.

It is held in 35 Cyc., p. 900, that "Officers of school districts are public officers and like other public officers their authority and powers are generally determined by statute, and they can rightfully perform all those acts which the law expressly or impliedly authorizes * * *." And in describing the powers of public officers in the case of A. H. Andrews Co. *vs.* Delight Special School District, 95 Ark. 26, the Court held that "The rule respecting such powers is that in addition to the powers expressly given by statute to an officer or board of officers, he or it has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers.

The question to be decided by the Commissioner therefore is whether a board of education can legally enlarge the duties of its district clerk. The office of district clerk must in the Commissioner's opinion be considered a public office, since it is provided for by statute and embodies certain permanent duties or functions prescribed by law. As stated in the opinions above quoted the authority of public officers is "determined by statute" and is limited to "those acts which the law expressly or impliedly authorizes" and they have only "such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers." Since, therefore, the district clerk of a board of education derives his powers not from the school board but from the statute, he will be limited to the exercise of such statutory powers express and implied, and the Board of Education is in the Commissioner's opinion without authority to enlarge or add to such powers. That the Legislature considered the duties of the office of district clerk as fixed and limited is evidenced by its having prohibited a member of a board of education from being interested in any contract with the board of which he is a member and yet at the same time providing that the district clerk may be a member of the board. Should the district clerk be able to perform and be compensated for duties and functions other than those expressly or impliedly conferred by statute upon him as clerk, then a board member could be employed under the official title of district clerk in the very capacities in which the law intended to prevent his being employed while a board member.

It is therefore the opinion of the Commissioner of Education that the Piscataway Township Board of Education cannot legally enlarge the statutory powers of the district clerk so as to include any function such as the supervising of the business of the schools and of buildings, grounds, equipment, janitors, etc., with the further result of enabling a Board member to engage in and be compensated for duties expressly denied him by statute. There would appear however to be nothing illegal in a district clerk's performing such duties as are logically connected with his statutory functions, such for instance as the distribution and supervision of school supplies, which duties are implied in his express power of purchasing school supplies.

It is therefore the opinion of the Commissioner of Education that the resolution of the Piscataway Township Board of Education of August 31, 1926, is illegal so far as it attempted to enlarge the duties of the district clerk to include the supervision of business generally and of buildings, grounds, equipment and janitors and also to include the duties of truant officer. It is accordingly hereby ordered that the Piscataway Township Board of Education proceed at once to take official action to confine the duties and compensation of the district clerk to those functions expressly or impliedly authorized by the School Law for that office.

January 7, 1927.

WHEN BOARD FAILS TO APPROPRIATE FOR CLERKS IN OFFICE OF SECRETARY IN ARTICLE VI DISTRICT APPOINTMENTS BY SECRETARY BECOME NULL AND VOID

AUGUSTA BIEL, MARIE MCNAMARA, PEARL RUTKOWSKI, HELEN WENDELL,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

For the Appellants, Charles Rubenstein.
For the Respondent, Alfred Brenner.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellants were employed as clerks in the office of the secretary of the Board of Education of the City of Bayonne, in accordance with Section 57, Chapter 1, P. L. 1903, S. S., which reads as follows:

> "The secretary may appoint and remove clerks in his office, but the number and salaries of such clerks shall be determined by the board of education."

The testimony (p. 71) shows the original appointment of Helen Wendell at $33.33 per week on January 21, 1932. At the same meeting of the Board the secretary recommended the reappointment of Augusta Biel, Marie McNamara and Pearl Rutkowski, and upon a resolution to fix their salaries a majority of the Board voted in the negative.

At a meeting of the Board of Education, held February 4, 1932, the following letter was received:

> "Hon. Board of Education, Bayonne, N. J.
> Gentlemen:
>
> In the interest of more economically operating the school system subject to the approval of your Board, *I deem it necessary to discharge* the following employees of my office:
>
> Augusta Biel .....Clerk
> Marie McNamara .....Telephone Operator
> Mrs. Pearl Rutkowski .....Clerk
> Helen Wendell .....Clerk
>
> Upon the adoption of a resolution authorizing the dismissal of the employees named, notice of dismissal will be given to them by me.
>
> Respectfully yours,
> J. A. SKLENAR, *Secretary.*"

Received and filed.

Subsequent to the reading of this communication the following resolution was adopted:

"28. By Trustee McGrath:

WHEREAS, in the interest of economy the secretary of the Board of Education has advised the dismissal of the following:

Augusta Biel .....Clerk
Marie McNamara .....Telephone Operator
Mrs. Pearl Rutkowski .....Clerk
Helen Wendell .....Clerk; and

WHEREAS, it is the judgment of the Board of Education that the further retention of said employees is unnecessary;

Therefore, Be It Resolved, that the recommendation of the secretary of the Board of Education be adopted and he authorized and directed to dismiss from further employment the persons previously named.

Be It Further Resolved, that this resolution shall take effect immediately.

Recommended by Jas. J. McGrath,

Chas. E. Kelly,
S. R. Woodruff,
Committee on Teachers and Salaries.

Adopted.
Ayes: Trustees Zeller, McGrath, Larkey, Woodruff, Kelly and President Nealon.
Nays: Trustees Lawler and Jones.
Absent: Trustee Zygmund."

Under Section 57, P. L. 1935, above cited, the secretary may appoint and remove clerks in his office, and the board determines the salaries. The secretary stated that subject to the approval of the Board of Education he would dismiss the appellants. The Board thereupon authorized and directed their dismissal. The evidence is clear that the appellants understood that they were dismissed by the secretary. The statute indicates that clerks are not to be appointed for specific terms but are to be employed and discharged at the pleasure of the secretary as he deems advisable for the efficient administration of his office. When a board of education fails to fix a salary for a clerk, there is no position to be filled by the secretary. His appointments are dependent upon the board providing positions and salaries.

Since salaries were not approved by the Board of Education for the positions to which three of the appellants had been reappointed such reappointments became null and void. Even if salaries had been fixed by the Board for these appellants at the meeting of January 21, their employment would have been legally terminated when the secretary dismissed them in accordance with his letter to the Board under date of February 4, 1932.

Appellants were legally removed. The appeal is dismissed.

July 7, 1932.

VIOLATION OF CONTRACT OF EMPLOYMENT BY BOARD OF EDUCATION

MARY A. FEENEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named appellant to contest the legality of the termination of her services on July 15, 1926, by resolution of the North Bergen Board of Education dated July 2, 1928, and to demand her reinstatement in the position of assistant secretary of the North Bergen Board.

A hearing conducted by the Assistant Commissioner in Jersey City on October 8, 1928, revealed the following facts:

On July 29, 1924, appellant was appointed as assistant secretary by the following resolution of the North Bergen Board of Education:

> "WHEREAS, Mary A. Feeney has been Executive Clerk in the office of the Secretary of the Board of Education for several years; now therefore be it
>
> *Resolved,* That the said Mary A. Feeney be and she is hereby appointed Assistant Secretary of the Board of Education, said appointment to take effect September 1, 1924, at her present annual salary subject to the rules and regulations of the Board of Education."

On July 2, 1928, appellant's services were terminated by the following resolution:

> "WHEREAS, This Board of Education has, by virtue of a resolution heretofore adopted, assumed the duties heretofore performed by the Business Manager; and
>
> WHEREAS, By reason of the aforesaid the work heretofore performed in the office of the Secretary has been decreased, and it is now deemed advisable that the force of clerks in the office of the Secretary be reduced; now therefore be it
>
> *Resolved,* That the office of Clerk to the Secretary of the Board of Education heretofore held by Mary A. Feeney, be and the same is hereby abolished and the services of Mary A. Feeney be and they hereby are dispensed with from and after July 15, 1928."

The Commissioner cannot agree with appellant's contention that the absence of charges and a hearing constituted in itself an illegal dismissal. Chapter 201, P. L. 1927, which provided for tenure protection for assistant secretaries after three years of service was not retroactive so as to give appellant the benefit of service prior to the act, and moreover, the preceding Federal census does not reveal a population in North Bergen equaling 25,000 so as to render the statute applicable to that district. Appellant is not, therefore, in the Commissioner's opinion entitled to charges and a hearing as would be the case if she were a tenure incumbent.

It remains, therefore, to consider whether appellant's contract status with the North Bergen Board was such that the attempted abolition of her position by the resolution of July 2, 1928, constituted an unlawful dismissal. The resolution by which appellant was appointed Assistant Secretary in 1924 stated that she was to be employed "at her present annual salary" and contained no other provision as to her term of employment. It has been held in many cases, notably that of Beach *vs.* Mullen, 34 N. J. L. 343, that

> "If the payment of monthly or weekly wages is the only circumstance from which the duration of a contract is to be inferred, it will be taken to be a hiring for a month or week."

In the appointment resolution in the case under consideration, therefore, in which the stipulation of an annual salary is the only indication of term, it must be considered that appellant was originally appointed for only one year from September 1, 1924. It is also a well recognized legal principle supported by many cases that a definite term contract is construed upon its expiration to be renewed for a like period and upon like terms if all the circumstances, such as the continued retention and compensation of the employee indicate such an intention. 26 Cyc. 976, supports this contention and in the case of Passino *vs.* Brady Brass Company, 83 N. J. L. 419, the Court held that

> "The existence of a continuing contract of service from year to year or from one definite period to another may be implied from proved facts and circumstances and the course of business between the parties, and is always a question of the intent of the parties."

In the present case the appellant, Mary A. Feeney, was retained and compensated as Assistant Secretary not only after September 1, 1925, the date of completion of the first contract for one year, but after the completion of each successive yearly contract. Her retention, therefore, in her position after September 1, 1927, must in the Commissioner's opinion be construed as a renewal of her contract for another year, namely, until September 1, 1928. This term in the Commissioner's opinion was in no way altered by the fact that the North Bergen Board of Education granted stated increases in salaries to certain classes of employees, including clerical assistants, effective during the school year beginning July 1, 1927, and ending June 30, 1928. This action affected neither employments nor terms of service and merely limited the time during which the stated increases for certain employees would be effective. In the Commis-

sioner's opinion, therefore, the appellant, Mary A. Feeney, was serving an implied contract of one year from September 1, 1927, upon the same terms as those of the preceding year, subject to whatever increases in salary had been or should be made.

It remains, therefore, to be considered whether appellant's contract for one year from September 1, 1927, to September 1, 1928, was violated by the resolution of the Board of Education of July 2, 1928, above quoted, abolishing "the office of Clerk to the Secretary of the Board of Education heretofore held by Mary A. Feeney."

The Commissioner does not consider it necessary to determine whether appellant's position as Assistant Secretary was actually abolished by the action above referred to, which referred merely to "the office of Clerk to the Secretary," or whether the action of the Board was taken in good faith. Even though it be conceded that appellant's position was actually abolished and that the action was entirely bona fide, it is nevertheless the Commissioner's opinion that a contract such as that between appellant and the Board of Education continued to be a binding obligation upon the latter, regardless of the abolition of the position. It was held in the case of Board of Education of Flemington *vs.* State Board of Education, 52 Vroom 211, that the contract between the teacher and the school Board would have continued in full force and effect and as a binding obligation upon the Board regardless of the fact that the position in question had passed from under the Board's control, if such contract had not contained in itself a provision for its own termination.

Neither does the Commissioner find it necessary to consider the question raised in the respondent's brief as to whether appellant was actually occupying an office or a position, since the respondent conceded to the appellant the more favorable status of a position, in connection with which any contractual obligation as to term, etc., incurred by the Board of Education cannot legally be impaired by it.

It is, therefore, the conclusion of the Commissioner of Education that appellant's implied contract from September 1, 1927, to September 1, 1928, was violated by the termination of her services as Assistant Secretary on July 15th under the resolution of July 2d purporting to abolish the position. Since the period of the contract had already expired on September 1, 1928, and it is accordingly impossible to reinstate appellant for the duration of that contract, it is hereby ordered by the Commissioner that the North Bergen Board of Education proceed to pay to the appellant, Mary A. Feeney, her compensation from July 15th to September 1st, 1928, at the rate which she was receiving at the time of her dismissal on July 15, 1928.

November 30, 1928.

Decision of the State Board of Education

The appellant was employed by the Board of Education of North Bergen Township, Hudson County, as Assistant Secretary to the Board. On July 2, 1928, the Board, without preferring charges against her, passed a resolution abolishing her office and dispensing with her services "from and after July 15,

1928." She filed a petition with the Commissioner alleging that the action of the Board was unlawful, and requesting the Commissioner to order her reinstatement. After a hearing and the taking of a considerable amount of testimony, the Commissioner decided that the appellant was not under tenure of office and therefore was not entitled to a hearing on charges, but that her implied contract of employment from September 1, 1927, to September 1, 1928, was violated by the termination of her services. He therefore ordered the North Bergen Board of Education to pay her compensation from July 15 to September 1, 1928, at the rate she was receiving at the time of her dismissal. The appellant does not appeal from that part of his decision, but now contends that she is entitled to have the resolution of July 2 set aside.

It is our opinion, after considering the arguments and briefs of counsel, that the Commissioner's conclusion was correct, and his decision should, therefore, be affirmed, and we so recommend.

March 2, 1929.

APPOINTMENT OF SECRETARY

ALBERT LEULY ET AL.,

Appellants,

vs.

HENRY RITTER ET AL.,

Respondents.

William C. Asper, for Appellants.
Francis H. McCauley, for Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

In the decision rendered by me in this matter on February 24, 1914, three points were reserved until further evidence was submitted. These points were, the legality of the appointment of Hurley as secretary at the meeting held on January 9, 1914; the action taken at the meeting held January 28 in appointing Ritter and O'Hara as members of the Board of School Estimate; and the action taken at the meeting of February 2 appointing Briesen as secretary.

An agreed state of facts submitted this day contains a resolution adopted by the Board of Education of the Township of Weehawken at a meeting held February 2, which reads as follows:

> "*Resolved,* That the office of the secretary of the Board of Education and the district clerk of the Board of Education be declared vacant, and that Arthur V. Briesen be and he is hereby appointed secretary of the Board of Education and as district clerk of the Board of Education in the

Township of Weehawken, in the County of Hudson and State of New Jersey, for a term of one year, from the first day of February, 1914, to the first day of February, 1915, at a salary of $900.00 per annum, payable in twelve equal monthly installments of $75 each.

"Dated, February 2, 1914."

Section 56 of the general school law, passed at the second special session of 1903, reads in part as follows:

> "A secretary shall be appointed by the majority vote of all the members of the Board of Education; he shall be paid such salary as said board shall determine, and may be removed by a majority vote of all the members of said board."

It appears that the resolution above quoted declared the office of secretary to be vacant, and also appointed Arthur V. Briesen as secretary of the Board to fill the vacancy thus created. This action having been taken by the vote of a majority of all the members of the Board, William E. Hurley was removed from his office as secretary of the Board of Education of the Township of Weehawken, and Arthur V. Briesen was regularly and legally elected as secretary of said Board.

It is also agreed by the parties hereto that the meeting of the Board held January 28 was a regular meeting of the Board. At this meeting a resolution was adopted appointing Messrs. Ritter and O'Hara as members of the Board of School Estimate. It is well settled that when a special meeting of a municipal board is called, each member must have notice of the time and place of the meeting and the purpose for which it is called. It is not necessary that notice be sent to the members of a board of the time and place of a regular meeting for the reasons that the members of a board are presumed to know the time and place where a regular meeting will be held, and it is their duty to attend without formal notice. The meeting of January 28 was a regular meeting, and the action taken in appointing Messrs. Ritter and O'Hara was regular, and said persons are members of the Board of School Estimate for the ensuing year.

February 26, 1914.

Affirmed by the STATE BOARD OF EDUCATION May 3, 1914.

SECRETARY OR ASSISTANT SECRETARY OF A BOARD OF EDUCATION IN ARTICLE VI DISTRICT MAY BE REMOVED BY BOARD IN ACCORDANCE WITH TERMS OF HIS EMPLOYMENT

EDWARD A. NELSON,
Appellant,
vs.
BOARD OF EDUCATION OF THE CITY OF BAYONNE,
Respondent.

For the Appellant, Charles Rubenstein.
For the Respondent, Alfred Brenner.

DECISION OF THE COMMISSIONER OF EDUCATION

Edward A. Nelson was appointed assistant secretary of the Board of Education of the City of Bayonne, effective November 1, 1927, and under the provisions of Chapter 201, P. L. 1927, he was protected in his employment after July 1, 1930. On February 4, 1932, in accordance with the plan of the Board for more economical operation of the school system, the secretary recommended the discharge of several employees in his office, including Edward A. Nelson, the assistant secretary, and the Board of Education at a meeting held on that date passed the following resolution:

"27. By Trustee McGrath:

"WHEREAS, The present financial status of the Board is in such condition as to require the most rigid economy and the retention only of those employees whose services are absolutely necessary in the school system; and

"WHEREAS, It is the judgment of the Board of Education that it is necessary to reduce the number of its employees in the interest of more economically operating the school system; and

"WHEREAS, It is the judgment of the Board of Education that the employment of Edward A. Nelson as assistant secretary is unnecessary; and

"WHEREAS, The secretary of the Board of Education has recommended the dismissal of the assistant secretary,

"Be It Resolved, That the recommendation of the secretary of the Board of Education be accepted and adopted, and

"Be It Further Resolved, That the employment of assistant secretary, now held by Edward A. Nelson, be and the same is hereby abolished.

"Be It Further Resolved, That this resolution shall take effect immediately.

"Recommended by
"JAS. J. MCGRATH,
"CHAS. E. KELLY,
"S. R. WOODRUFF,

"Committee on Teachers and Salaries.

"Adopted.
"Ayes: Trustees Zeller, McGrath, Larkey, Woodruff, Kelly and President Nealon.
"Nays: Trustees Laylor and Jones.
"Absent: Trustee Zygmund."

It is the contention of counsel for appellant that the resolution merely created a vacancy and did not abolish the position, that the act of the Board was not bona fide, and the secretary not having removed the petitioner, the dismissal was illegal.

The resolution states:

"Be it further resolved that the employment of assistant secretary now held by Edward A. Nelson be and the same is hereby abolished."

The use of the word "employment" and not the word "position" or "office," appears to be the reason of counsel for holding that the position or office still continues. The Supreme Court in the case of Fredericks *vs.* Board of Health, 82 N. J. L. 200, defines the words "office," "position," and "employment," and it is upon these definitions that counsel contends that appellant held a position and not an employment. The intention of the Board of Education in its resolution appears to be very clear. It was to abolish the office, position or employment held by the assistant secretary. To hold that public bodies cannot effect a purpose because of a fine legal distinction in the use of a word, would be contrary to the general ruling of our civil courts. The board said "the employment now held by Edward A. Nelson . . . is hereby abolished," and we think it should be construed to mean that position was not thereafter to exist.

The authority of a board to abolish a position in good faith is well established in this State. Evans *vs.* Hudson Freeholders, 53 N. J. L. 585; Fire Commissioners of Newark *vs.* Henry A. Lyon et al., 53 N. J. L. 632; McBride *vs.* Common Council of Bayonne, 74 N. J. L. 398; Parker *vs.* Bayonne, 85 N. J. L. 186; Colgary *vs.* Street Commissioners of Newark, 85 N. J. L. 583.

No testimony was presented which establishes bad faith in this act of the Board.

Chapter 201, P. L. 1927, confers tenure protection, after three years of employment, upon secretaries, assistant secretaries and business managers and provides for their removal thereafter by the Board of Education, for neglect or other good cause.

Until a secretary or assistant secretary has been employed three years he may be removed by the Board of Education in accordance with the terms of his employment. He is not classified as a clerk in the office of the secretary and is removable by the Board only, and not by the secretary.

Since the Board of Education abolished the position or employment of the assistant secretary, the term of office of the encumbent was automatically terminated. The appeal is accordingly dismissed.

July 7, 1932.

DECISION OF THE STATE BOARD OF EDUCATION

On November 27, 1927, Edward A. Nelson was appointed by respondent as its assistant secretary, effective November 1, 1927. After November 1, 1930, he was protected in his employment by the provisions of Chapter 201, P. L. 1927. On February 4, 1932, for reasons of economy, respondent adopted a resolution "that the employment of assistant secretary, now held by Edward A. Nelson, be and the same is hereby abolished." Appellant contends that the resolution was ineffective to abolish the position of assistant secretary, that the act of respondent was not bona fide, and that the secretary not having removed appellant, the termination of his employment was illegal. The Commissioner of Education, in his opinion, disposes of these contentions, and dismissed the appeal. We find no error in his decision and recommend that it be affirmed.

November 5, 1932.

LEGALITY OF DISMISSAL OF CLERICAL EMPLOYEE BY SECRETARY OF BOARD OF EDUCATION

WILLIAM ROCHFORD,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE AND JOSEPH A. SKLENAR, Secretary,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

A hearing which was conducted by the Assistant Commissioner on April 4, 1929, in the City of Bayonne, revealed the following to be the facts in this case:

Appellant was first appointed by the Secretary of the Bayonne Board of Education on July 1, 1924, as a bookkeeper in the office of the latter official. On September 20, 1928, the Bayonne Board of Education adopted a resolution terminating appellant's services as bookkeeper in the Secretary's office and this action was declared invalid by a decision of the Commissioner of Education dated January 3, 1929, on the ground that the sole function of the Board of

Education in relation to the clerks in the Secretary's office was to determine their number, and that the appointment and removal of individuals within that number was the prerogative solely of the Secretary. On January 17, 1929 the Secretary of the Board, Joseph A. Sklenar, himself proceeded to remove and discharge the appellant as bookkeeper, such removal to be effective January 31, 1929, and the Board of Education immediately upon receipt of the Secretary's report adopted a resolution reducing the number of clerks in the Secretary's office to eight.

It is contended by the appellant that the Secretary of the Board of Education was without power on January 17, 1929, to remove appellant who had been illegally removed and had not been reinstated by the Board in accordance with the Commissioner's decision of January 3, 1929, and that the Board of Education must therefore proceed to reinstate the appellant in his position before any removal action could legally be taken against him.

Section 72, Article VI, page 41 of the 1928 Compilation of the New Jersey School Law provides as follows:

> "The Secretary may appoint and remove clerks in his office, but the number and salaries of such clerks shall be determined by the Board of Education."

The Commissioner cannot agree with the appellant's above contention that on January 17, 1929, the Secretary lacked the power to terminate appellant's services because he had been removed from office by the Board of Education in September, 1928, and had not been reinstated by the Board in accordance with the Commissioner's decision of January 3, 1929. It is the Commissioner's present opinion, as distinctly stated by him in the earlier decision above referred to, that the function of the Board of Education was solely the determination of the number of clerks in the Secretary's office and that the Board possessed no power for removal or appointment within that number. Accordingly (to quote his earlier opinion) "the resolution of the Bayonne Board adopted September 20, 1928, purporting to terminate appellant's services but making no change in the number of clerks had no effect whatever upon the status of the appellant who, therefore, continues to hold his position as bookkeeper in the office of the Secretary." Nowhere, therefore, in the Commissioner's decision of January 3, 1929, was there an order that the Board proceed to reinstate the appellant in his position as bookkeeper in the Secretary's office.

Moreover, the Commissioner is of the opinion that not only was the appellant occupying his position at the time of his dismissal by the Secretary on January 17, 1929, with status unimpaired by any removal action by the Board of Education, but that he was at that time serving an indeterminate term without any such statutory military tenure protection as would in any way interfere with the Secretary's action. The protection conferred by Chapter 229, P. L. 1922, upon employees of Boards of Education who were veterans of the United States military service was repealed by the provisions of Chapter 287, P. L. 1928, and the recently enacted statute (Chapter 29, P. L. 1929) restoring that protection was not yet in effect at the time of appellant's dismissal by the Secretary of the Bayonne Board on January 17, 1929.

It is, moreover, the Commissioner's opinion that the Secretary was in no way restricted in his power to remove clerks in his office by any rule of the Bayonne Board of Education such as that contained in paragraph 81 of the "Rules and Regulations" providing that the Secretary "shall recommend through the Superintendent the employment and dismissal of all subordinates." As well argued by counsel for respondents, a Board of Education cannot, as decided by the Commissioner in the case of Bayonne *vs.* Ryan, Custodian (1926), make a rule or regulation inconsistent with a statutory provision. The Bayonne Board could not, therefore, by rule even under the statute authorizing the Board to confer various powers upon the Superintendent, so enlarge those powers of the Superintendent as to restrict the authority of the Secretary plainly conferred by another statutory provision to "appoint and remove the clerks in his office."

The Secretary furthermore cannot, as contended by the appellant, be restricted to removal of employees only in cases where the Board had reduced the number of clerks in his office. The Secretary's statutory power to appointment and removal of clerks within the number fixed by the Board is, in the Commissioner's opinion, equally effective whether the Board "determines the number" by allowing it to remain fixed or by increasing or reducing such number.

Neither in the Commissioner's opinion can it be successfully argued that the appellant was originally appointed on July 1, 1924, for a period of one year, so that under the doctrine of implied renewal of contracts he could be considered at the time of his dismissal on January 17, 1929, as under contract until July 1st of the present year. The facts in the case indicated that appellant was first appointed by the Secretary on July 1, 1924, with no indication of any kind of any definite period of employment. It is true that the Board upon being notified of the appointment fixed the compensation at $2,500 per annum, but this action formed no part of the appointment which, as above stated, was made by the Secretary for an indeterminate period and therefore terminable at any time at the will of the appointing power.

The case of the respondents in this matter is, in the Commissioner's opinion still further strengthened by the fact that the Bayonne Board immediately upon receipt of the Secretary's report that he had dismissed appellant as bookkeeper proceeded to reduce the number of clerks in that department from nine to eight. The position of bookkeeper after the Board's action was no longer in existence to be filled by anyone.

It is, therefore, the opinion of the Commissioner of Education that the appellant, William Rochford, was legally dismissed by the Secretary of the Bayonne Board of Education on January 17, 1929, from his position as bookkeeper in the office of the latter official. The appeal is accordingly hereby dismissed.

May 8, 1929.

DECISION OF STATE BOARD OF EDUCATION

The appellant was appointed by the Secretary of the Bayonne Board of Education in 1924 as a bookkeeper in the Secretary's office. In 1929, he was discharged by the Secretary. He appealed to the Commissioner, who sustained the action of the Secretary, and from the Commissioner's decision he has now appealed to this Board.

The School Law provides (1928 Compilation, p. 41):

> "The Secretary may appoint and remove clerks in his office, but the number and salaries of such clerks shall be determined by the Board of Education."

We agree with the conclusions reached in the Commissioner's opinion and recommend that it be affirmed.

As to the appellant's contention on this appeal that Chapter 287 of the Laws of 1926 is unconstitutional, this Board has held more than once that it is without authority to declare an act of the Legislature unconstitutional.

December 7, 1929.

FIXING OF SCHOOL CUSTODIAN'S BONDS AND DESIGNATION OF BANK ACCOUNT

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Appellant,

vs.

JOHN J. RYAN, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On October 21, 1926, the Bayonne Board of Education by resolution duly adopted designated the Mechanics National Bank of Bayonne as the depositary for school funds and ordered the respondent, the Custodian of School Moneys, to deposit therein all school funds then in his hands. On November 4, 1926, the Board of Education by another resolution directed the respondent to give bonds for the faithful discharge of his duties in the sum of $500,000 with sureties thereon consisting of three separate surety companies. The Custodian of School Moneys refused to comply with either of the directions contained in the above mentioned resolutions and the Board of Education then proceeded to bring this appeal.

The appellant in making these demands of the Custodian of School Moneys as to the giving of bonds and as to the place of deposit of school funds relies

upon the following statutory requirements which were added by Chapter 302, P. L. 1915, as an amendment to section 185 of the School Act of 1903 (Sec. 276, School Law):

> "* * * whenever any school district shall contain more than one municipality the Board of Education may appoint a suitable person as custodian of school moneys of said district, and may fix his salary and term of office. Such custodian shall, when requested to do so at any time by the board, render to said board a true and full account of all moneys in his possession, as such custodian, up to such time, and of all payments made by him out of said moneys and for what purpose, and shall also, when required by resolution of said board, deposit in any bank or banking institution designated by said board, all moneys then in his hands or thereafter collected or received by him as such custodian; he shall give bonds for the faithful discharge of his duties in such amount and with such sureties as said board shall direct, but such bonds shall be for a sum not less than the amount apportioned to said district by the County Superintendent of Schools; until the appointment of a custodian of school moneys by the board of education, the collector or other person residing in the municipality situate in such school district having the largest amount of taxable property shall be custodian of the school moneys of such district."

In reaching a determination as to the real intent of the Legislature in the above quoted provisions of Chapter 302, P. L. 1915, it must be noted that no amendment was made as to the place of deposit of school moneys and the giving of bonds by the custodian in that part of section 185 which deals with the custodian's official duties being covered by his bonds as municipal treasurer or collector and with his official duties generally, but that on the contrary such amendment as to the place of deposit of school moneys and the giving of bonds appears only in the latter part of the section after the new provision, "whenever any school district shall contain more than one municipality, etc." This clearly indicates to the Commissioner that it was the intention on the part of the Legislature to allow the Board of Education to impose such requirements upon the school custodian as appellant contends for only in the case of school districts containing more than one municipality. Moreover, since the first part of section 185 definitely provides that the bonds of the municipal treasurer or collector shall be deemed to cover his duties as school custodian, it must necessarily follow that the subsequently added provision in the same section for the giving of individual bonds by the custodian (while the former provision remains unchanged) can apply only to the Custodian of School Moneys in districts consisting of more than one municipality; and since the latter provision is introduced by the pronoun "he" and refers to the custodian immediately above mentioned who is required to place school moneys in the depositary designated by the Board of Education, it must also follow that both provisions thus connected relate solely to the custodian of school moneys in a district consisting of more than one municipality.

It is therefore the opinion of the Commissioner of Education that since the Board of Education of the City of Bayonne consists of but one municipality, the bonds of the Custodian of School Moneys are controlled by that part of section 185 which provides that the bonds given by the municipal treasurer or collector, as the case may be, shall be deemed to cover his duties as Custodian of School Moneys; and it is further the opinion of the Commissioner that the Custodian of School Moneys in such a district as the City of Bayonne has full discretion as to the place of deposit of school funds, since he is under no further statutory requirement in that respect than that he "shall receive and hold in trust all school moneys belonging to such school district * * * which shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the Board of Education, etc."

The Custodian of School Moneys of Bayonne therefore, who according to section 81 of the School Law holds his office by virtue of being City Treasurer, must be considered to be covered by his official bonds as treasurer and in no way compelled to comply with the direction of the Board of Education as to the place in which he shall deposit school moneys.

The appeal is accordingly hereby dismissed.

April 11, 1927.

REFUSAL OF CUSTODIAN TO PAY ORDERS

THE BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON,

Appellant,

vs.

JOHN V. MELICK, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by the Board of Education of the Borough of Hampton, Hunterdon County, on the refusal of the custodian of school moneys to pay certain orders regularly drawn on him by authority of the Board of Education.

Article 18 of the School Law, edition of 1914, section 227, provides that school moneys shall be paid out by the custodian only "on orders legally issued and signed by the president and district clerk or secretary of the board of education; any ordinance, by-law or resolution of a township committee, common council or other governing body of any municipality attempting to control such moneys, or which shall in any way prevent the custodian of the school moneys of the school district from paying the orders of the board of education as and when they shall be presented for payment shall be absolutely

void and of no effect." The law as quoted is plainly mandatory upon the custodian to pay the orders of a board of education upon being presented to him in a legal form.

The decisions of the courts are also to this effect. In the case of Zimmerman *vs.* Mathe the court in its decision uses the following language: "With the expenditure of money raised for school purposes and the application of the moneys to the purpose for which they were raised the township collector has no official concern."

It has also been held that the custodian of the moneys of a school district in the payment of orders is not responsible for the application the school board has made of the money when such orders come to him drawn according to law.

In this case it is plainly the duty of the custodian of the school moneys, John V. Melick, to pay the orders issued by the Board of Education, and he is hereby commanded so to do.

The appeal is sustained.

February 9, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The respondent, Mr. Melick, as custodian of school moneys in the Borough of Hampton, declined to pay certain bills at the request of the Board of Education of the Borough of Hampton, because he did not consider the bills legal. This is a proceeding to compel the custodian to obey the orders of the Board of Education and is, specifically, an appeal from the decision rendered by the Commissioner of Education.

Article 18 of the School Law, section 227, provides that school moneys *shall* be paid out by the custodian "on orders *legally issued and signed* by the president and district clerk, or secretary of the board of education," etc. The word "shall" makes it mandatory upon the custodian to obey the directions of the board. The word "legally" qualifies the words "issued and signed" and indicates that the *issuing* and the *signing* must be legal, but is evidently not meant to qualify in a broad way the word "orders." The reading of "orders, issued and signed legally" gives the right meaning. The custodian has not the powers of an auditor, and cannot make legal quibbles over every dollar paid out. If the statute had any idea of vesting him with any such powers it would have so stated. As it now reads the statute names him a "custodian" and gives him no power but that of a keeper of money to be paid out when duly authorized by the proper authorities.

The note cited on page 388 of the School Law (Edition of 1914) is evidently a continuation from the old forms used before 1911. It is not law nor even a rule of the State Board, but a note of direction written in by some assistant commissioner.

June 3, 1916.

VETERANS' TENURE ACT DOES NOT PROTECT SOLICITOR OF BOARD OF EDUCATION INDETERMINATELY APPOINTED

HENRY M. EVANS,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER CITY,

Respondent.

For the Petitioner, Per Se.
For the Respondent, Firmin Michel.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, a counselor-at-law of New Jersey, was first elected respondent's solicitor December 1, 1919, and continued as such until February 20, 1934, when the Board by resolution terminated his services and elected as his successor Firmin Michel who, at the time of the hearing in this case was still employed by the Board under an annual appointment.

The minutes of December 31, 1932, show respondent's election of appellant as follows:

> "It was moved by Mr. Stetser and seconded by Mr. Sagers that we go into the nomination and election of a solicitor.
>
> "It was moved by Mr. Stetser and seconded by Mr. Sagers that Henry M. Evans be elected solicitor from December 1 at a salary of $500.00 per year. There being no dissenting vote, President Kelley declared Mr. Evans unanimously elected solicitor from December 1, at a salary of $500, per year."

Mr. Evans was not subsequently re-elected, but continued in the service of the Board and was paid his salary in accordance with the above resolution until February 20, 1934. At the meeting of the Board held February 1, 1934, Mr. Michel was nominated as solicitor to succeed appellant, but before a vote was taken Mr. Evans presented written notification to the Board that he claimed the solicitorship under the provisions of the Veterans' Tenure Act (Chapter 29, P. L. 1929). Whereupon the election of his successor was deferred pending a final ruling on the point. At the Board meeting held February 20, 1934, a resolution was presented setting forth that Mr. Evans was no longer retained as solicitor and providing for the election of Mr. Michel for a term of one year. Before the roll call was taken upon the resolution, Mr. Evans again protested against its adoption, reiterating his right to the position under the Veterans' Act. The resolution was nevertheless adopted and a vote of thanks was extended to Mr. Evans for his services. On March 13, the appellant

filed with the respondent a copy of his petition to the Commissioner for reinstatement with salary from the date of his dismissal.

It is admitted by the Gloucester City Board of Education that Mr. Evans is an honorably discharged veteran, and the testimony shows that since his dismissal appellant's services have been at all times available to the Board of Education.

Respondent holds that the action of the Board in terminating the services of appellant is legal under the following allegations:

(1) The resolution appearing in the minutes of December 31, 1932, electing Mr. Evans for an indeterminate period, is not a verbatim record of the resolution offered at the Board meeting.

(2) Certain members did not take the prescribed oath of office, are not, therefore, *de jure* members of the Board, and cannot bind it with an indeterminate appointment.

(3) That the work of the solicitor does not constitute a position as contemplated by Chapter 29, P. L. 1929.

(4) That the solicitor's term had previously been fixed at one year and was determinate, and further, that a solicitor receives an honorarium and not a salary.

(1) While respondent attempts to show that the minutes were not a verbatim record of appellant's indeterminate appointment, the testimony in nowise discredited the minutes. Their subsequent approval by the Board and the fact that Mr. Evans was not re-employed the following year lend support to the validity of the record as to an indeterminte period. The records are the best evidence of what was done or resolved. Durbrow *vs.* Hackensack Meadows Co., 77 N. J. L. 89.

(2) The School Law, Section 42, Chapter 1, P. L. 1903, S. S., provides that the oath of a board member shall set forth that he possesses the qualifications to be a member of said Board and that he will faithfully perform the duties of said office. All of the Board members were regularly appointed, but in the case of two the oaths did not set forth that they possessed the qualifications to be members of said Board. The oath of office of another member could not be found, and it was held by counsel that she was not duly sworn. There was no attempt to subpœna this member and the contention falls through lack of proof. The Supreme Court in the case of Rossell *vs.* Board of Education of Neptune Township, 68 N. J. L. 498, held that the failure of an officer to take the prescribed oath will not prevent his becoming a *de facto* officer. No attempt has been made by *quo warranto* proceedings to show whether the present members are *de jure* or *de facto*. However, the Court of Errors and Appeals in the case of Brinkerhoff *vs.* Jersey City, 64 N. J. L. 225, held that the principles upon which the acts of *de facto* officers are held valid require the recognition of appointments to office made by them, when such appointments would be valid, if made by officers *de jure*.

(3) In the case of Hayes *vs.* Townsend, 1928 Compilation of School Law Decisions, 301, the Supreme Court said:

> " * * * The general powers of boards of education under the School Act are substantially similar to those in the Newark charter. They may appoint such officers, agents and employees as may be needed and fix their compensation. Section 50. Whether or not a permanent solicitor at a fixed salary is needed is a matter primarily for their determination."

The duties of a solicitor, who was present at every meeting for a number of years to advise the Board in the conduct of its business, are permanent and certain and constitute a position, as defined by the Supreme Court in the cases of Fredericks *vs.* Board of Health, 82 N. J. L. 200, and Lewis *vs.* Jersey City, 51 N. J. L. 240.

(4) The employment of Mr. Evans on December 31, 1932, is not affected by any previous appointments. He was to receive "a salary of $500 per year." The last resolution speaks for itself and the salary so fixed cannot be termed an honorarium, as argued by respondent's counsel.

The appellant, an honorably discharged veteran elected to a position for an indeterminate period, is protected by the Veterans' Tenure of Office Act, and cannot be removed except as provided therein. The Board of Education of Gloucester City is directed to reinstate Mr. Evans as its solicitor and to pay his salary from February 20, 1934.

July 31, 1934.

Henry M. Evans, the respondent, was appointed solicitor of the Board of Education of Gloucester City on December 1, 1919, by a resolution adopted on that date. The resolution created the position of solicitor for the Board, and pertinent parts thereof are in the following language:

"It was moved by Mr. Connor and seconded by Dr. Beck that the Board of Education employ the services of a solicitor. Carried." Thereupon a motion was made and carried that the Board go into the nomination and election of a solicitor. Mr. Evans was then nominated and a vote was taken which resulted in his election. After this was done, the following motion was made and carried: "It was moved by Mr. Connor and seconded by Dr. Beck that the term of office be for one year at a salary of $300.00. Carried." Annually thereafter during the years 1920, 1921, 1922, 1923, 1924, 1925 and 1926, Mr. Evans was elected for an express term of one year. No record is produced of an election in 1927, but on January 12, 1928, the minutes of the Board show that Mr. Evans was again elected solicitor and no mention is made in the motion or resolution of a term. The minutes show that on December 11, 1928, and on December 10, 1929, and on January 13, 1931, he was elected for a term of one year. On December 8, 1931, he was again elected without mention of a term, and on December 13, 1932, he was again elected without mention of a term, except that it be from December 1, 1932. No election of solicitor was thereafter had by the Board until February 20, 1934, at which time the appellant Board appointed the present incumbent, Mr. Firmin Michel.

At the time of the last election and at the organization meeting of the Board held on February 1, 1934, Mr. Evans protested against the election of a solicitor, stating that he had been elected in the year 1932 without term, and that, being a veteran of the World War, he was protected in his incumbency of the position by the provisions of Chapter 29 of the Laws of 1929, commonly known as the Veterans' Tenure Act.

The Board of Education disregarded his objections and appointed the present incumbent. Mr. Evans appealed from such action to the Commissioner of Education, who decided that he was entitled to continue in his position during good behavior, his term of service being one not fixed by law, and thus within the provisions of the Tenure Law. The Board of Education appeals to this board from that decision.

The sole question for decision seems to be whether Mr. Evans was appointed in 1932 to serve for a definite term. The position of solicitor to a board of education is not one which is created by law. The authority to create such a position and to make an appointment by boards of education is found in Section 50 of the School Law, which reads:

> "Every such board shall have the supervision, control and management of the public schools and public school property in its district, and shall keep such property insured. It shall appoint a person to be its secretary and may appoint a superintendent of schools, a business manager, and other officers, agents and employees as may be needed, and may fix their compensation and terms of employment, but no such appointee, officer, agent or employee, other than the secretary, shall be a member of said board."

The original motion or resolution of the Board, adopted in 1919, which created the position of solicitor, may be construed to fix a term. After the adoption of the motion creating the position, and the election or appointment of Mr. Evans, there was a separate motion which is quoted above "that the term of office be for one year at a salary of $300.00." No action of the Board changing such motion has been brought to our attention. However, the courts have repeatedly held that where a power of appointment is in an administrative board, such appointment cannot be for a longer term than the official life of that board. The case of Burgan *vs.* Civil Service Commission, 84, N. J. L., page 219, was a contest over the office of secretary to a county tax board. That board is, like boards of education, organized annually. The statute which creates the board authorizes each upon organization to elect a president and to employ a secretary. In the appointment of the claimant to the position, no term of office was expressed, but he had been elected annually a number of years in succession. The Court in discussing the question whether the secretary's term was fixed by law, says:

> "The statute clearly implies the employment of a secretary, by the Board, for the term of one year, that is, during the life of the Board which is limited to one year, or otherwise the provision for the organization of the Board annually, and the election from their number (including

the new member) of a president and with power to employ a secretary would be rendered senseless."

"We think that the term of the secretary is as definitely fixed by law for one year, by the statute, as if the act had in express terms stated that the term of employment of the secretary shall be one year. The logical sequence of this view is that Mr. Smith's term was fixed by law and was properly filled by the new Board."

The case of Young *vs.* Stafford, 86 N. J. L., page 422, was also a contest over the office of secretary to a county tax board. The Court reached the same conclusion as in the Burgan case before cited, and in its decision says that the language of the statute, "viz., 'each board shall upon organization * * * have power to employ a secretary,' and so forth, which is the same statute that is now before us, from the language of which it is perfectly clear that what each board upon its organization has the power to do, every board has the power to do, and that if every board upon its organization has the power to employ a secretary, no previously organized board has the power to employ one for it; hence, by the language of the act, the employment of a secretary is necessarily limited to the organized life of the board that appointed him."

In the recent case decided by this board, Skladzien *vs.* Board of Education of the City of Bayonne, it was held that the appointment of a medical inspector was limited to the life of the board appointing him. This decision was appealed to the Supreme Court and there sustained. In its discussion of the question, the Supreme Court, in a per curiam opinion, speaking of the section directing boards of education to appoint a medical inspector and fix his salary and term of office, says:

Now the statute here under consideration (Section 229) provides that 'Every board of education shall employ * * * a medical inspector, etc., * * *' which as we see it must be construed as giving such power of appointment to *each* board of education."

"A new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new board of education. Such board is not therefore a continuous body for that reason. It has all the indicia of non-continuous bodies. It organizes in February of each year, adopts rules for its own administration each year, is completed each year by the selection of three new members in the place and stead of those three whose terms have expired." Skladzien *vs.* Board of Education of Bayonne, 12 Misc., page 602.

The language of the foregoing cases is apposite to the situation in the present case. If we grant that the language of the motion adopted by the Board in December, 1919, "that the term of office be for one year," had reference only to election then made, nevertheless under the law as declared by the cases mentioned, the term of the solicitor, as in the Burgan case above cited, is as definitely fixed by law for one year by the statute, as if the act had in express

terms stated that the term of such officers, agents, and employees as the Board is authorized to appoint should be one year. It results necessarily that the respondent occupied a position the term of which is fixed, either by the motion or resolution of the Board when it created the position, or by law, at one year. The term of the respondent having ended with the life of the Board on February 1, 1934, the new Board which organized on that day had the power to appoint his successor.

The decision of the Commissioner of Education should be reversed and the appeal sustained, and it is so recommended.

January 12, 1935.

DECISION OF THE SUPREME COURT

No. 225, May Term, 1935

Argued May, 1935.

On *Certiorari.*

For Prosecutor, Henry M. Evans, *pro se.*

For Defendants, Firmin Michel.

Before Justices Parker, Case and Bodine.

PER CURIAM: Prosecutor seeks to review the action of the State Board of Education in holding that a solicitor for a local board of education held an office or position, the term of which was fixed by resolution or law at one year. He claims an indefinite term and tenure under the Veterans' Act of 1929, P. L. 57.

Local boards of education under Section 50 of the School Law (Comp. Stats., 4741) have power to appoint needed officers and agents and to fix their compensation and term of office. For a number of years, prosecutor was annually appointed solicitor for a term of one year. On December 13, 1932, he was again appointed without mention of term, except that his appointment was from December 1, 1932, for an annual salary. Soon thereafter a successor was chosen without charges having been made.

A local board of education is a non-continuous body of necessity organizing each year. Skladzien *vs.* Board of Education of Bayonne, 12 Misc. 602, affirmed Court of Errors and Appeals. Prosecutor's term of office was either fixed by resolution creating the office at one year, or if not so fixed in the absence of statute, presently in force, or ordinance or rule under legislative sanction, the term was for one year beginning coterminous with that of the appointing power. Skladzien *vs.* Board of Education of Bayonne, *supra.*

It is not material to the determination of this case that the solicitor of a board of education be regarded as an officer. However, we think he was an officer rather than the holder of a position. State, Hoxsey, pros., *vs.* Paterson, 40 N. J. L. 186. His term of office, as before noted, was either fixed at one year by the resolution creating the office or by law.

The Supreme Court held in Board of Education *vs.* Bidgood, 168 Atl. 162, that a chauffeur to a board of education held a position and was protected by the Veterans' Act. He was appointed without a term for a monthly salary. The Court of Errors and Appeals had not decided, when that decision was

rendered, that local school board officers and employees hold, in the absence of other circumstances, a term coterminous with that of the board making the appointment.

The writ will be dismissed.

DECISION OF THE COURT OF ERRORS AND APPEALS
No. 24, February Term, 1936

Argued February 5, 1936; decided May 14, 1936.

Appeal from Supreme Court.

For Appellant, Henry M. Evans, Attorney of Alfred Brenner, of counsel Rec.

For Respondents, Firmin Michel.

PER CURIAM: An affirmance of the judgment of the Supreme Court is called for and for the reason set forth in the opinion of that Court that the "Prosecutor's term of office was either fixed by the resolution creating the office at one year, or if not so fixed, in the absence of statute, presently in force, or ordinance or rule under legislative sanction, the term was for one year being coterminous with that of the appointing power."

We agree with the Supreme Court that—

> "It is not material to the determination of this case that the solicitor of a board of education be regarded as an officer."

The judgment under review, is affirmed, with costs.

May 14, 1936.

LACK OF AUTHORITY NOT A VALID EXCUSE FOR REFUSAL TO PAY COUNSEL FEES

ENOCH A. HIGBEE, JR.,
Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT,
Respondent.

Pro se for the Respondent, EDISON HEDGES.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the City of Somers Point on April 19, 1932, duly adopted the following resolution:

> *"Be It Resolved,* By the Board of Education that the President, or any member designated by him, is hereby given the power to procure whatever legal advice the president may feel is necessary for the conducting of school business."

Subsequently the president of the Board requested of Enoch A. Higbee, Jr., a counselor-at-law of the State of New Jersey, a legal opinion on various matters relating to the conduct of school business. On June 10, 1933, an opinion was rendered with the following introduction:

> "As requested by you on January 9, 1933, and in accordance with authority which I understand has been vested in you as president of the School Board to request legal opinions from any attorney you may select, I beg to advise as follows: * * *"

Later a bill was presented by Mr. Higbee to the Board of Education in the amount of $50.00 for the legal advice, and $0.15 for postage, making a total of $50.15, the reasonableness of which is admitted by the defendant. The only question involved in this case is whether or not the Board of Education could lawfully delegate such authority to its president.

While the courts have held that in most instances a board of education cannot delegate authority, they have drawn a distinction between cases where the function is of major importance and those in which the act authorized is ministerial or administrative.

In the case of Kraft *vs.* Board of Education of Weehawken, 67 N. J. L. 512, where is was contended that the Board could not delegate power to a committee to purchase school furniture, the Court said:

> "In support of this contention we are referred to the case of Foster *vs.* Cape May, 31 Vroom 78. It was there held that to enter into a contract of public lighting for five years, under authority specially provided by the statute, was so important a function of the city government that a resolution delegating such power to a committee was not warranted by the statute. Where, however, the power to purchase is only ministerial or administrative, it may be delegated to a committee of the corporate body created for that purpose. This principle is conceded in the case last named, and was sustained by the Court of Errors in Burlington *vs.* Dennison, 13 Id. 165. From the view we have taken of this case it is unnecessary to determine to which class the power here sought to be exercised belongs, and whether it could be delegated to a committee of the Board, * * *"

In Burlington *vs.* Dennison, the Court quotes from Dillon on Municipal Corporations, par. 60 and 374, as follows:

> "The principle that municipal powers or discretion cannot be delegated does not prevent a corporation from appointing agents and empowering them to make contracts, nor from appointing committees and investing them with duties of ministerial or administrative character. The authorized body of a municipal corporation may bind it by an ordinance or resolution, or may, by vote, clothe its officers, agents or committees with power to act for it, and a contract made by persons thus appointed by the corporation will bind it."

In Bigelow *vs.* City of Perth Amboy, 25 N. J. L. 297, it is set forth that prior to the purchase of stone by the mayor, the city council had resolved that 23,000 feet of flagstone should be provided at once for the use of the city, and the mayor was appointed to carry the resolution into effect. In sustaining the right of the creditor to collect, the Court said:

> "It is expressly proved by the city council that a resolution substantially the same as that shown to the clerk of the plaintiffs was passed by the council. Whether the resolution furnished to the mayor was copied from the minutes, or furnished to him before the minutes were recorded, or whether they were recorded at all is a matter which cannot prejudice the claim of the creditor."

It is the opinion of the Commissioner that this case is controlled by the rulings in the cases of Kraft *vs.* Board of Education of Weehawken and Bigelow *vs.* Perth Amboy in that the power granted to the president is ministerial or administrative and not such as is set forth in Foster *vs.* Cape May, 31 Vroom 78, or American Heating and Ventilating Company *vs.* Board of Education of the Town of West New York, 81 N. J. L. 423, referred to by respondent's counsel in which the contract bound the Board of Education in the amount of $2,292.50. The Somers Point Board of Education, by resolution, authorized the president to secure advice. Of course, the bill rendered was to be passed upon by the Board. If the Board considered it excessive or unreasonable, it could withhold payment until a proper charge could be determined by a court of competent jurisdiction. The Board does not deny the reasonableness of the bill, but now sets up the claim that its authorization was not legal and denies payment on that ground. If the Board thought the authority granted by the resolution exceeded its power, it could have rescinded the resolution. It now comes into court to deny its own acts in relation to a small bill which it authorized.

While a board of education should limit the expenditure that might be incurred by an official in securing legal advice, it has the right to authorize the securing of legal opinions for administrative purposes. In this case, where the respondent admits the charge is not excessive, it cannot set up as a defense the lack of authority to pay for the service rendered in accordance with its resolution. The Board of Education of the City of Somers Point is hereby directed to pay appellant $50.15 for legal services rendered by him

November 21, 1933.

MEDICAL INSPECTOR, WHO IS VETERAN AND INDETERMINATELY APPOINTED, IS PROTECTED BY VETERANS' TENURE ACT

GEORGE W. DAVIES, M. D.,
Appellant,
vs.
BOARD OF EDUCATION OF CEDAR GROVE,
ESSEX COUNTY,
Respondent.

For the Appellant, Arthur T. Vanderbilt.
For the Respondent, Samuel W. Boardman, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was first employed as medical inspector in the schools of Cedar Grove when it was ascertained that Dr. Bush, his predecessor, had enlisted to serve in the World War. The president and clerk were authorized to secure a school physician and appellant was employed by them and compensated by the Board of Education. In November, 1918, when the appellant enlisted for United States Army service in the World War, he resigned as medical inspector, but upon his return, four months later, was re-employed in accordance with the minutes of February, 1918, which read:

> "On motion, George W. Davies was appointed medical inspector for the balance of the term."

Dr. Davies continued as medical inspector from February 5, 1919, until his further services were refused by the Board of Education in a letter dated September 5, 1933 (Exhibit A-1). During the intervening period, from 1919 to 1933, the minutes of the Board show an almost equal division of appointments for indeterminate and definite periods. The last two employments read:

> 1931 "On individual motion the following were elected:" (among which appear) "School physician, George W. Davies;"
> 1932 Among those elected on individual motion: "Dr. Davies, as school physician."

Dr. Davies testified that after his employment in 1918 and his resumption in 1919, he neither asked for reappointment nor for increase in salary, to the best of his knowledge he had never been notified in writing of any appointment, and his only notification of salary increment was by the increased amount of his salary check. The Board of Education did not submit any testimony to show that the district clerk had ever notified the appellant of any definite term employment. It must, therefore, be concluded that after November, 1919, appellant continuously served as medical inspector without formal notice of re-election.

Dr. Davies submitted his honorable World War discharge, dated January 31, 1919, from service as first lieutenant, Medical Corps, Camp Examining Board. He contends that as an honorably discharged veteran he was protected in his position as medical inspector by the provisions of Chapter 29, P. L. 1929 (Veterans' Tenure Act) and that the termination of his services by the respondent was, therefore, illegal.

Counsel for respondent holds that the appellant is not an honorably discharged soldier as comprehended by Chapter 29, P. L. 1929, and cites in support of his argument the case of Stephens *vs.* Civil Service Commission, 101 N. J. L. 192, where an army field clerk was held not to be a soldier within the meaning of the Veterans' Tenure of Office Act. In that case the Court held that the oath prescribed by the Adjutant General's Office, applicable to a field clerk, is not that of enlisted men, but one prescribed for any person taking an oath of office in the United States; and even though the field clerk had an honorable discharge, it is not required by statute as in the case of enlisted men. The Court held that the definition of "soldier" is limited to enlisted men, including non-commissioned officers and those whose enlistment arises as a result of the operation of the selected draft and, by necessary implication, to those who exercise command over enlisted men.

Dr. Davies was commissioned by the President of the United States as first lieutenant, United States Army. He was required to take the oath of an enlisted man (39 U. S. Stat. L. p. 668) which included the provision that he obey the orders of the President and his other superior officers. Appellant was legally entitled to a discharge (39 U. S. Stat. L. p. 668). His service entitles him to protection of the Veterans' Tenure Act.

The appellant was appointed indeterminately be several resolutions of the Board of Education. He did not waive any of his rights under such indeterminate appointments and is, accordingly, protected in his service by the Veterans' Tenure Act and cannot be removed except in the manner provided therein. Appellant's services were, therefore, illegally terminated by respondent in September, 1933. (Heaviland *vs.* Burlington Freeholders, 64 N. J. L. 176; Board of Education *vs.* Bidgood, 11 N. J. Misc. 735; Harney *vs.* Board of Education of Teaneck, decided by the Commissioner of Education November 18, 1933.)

The Board of Education of the Township of Cedar Grove is directed to reinstate Dr. Davies from the date of his dismissal, with salary at the rate he was receiving last year, subject to the provisions of Chapter 12, P. L. 1933.

March 9, 1934.

Decision of the State Board of Education

The facts in this case will be found in the opinion of the Commissioner. Dr. Davies served as a first lieutenant in the Medical Corps in the Army during the World War and received an honorable discharge. Thereafter, he was appointed medical inspector of the Cedar Grove schools and was continuously re-employed until September, 1933, when "his further services were refused by the Board of Education." His employment was at all times for

an indeterminate period. The appellant contends that he was not a soldier as comprehended by Chapter 29 of the Public Laws of 1929. The Commissioner has held to the contrary. We agree with him and with his conclusion that Dr. Davies was illegally dismissed.

His opinion directs that Dr. Davies be reinstated from the date of his dismissal with salary at the rate he was receiving at the time of his discharge. It is recommended that his decision be affirmed.

July 14, 1934.

DECISION OF THE SUPREME COURT

No. 238, January Term, 1935

Argued January 17, 1935; decided April 17, 1935.
On certiorari.
Before Justices Heher and Perskie.
For the Prosecutor, John Trier and Samuel W. Boardman, Jr.
For the Respondent, George W. Davies, Spaulding Frazer.
The opinion of the Court was delivered by
HEHER, *J.*

The sole question presented for determination is whether the respondent, Dr. Davies, as medical inspector in the school system under the jurisdiction of prosecutor, held an office or position within the provisions of Chapter 29 of the Laws of 1929 (Pamph. L. 1929, p. 57), protecting, among others, the holder of a "position or office under the government of this State, or the government of any county, city, town, township, or other municipality of this State, including any person employed by a school board or board of education, * * * whose term of office is not now fixed by law, * * * who has served as a soldier, sailor or marine, in any war of the United States, or in the New Jersey State Militia during the period of the World War, and has been honorably discharged, * * *" against removal from "such position or office except for good cause shown after a fair and impartial hearing." The tenure is "during good behavior." On September 5, 1933, Dr. Davies, who had served in this office for many years, was removed, and another appointed in his place. The State Commissioner of Education answered this inquiry in the affirmative; and the State Board of Education affirmed the judgment. The local Board of Education thereupon sued out a writ of certiorari.

The challenged judgment is erroneous. Dr. Davies held the office in question for a term prescribed by law, and he was therefore not within the statutory class. Section 229 of the act establishing our public school system ordains that "every Board of Education shall employ a competent physician to be known as the medical inspector, and may also employ a nurse, and fix their salaries and terms of office." Pamph. L. 1931, p. 143. In Skladzien *vs.* Board of Education of the City of Bayonne, 12 N. J. Misc. 602, 173 Atl. 600, this Court held that, in virtue of this provision, "a new board comes into being each year," and that there is vested in each succeeding board the prerogative of appointing a medical inspector of its own selection."

Counsel, while criticising the interpretation thus placed upon the statute, seeks to distinguish this and the instant case. The attempt at distinction would seem to be in vain; but we need not pursue either inquiry. There is no factual basis for Dr. Davies' claim that he is within the statutory class. He was, in fact, appointed to the office in question for a fixed term of one year. With one or two exceptions, according to the board's minutes, he was reappointed annually during the term of his office. He was first retained in 1917; the minutes are silent as to the term of his appointment. On November 7, 1918, he resigned to enter the nation's military service. On January 31, 1919, he received an honorable discharge from the service; and, on February 6, 1919, he was "reappointed medical inspector for the *balance of the term.*" It is evident that the reference is to the school term. On August 4, 1921, he was "*Re-engaged* as medical inspector for the *coming school year* at salary of $400 a year;" on April 25, 1922, he was "*re-engaged* as medical inspector at salary $400 per year." On August 21, 1924, he was "*re-engaged* at salary of $60 per month *for ten months;*" on March 23, 1927, he was "*re-appointed* school physician;" on March 1, 1928, he was "nominated and elected school physician." On March 25, 1929, the Teachers' Committee was empowered to "engage Dr. Davies as school physician;" and on March 6, 1930, he was "elected school physician." The minutes have this item under date of March 19, 1931: On individual motion the following were elected: * * * School physician, George W. Davies." And the final appointment was made in 1932. The minutes contain the following entry: "Mr. Ludlum was elected vice-president; Mr. Little, clerk; Mr. Myers, custodian; Mr. Stech, janitor; Dr. Davies, physician." All "were elected on individual motion." Under date of June 1, 1933, this item appears: "Teachers' Committee recommended Dr. Davies be not re-engaged as school physician." The pertinent provisions of the minutes for the years 1923, 1925 and 1926 make mention only of the salary to be paid to Dr. Davies.

The minutes thus clearly evince the Board's purpose to make the final appointment the customary annual one for a fixed term. It is hardly open to question that, in these circumstances, all parties understood that Dr. Davies held his office, during the entire period, in virtue of annual appointments for a fixed term of one year. It is evident that he was not, as the Commissioner found, "appointed indeterminately by several resolutions of the Board of Education." And the final appointment, or, as it is termed in the minutes, "election," is given character by the relation which theretofore existed between the parties, and the practice and course of conduct that had governed them. It may well be that, standing alone, it affords a rational basis for the claim of an indefinite tenure; but, when considered in the light of the practice that governed the parties, it is clear that this was the conventional annual appointment for a prescribed term of one year. His original appointment, after his return from military service, was for the "balance of the term." He was thereafter "Re-engaged * * * for the coming school year;" and the minutes show that, subsequent to the year 1926, he was annually reappointed," "engaged," or "elected" to the office in question. While the minutes, in this regard, may be technically deficient, they substantially show an appointment for a fixed term.

Technical accuracy in the notation of such proceedings upon the minutes of the body is not required. It may well be that, if defective or ambiguous, parol evidence would be admissible to revise and correct them; but there was no attempt in the instant case to show that the appointment was, in fact, for an indefinite term. The power of the local board to fix the term cannot be denied; it is expressly conferred by the statute. It is immaterial whether these annual appointments were for the school year, or for a period coterminus with the life of the Board, assuming the applicability of the doctrine laid down in the Skladzien case, *supra*. In either event, he was not, at the time of the appointment of his successor, in the preferred class created by the statute.

Nor is there significance in the fact, found by the Commissioner, that "after November, 1919, appellant continuously served as medical inspector without *formal notice* of re-election." The lack of "formal notice" does not convert an appointment for a definite term into an indefinite tenure. The relationship is not contractual in nature. In making the appointment in question, the Board was indubitably filling a public office created by statute. Fredericks *vs.* Board of Health, 82 N. J. L. 200. Civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government. To refuse an office in a public corporation connected with local jurisdiction was, at the common law, an offense punishable by indictment. An office was regarded as a burden which the appointee was bound, in the common interest, to bear. Kuberski *vs.* Kausserman, 113 N. J. L. 162, 172 Atl. 738; Ross *vs.* Board of Freeholders, 90 N. J. L. 522; Stuhr *vs.* Curran, 44 N J. L. 181; Hoboken *vs.* Gear, 27 N. J. L. 265. Public offices are not created for the benefit of office-holders. In England offices were early regarded as incorporeal hereditaments granted by royal favor, and the subjects of vested or private interests. In this country they are not held by grant or contract; nor has any individual an indefeasible right therein beyond the constitutional tenure and the emoluments arising out of the actual rendition of services for which they are compensatory. Stuhr *vs.* Curran, *supra*. Moreover, it is to be presumed that Dr. Davies knew the term of his several appointments. Public policy does not permit of a contrary rule. These appointments were made at meetings of a public body; and its minutes are public records, and open to the inspection of all citizens.

Judgment reversed.

EMPLOYMENT OF MEDICAL INSPECTOR MAY BE TERMINATED IN ACCORDANCE WITH THE TERMS OF THE CONTRACT

WILLIAM U. MEIER, M.D.,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,

Respondent.

For Appellant, Harold D. Green.

For Respondent, J. W. & E. A. DeYoe, J. W. DeYoe, of counsel.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Borough of Wanaque at its meeting on April 11, 1935, appointed Dr. William U. Meier as medical inspector under a resolution which reads:

> "Chairman David MacDougall of the Educational Committee made the following recommendations * * * (3) Reappoint the employees indicated below, giving them from April, to May 6 to accept or reject the reappointment. Insert a sixty days' notice clause in the contracts." (List of employees follows which includes the name of Dr. Meier as medical inspector.)

Immediately below the list of employees there appears:

> "A motion was made by Mr. Whetham, seconded by Mr. Townsend, that the recommendation of the Education Committee be adopted. Carried."

On April 12 Mr. Bert P. Bos who is supervising principal and also district clerk notified Dr. Meier of his appointment in a letter which reads as follows:

> "You are hereby notified of your reappointment as medical inspector in the Wanaque Schools at a salary of $30.00 per month for 10 months.
>
> "If this blank is not signed and returned to the supervising principal on or before May 6, 1935, it will be considered that you decline the appointment.
>
> BERT P. BOS,
> *Supervising Principal.*

Below the signature of Mr. Bos was a place for the signature of Dr. Meier indicating his acceptance. The letter was returned signed by Dr. Meier before

May 6. The minutes of the Board of Education do not disclose any ratification of the above letter containing Dr. Meier's acceptance. On May 9, 1935, the Board rescinded its action employing Dr. Meier and on May 28 he was sent the following letter by the district clerk:

> "At the adjourned meeting of the Board of Education held on Monday evening, May 27, 1935, I was instructed to notify you that at a regular meeting held on May 9, 1935, it was decided to rescind the action of the Board of Education taken at the meeting held on April 11, 1935, in appointing you as medical inspector for the school year, 1935-1936."

It is contended by counsel for appellant that the Board could not rescind its appointment since the rescission action was not taken until after the offer had been accepted, and that such offer and acceptance constituted a valid contract. He further contends that since the rules of the State Board of Education require an annual appointment of a medical inspector, the Board could not terminate Dr. Meier's services within a year.

The resolution employing Dr. Meier required the insertion of a sixty days' notice clause in the contract. Since the Board of Education had no knowledge of the omission of the sixty-day notice clause in the letter, it cannot be bound by its agent's act, which was neither in accordance with the resolution of employment nor subsequently ratified by the Board.

The rule of the State Board of Education cited by appellant's counsel, in reference to the employment of a medical inspector, reads:

> "118. The medical inspector should be appointed for at least one year. He should be chosen without competition."

Counsel attempts to argue that the word "should" as used in this rule has the same effect as "shall." The authorities in English do not support this contention. The word "should" as used in the above quoted rule is a recommendation and not a mandate.

Since the Board notified Dr. Meier on May 28 that it had discontinued his services, he had no legal right to the position after sixty days from that date. His salary was payable at the rate of $30.00 per month during a period of ten months, which is the time that the schools are open in the district, and the services and pay therefor were to begin in September. Accordingly, no compensation was due Dr. Meier upon the legal termination of his services on or about July 28, 1935. The petition is dismissed.

October 19, 1935.

BOARD CANNOT RESCIND RESOLUTION OF EMPLOYMENT OF MEDICAL INSPECTOR FOR LEGAL TERM AFTER SERVICES HAVE BEEN RENDERED

NICHOLAS F. MIRABILE, M.D.,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

For Petitioner, William M. Seufert.
For Respondent, Messrs. Carey & Lane.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent board of education which organized on February 1, 1935, continued the employment of Dr. Nicholas F. Mirabile as medical inspector by the adoption on June 3, 1935, of the following resolution:

"*Resolved,* By the Board of Education of the City of Garfield, N. J., that the following employees be and they are hereby reappointed for the term of one (1) year, beginning July 1, 1935, at a yearly salary rate specified herein, and

"*Be It Further Resolved,* That they shall be paid in the same manner as all other employees of the said Board.

Max Merkel, Chief Attendance Officer	$1,760.00
Anthony Guzio, Attendance Officer	1,720.00
Mary Kral, Clerk, Secretary's Office	848.00
Rae Copello, Clerk, Superintendent's Office	848.00
Frances S. Kesse, School Nurse	1,280.00
Helen Francke, School Nurse	1,280.00
Dr. N. F. Mirabile, Medical Inspector	1,200.00

(Signed) VINCENT COPELLO,
JOSEPH FRISCO,
RALPH ESPOSITO,
JOHN CHOVAN.

Dated—June 3, 1935."

Dr. Mirabile received notice of his reappointment and began his duties thereunder on July 1.

On or about June 19 Joseph Frisco, one of the members of the Board, moved from Garfield, and the mayor appointed William A. Forss, as his successor. On August 26, 1935, the Board, which then included Mr. Forss, adopted the following:

> "WHEREAS, The Board of Education of the City of Garfield, New Jersey, on the third day of June, 1935, by resolution appointed the following employees for the term of one (1) year, beginning July 1, 1935, at the yearly rate specified therein,
>
> | | |
> |---|---|
> | Max Merkel, Chief Attendance Officer | $1,760.00 |
> | Anthony Guzio, Attendance Officer | 1,720.00 |
> | Mary Kral, Clerk, Secretary's Office | 848.00 |
> | Rae Copello, Clerk, Superintendent's Office | 848.00 |
> | Frances S. Kesse, School Nurse | 1,280.00 |
> | Helen Francke, School Nurse | 1,280.00 |
> | Dr. N. F. Mirabile, Medical Inspector | 1,200.00 |
>
> *"Be It Resolved,* That the said resolution as hereinabove referred to is hereby rescinded because of the illegality of said resolution of appointments.
>
> (Signed) WALTER S. KUHEN,
> WILLIAM A. FORSS,
> JOHN CHOVAN.
>
> 8/26/35."

Immediately after the adoption of the foregoing resolution, Dr. Mirabile received notice of the action of the Board, was paid for the months of July and August, but his services were thereafter refused. He, however, continued to report for work until a stipulation was entered into between the parties, setting forth that the discontinuance of his reporting would not affect his legal rights pending the outcome of an appeal which had been filed with the Commissioner of Education.

Section 229, Chapter 1, P. L. 1903, S. S., reads in part as follows:

> "Every board of education shall employ a competent physician to be known as the medical inspector, and may also employ a nurse, and fix their salaries and terms of office."

While it is the contention of counsel for respondent that the action of the Board on August 26 in rescinding the resolution of June 3 was for reasons of economy, the rescinding resolution gives no evidence of that purpose. The testimony clearly indicates that the appointment of Mr. Forss to succeed Mr. Frisco changed the balance of power of a partisan board of education, and the real motive was to replace members of one of the major political parties with those of the other.

The only question to be decided in this case is whether the appointment of petitioner on June 3, his acceptance, and the rendering of the service for which he was paid by the Board constitutes a valid contract which could not be changed by either party without the consent of the other. Counsel for respondent holds that the Board of Education, which organized on February 1, 1935, had no power to contract for any employment continuing beyond February 1 of the following year, and he cites in support of his view the case of Skladzien *vs.* Board of Education of Bayonne, 12 N. J. Misc. 602, affirmed 115 N. J. L. 203.

The Supreme Court in the Skladzien case points out that Section 229, Chapter 1, P. L. 1903, S. S., provides in part:

> "Every board of education shall employ a..... medical inspector..." and rules in relation thereto as follows:
>
> "* * * as we see it, must be construed as giving such power of appointment to each board of education * * *
>
> "A new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board, or the personnel remains the same, in fact and in law it is a new board of education. Such board is not therefore a continuous body for that reason. * * *
>
> "Generally, unless the term be fixed by statute, presently in force, or by ordinance or rule under legislative sanction, by direct delegation of that right of municipal control, to the appointing power, the term of an appointee to office cannot be longer than co-terminous with that of the appointing power * * *
>
> "It was not the legislative intent, as we see it, to preempt a succeeding board of education from exercising its prerogative of appointing a medical inspector of its own selection."

The Supreme Court, therefore, held in this case as did the Commissioner in Davis *vs.* Boonton, 1928 Compilation of School Law Decisions, 141, that when a board of education without legislative authority contracts beyond its official life, the contract may be voided by an incoming board. While it may be deduced that the Court held that a board of education could not appoint a medical inspector for a term that would extend beyond the date of the organization of the next succeeding board, it is to be noted that the Court was ruling upon the three-year appointment and held that legislative sanction was necessary for a medical inspector's term to extend beyond the date of the next organization of the board. It is significant that on the date that Dr. Skladzien was dismissed by the Bayonne Board of Education, March 16, 1933, Chapter 68, P. L. 1933 was approved by the Governor, and while it does not have any effect upon the Skladzien decision, where the appointment was clearly voidable, it gives legal authority to boards of education to enter into contracts with their employees for a period from July 1 to June 30. While under the ruling in the Skladzien case, without legislative enactment of Chapter 68, P. L. 1933,

the succeeding Board may have the right to void the appointment of Dr. Mirabile, such right did not inhere in the Board which made it.

From the earliest history of public education in this State, it has been the common practice of school trustees or boards of education to employ at their convenience during the spring or summer months teachers, janitors, and other employees needed for the conduct of the schools for the ensuing academic year. Appropriations are made by the board of school estimate in city school districts (Article VI), or voted by the citizens in borough, town, and township school districts (Article VII), and taxes are accordingly levied for the funds with which boards of education may enter into contracts for services and supplies for such academic year or the fiscal year, July 1 to June 30. While a board of education elected prior to July 1 of any year continues to function in relation to the needs of the school during that fiscal year, it has always been held to have authority to make contracts for services and supplies within the limits of the appropriations for the ensuing year. The Legislature by an act approved February 21, 1933 (Chapter 28), changed the fiscal year of schools from July 1-June 30 to January 1-December 31, but on November 15, 1933, by Chapter 400, the fiscal year was re-established from July 1 to June 30. With the exception of these few months, the above plan of fiscal control has not been changed, and even during this interim in 1933, Chapter 68 was passed which provided that notwithstanding the change in date for the fiscal year, the right of a board of education to contract for the services of teachers and other employees for the academic year from July 1 to June 30 should continue. A board organized February 1 (Article VI), which makes appointments for the ensuing period of July 1 to June 30 is not depriving a succeeding board of making appointments, since it in turn, within the appropriations available, makes similar appointments for the next ensuing academic or fiscal year, and this procedure which may be classified as the common law of school administration has been made statute law in the enactment of Chapter 68, P. L. 1933.

Petitioner having been legally employed by the respondent for "a term of one (1) year from July 1, 1935," the rescission resolution of August 26, 1935, is invalid. The Board of Education of the City of Garfield is directed to reinstate Dr. Mirabile as medical inspector in its schools for the term of which he was elected, with pay from September 1, 1935.

January 8, 1936.

VETERAN'S RIGHTS WAIVED UNDER A THREE-YEAR CONTRACT WHICH IS VOIDABLE BECAUSE OF EXTENDING BEYOND LIFE OF BOARD

PETER W. SKLADZIEN, M.D.,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

For the Appellant, Charles Rubenstein.

For the Respondent, Alfred Brenner.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, who is a duly qualified physician and an honorably discharged veteran of the World War, was originally appointed on June 3, 1926, effective June 17, 1926, and was assigned as chief medical inspector of the schools of Bayonne. He continued in the employ of the Board under a definite term contract from that date until August 3, 1931, when he was reappointed for a period of three years at a salary of $5,000 in accordance with Section 91 of the Rules of the Bayonne Board of Education, which reads as follows:

> "91. The chief medical inspector and medical inspectors shall be appointed in the first instance for a term of one year and thereafter, in case of reappointment, for a term of three years, in the discretion of the Board. They shall receive such salary as may be fixed by the Board of Education, which salary shall not be decreased during their term. They shall charge no fees nor receive any additional compensation for their services."

The present Board of Education organized February 1, 1933, and adopted the manual of rules used by the preceding Board with one or two exceptions, which rules include Section 91 above quoted. Subsequently the Board held regular meetings on February 2 and 16, a special meeting on February 24, and regular meetings on March 2 and 16, on which last named date in connection with other business transacted, the Committee on Teachers and Salaries recommended that Section 91 be amended to read as follows:

> "91. The chief medical inspector and medical inspectors shall be appointed for a term of one year. They shall receive such salary as may be fixed by the Board of Education, which salary shall not be decreased during their term. They shall charge no fees nor receive any additional compensation for their services."

Upon motion the recommendation was laid over until the next meeting in accordance with the manual. Thereafter, at the same meeting, the following resolution was adopted:

> "WHEREAS, Dr. Peter W. Skladzien was appointed by the Board of Education of the City of Bayonne on August 3, 1931, as medical inspector for a term of three years from said date, and
>
> "WHEREAS, Such appointment for a term of three years was illegal and is voidable at the option of any succeeding board of education; and
>
> "WHEREAS, This Board is desirous of terminating the employment of the said Dr. Peter W. Skladzien as medical inspector;
>
> *"Therefore, Be It Resolved*, That the employment of said Dr. Peter W. Skladzien as medical inspector be and the same hereby is terminated, effective immediately.
>
> "Adopted.
>
> "Ayes: Trustees Larkey, Woodruff, Zeller, Walsh, Greene, Williamson and President McGrath."

It is from this termination of employment that the petitioner appeals for reinstatement with compensation from March 16, 1933.

While appellant held a position as distinguished from an office (Fredericks *vs.* Board of Health of West Hoboken, 82 N. J. L. 188), he waived his right to protection under the provisions of Chapter 29, P. L. 1929, by accepting a definite term appointment. Hardy *vs.* Orange, 61 N. J. L. 620; Heaviland *vs.* Chosen Freeholders, 64 N. J. L. 178.

There remains to be decided whether in the absence of expressed statutory authority a board of education can bind its successors by appointments or contracts which will deprive them of the power to fill such positions. If boards do not have such power, is the appointment of the appellant by a preceding board void or voidable by the present board of education, and if voidable has it been tacitly or expressly ratified and thereby made binding upon the board?

Bouvier's Law Dictionary, Third Revision, at page 3406, defines a voidable contract as follows:

> "The distinction between void and voidable transactions is a fundamental one, though it is often obscured by carelessness of language. An act or agreement void from the beginning has no legal effect at all except so far as any party to it incurs penal consequences. A voidable act on the contrary takes its full and proper legal effect unless, and until it is disputed, and set aside by some tribunal entitled so to do; Pollock, Contr. 9. A voidable contract has been defined to be such an agreement as that one of the parties is entitled at his option to treat as never haivng been binding on him; id. 9. As applied to contracts, the distinction between the terms void and voidable is often one of great practical importance, and wherever technical accuracy is required, the term void can only be properly applied to such contracts as are a mere nullity and incapable of ratification or confirmation; Allis *vs.* Billings, 6 Metc. (Mass.) 417, 39 Am. Dec. 744."

Anson On Contract, Fourth American Copyrighted Edition, says in reference to voidable contracts, on page 19:

> "But a voidable contract is a contract with a flaw of which one of the parties may, if he please, take advantage. If he chooses to affirm, or if he fails to use his power of avoidance within a reasonable time so that the position of parties becomes altered, or if he take a benefit under the contract, or if third parties acquire rights under it, he will be bound by it."

In the case of Davis *vs.* Board of Education of the Town of Boonton, in which the Board attempted to terminate the service of appellant who held a three-year contract, the Commissioner held:

> "In the case of Serina M. Brown *vs.* Oakland Board of Education, reported on page 656 of the 1925 Compilation of the New Jersey School Law, it was held by the Commissioner of Education, whose decision was sustained by the State Board, that as boards of education are non-continuous bodies, one board could not by a three-year appointment of a teacher legally deprive a succeeding board of its right to appoint her successor, and that such appointment was accordingly voidable by such succeeding board. * * *
>
> "It is also the opinion of the Commissioner, however, that an appointment such as that of appellant, even though plainly voidable by a succeeding board of education, is nevertheless capable of subsequent ratification either express or implied, since it involved no collusion or fraud or elements which could render it void. In the recent case of Noonan and Arnot *vs.* Paterson Board of Education, above referred to, it was held that rules adopted by a preceding board of education and not per se binding upon a new board were nevertheless to be considered as ratified and adopted by such new board, if acted under or referred to by it as the rules governing such board." (New Jersey School Law Decisions, 1928, page 142.)

In the case of Edward A. Nelson *vs.* Board of Education of Bayonne where the appointment for a term of five years was contested, the Commissioner held:

> "While in the case under consideration there is no question in the Commissioner's opinion but that the five-year appointment of appellant as secretary was such as to deprive 'succeeding boards of their power to appoint' within the meaning of the above decision and hence was voidable by the incoming Board, it is also his opinion that under the authority of the case of Davis *vs.* Boonton (not yet reported), such an appointment not being void but voidable is capable of adoption or ratification either express or implied by the succeeding board, which will bind such board for the duration of its own official life. In the Commissioner's opinion there must be considered to have been such an implied ratification or adoption by the Bayonne Board of Education coming into office on February 1, 1927, of appellant's five-year appointment as secretary of the Bayonne Board. The appellant continued to be employed by such incoming Board for three

> and one-half months with no attempt at rescission of the appointment by the Board until May 19 of that year, and it is therefore the Commissioner's opinion that the Board coming into office on February, 1927, by its own acts adopted so far as it was concerned and for the extent of its own official life the five-year contract entire and indivisible in its term by which appellant was appointed secretary on May 6, 1926." (N. J. School Report, 1928, page 59.)

In the case of Warnock *vs.* Board of Education of Bayonne where the appellant was appointed for a term of three years and his services terminated by resolution of the Board, the Commissioner held:

> "The Bayonne Board of Education which organized during January and terminated appellant's services on February 4, could not be held to have ratified the three-year contract of the preceding Board." (Decided July 7, 1932; affirmed by the State Board of Education, November 5, 1932.)

In line with the authorities above cited, it is the conclusion of the Commissioner that appellant's appointment, or contract, was not void but voidable.

While a majority of the members of a board of education at the time of organization is usually composed of those who have served on such board for preceding years and may be presumed to have knowledge of contracts entered into by the board, such newly organized board must be allowed a reasonable time to consider the change of rules which it tentatively adopts and review the obligations placed upon it by preceding administrations. The mere acceptance of reports by a board of education and the payment of employees' salaries during a period of six weeks do not constitute a tacit ratification of contracts made by preceding boards.

Therefore, the three-year appointment of Dr. Skladzien was not ratified by the Board of Education of the City of Bayonne which organized February 1, 1933, and is not binding upon it. The appeal is dismissed.

July 25, 1933.

Decision of the State Board of Education

This is an appeal from the decision of the Commissioner of Education wherein he sustains the termination of appellant's service as chief medical inspector under appointment of the Board of Education of the City of Bayonne.

It appears by a stipulation of the parties, that Peter W. Skladzien, the appellant, is a competent physician, within the meaning of Section 229 of the School Law, as amended, and that he is a veteran of the World War, having been honorably discharged from the United States Army. That on June 3, 1926, he was appointed medical inspector by the Board of Education of the City of Bayonne for a term of five years, effective June 17, 1926, and was designated as chief medical inspector, at a salary of $5,000.00 per year. That on August 3, 1931, the Board of Education, by a resolution, appointed him as medical inspector for a term of three years. There is no date fixed in the resolution

of appointment when his term should begin, and therefore it must be deemed the new term was to begin upon the date of the appointment.

At the time of the reappointment, August 3, 1931, the rules and regulations of the Board of Education then in force, contained a provision as follows:

> "91. The chief medical inspector and medical inspectors shall be appointed in the first instance for a term of one year and therafter, in case of reappointment, for a term of three years, in the discretion of the Board. They shall receive such salary as may be fixed by the Board of Education, which salary shall not be decreased during their term. They shall charge no fees nor receive any additional compensation for their services."

On February 1, 1933, the Board of Education held its annual organization meeting and among other things, adopted the rules and regulations which had been in force the previous year, with certain exceptions which do not affect this controversy. Appellant after he was appointed in August, 1931, performed the duties of his office until March 16, 1933, on which date, at a regular meeting of the respondent Board of Education, a resolution was presented providing for the amendment of the rules and regulations of the Board, including Rule 91, which made the term of the medical inspector one year. This resolution was laid over until the next meeting, pursuant to the manual. At the same meeting, a resolution was adopted (seven members voting in favor) terminating appellant's services.

From this action, Dr. Skladzien appealed to the Commissioner of Education, charging that the termination of his services was illegal and prayed that an order be made directing the Board of Education to reinstate him.

The Commissioner of Education deemed appellant to have held a position by virtue of his appointment, as distinguished from an office, and to be under contract with the Board. That the contract having been one extending beyond the life of the appointing Board, was voidable by any succeeding board; that the respondent Board had not ratified the contract and therefore it was acting within its powers when it terminated appellant's services, and he dismissed the appeal.

We do not agree with the view of the Commissioner that the appointment of appellant as medical inspector, and his acceptance, constituted a contract. The office of medical inspector is one created by statute and its duties are thereby defined. Accepting the definitions of an "office" and a "position," in the case of Fredericks *vs.* Board of Health of West Hoboken, 82 N. J. Law, page 188, we are of opinion a "medical inspector" is a public officer. See also Water Commissioners *vs.* Cramer, 61 N. J. L. 270.

The statute in force when appellant was appointed, Section 229 of the School Law, as amended by Chapter 84, P. L. 1931, approved April 13, 1931, provided:

> "Every board of education shall employ a competent physician to be known as the medical inspector, and may also employ a nurse, and fix their salaries and terms of office," etc.

It was by authority of the foregoing provision the Board of Education assumed to make appellant's appointment for a term of three years. It is contended by appellant the rules and regulations of the Board, which provided for a term of three years, were also authority for the appointment for such term, and that such rules, having been adopted by respondent Board upon its organization, are binding upon it so long as they are unchanged, and that the adoption of the rules was a ratification of appellant's appointment, at least during the life of respondent Board.

The terms of the statute above quoted grant to every board of education the power to appoint a medical inspector. This language is plain and unambiguous. Boards of education are not continuous bodies. Each year upon organization a new board comes into being and no previous board, by making appointments extending beyond its own life can curtail the powers of appointment of its successor. 28 Cyc. page 424. Greene *vs.* Freeholders of Hudson, 44 N. J. L. 388. Adams *vs.* Haines, 48 N. J. L. 25; Mathis *vs.* Rose, 64 N. J. L. 45. The adoption by an administrative board of rules and regulations for its government which contain a provision that an officer shall be elected for a certain term, does not preclude the board from at any time terminating the service of such officer, reducing his salary or abolishing the office. In the case of Mathis *vs.* Rose, above cited, the City Council of Atlantic City was authorized to elect and appoint a street supervisor. An ordinance was adopted by the City Council relating to the election of street supervisor, providing that his term of office should be one year, etc. On March 21, 1899, Mathis was elected street supervisor for one year. On April 10, following, the City Council, without having reconsidered its previous action in electing Mathis and without giving any reason therefor, appointed Rose to the same office. It was contended the ordinance limited the power of the Council in making the appointment. The Supreme Court, in disposing of this contention, said, "The city council of 1893 could not, by an ordinance limit and restrain the city council of 1899 in respect to powers expressly granted by the Legislature." Where an administrative board appoints an officer by authority of a statute, rules of such board limiting and restricting such power are invalid, if they are inconsistent with the statute. Michaelis *vs.* Board of Fire Commissioners of Jersey City, 49 N. J. L. 154.

"A municipal council has inherent power to make rules of procedure for its government, providing such rules are not inconsistent with the Constitution or with any statute of the State. Such rules cannot have the effect of limiting the powers of the municipal council as established by statute, and an enactment which is actually adopted by a municipal assembly in accordance with its statutory powers, is not invalid because its own rules of procedure were not complied with, where they were in terms suspended or merely tacitly ignored." 19 R. C. L. 189. See also the decision of the Commissioner and that of the State Board of Education in case of Noonan, et al., *vs.* Board of Education of the City of Paterson, 1925 Compilation of School Law, on page 527, etc.

Appellant is not within the provisions of Chapter 14, P. L. 1907, page 37, known as the Veterans' Act, as amended by Chapter 29, P. L. 1929, page 57. It has been frequently held that such act does not apply when the appointee accepts a definite term. Bell *vs.* Atlantic City, 89 N. J. L. 443. That such

appointment was terminated before the expiration of the term does not affect the question. City of Hoboken *vs.* Gear, 27 N. J. L. 265.

We conclude for the foregoing reasons, appellant's petition was properly dismissed, and we recommend that the decision of the Commissioner of Education in that respect be affirmed.

November 4, 1933.

DECISION OF THE SUPREME COURT

No. 219, January Term, 1934

Submitted January Term, 1934; decided April, 1934.
On Certiorari.
Before Brogan, Chief Justice, and Justices Trenchard and Heher.
For Prosecutor, Charles Rubenstein.
For Defendants, Alfred Brenner.

PER CURIAM: The writ of certiorari allowed in this case brings up for review a resolution of the Board of Education of the City of Bayonne terminating the services of the prosecutor, Dr. Peter Skladzien, as medical inspector in the schools of that city. The record in the case shows that the prosecutor was, on August 3, 1931, by resolution of the Board of Education, *reappointed* medical inspector for a term of three years. He had been in the service of the Board prior thereto in a like capacity for a five-year term, the date of the former appointment being June 3, 1926.

Certain rules and regulations, concerning the affairs of school administration, had been in effect since 1931, upon which, in part, the prosecutor relies for his reinstatement to office. Among them we find the following:

> "91. The chief medical inspector and medical inspectors shall be appointed in the first instance for a term of one year and thereafter in case of reappointment for a term of three years in the discretion of the Board * * *."

The Board of Education, for the year 1932, adopted the same rules as the preceding Board, which included Rule 91 (*supra*) and the 1933 Board of Education did likewise. This rule (91) is of importance in this case and remained among the regulations, word for word, as above stated, at the time of the adoption of the resolution, here challenged. It was amended on April 6, 1933, so as to fix the term of medical inspectors for one year instead of three. However, on March 16, 1933, the resolution here under consideration, was adopted which terminated the services of the prosecutor as medical inspector. It will be observed that the prosecutor served under this Board, i. e., the 1933 Board of Education, from February 1, 1933, until March 16, 1933.

The prosecutor appealed to the Commissioner of Education for a reversal of the action of the Board, but he upheld the validity of the resolution. A further appeal was taken to the State Board of Education which affirmed the decision of the Commissioner of Education.

Three reasons are here assigned by the prosecutor for a reversal of the resolution in question, the chief of which is that the resolution illegally terminated the three-year appointment of the prosecutor as medical inspector. In support of this point, it is argued that the Board of Education, for the year 1931, was within its rights in appointing the prosecutor for a three-year term by virtue of the provisions of Section 229 of the School Law, which may be found under Chapter 84 of the Laws of 1931, P. L. 1931, page 143. That section provides as follows:

> "229. Every Board of Education shall employ a competent physician to be known as the medical inspector, and may also employ a nurse, and fix their salaries and terms of office. Every Board of Education shall adopt rules for the government of the medical inspector and nurse, which rules shall be submitted to the State Board of Education for approval."

The position of the prosecutor is perfectly plain. He says, first, that the statute (Section 229, *supra*) authorized an appointment for a fixed term; second, the rules (Section 91, *supra*) permitted a reappointment for three years and, third, that he was *reappointed* for a three-year term and, consequently, could not be molested (except for some delinquency, which is not the case here) until his term expired, relying on Bradshaw *vs.* Camden, 39 N. J. L. 416, and Bohan *vs.* Weehawken, 56 Id. 490. We do not think that the doctrine laid down in these and other cases of like import are controlling or even pertinent here. The former case concerned the make-up of the fire department of the City of Camden, the latter the creation of a police department of the Township of Weehawken. In these cases the legislation in question granted the right of municipal control to the governing body. In the very nature of things this is rather essential with regard to the important duties devolving on police and fire departments.

Now the statute here under consideration (Section 229, *supra*), provides that "every Board of Education shall employ a * * * medical inspector, etc. * * * which, as we see it, must be construed as giving such power of appointment to *each* Board of Education.

A new Board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new Board of Education. Such board is not therefore a continuous body for that reason. It has all of the indicia of non-continuous bodies. It organizes in February of each year, adopts rules for its own administration each year, is completed each year by the selection of three new members in the place and stead of those three whose terms have expired. Cf. State *vs.* Rogers, 56 N. J. L. 480; Gulnac *vs.* Freeholders, 74 Id. 543; Green *vs.* Freeholders, 44 Id. 388.

Nor has the prosecutor any rights, contractual in nature, that have been violated. The post is an office and not a position. It is a place in the governmental system expressly created by law and to which certain public duties attach. Stewart *vs.* Freeholders, 61 N. J. L. 118; Fredericks *vs.* Board of Health, 82 Id. 200, and the acceptance of a public office does not create a

contract between the parties. Hoboken *vs.* Gear, 27 N. J. L. 265; Kenny *vs.* Hudspeth, 59 Id. 320.

If the prosecutor's contention is sound, he might have, under the rules of a particular board, been appointed for a term of thirty years instead of three. This, too, would be defensible if such was the legislative intent in enacting the statute (Section 229, *supra*), but we do not so construe it. Generally, unless the term be fixed by statute, presently in force, or by ordinance or rule under legislative sanction, by direct delegation of that right of municipal control, to the appointing power, the term of an appointee to office cannot be longer than coterminous with that of the appointing power. Obviously, it may be shorter.

The Statute (Section 229, *supra*) granted the Board the right of administration only, with its essential incidents, which do not possess the quality of legislation. Mathis *vs.* Rose, 64 N. J. L. 45; Greene *vs.* Freeholders, *supra.*

It was not the legislative intent, as we see it, to pre-empt a succeeding Board of Education from exercising its prerogative of appointing a medical inspector of its own selection.

The further point is made that because the prosecutor rendered services up to March 16, and that during that interval, from February 1, the Board received his reports and paid him a salary, amounts to a ratification, is without merit. The Commissioner of Education held that that was not a ratification of the employment of the prosecutor and we agree with that finding.

As to the last point that the prosecutor was dismissed without charges being preferred against him, holding the view that we do, that his employment might be terminated by the new Board, no charges were necessary.

The decision of the State Board of Education will be affirmed and the writ dismissed, with costs.

Filed July 10, 1934.

VETERANS EMPLOYED BY BOARDS OF EDUCATION PROTECTED WHEN APPOINTED INDETERMINATELY

MAXWELL M. FISCHLER, M.D.,
Appellant,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts in this case come to the Commissioner on a stipulation briefly supplemented by testimony of the appellant and reveal that Maxwell M. Fischler, who served in the United States Army during the World War and holds an honorable discharge from such service, was employed by the Board

of Education of the Township of Union, Union County, on September 12, 1921, by an arrangement with the Chairman of the County Dental Clinic whereby the appellant served several districts upon a part-time basis and received pay from each district direct.

The records of the Board for the later years of his employment contain the following:

> "January 11, 1926. The Medical Inspection Committee reported that it would be possible to secure the services of Dr. Fischler, the school dentist, for a full day starting February 1st, at a salary of $900 per year, and recommended that this be done, as the nurse reports many children are still unattended who signed cards over a year ago.
>
> Moved by Mulford, seconded by Parker, that Dr. Fischler be engaged as dentist for a full day starting February 1st at a salary of $900 per year. Carried.
>
> June 11, 1928. Moved by Messner, seconded by Graham, that Dr. M. Fischler be appointed school dentist for the school year 1928-29 at a salary of $1,100. Carried.
>
> July 12, 1929. As recommended by the committee, it was moved by Hildebrant, seconded by Hall, that Dr. Henry Mehr be appointed school dentist for the year 1929-30, at a salary of $800. Roll call vote: Beach yes, Cox yes, Hall yes, Hildebrant yes, Messner yes, Pareis yes, Schadt yes, Friberger yes. The motion was declared carried."

The unrefuted testimony of the appellant is to the effect that he frequently asked for increases in salary during the period of his employment but that he never received from the Union Township Board of Education any contract and that he did not know that at the meeting of June 11, 1928, his appointment was definitely fixed for the school year 1928-29. Since July 12, 1929, the respondent has refused to recognize appellant as its school dentist and has advised him that he has been removed as dental operator of the district.

Chapter 29, P. L. 1929, reads in part as follows:

> "No person now holding a position or office under the government of this State, or the government of any county, city, town, township, or other municipality of this State, *including any person employed by a school board or Board of Education,* or who may hereafter be appointed to any such position, whose term of office is not now fixed by law, and receiving a salary from such State, county, city, town, township, or other municipality, *including any person employed by a school board or Board of Education,* who has served as a soldier, sailor or marine, in any war of the United States, or in the New Jersey State Militia during the period of the World War, and has been honorably discharged from the United States service, or from the New Jersey State Militia service, prior to or during such employment in or occupancy of such position or office, shall be removed from such position or office except for good cause shown after a fair and impartial hearing, * * *"

With the exception of the italicized words, Chapter 287, P. L. 1926, is identical with Chapter 29, P. L. 1929.

It is held by counsel for appellant that Chapter 287, P. L. 1926, applies to school districts under the words "other municipalities" even though school districts are not specifically mentioned as in Chapter 29, P. L. 1929, which is an amendment to the 1926 act. He argues that the inclusion of "including any person employed by a school board or Board of Education" is for clarification to the public and is not essential for legal interpretation. In his argument that the 1926 act applies in this case he cites the case of Commissioners of Public Instruction *vs.* Fell, 52 Equity 689. While this case was not brought under the Veterans' Preference Act but under the Municipal Mechanics' Lien Act, it appears to be in point and contains the following:

> "The fact that towns and townships are classified as muincipal corporations goes very far towards including school districts. A school district is a part of the machinery of government, as much so, to all intents and purposes, as a town or township. When the moral and intellectual interests of the people are considered, a school district may well be regarded as ranking as high in importance as that of any other territorial division. Through its agents it deals both with the property and liberty of citizens; more than this, towns and townships do not do.
>
> I think that the language used by the court in this case wholely dissipates the argument, insisted upon by counsel for the assignee, that since school districts are not mentioned in the act, they cannot be regarded as included within its meaning, because of the use of the phrase 'other municipalities'. It is manifest, from the language used in the above quotation, that the court used the word *municipal* with reference to precisely such organizations.
>
> I conclude, therefore, that the school district in which the complainants in this case are commissioners is within the provisions of the act of March 30, 1892."

It is to be noted that in the case of Board of Education *vs.* Tait, 80 Eq. 94, affirmed by the Court of Errors and Appeals, the act under which that case was brought, is entitled "An act to secure payment of laborers, mechanics, merchants, traders, and persons employed upon, or furnishing materials toward, the performance of any work in public improvements in cities, towns, townships, *and other municipalities* in this State". It is very clear that the Errors and Appeals Court considered "other municipalities" to embrace school districts, otherwise the act could not have applied to the cases before the Court.

In an opinion of the Attorney General to the Commissioner of Education under date of February 24, 1930, in relation to Chapter 243, P. L. 1911, and Chapter 253, P. L. 1913, he writes in part as follows:

> "As this department has heretofore advised you, school districts stand upon a parity with municipal corporations, and are in fact such.
>
> The acts of 1911 and 1913 speak of the State and of any county, city, township or other municipality thereof, and, in my opinion, both apply to school districts."

Counsel for respondent admits that similar acts passed prior to 1929 which include the words "other municipalities" have been interpreted by the courts to include school districts, but contends that in such instances the matters involved were those of public importance and the statutes were construed and extended in the interest of public welfare. The Commissioner cannot agree with counsel in that the protection of the wages of a person performing labor upon a school building is to be considered a matter of public importance more than the protection of a person in his position during good behavior and efficiency who has rendered service to the country when it has been at war. The legislative intent to protect the laborer on public work and the veteran in his employment is evidenced by the statutes above quoted. It is probable that either of these types of protection could be waived, but unless waived the protection is effective.

It must be concluded that since the Equity Courts of this State in cases which have been affirmed by the Court of Errors and Appeals have held that "other municipalities" as those words are used in the Veterans' Preference Act include school districts, the act of 1926 applies in this case and that the Legislature added in the 1929 act the words "including any person employed by a school board or Board of Education" not for the understanding of the courts which had definitely ruled upon the interpretation of "other municipalities," but for clarification to the average citizen who might be in doubt as to the comprehensiveness of "other municipalities".

Chapter 61, P. L. 1925, provides:

> "Any Board of Education * * * may maintain and conduct * * * dental clinics * * * and it shall be lawful for the governing body * * * to appropriate * * * for * * * maintenance and equipment. The operator must be registered to practice dentistry. * * *"

This act clearly authorizes a Board of Education to create a position of dental operator. The statute does not fix a term nor does it provide for appointment "for such term as the Board may fix." The Commissioner, however, agrees with attorney for the respondent that the Board is empowered by resolution to fix a term for the position under the ruling of the Supreme Court in the case of McGrath *vs.* Bayonne affirmed by the Court of Errors and Appeals, in which the Chief Justice says:

> "An office or position which is created by municipal ordinance or resolution, adopted pursuant to power conferred by the Legislature upon the governing body of the municipality for that purpose is just as much created by law and its term, when fixed by such ordinance or resolution, is just as much fixed by law as if the Legislature itself had acted in the premises."

The Board of Education of Union Township did not by rule fix a term for the position of dental operator, and there is nothing in the records of the Board to indicate a term was fixed unless by interpretation the resolution of 1928 electing the dentist for a year is so considered, but this possible fixing of a term is subsequent to the indefinite appointment of 1926 and according to the evidence was made without the knowledge of appellant.

The employment of appellant under date of January 11, 1926, "starting February 1st at a salary of $900 per year" is clearly for an indefinite term, while the employment under date of June 11, 1928, "for the school year 1928-29 at a salary of $1,100" is for a definite term. The evidence shows that Dr. Fischler occasionally asked for increases, which were apparently granted, as he learned of such increases through conversations with members of the Board and by corresponding increments in his salary warrants. At no time did he ask for reappointment or an extended term.

The appellant did not by any act of his own waive his protection under the Veterans' Act, and counsel for appellant holds that definite acts on his part to that end are necessary to constitute a waiver. In support of this contention, counsel cites Hardy *vs.* Orange, 61 N. J. L. 620, and also Freeman *vs.* Conover, 112 Atl. Rep. 324, Court of Errors and Appeals, where Chief Justice Gummere says:

> "By 'waiver' is meant the act of intentionally relinquishing or abandoning some known right, claim or privilege."

Appellant had tenure rights under his appointment beginning February 1, 1926. He did not ask for reappointment after that time or know that he had been appointed for a definite term by the resolution of June 11, 1928.

The State Board of Education in the case of DeBolt *vs.* Board of Education of Mount Laurel Township held that a request for a new term or knowledge of election for a definite term and its acceptance is necessary to change from an indefinite to a definite term of employment.

It is the opinion of the Commissioner that the Veterans' Preference Act of 1926 includes school districts in the term "other municipalities" and since the appellant was serving under an indefinite employment when the act became effective and has not since that time waived his rights under it, he is protected by the act and cannot be removed except in accordance with its provisions. The Board of Education of Union Township is directed to reinstate appellant in his position as dental operator and to pay him the amount of salary he would have received if he had not been removed.

May 7, 1930.

Affirmed by the State Board of Education without written opinion September 13, 1930.

BOARD OF EDUCATION WITHOUT LEGAL RIGHT TO APPOINT OSTEOPATH SCHOOL MEDICAL INSPECTOR

JAMES E. CHASTNEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant brings this appeal to contest the validity of the action of the Hasbrouck Heights Board of Education on February 8, 1928, in terminating appellant's services as school medical inspector of that district, such termination to become effective March 1st of the present year. The respondent, on the other hand, defends its action on the ground that it was acting in accordance with the decision of the Commissioner of Education of January 25, 1928, in the case of Belden B. Rau *vs.* Hasbrouck Heights Board of Education, to which appellant was not a party, which held that the appointment by a Board of Education of an osteopath as school medical inspector was contrary to the requirements of the School Law, as an osteopath was not a "competent physician" within the meaning of that act.

Appellant does not contend in the present controversy under consideration that he was dismissed by the respondent on any allegation of incapacity, misconduct, etc., but admits that the action of the Hasbrouck Heights Board of Education was based solely upon the Commissioner's decision above referred to declaring the appointment of an osteopath as school medical inspector to be a violation of the School Law, and that the facts in the present case are those ruled upon by such decision.

In view of the fact that the illegality of the appointment of an osteopath as school medical inspector has already been the subject of an official decision by the Commissioner of Education, the Commissioner is not disposed to acquiesce in appellant's contention that this question be again considered and determined. The point has already been adjudicated and such adjudication will be followed in deciding the present case under consideration.

The only point remaining therefore to be considered is whether any contract obligations between the appellant and the Hasbrouck Heights Board of Education can be deemed to have been violated by the action of the respondent on February 8, 1928, in terminating appellant's services. In the opinion of the Commissioner of Education the Hasbrouck Heights Board of Education was in the light of the Commissioner's decision of January 25, 1928, without legal authority to enter into an agreement with the appellant, an osteopath, for the former's appointment as school medical inspector of that district, and such a

contract is therefore *ultra vires* and not binding upon the Board. In the case of Hill Dredging Company *vs.* Ventnor City, 77 N. J. Eq. 467, the Court held that

> "A municipal corporation cannot be bound by an engagement which it had no power to make. * * * It follows that the defense of *ultra vires* is available to a municipal corporation."

The present contract for the appointment by the Hasbrouck Heights Board of Education of James E. Chastney, an osteopath, as school medical inspector of the district being in the light of official decision clearly *ultra vires* is therefore in the Commissioner's opinion in no way legally binding upon the respondent, the Hasbrouck Heights Board.

The appeal is accordingly hereby dismissed.

April 27, 1928.

Decision of State Board of Education

This is an appeal from the decision of the Commissioner of Education, filed April 27, 1928, affirming the action of the respondent in discharging appellant as medical inspector for the school year of 1927-1928, in which decision the Commissioner of Education held that an osteopath was not a physician within the meaning of the New Jersey School Law directing local boards of education to appoint a "competent physician", as medical inspector, and that therefore appellant's appointment as such medical inspector, he being an osteopathic physician, was without authority and the contract of employment of appellant not binding upon the respondent.

It appears without dispute that appellant is a duly licensed osteopathic physician. On June 28, 1927, respondent appointed the appellant as medical inspector of the school district of Hasbrouck Heights for the school year of 1927-1928. The appellant accepted the appointment and performed the duties of such office until his removal on or about February 8, 1928, by the cancellation of his appointment by respondent, to take effect as of March 1, 1928. The reason assigned for the removal of appellant was that the Commissioner of Education in a decision on January 25, 1928, upon an appeal taken by one Beldon B. Rau, a taxpayer, attacking the apointment of appellant, had held that the appointment was illegal and set it aside. The appellant was not a party to that proceeding and disregarding other action of appellant it is sufficient to say that he appealed to the Commissioner of Education from the action of respondent removing him as medical inspector. Upon this appeal the Commissioner held that appellant was not a physician within the meaning of the School Law; therefore his appointment as medical inspector by respondent was illegal and the contract of employment for the school year 1927-1928, not binding upon respondent. The question presented to this Board is whether an osteopathic physician is a "competent physician", so as to be eligible to appointment as medical inspector.

In Lewis *vs.* Jersey City, 51 N. J. L. 240, the Court said:

> "* * * the language of the act throughout, indicates the purpose to be to apply its provisions to those employments the duties of which are analogous to the duties of an office; that is, duties that are continuous and permanent and specially pertaining to the position assumed."

and in Evans *vs.* Freeholders, 53 N. J. L. 585, Justice Reed said:

> "But I am of the opinion that Evans did not hold an office or position which was protected by the statute. I think that his services lacked that fixed and continuous quality which the act contemplates. He seems to have no right to employment excepting as he was needed by the superintendent."

While the payment of appellant was on a per diem basis, which is common to employments as distinguished from offices and positions as defined by the Supreme Court in the case of Fredericks *vs.* Board of Health, 82 N. J. L. 200, it does not appear that the Board fixed the rate on a daily wage because the work would not be continuous or permanent, but rather for the purpose of making the compensation equal to the prevailing scale of wages for plumbers. The fact that appellant served without interruption for a period of twelve years, and that the work continues under other employees, gives to his employment a continuity and permanency which classifies it among those positions in which the Legislature intended to give protection to honorably discharged veterans. Appellant was removed without charges having been preferred, and his position was filled by another with every indication of political preferment. Therefore, under the conditions set forth and in view of the decisions cited, his dismissal was a violation of the Veterans' Tenure of Office Act.

(2) In People ex rel. Connolly *vs.* Board of Education, 144 New York Appellate Division 1, which was an appeal from the granting of a writ of mandamus, the Court said:

> "I am of the opinion that the motion for a pre-emptory writ of mandamus should have been denied. A delay of nearly sixteen months—in the absence of any explanation—constitutes such laches on the part of the relator that he was not entitled to the relief sought, even though he would have had a legal right to be reinstated had he promptly made his application."

In United States ex rel. Arant *vs.* Lane, 249 U. S. 367, Mr. Justice Clark, speaking for the Court said:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service."

In People ex rel. Young *vs.* Collis, 6 New York Appellate Division 467, in denying a writ for reinstatement of a veteran the Court said:

> "It is manifestly unfair when there is a disagreement as to the propriety or legality of the discharge, that the relator should lie still and allow another person to occupy the position from which he has been removed, and draw pay for his services therein, and after more than four months have elapsed that he should be allowed to have this remedy by mandamus to be reinstated in the office, and recover compensation for his services therein which he has not performed, and which he has for a long time without objection permitted another person to perform and to be paid for."

In Bullwinkle *vs.* East Orange, 133 Atl. Rep. 744, the Court held that the attacks by dismissed employees on municipal action should be made with the utmost promptitude and if practicable at the very outset.

The petitioner was dismissed on January 22 and filed his petition against the action of the Board on September 15, nearly eight months after his dismissal, during which time the Board of Education has paid his successor. By appellant's delay in prosecuting his case, the municipality has spent the money to which he might have been legally entitled had he promptly brought the appeal. It is unfair to the taxpayers of a community for a former employee to wait several months after his dismissal to contest its legality when his reinstatement with pay would double the cost of the work performed. Appellant is guilty of laches and is, therefore, neither entitled to compensation from the date of his dismissal nor to reinstatement in his position. The appeal is dismissed.

February 20, 1933.

Decision of the State Board of Education

In June, 1920, the Board of Education of the City of Bayonne appointed Mr. Gleason a plumber in its schools at $8.00 per day. Every morning Mr. Gleason reported to the superintendent of repairs, by whom he was directed to go to a certain school and do work. When he finished he would be sent to another school. On January 22, 1932, the superintendent of buildings notified Mr. Gleason that his services were discontinued and on February 4, 1932, the Board approved the act of the superintendent. On September 15, 1932, Mr. Gleason filed with the Commissioner of Education a petition protesting his dismissal and asking for reinstatement. The Bayonne Board answered. The Commissioner held that Mr. Gleason was protected in his position by the Veterans' Tenure Act, but that he should have acted promptly following his dismissal and that as he delayed nearly eight months he was guilty of laches and that, therefore, his application for reinstatement and back pay should be dismissed. Following the decision of the Commissioner, Mr. Gleason waived his claim to back pay and on his appeal to this Board not only urged that the decision of the Commissioner was erroneous but also urged that the case be remanded to the Commissioner so that his withdrawal of

claim to back salary might be filed and considered on the question of laches. We do not believe that the case should be remanded and we recommend that the application be denied. On the merits we do not believe that it is necessary for us to enter into a detailed discussion. With the conclusion of the Commissioner that the petition of Mr. Gleason for reinstatement be denied we agree and we recommend that the decision be affirmed.

May 6, 1933.

ATTENDANCE OFFICER UNDER CONTRACT CANNOT BE DISMISSED DURING HIS TERM EXCEPT FOR CAUSE

ALFRED THORNLEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD,

Respondent.

For the Appellant, Harry Tenenbaum.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was employed as attendance officer and utility man by the respondent from February 5, 1925, until September 14, 1933, when he was notified by the secretary of the Board that his position as attendance officer had been abolished for reasons of economy. His last annual contract was executed on June 16, 1933, for a period of nine months beginning September 1, 1933, at a compensation of $1,100, payable in equal monthly installments. In none of the contracts is there a specification of the amount of time to be spent in the various types of work or the compensation applicable to each. Appellant asks for reinstatement under the provisions of the contract executed on June 16, 1933.

Section 17 of Chapter 223, P. L. 1914, as amended by Chapter 36, P. L. 1919, reads in part as follows:

> "For the purpose of enforcing the provisions of this article the Board of Education of each school district and the Board of Education of the county vocational school *shall appoint* a suitable number of qualified persons to be designated as attendance officers and shall fix their compensation."

Chapter 274, P. L. 1933, reads:

> (1) "The services of all truant officers of the public schools in any school district in any city of this State shall be during good behavior and efficiency after the expiration of the period of employment of one year in said school district; provided * * *

(2) "No truant officer shall be dismissed or subjected to reduction in salary except for inefficiency, conduct unbecoming an officer or other just cause * * *"

The appellant admits the waiving of the tenure rights provided in Chapter 275, P. L. 1911, by entrance into a contract with the Board for a specified period, and in the opinion of the Commissioner the protection afforded attendance officers is a personal privilege and not a matter of public policy. Accordingly, Mr. Thornley's rights to employment are controlled by his appointment by the Board and the contract as executed.

The State Board of Education in the case of Scull *vs.* Board of Education of Somers Point, decided November 4, 1933, in which the validity of a contract with a city superintendent of schools was at issue, held:

"The acceptance of a public office by the appointee does not constitute a contract, or create any contractual relationship. City of Hoboken *vs.* Gear, 27 N. J. L. 225; Love *vs.* Mayor, etc., of Jersey City, 40 N. J. L. 456; Uffert *vs.* Vogt, 65 N. J. L. 377. A written contract, however, was executed by the Board of Education and the appellant below. In our opinion, such contract not being authorized by law is a nullity. The statute gives every board of education the right to appoint its officers, and such board would have a right to abolish such offices where it, in good faith, desired to effect economies. The writing added no force to the resolution making the appointment. Greene *vs.* Freeholders of Hudson, 44 N. J. L. 388."

The appointment of a superintendent of schools is optional with a board of education; whereas, in the present case, the appointment of an attendance officer is mandatory under Chapter 223, P. L. 1914, and the position cannot be abolished. It was also held by the Commissioner and affirmed by the State Board of Education in the case of Kelly *vs.* Lawnside that the mandatory position of principal of a school could not be abolished.

The testimony shows that since the attempted abolition of the position of attendance officer in Wildwood, the work has been performed by the assistant health officer of that city, who stated that although his assignment really came from the mayor, he was actually sent to the schools by the chief of police. The Board of Education has never appointed him to act as attendance officer and he is accordingly functioning in that position illegally. While upon the termination of the contract with the present attendance officer, the Board of Education might avail itself of the proffered services of a city employee, the position of attendance officer cannot be abolished under our present statutes nor can the services of Mr. Thornley be terminated prior to the expiration of his present employment.

In view of the decisions of the State Board of Education, above cited, the Board of Education of Wildwood is directed to reinstate Alfred Thornley under the provisions of his contract.

January 10, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

The respondent was employed as attendance officer and utility man by the Wildwood Board of Education for several years. His employment was under annual written contracts, the last of which was executed on June 16, 1933, for a period of nine months beginning September 1, 1933. On September 14, 1933, he was notified that his position as attendance officer had been abolished for reasons of economy. The respondent admits that by entering into the contracts he waived his tenure rights and this proceeding is based upon his rights under the contract. The Commissioner held that that contract could not be terminated by the Board's attempted abolishment of the position prior to the expiration of his employment under the agreement. We agree with this conclusion and with the direction made by the Commissioner in his decision that Mr. Thornley be reinstated under the provisions of his contract. It is therefore recommended that the Commissioner's decision be affirmed.

May 12, 1934.

ILLEGAL REDUCTION OF SALARY OF ATTENDANCE OFFICER

IN THE MATTER OF JOHN F. HALL,
Appellant,
vs.
THE BOARD OF EDUCATION OF ATLANTIC CITY,
Respondent.

Babcock and Champion, for the Appellant.
James H. Hayes, Jr., for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant is employed by the respondent as a truant officer. He was first appointed on September 1, 1910, at a salary of seventy dollars per month. The following year his salary was increased to eighty-five dollars per month, and continued at that amount until October, 1912. On October 2, 1912, D. F. McDonald presented to the respondent the following charge against the appellant:

"To the Board of Education of Atlantic City:

"I desire to prefer the following charge against John F. Hall, truant officer of the City of Atlantic City, that the services he is rendering to the Board of Education of Atlantic City are not commensurate with the salary received by said truant officer, said salary being too high."

On the 16th of October, 1912, the respondent held a hearing on the above complaint, and, at a later date, sustained the charge and adopted a resolution reducing the salary of the appellant to sixty-five dollars per month. It is from this action that the appeal is taken.

Chapter 275, P. L. 1911, provides that "the services of all truant officers of the public schools in any school district in any city of the State shall be, during good behavior and efficiency, after the expiration of a period of employment of one year in said school district." It also provides that "no truant officer shall be dismissed or subjected to a reduction of salary except for inefficiency, conduct unbecoming an officer or other just cause, and after a written charge of the cause or causes, shall have been preferred against him or her, signed by the person or persons making the same."

No charge of "inefficiency or conduct unbecoming an officer" was made against the appellant, and the charge, therefore, must be considered as having been made for "other just cause."

The testimony shows that, prior to the beginning of the present school year, some of the truant officers had charge of two schools and others had charge of three or four; that the respondent at the beginning of the year appointed an additional officer and readjusted the work so as to give each officer supervision of about the same number of children. Such readjustment is assigned as the "just cause" for reducing the salary of the appellant.

The complainant, who is also chairman of the committee of the Board of Education having charge of the truant officers, testified in part as follows:

Q. And you think that because their districts have been cut down their services have been cut down, is that the idea?

A. We think each one having two schools can give more efficiency.

Q. You say that is the reason, they don't have as extended services now because they have less district?

A. The committee felt as if they would give us better results. Often at the meetings they would say, "well, now, we didn't see such and such a man, he wasn't at home, or such and such a man, but we will go there tomorrow, and this girl we couldn't find." Now, the committee felt as if we could get better results by having two schools. Now, Mr. Burger had to go all the way from Michigan Avenue all the way to Jackson, covering four schools. Now, that was entirely too much work for one man.

Q. Has this change in the districting affected the amount of service these persons are required to render?

A. We thought they would give us better services by having only two schools.

Surely the rendering of more efficient service cannot be considered as "just cause" for reducing officers' compensation.

Relieving a truant officer of a part of his duties is not "just cause" for reducing his salary. To adopt such interpretation of the law would make it possible for a board of education to defeat the intent of the law by reducing his salary below a living wage, thereby forcing him to resign.

The resolution adopted by the respondent reducing the salary of the appellant is a violation of the statute, and is, therefore, null and void.

June 13, 1913.

LEGALITY OF TERMINATION OF SERVICES OF CHAUFFEUR TO SUPERINTENDENT OF SCHOOLS

WILLIAM THORPE,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant, who was appointed as a chauffeur by the Bayonne Board of Education for one year from February 8, 1927, at an annual salary of $2,100, brings this action to contest the validity of the termination by the Board of his services in that capacity on March 1, 1928. Appellant relies upon several grounds in bringing this appeal. He contends that as a United States army veteran he could not be dismissed except upon charges and a hearing as provided in the Military Tenure Law; that since his services and compensation as chauffeur continued after the expiration of his year's contract on February 8, 1928, and until March 7, 1928, he must be deemed by implication of law to have been re-employed for another one year period; that in any event the continuance of his compensation by the Board for six days after the official termination of his services on March 1, 1928, estopped the Board from relying upon such termination; and finally, that the action of the Board of Education on March 1, 1928, in terminating appellant's employment was illegal since the affirmative vote was only 4 out of 9 members present, while 3 voted in the negative and 2 refrained from voting.

A hearing in this case was held on April 24, 1928, by the Assistant Commissioner of Education at Bayonne at which testimony for both sides was heard. Briefs upon the legal points involved have subsequently been filed for both appellant and respondent.

The Commissioner cannot agree with the contention of the respondent that he has no jurisdiction over the controversy in question. It was held by the Supreme Court in the case of Schwarzrock *vs.* Bayonne Board of Education, decided July 6, 1917, involving the validity of the removal from office of a supervisor of buildings that the Commissioner has full jurisdiction to decide any controversy which may arise concerning the removal of an incumbent from any position under the School Law. This ruling is entirely applicable to the case under consideration.

The Commissioner, on the other hand, cannot agree with appellant's contention that the resolution of the Bayonne Board of Education of March 1, 1928, terminating his services as chauffeur did not receive a sufficient vote to legally carry it. It is true that the New Jersey cases, notably, Barnert *vs.* Paterson,

48 N. J. L. 395, and Public Service Railway Company *vs.* General Omnibus Company, 93 N. J. L. 344, as well as McDermott *vs.* Miller, 45 N. J. L. 251, cited by appellant, hold that in the absence of statute or charter provision to the contrary "A majority of those present, there being a quorum, is required for the adoption or passage of a motion or the doing of any other act the Board has power to do." It is, however, the general consensus of judicial opinion in various States as well as that of Cushing's Manual and of textbook writers upon the subject of the procedure of public Boards or bodies that where a majority vote of those present and constituting a quorum is required for the passage of a resolution, those who do not vote will be considered as acquiescing in the passage of the resolution before the Board and to have accordingly voted in the affirmative. (State, William M. Shinnich, Rel. *vs.* Green, 37 Ohio State 227, Willcock on Corporations, Sec. 546, Grant on Corporations, p. 71, Cushing's Manual.)

Such was also the opinion of the New Jersey Supreme Court in the case of Mount *vs.* Parker, 32 N. J. L. 341, which held as follows:

> "It being the well established law, that where no specified number of votes is required, but a majority of a Board, regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do."

In the present case under consideration 9 members of the Bayonne Board of Education were present at the meeting on March 1st at which the resolution terminating appellant's services was presented. Four voted in the affirmative, 3 in the negative and 2 refrained from voting. According to the above decisions, the two members who refrained from voting must be deemed to have voted in the affirmative so as to carry the resolution by a vote of 6 to 3, which is a majority of those present constituting the quorum.

The Commissioner can see no merit in appellant's contention that his holding over in the position of chauffeur from the date of the expiration of the one-year contract on February 8, 1928, until March 1st constituted a renewal of such contracts for another year. In all of the cases which hold that a legal presumption arises from continuing in a position after the expiration of a definite term contract, the circumstances are so strong as to clearly give rise to the presumption, such for instance as the fact that the holding over and receipt of compensation extends over a period of several months following the expiration of the term. In the New Jersey case of Passino *vs.* Brady Brass Company, 83 N. J. L. 419, the Court held that the

> "existence of a continuing contract of service from year to year or from one definite period to another may be implied from proved facts and circumstances, and the course of business between the parties, and is always a question of the intent of the parties."

In the case under consideration a new Board had come into office in Bayonne on February 1, 1928, and had held only one meeting, namely, on February 16th, prior to terminating appellant's services on March 1st. A municipal body,

especially one just coming into office, must be deemed to require a reasonable time in which to act and in fact become cognizant of expiring contracts, etc.; and accordingly the short interval elapsing between the expiration of appellant's contract on February 8th and his dismissal on March 1st is not in the Commissioner's opinion a sufficiently strong circumstance from which any presumption of the Board's intention to continue appellant in his position for another year can be implied. Neither is there anything to indicate any real intention on the part of the appellant to continue to hold his position, since the testimony indicates that on or just prior to March 1st appellant inquired of one of the Board members whether there was any prospect of his being re-employed since his term was about to expire.

It is further the Commissioner's opinion that the action of the Bayonne Board in continuing to pay appellant's salary from March 1st to March 7th did not estop the Board from claiming the validity of the action on March 1st terminating appellant's services. Appellant had definite official notice from the Board's action of March 1st that his actual services as an employee of the Board were at an end and could not in the Commissioner's opinion be said to have been induced to believe that his employment was to be continued merely from the fact of receiving a few days extra compensation subsequent to the action of March 1st.

The question as to whether appellant enjoyed military tenure protection has already been decided by the Commissioner and sustained by the State Board of Education in the case of Arthur Feilitzsch *vs.* Bayonne Board of Education and such decision, since it has not been reversed by the Supreme Court, is the authority in the present instance. It was held in that controversy that the protection conferred by Chapter 249, P. L. 1922, upon school Board employees who were honorably discharged veterans of the United States military service was repealed by Chapter 247, P. L. 1926. Moreover, even if military tenure protection existed in this case it would not, according to the decision of the courts in the case of Hardy *vs.* Orange, 61 N. J. L. 623, survive the expiration of appellant's definite term contract for one year on February 8, 1928. According to the latter case, military tenure is capable of being waived by a contract for a definite term and such is the situation in the case under consideration.

In view of all the facts and circumstances in this case it is therefore the opinion of the Commissioner of Education that appellant's services as chauffeur in the Bayonne school district were legally terminated by the action of the Bayonne Board on March 1, 1928.

June 7, 1928.

Decision of the State Board of Education

The appellant, who was chauffeur for the Superintendent of Schools in Bayonne at an annual salary of $2,100, appealed to the Commissioner from the action of the Board terminating his services on March 1, 1928, alleging that a sufficient number of the members present at the meeting did not vote in favor of the termination of his employment; that the continuation of his services after the expiration of his year's contract, and payment for that extra period, pre-

vented his dismissal, and that as a United States Army Veteran he could not be dismissed except upon charges and a hearing. The Commissioner in a detailed opinion has ruled against him on all of these points. The conclusions reached by the Commission seem to us to be correct and it is therefore recommended that his decision be affirmed.

November 3, 1928.

BOARD CANNOT RESCIND RESOLUTION OF EMPLOYMENT OF NURSE FOR LEGAL TERM AFTER SERVICES HAVE BEEN RENDERED

FRANCES S. KESSE AND HELEN FRANCKE,
Petitioners,
vs.
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,
Respondent.

William M. Seufert, for Petitioners.
Messrs. Carey & Lane, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent Board of Education which organized on February 1, 1935, adopted on June 3, 1935, the following resolution:

"Resolved, By the Board of Education of the City of Garfield, N. J., that the following employees be and they are hereby reappointed for the term of one (1) year, beginning July 1, 1935, at a yearly salary rate specified herein, and

"Be It Further Resolved, That they shall be paid in the same manner as all other employees of the said Board:

Max Merkel, Chief Attendance Officer	$1,760,00
Anthony Guzio, Attendance Officer	1,720.00
Mary Kral, Clerk, Secretary's Office	848.00
Rae Copello, Clerk, Superintendent's Office	848.00
Frances S. Kesse, School Nurse	1,280.00
Helen Francke, School Nurse	1,280.00
Dr. N. F. Mirabile, Medical Inspector	1,200.00

Signed,
VINCENNT COPELLO,
JOSEPH FRISCO,
RALPH ESPOSITO,
JOHN CHOVAN.

"Dated—June 3, 1935."

The petitioners received notice of their employments and began service on July 1, 1935.

On or about June 19 Joseph Frisco, one of the members of the Board, moved from Garfield, and the mayor appointed William A. Forss as his successor. On August 26, 1935, the Board, which then included Mr. Forss, adopted the following:

> "WHEREAS, The Board of Education of the City of Garfield, New Jersey, on the third day of June, 1935, by resolution appointed the following employees for the term of one (1) year, beginning July 1, 1935, at the yearly rate specified therein:
>
> | | |
> |---|---|
> | Max Merkel, Chief Attendance Officer | $1,760.00 |
> | Anthony Guzio, Attendance Officer | 1,720.00 |
> | Mary Kral, Clerk, Secretary's Office | 848.00 |
> | Rae Copello, Clerk, Superintendent's Office | 848.00 |
> | Frances S. Kesse, School Nurse | 1,280.00 |
> | Helen Francke, School Nurse | 1,280.00 |
> | Dr. N. F. Mirabile, Medical Inspector | 1,200.00 |
>
> "*Be It Resolved,* That the said resolution as hereinabove referred to is hereby rescinded because of the illegality of said resolution of appointments.
>
> Signed,
> WALTER A. KUHNEN,
> WILLIAM A. FORSS,
> JOHN CHOVAN.
>
> "8/26/35."

Immediately after the adoption of the foregoing resolution petitioners received notice that their services were terminated, but they were paid in full for the months of July and August. Petitioners continued to report for work until a stipulation was entered into between the parties, setting forth that the discontinuance of reporting would not affect their legal rights pending the outcome of a petition which had been filed with the Commissioner of Education.

Section 229, Chapter 1, P. L. 1903, S. S., reads in part as follows:

> "Every board of education shall employ a competent physician to be known as the medical inspector, and may also employ a nurse, and fix their salaries and terms of office.
>
> "* * * The board of education may appoint more than one medical inspector and more than one nurse."

Chapter 68, P. L. 1933, reads:

> "Notwithstanding any provisions of law fixing the fiscal year for schools from January first to December thirty-first or declaring for purposes of adjustment a fiscal year from July first, one thousand nine hundred and

thirty-three to December thirty-first, one thousand nine hundred and thirty-three, any board of education may for the period from July first of any year for which said board of education shall have been organized to June thirtieth of the succeeding year enter into contracts for the services of teachers and other employees and fix and determine their salaries for such last-named period."

With the exception that the appointment of a physician as medical inspector is mandatory and that of a nurse is permissive, this case is identical with that of Mirabile *vs.* Board of Education of the City of Garfield, decided this day by the Commissioner, and for the reasons therein set forth, the action of the Board purporting to terminate the services of the petitioners is invalid. The Board of Education of the City of Garfield is directed to reinstate Frances S. Kesse and Helen Francke under the terms of their employment of June 3, 1935, with pay from September 1, 1935.

January 8, 1936.

DISMISSAL OF SUPERVISOR OF BUILDINGS

GUSTAV S. SCHWARZROCK,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE CITY OF BAYONNE,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant, Gustav S. Schwarzrock, was appointed by the Board of Education of the City of Bayonne on May 1, 1913, as supervisor of buildings and repairs for a term of three years from July 1, 1913. While acting in such capacity, namely, on July 23, 1914, charges were preferred against the appellant to the effect that he solicited a gift of $25 from one Nathan Baress, a junk dealer, in return for which the appellant was to permit Nathan Baress to take away a certain amount of junk belonging to the Board of Education and under the charge of the appellant.

Under these charges the Board of Education tried Mr. Schwarzrock and found him guilty as charged. He was dismissed from the service of the Board on November 19, 1914. From this action of the Board appeal was taken and a hearing was held by the late Assistant Commissioner of Education, J. B. Betts. Testimony was taken, but before decision was reached Mr. Betts died. Typewritten testimony was submitted to the present Assistant Commissioner of Education for consideration. Oral argument was had and written memorandums were filed bearing on the case.

An examination of the testimony shows that all the evidence given in the case bore on the question of whether or not a bribe had been solicited by

Mr. Schwarzrock. This was the fundamental question to be decided in the case. The dismissal of Mr. Schwarzrock by the Board of Education was made on the charge that he did solicit of said Nathan Baress a bribe. Counsel for the Appellant in the memorandum filed with the Commissioner makes this statement: "We (the appellant) maintain that in a case like the present where criminal charges are made against a man and not mere incapacity the charges are of such a serious nature that it is necessary to prove the charges beyond a reasonable doubt in order to sustain dismissal."

Holding that the charges were of a criminal nature, the Commissioner decided that this was not a controversy arising under the School Law and therefore dismissed the appeal. The appellant took the case to the State Board of Education on further appeal. This body decided that inasmuch as a contract existed between Mr. Schwarzrock and the Bayonne Board of Education it was a proper matter for adjudication by the Commissioner and remanded the case back to him for further consideration and the taking of new testimony. Counsel in the case were notified that the matter would be taken up and a rehearing given if desired. Counsel thereupon, by agreement, submitted a stipulation which set forth that Nathan Baress, the main witness in the case, had been indicted for perjury and had pleaded non vult. This was the only new testimony in the case.

At the hearing before Commissioner Betts, Nathan Baress testified that Mr. Schwarzrock came to see him while he, Baress, was loading scrap iron at the railroad station. The following is Nathan Baress' testimony on this point:

> "Schwarzrock says to me, he says: 'Can't you spare me $25?' I says, 'What for the $25?' Well, he says, 'Oh, I will straighten it up with you if you will take that stuff away.' I believe I said, 'I haven't got the money, but I will see you a little later.' Then he went away. I told him at 21st street; there are some saloons up there. *Q*. Did you meet him at Greenburg's place? *A*. I did meet him in a saloon. *Q*. And what conversation did you have with him then? *A*. I think we had a drink together, and he started to ask we again for $25, and I told him I wouldn't bother giving any money. *Q*. You told him you didn't think you would pay $25? *A*. I wouldn't bother with that matter at all, the $25. *Q*. How much stuff was there there? *A*. My estimate was $100."

William Baress, son of Nathan Baress, who was at the railroad station at the time, testified that he saw Mr. Schwarzrock talking to his father and overheard the conversation as testified to by Mr. Baress.

Mr. Schwarzrock, in his testimony, denies the charge of soliciting a bribe made by Mr. Baress. He denies being at the railroad station on the day that it is alleged the conversation took place. In his denial he is supported by his son.

It thus appears that we have to pass on the question of the veracity of the two main witnesses, Mr. Baress on the one hand and Mr. Schwarzrock on the other. Several reputable witnesses were called to testify as to the character of Mr. Schwarzrock. All gave testimony to the good character and standing

in the community of Mr. Schwarzrock. On the other hand, the Court records in the case of Mr. Baress show that he was indicted for perjury and pleaded non vult. The good character of Mr. Schwarzrock on the one side and the bad character of Mr. Baress on the other side should be considered in reaching a conclusion in the case. The word of one man is as good as the word of another, provided the one man's general reputation for veracity is as good as that of the other. Then, too, the character of the testimony should be taken into consideration. Mr. Baress does not charge directly that a bribe was solicited or a bargain was made or even that a bargain was proposed that for a certain sum, namely $25, there would be delivered to him scrap iron worth $100.

Reading the testimony closely, even if it be taken to be true, there is nothing more indicated in the testimony itself than the fact that Mr. Schwarzrock wanted to borrow $25 from Mr. Baress. "He would make it right when he came for the scrap iron" might be construed to mean that he would settle with him when he came for the scrap iron. So there is an absence of a direct charge that a bribe was solicited. That would have to be read into the testimony. There is no claim that the alleged bribe was ever consummated. Certain it is there is no evidence that any property of the Board of Education was corruptly bargained away by Mr. Schwarzrock. Assuming that the testimony of Mr. Baress is true, we have to further assume that in the corrupt bargain which was proposed Mr. Baress' character was so far above that of Mr. Schwarzrock that he repelled the corrupt proposal. This the general testimony in the case will not bear out.

I therefore must conclude that the charges were not proven to the satisfaction of any unprejudiced mind. Inasmuch as the dismissal of Mr. Schwarzrock was based upon the charge of soliciting a bribe, inasmuch as the bargain was never consummated, and inasmuch as the testimony supporting the charge is of such a doubtful character, I am clearly of the opinion that Mr. Schwarzrock's dismissal as supervisor of buildings and repairs was without cause.

The appeal is sustained.

July 13, 1916.

Decision of the State Board of Education

In this case the appellant, Schwarzrock, while in the service of the respondent, was accused of soliciting a bribe from a junk dealer. He was duly tried by the respondent, found guilty, and dismissed from the service of the respondent.

The injection of an alleged crime into the case has confused the issue. The Board of Education, the Commissioner of Education, and the State Board of Education have no jurisdiction in criminal matters. There was a contract for three years' service between Schwarzrock and the Board of Education of Bayonne, and the only pertinence of the alleged crime in the case was the furnishing of a possible excuse to the respondent for dismissing the appellant and thus terminating the contract. The sole question seems to be: *Is* the evidence of bribery offered sufficient to warrant the respondent in dismissing

the appellant from service and thus terminating the contract? We do not think it is.

The decision of the Commissioner is affirmed.

October 7, 1916.

DECISION OF THE SUPREME COURT

The certiorari at the suit of the Board of Education brings up the decision of the State Board affirming the Commissioner of Education and reversing the action of the local Board removing Schwarzrock from the position of supervisor of buildings and repairs.

1. I agree with the State Board that the controversy was one of which the Commissioner of Education and the State Board had jurisdiction under Section 10 of the School Law. That the controversy was whether the local Board had rightfully removed Schwarzrock from a position existing under the School Law. The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the Board, not for the purpose of the Criminal Law. Whether in such a case the Board should act before action is taken by the criminal courts is a matter resting in the discretion of the Board.

2. It necessarily results from the provision that the facts involved in any controversy or dispute shall be made known to the Commissioner by written statements verified by oath and accompanied by certified copies of documents, that the hearing before him should be a new hearing, and that he is not limited to a mere review of evidence taken before the local Board. An examination of the evidence in this case makes it clear that the Commissioner and the State Board reached a correct result. It would be intolerable to permit a public official of good repute to be dismissed from office on the testimony of one who had been convicted of perjury, in the face of the officer's denial.

3. The action of the State Board setting aside the removal of Schwarzrock has the effect of a judgment and a mandamus will issue in a proper case. Thompson *vs.* Board of Education, 57 N. J. L. 628. The alternative writ in the present case avers that Schwarzrock was appointed supervisor for three years at a salary of $1,800; that after his wrongful dismissal he was always ready and willing to perform his duties until July 1, 1916 (the expiration of his term), and that the local board refused to allow him to do so; that they refused to pay him the sum due as salary $3,000; that there are funds in the hands of the Commissioner of Finance and the Custodian of the School Funds applicable to the payment of said sum of $3,000. These averments are admitted by the demurrer. Perhaps the defendant meant to challenge the averments by the reasons, but it is a mistake to say, as in reasons three and four, that the writ does not show that the amount claimed is in possession of respondents, and that it does not show that the respondents are in possession of moneys applicable to the payment required by the writ. The writ does show these facts. If the defendants meant to traverse the averments they should

not have demurred. I cannot distinguish the present case from Thompson *vs.* Board of Education, supra. The writ should go. While it prays relief in the alternative, that was proper in view of the relator's uncertainty whether there were funds in hand to meet his claim. In view of the admission of that fact, I see no reason why the peremptory mandamus should not command the drawing of a salary warrant upon the custodian and the payment by the custodian, or other proper officer. The relator is entitled to costs.

July 6, 1917.

ORGANIZATION OF BOARD OF EDUCATION AT A MEETING CALLED FOR THAT PURPOSE WITH MAJORITY OF BOARD PRESENT IS LEGAL

STEPHEN STOOTHOFF,
Appellant,
vs.

LOUIS H. BLOOD, et al.,
Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, a citizen and member of the Board of Education of Matawan Township, asks that the alleged organization of the Matawan Township Board of Education on April 7, 1930, be declared illegal and all elections to office, appointments, and other acts by such Board of Education be declared null and void for the reason that Julia B. Davies, a newly elected member of the Board, is interested directly or indirectly in contracts with the Board of Education which in the opinion of the appellant disqualifies her for membership on the Board.

Mrs. Davies, a resident and citizen of the school district for more than three years immediately preceding the organization, was elected a member of the Board of Education on February 11, 1930, and was notified by the district clerk that the Board would meet for organization at 8:00 P. M. on April 7 in the Matawan High School. There were present on April 7 in the Board of Education room in the High School at 8:00 P. M. in accordance with the notice four members whose terms continued from preceding elections, three members who were elected for the term of three years, and two members including Mrs. Davies who were elected to fill unexpired terms—making a full Board of nine members.

The meeting was called to order by the District Clerk and the newly elected members presented their oaths of office. No question was raised about the oath of office of any of the new members except in the case of Julia B. Davies. When the clerk announced the affidavit of Mrs. Davies, objection was made by George J. S. Thompson, a member of the Board, to the filing of her affidavit on the ground that as he understood the case of Engel *vs.* Passaic Township

Board of Education reported on p. 266 of the 1928 Compilation of New Jersey School Law Decisions, Mrs. Davies was not eligible to membership. Motions were made in reference to the filing of the affidavit, but before a vote was taken and during a period of more or less heated discussion the five newly elected members withdrew from the Board room taking their oaths of office with them and went to the adjoining study room. At the time of leaving or subsequently they invited the district clerk and the other four members of the Board to meet with them, all of whom refused to go. The four members remaining in the Board room voted upon motions which they considered to be before the meeting in reference to the acceptance of the oath of office of Mrs. Davies and then proceeded to elect a president and vice-president. The five members who went into the study room after learning of the refusal of the district clerk and the other four members of the Board of Education to meet with them elected one of the members, Mr. Dominick, temporary chairman, and then proceeded to elect Louis H. Blood, president, and C. W. Bogart, vice-president.

Mrs. Davies presented the following resolution which received the unanimous vote of the five members:

> "WHEREAS, The clerk of this Board of Education refuses to act as such, therefore be it
>
> *Resolved,* That Edmund H. Dominick be chosen as clerk of the Matawan Township Board of Education for the time specified by law at a compensation of $300 per year."

A motion was made and carried demanding that Mrs. Eggleston, the former district clerk, turn over to Mr. Dominick the records of the Board of Education. Other motions in reference to notifying the custodian of school moneys and the post office about the duly constituted officials and a resolution setting a date for the regular monthly meeting were also offered and passed.

The 1928 Compilation of the New Jersey School Law in application to the points raised by the attorneys in this case contains the following:

> Section 1. "Its (State Board of Education) meetings, as well as those of every board of education in the State, shall be public and shall commence not later than eight P. M."
>
> Section 126. "A member of such board of education shall, before entering upon the duties of his office, take and subscribe an oath, before any officer authorized by law to administer oaths, that he possesses the qualifications to be a member of said board prescribed therefor in this article, and that he will faithfully discharge the duties of his said office. Said oath shall be filed with the district clerk of said board." * * *

Section 126 further provides:

> "Each board of education created under the provisions of this article shall organize annually on or before the first Monday in April, or on such other day as said board may agree upon prior to the first Monday in April, by the election of one of its members as president and another as vice-president."

The Board of Education met at eight o'clock P. M. on April 7 and regardless of the later withdrawal of a part of the Board to another room, there is no substantial ground for holding that the meeting which followed in the second room was not held in accordance with the statutes requiring that all meetings of Boards of Education shall begin not later than eight o'clock P. M.

The five newly elected members presented their oaths of office to the district clerk, and later filed them in her absence at the meeting in the study room with the acting clerk. They thereby qualified as *de facto* or *de jure* members of the Board of Education.

In a decision by the Commissioner under even date, it is held that Julia B. Davies is ineligible to hold the office of a member of the Board of Education. She was, however, elected by the people and took the oath of office which was presented to the district clerk, and thereby completed the acts required of her to sit as a member of the Board.

While a member of the Board can raise a question about the qualification of any of the members, so that parties dealing with the Board may have knowledge of the questionable title to office of such member, a Board of Education has no legal right to rule upon the filing of the oath of office.

Even if Mrs. Davies was not at the time of organization a *de jure* member of the Board as is held by the Commissioner, she was a *de facto* member of the Board and as such she had reasonable color of title and a right to participate in the conduct of the business of the Board.

The Court of Errors and Appeals in the case of Oliver *vs.* Jersey City, 63 N. J. L. 634, held as follows:

> "Lord Ellenborough, in 1805, in Rex *vs.* Bedford Level, 6 East 356, said: 'An officer *de facto* is one who has a reputation of being an officer, who assumes to be and yet is not a good officer in point of law.' This definition has never been questioned, and all those given by the textbook writers since are little more than variations of this one."
>
> "There are no facts in this case to justify us in relaxing the wise and ancient rule so deeply rooted in public policy, that the acts of *de facto* officers holding under color of a title originally lawful, *when acting in good faith,* will protect third persons and the public in their dealings with them whether serving alone or as members of a governing or legislative body."
>
> "But this legal protection is not afforded where the defects in the title of the officer are notorious and such as to make those relying on his acts chargeable with such knowledge. What, then, must be considered notice sufficient to warn third parties and the public? * * * * * * , the judgment of a court against the title of the officer, are such facts as third persons and the public are as a general rule required to take notice of."

At the time of organization no court had ruled upon the qualifications of Mrs. Davies. She could therefore legally participate in the meeting. There is no evidence to the effect that the Board did not act in good faith in the election of its officers. It was the majority group of the Board and it is to be supposed that it would elect its officers from among its group. The meeting was called for the purpose of organization, and even though a *de facto* member was included in the necessary quorum, the organization was effected.

If all members had remained in the Board room other acts than those of organization could have been executed, since the presence of all members would correct any lack of notice. After the majority group of the members withdrew to the other room without notice that they would transact other business than that of organization, they were limited to organization of the Board of Education. The law above quoted states that boards of education shall organize "by the election of one of its members as president and another as vice-president." No time is fixed in the statutes for the election of the district clerk which may therefore be at any regular meeting of the Board or any meeting specially called for that purpose. The election of this officer was not legally before the Board.

The Commissioner is unable to rule upon the legality of specific acts of the Board subsequent to the organization meeting for the reason that the records of the transactions of the Board at such meetings are not before him. Attorney for the appellant objected to the admission of the minutes of the meetings of the *de facto* Board held since April 7 except that part of the minutes of the next succeeding meeting which shows the approval of the minutes of April 7. The general rule may be laid down, however, in line with the above citations from the case of Oliver *vs.* Jersey City decided by the Court of Errors and Appeals, that the acts of the Board at subsequent meetings in so far as they affect the public and third parties are valid.

The election of a district clerk at the special meeting called for organization of the Board without notice to the members that other business would be transacted or without a full attendance of all members of the Board of Education at the time the motion was made is null and void, but the organization of the Board by the majority group which includes the election of Louis H. Blood as president, and C. W. Bogart as vice-president, is hereby sustained.

May 29, 1930.

Affirmed by the State Board of Education without written opinion September 15, 1930.

UNSECONDED RESOLUTION NOT PART OF BOARD OF EDUCATION PROCEEDINGS SO AS TO REQUIRE RECORDING

LAVEY L. LEVINE,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, and JOSEPH A. SKLENAR,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by Lavey L. Levine against the Board of Education of the City of Bayonne and Joseph A. Sklenar, secretary of the Board, because of their refusal to record into the minutes certain resolutions presented by the petitioner.

It is stipulated and agreed between counsel that at a regular meeting of the Board on November 17, 1927, the petitioner, who is a member of the Board, presented five typewritten resolutions which were read by the secretary. None of the resolutions were seconded and no further action was taken upon them by the Board. The secretary made no record of the resolutions in the minutes.

At the December 1 meeting of the Board, Mr. Levine requested the secretary to correct the minutes of November 17 by inserting the resolutions which he had made, and upon the refusal of the secretary to make the changes requested, the petitioner made a motion to the same effect, which motion was not seconded and received no further consideration by the Board.

The petitioner alleges that these acts of the secretary and the Board of Education are illegal and prays that upon such determination by the Commissioner, respondents be required to correct the minutes as requested.

Counsel for the petitioner contends that the proceedings of the Board should include either the full text of all resolutions offered by its members or at least a reference to show that resolutions were offered by a particular member. He argues that "Proceedings," defined by Webster's International Dictionary as "the published record of the actions taken or things done," would include the presentment of resolutions, the reading of the same and a motion made to adopt them as things done or transacted at a meeting of the Board whether or not any action was taken by the Board upon such presentments. He further contends that to deprive a member of a privilege of having a record made of such presentments would be to deprive him of a protection against a charge of misfeasance or malfeasance in office.

Counsel for the respondent rests his defense upon the provision of the School Law (1925 Edition, Section 72, page 40):

> "The secretary shall record the proceedings of the board and of its committees, etc. * * *" and School Law (1925 Edition, Section 64-A, page 37) "Such board shall make, amend and repeal rules, regulations and by-laws not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government for the transaction of business * * *" and as agreed in a further stipulation "That the present Board of Education adopted the rules and regulations designated as 'The Manual' and which are referred to in the answer of the respondents on the 3rd day of February, 1925."
>
> Paragraph 12 of "The Manual" reads: "No motion shall be entertained unless seconded. The name of a member making a motion shall be entered in the minutes and every resolution or report made shall be in writing except by consent of two-thirds of all the members present."
>
> Paragraph 24 reads: "All meetings of the board shall be governed by the usual Parliamentary Law. In all questions of Parliamentary Law not herein provided for, Cushing's Manual shall be the standard authority."
>
> Cushing's Manual provides: "A motion must be seconded, that is, approved by some one member, at least, expressing his approval by rising and saying that he seconds the motion; and if a motion be not seconded, no notice whatever is to be taken of it by the presiding officer, etc. * * *"

The Commissioner cannot agree with counsel for the petitioner in his argument that actions of individual members constitute proceedings to be recorded by the secretary. The law clearly states "The secretary shall record the proceedings of the board"; that is, actions taken or things done by "the board" and does not require a record of actions taken or things done by individuals.

Section 72 constitutes the legal provision of what must be recorded in the records of the board, and Section 4-A provides that the board shall make rules not inconsistent with the law and the rules of the State Board of Education for its government for the transaction of business. In line with statutes of this nature, the Legislature has defined a minimum and permits the board to decide the limitations in excess of such minimum. The requirement of rules is for the guidance of the secretary, but Section 64-A provides "Such board shall *make, amend* and *repeal* rules." The last action of the board in relation to its proceedings constitutes its repealed or amended rules. There is no evidence to show that the rules in "The Manual" relating to this subject have been repealed or amended.

The Board in adopting Cushing's Manual has the rule until changed "If a motion be not seconded, no notice whatever is to be taken of it by the presiding officer." This rule even forbids the president from recognizing a motion which has not been seconded, and since nothing done at a meeting becomes a proceeding of the board until acted upon by it, neither the law nor the rules of the board require a record of a motion which is not seconded.

The board of education may require a record of motions which have not been seconded. The law has given them authority to decide. The Board of Education of the City of Bayonne has made a decision within the authority conferred upon it by statute. Whether certain advantages might accrue to individual members by having their unseconded resolutions and speeches before the Board recorded in the minutes, does not affect the right of the Board to decide the matter.

It is the opinion of the Commissioner of Education that the Bayonne Board of Education has full power to decide what shall be included in the minutes in excess of a record of action taken or things done by the Board, and that it acted within its authority in refusing to record the resolutions presented by the petitioner on November 17 and the unseconded motion of December 1.

The appeal is accordingly hereby dismissed.

March 2, 1928.

Affirmed by the State Board of Education without written opinion July 14, 1928.

ADEQUACY OF NOTICE OF ANNUAL SCHOOL ELECTION

GEORGE P. ECKERT,

Appellant,

vs.

LONG BEACH TOWNSHIP BOARD OF EDUCATION,

Respondent.

Maja Leon Berry, for Appellant.

William Howard Jeffery, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action has been brought by the above named appellant, a citizen and taxpayer of the School District of Long Beach Township, Ocean County, New Jersey, to contest the legality of the election held in that district on February 13, 1923, at which the appropriation for current expenses, building and repairing and manual training was made by the district voters for the coming year, 1923-24, and one member of the board of education was elected.

Appellant contends that the total amount voted for such expenses for the coming year, namely, $4,000, is greatly in excess of the actual need of the school district; and that owing to the failure of the District Clerk to publish the newspaper notice of such election required by statute, many persons who would have attended the meeting and voted against such budget were deprived of knowledge thereof and consequently remained away with the result that the budget was carried and the board member was elected with only four votes cast.

A hearing was conducted by the Assistant Commissioner of Education at the Court House at Toms River on Thrusday, June 7, at which hearing witnesses were heard.

In the case under consideration the election for the voting of the annual budget was held at the same time as the annual election for members of the Board of Education, and the School Law requires that in calling both annual and special elections a newspaper notice must be published by the district at least one week in advance thereof in addition to the posting of notices in at least seven public places. The appellant admitted at the hearing the posting by the District Clerk of the seven public notices required, but contended that the lack of publication of the newspaper notice renders the election void. Appellant contends, and the contention is not denied by the respondent, that there are a sufficient number of voters to change the result who allege and are willing to swear that they would have attended the election had they had knowledge thereof.

Legal authorities hold, and the ruling is supported by many States, that a substantial and not an exact compliance with a statute prescribing the method

of calling an election is sufficient in cases where the election is proved to have been made generally known to all the district voters by means of statute or otherwise, and where a full and fair expression of the popular will has been demonstrated at such election (Brown *vs.* Street Lighting District, 70 N. J. L. 762). Such substantial compliance, however, is not sufficient where it can be shown that a sufficient number of persons were deprived of knowledge of such election to change the result (Cyc. page 324, N. 73). The latter situation appears to exist in the case before us where the statutory requirement as to notice was only partially complied with, where the law designates the day only of the annual election for board of education members and contains no information as the day, to time or place of the budget election, and where such budget was actually voted upon and carried and the board member elected by only four persons, while a substantial number of voters allege that they were deprived of the right to vote by lack of knowledge of the election.

In view, therefore, of the failure of the district clerk to publish a newspaper notice required by law for calling all school elections, and in view of the fact that more than a sufficient number of persons whose votes could have changed the result of the election allege that they would have attended such meeting had they had knowledge thereof, it is the opinion of the Commissioner of Education that the validity of the election at which a $4,000 appropriation was voted for the coming year, 1923-24, and a board of education member elected in the School District of Long Beach Township cannot be sustained. It is accordingly hereby ordered that such election be set aside in its entirety.

Dated: June 27, 1923.

USE OF PASTERS ON BALLOTS AT ANNUAL SCHOOL ELECTION LEGAL

JUSTIN SHEARN,

Appellant,

vs.

MIDDLESEX BOROUGH ANNUAL SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

At the annual school election held in the Borough of Middlesex in the County of Middlesex, on February 10, 1931, 301 ballots were cast, of which 45 were declared void and rejected by the judge of the election. Justin Shearn, one of the defeated candidates, appeals for a recount of the ballots for the reason that he believes that many of the ballots rejected were valid and should have been counted, and, if counted, would result in his election. Since the number of rejected ballots could have changed the result of the election because of

the small plurality by which certain candidates were declared elected, a recount of the ballots was conducted in the office of the County Superintendent of Schools at New Brunswick on March 6, 1931, after due notice had been given to all candidates who could be affected by the recount. Both the successful and defeated candidates were represented by counsel.

Seven of the rejected ballots either show votes cast for four people, whereas only three were to be elected, or do not have crosses or plus marks in the squares before the names of the candidates. These were also rejected by the Commissioner without objection of counsel on either side.

Each of twenty-six ballots has a paster placed over a name of one of the candidates printed on the ballot. The candidate named on the paster did not receive sufficient votes to be considered in the recount. Because the paster was not placed in the spaces provided for personal choice, all of these ballots were rejected without the votes being counted for the other candidates on the ballots with crosses or plus marks opposite their names. While it is not necessary in this case to decide whether the ballot should have been counted for the person whose name appears on the paster when it is not placed in the space provided for personal choice, it is the opinion of the Commissioner that the votes for other candidates should have been counted. Counsel for respondent objected to the counting of any votes on these ballots for the reason that he considers them to be marked ballots. With this contention the Commissioner cannot agree. There is no indication of any kind that a paster was placed on any ballot to distinguish it from other ballots, but a very clear intention was shown to vote for the person named on the paster rather than for one of the candidates whose name was printed on the ballot. By counting the votes on these ballots the appellant is entitled to 21 more votes than is shown by the original tally sheet.

Two ballots were rejected because a cross had been placed in one of the squares and had then been erased and either two or three votes cast for other candidates; and ten ballots were rejected because a lead pencil line had been drawn through the name of one of the candidates or there were crosses in the squares opposite the personal choice spaces without any names having been written or pasted in the spaces. All of these were objected to on the ground that they constituted marked ballots. The Commissioner is of the opinion that all these ballots should have been counted for the candidates where crosses were properly placed before their names and that they should not have been rejected by the judge of the election.

By accepting the official result as shown by the tally sheet which was re-affirmed by a recount, with the exception of one additional vote for Mr. Shearn, the result of the election is as follows:

	Tally Sheet Original Count	Added by Counting Paster Ballots	Added by Counting Ballots with Erasures or X Opposite Blank Spaces	Added by Recount of All Ballots Not Rejected	TOTAL
Loretto E. Campbell	121	1	6	..	128
Samuel B. Frank	129*	2	4	..	133*
Justin Shearn	117	21	5	1	144*
Charles B. Tomer	153*	23	6	..	182*
Merritt Wertheim	123*	2	4	..	129

Asterisks in column one indicate those declared elected by the judge of the election on February 10.

Asterisks in column five indicate those who are declared elected by the Commissioner on March 6.

Objection was made by counsel for the respondent members to the jurisdiction of the Commissioner to conduct hearings in school elections and to the recounting of ballots. It does not seem necessary to go into the various citations of School Law to establish the authority of the Commissioner to review elections conducted under the provisions of the School Law. The Supreme Court in the case of Buren *vs.* Albertson, 54 N. J. L. 72, said:

> "We see no sufficient reason for holding that controversies over an election of school trustees are not embraced in the provisions of sections twenty-eight and thirteen. Such controversies are plainly within the fair meaning of the language employed, 'all controversies arising under the School Law,' and the considerations which would lead the Legislature to provide a speedy and inexpensive proceeding for the adjustment of disputes arising under other portions of the School Law would dictate the same policy with respect to these controversies. Even though the right to the office of school trustee is to be ultimately determined on quo warranto, there is no impropriety in its being passed upon, for immediate purposes, by such instrumentalities as the Legislature may appoint. Conger *vs.* Convery, 23 Vroom 417."

This opinion of the Supreme Court has been reaffirmed in many cases since the rendering of the above decision.

The School Law does not set forth the conditions upon which ballots may be counted or rejected. The general election laws may be considered only indicatively without having definite application to school elections.

Chapter 187, P. L. 1930, "An act to regulate elections (Revision of 1930)," provides as follows:

> Par. 205. "No ballot which shall have either on its face or back any mark, sign, erasure, designation or device whatsoever other than is permitted by this act, by which said ballot can be distinguished from another

ballot, shall be declared null and void, unless the district board canvassing said ballots or the county board, justice of the Supreme Court, or other judge or officer conducting the recount thereof shall be satisfied that the placing of said mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish said ballot * * * provided, further, that no ballot shall be declared null and void or invalid by reason of having a cross (×) or a plus (+) appearing in a square at the left of a blank space or a space wherein no name is printed."

Par. 206. "* * * Ballots which shall be declared invalid with respect to a part of the officers to be voted for or public questions to be voted upon shall be canvassed, estimated and numbered with respect to the part which is not invalid and preserved as other ballots and placed in their proper order on the string with the valid ballots."

When an election law is not specific, the voter is doubtful about the procedure to be followed. Such confusion should not cause his ballot to be declared void, if there is shown an intent to cast a valid vote. Since the laws on school elections are not so specific in relation to marking and counting of the ballots as those applying to general elections, the intention of the voter must be more liberally construed. Even in a general election under the provisions above quoted, ballots similar to those counted by the Commissioner must be declared legal ballots unless the officer believes that pasters were placed on the ballots or erasures or crosses were actually made to distinguish them, and, as above stated, there was no indication of that intention.

It is, therefore, the opinion of the Commissioner that Charles B. Tomer, Justin Shearn, and Samuel B. Frank were legally elected to membership on the Board of Education of the Borough of Middlesex for the term of three years.

March 11, 1931.

PERSONAL CHOICE VOTES FOR BOARD MEMBERSHIP COUNTED WHEN INTENTION OF VOTER IS CLEAR

ALBERT LAYTON,

Appellant,

vs.

BEDMINSTER TOWNSHIP SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

A petition for the recount of ballots cast at the annual school election in Bedminster Township, February 9, 1932, was filed by Albert A. Layton, who was defeated for membership on the Board by a plurality of one vote with four votes rejected which he claims should have been counted for him.

A recount was conducted by the Assistant Commissioner in the office of the County Superintendent of Schools of Somerset County on March 4, 1932, at which it was disclosed that appellant did not file a petition to have his name placed on the ballot and, therefore, his name was written in the personal choice space. Of the four votes in question, one was written "A. Layton," two "A. A. Layton," and one "Mr. Layton."

The School Law, 1931 Compilation, Section 145, states in relation to the names being printed upon the ballots

> "* * * provided that the names of the candidates shall be printed as they appear signed to the certificate of acceptance."

While the sample ballot printed on page 74 of the same compilation shows the surname written in full, the law above cited would indicate that if initials are used instead of the name in the filing of a petition, the initials rather than the full name would appear on the ballot. When no petition is filed, a broader interpretation would appear to be justified.

It is therefore, the opinion of the Commissioner since there was no other candidate for the position by the name of Layton that all four of the ballots should be counted. Even should the ballot which is marked "Mr. Layton" be rejected, and the other three counted, he would receive a vote sufficient to give him the second highest number of votes cast for the various candidates.

The result of the recount is as follows:

Armstrong Smith	79
Albert Layton	67
David Nevius	65
Howard Apgar	64
Walter VanPelt	62
Herman Gulick	61
William Hassenger	1

Armstrong Smith, Albert Layton and David Nevius are, therefore, declared to be legally elected to membership on the Board of Education of Bedminster Township for the three-year term.

March 8, 1932.

PART OF BALLOT LEGALLY MARKED SHOULD BE COUNTED

EDWARD T. STANTON,

Appellant,

vs.

ENGLEWOOD CLIFFS ANNUAL SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

A recount was conducted in the annual school election held in the Borough of Englewood Cliffs on February 11, 1928, by the Assistant Commissioner of Education in the office of the County Superintendent of Schools of Bergen County on March 12, 1930, for the reason that Eugenie Michel and Edward T. Stanton, who were candidates for a two-year term each received 38 votes with five ballots rejected by the election officials. All five of the ballots were rejected because in voting for members for the three-year term a line was drawn through the name of one candidate and another name written after the name which was crossed out. While it is the opinion of the Commissioner that a line drawn through a name did not affect the votes for other candidates for the three-year term, there could be no ground for rejecting the entire ballot and thereby depriving candidates of votes which they received for the term of two years when such votes were legally recorded.

A recount of the five ballots gave to Edward T. Stanton five additional votes which makes the totals for Eugenie Michel 38 and Edward T. Stanton 43. Since Edward T. Stanton has a plurality of five votes, he is accordingly elected to membership on the Board of Education of the Borough of Englewood Cliffs for the term of two years.

March 27, 1930.

CALLING OF ELECTION ON PETITION OF VOTERS

RICHARD W. WILLS,

Appellant,

vs.

THE BOARD OF EDUCATION OF UPPER FREEHOLD TOWNSHIP,

Respondent.

John Meirs, for the Appellant.

Barton B. Hutchinson, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal taken from the action of the Board of Education of Upper Freehold Township in refusing to call a meeting of the voters of the school district when petitioned to do so by more than fifty legal voters.

The law applicable to the case is found in section X of the School Law and reads as follows:

> "The Board of Education shall have power * * * to call a special meeting of the legal voters of the district at any time when in its judgment the interests of the school require it, or whenever fifty of such legal voters shall request it by petition so to do. In the notices of any special meeting, called upon petition as aforesaid, shall be inserted the purposes named in said petition so far as the same are not in conflict with the provisions of this act."

This seems by implication to be mandatory. The law requires that the Board of Education insert in the notices calling a special election the things contained in the petition, provided that these things are not in conflict with the provisions of the School Law. It thus becomes the duty of the Board of Education to determine for itself whether the things in the petition are in conflict in any way with other things in the School Law. If there is no conflict, then it is mandatory upon the Board to call a special meeting when petitioned to do so by fifty voters. In order to determine the question at issue it is well to briefly set forth the case.

At the annual election held on March 16, 1915, there was voted to be raised by special tax the following amounts of money: for current expenses of the schools, $4,100; for repairs, $400; for lot at Cream Ridge, $500; for new school at Cream Ridge, $5,000.

At a meeting of the Board of Education held on April 5, 1915, a petition was presented signed by 218 persons asking that a special meeting of the voters be called in order that the appropriations as set forth in the petition

might be substituted for the appropriations already voted. These are the propositions contained in the petition:

> "To enable the Board of Education to purchase or take and condemn land adjacent to the brick schoolhouse at Cream Ridge, for the purpose of enlarging the ground appurtenant to said schoolhouse, $200; for repairs of schoolhouse, $400; to enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the building code of the State Board of Education, $1,000; for current expenses, $3,000."

The Board deferred action on the petition at this meeting, as it did from time to time thereafter, until it was finally denied at a meeting of the Board in October, 1915.

The first purpose named in the petition is to purchase land "adjacent to the brick schoolhouse at Cream Ridge for $200." The quantity of land is not mentioned. It may be any quantity. To insert in a notice to the voters that land adjacent to the Cream Ridge brick school could be purchased for $200, without naming the quantity, is too indefinite. On such a notice voters could not know what they were voting for. Surely to insert such a meaningless proposition as that in a notice to the voters would be in conflict with common sense, and, therefore, with the law.

The next proposition in the petition is "to enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the building code of the State Board of Education," at a cost of $1,000.

The brick building at Cream Ridge is a very old building, 18 feet by 24 feet, with 8-foot ceilings and no cellar. The Board of Education had been notified by the County Superintendent of Schools that unless a new building was provided in conformity with the School Law he would proceed to formally condemn the building as unfit to house forty children and more who were in attendance at the school. Acting under his instructions, the Board of Education submitted the question to the voters at the annual election, and a majority of the voters responded in an affirmative vote, providing adequate moneys for all requirements of the school.

Article X, section 152, of the School Law, edition of 1914, says:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment."

This is plainly and positively mandatory, with no qualifying condition. The legal voters at the annual election on March 16, acting under this positive mandate in the law, gave by a majority vote an order to the Board of Education to cause to be raised by tax $5,000 to build a "proper school building, together with furniture and equipment." This also included grading, fencing and suitable outhouses.

In the petition the Board of Education is asked to insert in the notice calling a special meeting, $1,000 for a suitable building, furniture and equipment. This is an impossible amount of money for such a purpose. It would take more than half the amount for proper outhouses, furniture, heating and ventilating. The Board of Education in the exercise of its judgment decided it was in conflict with the section of the School Law above quoted, because with only $1,000 it was impossible to furnish proper school facilities according to the building code of the State Board of Education.

At the annual meeting there was voted for current expenses the sum of $4,000. The law defines current expenses as including principals', teachers', janitors' and medical inspectors' salaries, fuel, textbooks, school supplies, flags, transportation of pupils, tuition of pupils attending schools in other districts, truant officers and the incidental expenses of the schools. Many of these things are made by special statute mandatory, and all are items necessary to keep the schools open, and hence the voting of money for them by special taxation is mandatory. It would follow, therefore, that a petition containing a request to lower the amount already voted as provided by law would be a "purpose in conflict with the School Law."

If, as the counsel for the Appellant claims, the law providing for the calling of a special meeting by petition is mandatory *per se,* then by a continuous performance of fifty voters school government by petition could be substituted for government by ballot. Thus nothing in school affairs could be settled definitely and endless confusion would follow.

As a rule, Boards of Education ask for such a sum for current expenses as they find from experience is necessary to keep the schools open the length of time required by law. Upper Freehold is a school district of nine schoolhouses, fourteen teachers and a supervising principal. $4,100 is not an excessive sum for current expenses in such a district. To reduce the amount to $3,000 would result in going in debt in order to keep the schools open nine months, as required by law.

Four thousand dollars is needed in addition to the amount appropriated from State moneys in order to "provide for the maintenance, support and management of the schools" of Upper Freehold Township. To raise less than this amount would result in not providing for the proper support of the schools. In the matter of the insufficient amount proposed in the petition, there is positive conflict with the provisions of the School Law.

At the hearing in this case no evidence was introduced by the appellant to show that the schools could be kept open as required by law for the amount named in the petition for current expenses, nor that a proper school building could be furnished for the amount named.

I find, first, that it is the duty of a Board of Education, when it receives a petition signed by fifty legal voters resident in a school district asking that a special meeting be called, to ascertain whether the purposes named in the petition are in conflict with the provisions of the School Law. If the Board finds that there is conflict, then it is not bound to call such special meeting.

It is my opinion that the purposes named in this petition under consideration are each and severally plainly in conflict with the provisions of the

School Law as found in Chapter 123, P. L. 1907, and that the Board of Education of Upper Freehold Township was justified in refusing to call the special election for the purposes as set forth in the petition.

The appellant also petitioned for a recount of the ballots voted at the annual election in March, 1915. This request is refused because of not being made at a reasonable time after the election.

The appeal is dismissed.

March 22, 1916.

DECISION OF THE STATE BOARD OF EDUCATION

The papers and correspondence in this case are voluminous and the issues raised confusing, but the kernel of the matter lies in a small compass if we can get at it.

It seems that the schoolhouse at Cream Ridge, in Upper Freehold Township, was old and badly out of repair, that it had been condemned by the County Superintendent, and that the necessity for a new building, or extensive repairs on the old building, was admitted by everyone. The Board of Education of the township at the annual meeting, held March 16, 1915, submitted to the legal voters of the township the following propositions:

For building and repairing schoolhouses	$400
For current expenses	4,100
For purchase of land from D. L. Weiss	500
For erection and equipment of new schoolhouse	5,000

By a majority vote of those present the propositions were duly endorsed and declared carried.

But there had been a minority opposition displayed at the meeting. This minority after the annual meeting got up a petition signed by more than fifty voters asking that a special meeting be called for the purpose of submitting to the voters at the time, for their approval or rejection, by vote of the majority of those present, the following appropriations:

For purchase of land	$200
For repairs to schoolhouse	400
To enlarge, repair and furnish the brick house at Cream Ridge, making the same comply with the minimum requirements of the Building Code of the State Board of Education	1,000
For current expenses	3,000

which appropriations, when made, "shall be in lieu of the appropriations submitted to the voters at a meeting held Tuesday, March 16, 1915."

Both parties to this controversy seem to have agreed that there should be something done about the condemned schoolhouse, but they disagree upon the amount of the improvement. The contest is over how much money should be expended, and the second call for a meeting was to be in the nature of a

recall. This is the kernel of the matter to which reference has been made, and all the side issues brought in are merely so much confusion and distraction. The case turns upon the legality of the acts of the Board of Education, first, in declaring the appropriations at the annual meeting of March 16, 1915, as duly and legally voted, and second, in denying the subsequent petition of the more than fifty voters, calling for a meeting to pass appropriations in lieu of those already passed.

Irregularities in the manner of voting and counting at the annual election are charged by the appellant, but we do not think them proven. We assume the legality of the first election and venture to think it would not have been questioned had the sums appropriated been smaller in amount. The legality of the second act of the Board of Education in refusing to call a special meeting on the petition of more than fifty voters is another matter, and is to be decided upon the interpretation of Article 7, section 97, paragraph X, of the School Law (1914). That paragraph reads as follows:

> "The Board of Education shall have power to call a special meeting of the legal voters of the district at any time when in its judgment the interests of the school require it, or whenever fifty of such legal voters shall request it by petition so to do. In the notices of any special meeting, called upon petition as aforesaid, shall be inserted the purposes named in said petition, *so far as the same are not in conflict with the provisions of this act.*"

It will be observed that the wording here is not "shall call a special meeting, etc.," but "shall *have power* to call a special meeting." The phrase stands at the head of the section and qualifies fourteen paragraphs, all of them more or less requiring the use of discretion. If the words "have power" be disregarded, then such paragraphs as VIII would read that the Board *"shall* suspend or dismiss pupils from school," or paragraph V, *"shall* take and condemn land and other property for school purposes"—mandatory readings that obviously were never intended by the Legislature. School boards were given the *power* to do these things, but were not compelled to do them by legal mandate. We think the reading of paragraph X should be that school boards have the *power* to call special meetings, but are not compelled to do so if in their judgment the interests of the school do not require them. It will be noted that the first part of the opening sentence reads: "The Board of Education shall have power to call a special meeting of the legal voters of the district at any time *when in its judgment the interests of the school require it,* or whenever fifty of such legal voters shall request it by petition." This specifically reposes faith in the *judgment* of the Board as regards its own act, and implies a vesting with discretion as to the acts of any fifty petitioning voters. The intent of the law seems to be that the Board, by its own initiative, or by a reminder from fifty legal voters, could, in its judgment, call a special meeting.

But, as regards the calling of this special meeting on the petition of fifty voters, there is a proviso in paragraph X which seems to put still more discretion and authority in the Board of Education. This proviso requires

that in the aforesaid petition "shall be inserted the purposes named" for which said meeting is called. These purposes shall be inserted in the petition *"so far as the same are not in conflict with the provisions of this act."* Evidently the Board was clothed with authority to deny the petition if it should in its purposes prove conflicting with what has been called "this act."

What "act" was here intended? None other than the general school act, entitled "An act to establish a thorough and efficient system of free public schools," etc., of which Article 7, section 97, paragraph X, is a part and parcel. With what provisions of this "act" would the purposes set forth in the petition of the more than fifty voters in Upper Freehold Township for a special meeting be in conflict? Generally with the provisions of this very section 97, and specifically with paragraph IV, which empowers the Board of Education "to purchase, sell and improve school grounds; to erect, lease, enlarge, improve, repair or furnish school buildings, and to borrow money therefor with or without mortgage; *provided*, that for any such act it shall have the previous authority of a vote of the legal voters of the district." The Board of Education had authority given it in this paragraph to build a new schoolhouse and equip it; it had also "the previous authority of a vote of the legal voters of the district." Any new meeting called for the specific purposes of undoing or nullifying the authority thus given would be "in conflict with the provisions of this act." If permitted or allowed it would render nugatory or ineffective any action that the Board might take. For if the fifty petitioners were defeated on their first petition they could immediately get up a second or third or tenth petition, and thus go on indefinitely to the defeat of the law and to the rendering void of the purposes of the school system.

We think the Board of Education of Upper Freehold Township was within the law in declining to call a special meeting at the instance of the more than fifty voters; and that the annual meeting of March 16, 1915, and the vote upon the appropriations then and there proposed were legal and should not be interfered with.

The appeal is dismissed.

July 1, 1916.

MORE THAN ONE SCHOOLHOUSE MAY BE DESIGNATED BY BOARD OF EDUCATION FOR A SCHOOL ELECTION

H. P. TUNISON,

Appellant,

vs.

BOARD OF EDUCATION OF WARREN TOWNSHIP, SOMERSET COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition in this case asks that the annual school election held in Warren Township on February 11, 1930, be set aside upon the grounds that the Board of Education designated more than one schoolhouse to be used as polling places for the election.

No hearing was conducted in this case for the reason that the Board of Education admits that it designated more than one polling place for the annual school election. An opportunity for oral argument was granted by the Commissioner on April 2, 1930, at which the appellant was present to state his views of the law.

Section 12 (a) of Chapter 233, P. L. 1929, reads in part as follows:

> "12 (a) For the purpose of holding said school elections, the board of education shall provide at least one suitable polling place in a schoolhouse situated within the school district. In school districts in which there are two or more schoolhouses, the board of education shall provide an additional polling place in any such schoolhouse, whenever a petition signed by not less than five per centum (5%) of the registered qualified voters of said school district shall request that said schoolhouse be designated as a polling place for such elections * * *"

It is to be noted that this provision requires that the board of education *shall provide at least one polling place.*

It is the opinion of the Commissioner that the mandatory provision requiring "at least one" indicates the permission to establish more than one when in the board's discretion it is advisable to do so, and this permissive interpretation in no way conflicts with the second sentence which says that in school districts in which there are two or more schoolhouses the board of education shall provide an additional polling place upon petition.

The Commissioner cannot agree with the contention of the appellant that the Board can upon its own volition establish but one polling place or that only one polling place can be opened upon petition. A reasonable interpretation of the act is to the effect that a board of education shall open an additional polling

place upon a petition of five per centum of the legal voters and when the qualified voters of one section of a large district present a petition for the opening of the school building in that section, it does not act to deprive the voters in other parts from petitioning to have polling places established in their respective buildings.

The Board of Education of Warren Township acted within its authority in establishing polling places in more than one school building. The election is, therefore, declared to be valid and the appeal is accordingly hereby dismissed.

April 5, 1930.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant in this case contends that the Commissioner was wrong in holding that the Board of Education of Warren Township acted within its authority in providing polling places in more than one school building for an election of members of the Board of Education held on February 11, 1930. The ground stated for his contention is that the Board could not under the law in effect on that date designate more than one polling place in the absence of a petition of 5 per centum of the registered qualified voters of the district.

Section 12 (a) of Chapter 233 of the Public Laws of 1929 provides that the "board of education shall provide at least one suitable place in a schoolhouse situated within the school district," and that in districts where there are two or more schoolhouses it "shall provide an additional polling place in any such schoolhouse, whenever a petition signed by not less than 5 per centum of the voters" shall so request.

In our opinion, the statute above quoted is properly interpreted to mean that in districts having a plurality of schoolhouses, boards of education have discretion to designate more than one schoolhouse for holding elections, but when 5 per centum of the voters in the district file a petition requesting that an additional polling place be provided in a schoolhouse, the Board is compelled to do so.

It is therefore recommended that the Commissioner's opinion be affirmed.

July 12, 1930.

OTHER THAN ALPHABETICAL ARRANGEMENT OF CANDIDATES' NAMES ON BALLOT GROUND FOR INVALIDATION OF ANNUAL SCHOOL ELECTION

FRANK H. ENGLE and BENJAMIN GREEN,
Appellants,
vs.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY,
Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellants, who are citizens, residents and voters of the School District of the Township of Hainesport, Burlington County, bring this petition to set aside the election of school board members at the annual election held in said district February 14, 1928, and pray that an order be issued for a new election for the purpose of legally electing members to the Board.

Counsel for appellants contends that the election was illegal in that the official ballot used in said election was contrary to law because the names of the respective candidates were not placed upon the same according to the alphabetical order of their surnames as required by Paragraph 7, Section 118 of the 1925 Edition of the New Jersey School Law, and for the further reason that the district clerk did not sit for the purpose of registering voters the evening before the election as prescribed by law.

No hearing was conducted in this case since the official ballot discloses and the district clerk admits the allegation that the surnames of the candidates were not arranged alphabetically.

Paragraph 7, Section 118, 1925 Edition of the School Law provides:

> "The names of the candidates shall be printed upon the official ballot according to the alphabetical order of their surnames and the grouping of two or more candidates upon any ballot to be used for the election of members of the said district board of education is hereby prohibited."

In the case of the contested annual election in Hillsborough Township, Somerset County, decided June 9, 1927, the Commissioner held that such election must be set aside as illegal because of the fatal defect of not arranging the names upon the ballot alphabetically as required by the above provision of law.

The arrangement of the names being so definitely required and the possibilities of an illegal arrangement being prejudicial to candidates, it is the opinion of the Commissioner that this failure to comply with the law is sufficient in itself to invalidate the election.

It, therefore, does not seem necessary to go into the effect of the registration of voters on the evening preceding the election.

Petitioners ask for a new election.

School Law, 1925 Edition, Section 116, provides:

> "An election of members of the board of education shall be held in each township, incorporated town or borough school district, on the second Tuesday in February in each year * * *"

and Section 35, Paragraph IV enumerates among the duties of the County Superintendent of Schools:

> "To appoint members of the board of education of a new township, incorporated town or borough school district and for any school district under his supervision which shall fail to elect members at the regular time. Such appointees shall serve only until the next election in the district for members of the board of education."

The above statutes make full provisions for appointments of board members when the people fail to legally elect at an annual meeting.

The election for members of the Board of Education in the School District of Hainesport Township is hereby set aside and the County Superintendent is accordingly authorized to fill such vacancies.

March 7, 1928.

MISSPELLING OF NAME, THE USE OF AN INITIAL, OR THE OMISSION OF ONE OF THE CHRISTIAN NAMES DOES NOT INVALIDATE A VOTE

JOSEPH FLACH,

Appellant,

IN RE MADISON BOROUGH ANNUAL SCHOOL ELECTION.

DECISION OF THE COMMISSIONER OF EDUCATION

The annual school election officials in the Borough of Madison on February 13, 1935, declared as duly elected for the three-year term Robert H. McBride and Burr L. Chase, who received 137 and 132 votes, respectively. Joseph Bernard Flach, who was a candidate and whose name was variously written or printed on the ballot, was credited only with the votes written or printed "Joseph Flach." Because a number of apparent votes for him were counted separately by the election officials, due to the variation in the spelling, Mr. Flach appealed for a recount which was conducted by the Assistant Commissioner on March 25, 1935, and shows votes cast for candidates as follows:

Robert H. McBride	137
Burr L. Chase	131
Joseph Flach	110
Jos. Flach	3
Joseph Flack	16
J. B. Flachs	1
Joe Flach	2
J. B. Flach	1
Joseph B. Flack	1
Joseph F. Flach	1

Mr. Flach and Mr. Chase were present with counsel, who viewed the recount and made no protest to the counting of the ballots which established the results above set forth. The names of Robert H. McBride and Burr L. Chase were printed upon the ballot, and the Flach votes were cast by the use of stickers or pasters. Mr. Flach testified that he is the only person by the name of Joseph Flach living in the Borough of Madison, and no contradictory testimony was presented.

Counsel for Mr. Chase contends that the Commissioner is without jurisdiction to hear a controversy affecting title to office, and that the School Election Law, Chapter 211, P. L. 1922, permits only as candidates those who have been duly nominated by petition, as therein provided.

The Commissioner cannot agree with the contention of counsel to the effect that the Commissioner of Education and State Board of Education have no jurisdiction over annual school election controversies. The Supreme Court in ruling upon this point in Koven *vs.* Stanley, 87 Atl. Rep. 89, does not deny the jurisdiction of the Commissioner or State Board of Education "to pass on the question for immediate purposes" or as "a supplement to the election machinery;" but, in deciding to issue a writ of *quo warranto* and assume jurisdiction immediately without waiting to appeal to the educational tribunals, the Court gave as its reason the fact that its remedy would be sure to prove effective, whereas the educational tribunals could not enforce any ouster of an incumbent from a public office should they decree it. Moreover, in the case of Buren *vs.* Albertson, 54 N. J. L. 72 (cited by the Court in the Koven *vs.* Stanley case), Justice Dixon held in part as follows:

> "We see no sufficient reason for holding that controversies over an election of school trustees are not embraced in the provisions of Sections 28 and 13. Such controversies are plainly within the fair meaning of the language employed 'all controversies arising under the School law,' and the considerations which would leave the Legislature to provide a speedy and inexpensive procedure for the adjustment of disputes arising under other portions of the School Law, would dictate the same policy with regard to these controversies. Even though the right to the office of school trustee is to be ultimately determined on *quo warranto,* there is no impropriety in its being passed upon, for immediate purposes, by such instrumentality as the Legislature may appoint."

In support of the contention that votes could be cast for only Robert H. McBride and Burr L. Chase, who were nominated by petition, and that any other votes were illegal, counsel cites Chapter 211, P. L. 1922, Section 2, which reads:

> "Candidates to be voted for at the regular school election for members of the district board of education shall hereafter be nominated directly by petition, as hereinafter provided."

The following six sections set forth the procedure for nomination by petition, by which the names of candidates may be printed upon the ballot. Section 6 of this act has been amended by Chapter 136, P. L. 1933, to provide that the petition must be filed twenty days, instead of five days, before the date of the election, as provided in the original act. Counsel holds that this amendment expressed the Legislative intent that the voters be given ample opportunity to consider the qualifications of the candidates for the office, and that persons whose qualifications could not be so considered would be ineligible for election. In opposing this argument, attorney for Mr. Flach refers to the sample ballot under Section 10, which shows the same number of blank spaces as there are candidates to be elected for the different terms, and to the preceding section, the latter part of which reads:

> "Immediately after the space allotted to the names of candidates there shall be as many ruled blank spaces as there are members to be voted for. Immediately to the left and on the same line with the name of each candidate and blank space there shall be printed a square the same size of type in which the name of the candidate is printed, * * *"

He holds the statute clearly shows that these spaces were made for the use of pasters or for the writing in of the names of personal choice candidates, which is the common procedure in all other municipal elections in this State.

The use of pasters and the writing of the names upon ballots have been sustained by the Commissioner in Shearn *vs.* Middlesex Borough, 1932 Compilation School Law Decisions, 971; Cramer *vs.* Washington Township, 1932 Compilation School Law Decisions, 985. The latter decision was affirmed by the State Board of Education.

The principal question in this controversy is whether the intention of the voter shall be considered in relation to the spelling of the name, or whether the vote can be counted for a person only when the full name is correctly written or printed. The full name of Mr. Flach is Joseph Bernard Flach, and no ballot was cast with the name so written or pasted upon it; neither were the full names of Mr. McBride and Mr. Chase printed on the ballot, but only the initials of their middle names, which is in accordance with the sample ballot under Section 10 of Chapter 211, P. L. 1922.

While the General Election Law is not binding in any way upon school elections, its provisions show the legislative ruling as to counting ballots where the matter has been brought to the attention of the Legislature. The latter part of Paragraph 205 of that act reads as follows:

" * * * provided further, that no ballot cast for any candidate shall be invalid by reason of the fact that the name of such candidate may be misprinted, or his Christian name or his initials may be omitted; provided, further, that no ballot cast for any candidate shall be invalid by reason of the use of any paster permitted by this act on which the title of office may be printed or the name of such candidate may be misprinted or part of his Christian or surname or initials may be omitted, or that by reason of the fact that the voter in writing the name of such candidate may misspell the name or omit part of his Christian name or surname or initials; * * *"

In the case of Albert Layton *vs.* Bedminster Township Board of Education, 1932 Compilation School Law Decisions, 968, the Commissioner ruled upon the counting of ballots, as follows:

"A recount was conducted by the Assistant Commissioner in the office of the County Superintendent of Schools of Somerset County on March 4, 1932, at which it was disclosed that appellant did not file a petition to have his name placed on the ballot and, therefore, his name was written in the personal choice space. Of the four votes in question, one was written 'A. Layton,' two 'A. A. Layton,' and one 'Mr. Layton.'

"The School Law, 1931 Compilation, Section 145, states in relation to the names being printed upon the ballots

' * * * provided that the names of the candidates shall be printed as they appear signed to the certificate of acceptance.'

"While the sample ballot printed on page 74 of the same compilation shows the surname written in full, the law above cited would indicate that if initials are used instead of the name in the filing of a petition, the initials rather than the full name would appear on the ballot. When no petition is filed, a broader interpretation would appear to be justified.

"It is, therefore, the opinion of the Commissioner since there was no other candidate for the position by the name of Layton that all four of the ballots should be counted."

It is clearly evident that the votes cast for Mr. Flach, with the name variously written, were intended for Joseph Bernard Flach, and in accordance with the decision of the Commissioner of Education in Layton *vs.* Bedminster Township, above cited, they should have been counted for Mr. Flach, giving him a total of 135. Since Robert H. McBride received 137 votes, Joseph Flach, 135, and Burr L. Chase, 131, with only two candidates to be elected, Robert H. McBride and Joseph Flach are declared to be legally elected to membership on the Board of Education of the Borough of Madison.

March 27, 1935.

RECOUNT OF ANNUAL SCHOOL ELECTION BALLOTS

GEORGE W. EVANS,

Appellant,

vs.

CLEMENTON TOWNSHIP ANNUAL SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

George W. Evans, a candidate for the three-year term on the Board of Education of the Township of Clementon, Camden County, appeals for a recount of the ballots cast at the annual school election held February 13, 1929, for the following reasons: there was a plurality of only ten votes between the number cast for him and that cast for Anthony L. King, who received the least number of votes of the candidates declared elected, forty-three ballots many of which were marked for appellants were rejected by the election officials, there were disagreements as to the counts between the two officials who tallied in one district, and there was a difference of opinion between the citizens and election officials as to the counting of certain ballots in other districts. Because of the large number of rejected ballots in relation to the plurality, a recount of the rejected ballots was granted and testimony was taken to establish sufficient reason for a recount of the approximately fifteen hundred other ballots voted in the four election districts.

A hearing was conducted in the Court House at Camden on Thursday, March 7, 1929, at which the candidates declared elected and those declared defeated were represented by counsel. The testimony discloses an intention on the part of the officials to conduct the election and count the ballots in accordance with the law, but shows a number of ballots counted about which there was a difference of opinion, and several occasions in one district when the tally sheets were not in agreement.

Accordingly a recount of all the ballots was conducted on Tuesday, March 12, with the following result:

	George W. Evans	Walter G. Gerow	Edwin Kirkbride	Anthony L. King	W. E. H. Simpkins	Alex. Watson
Lindenwold	342	373	333	350	322	371
Somerdale	81	160	76	181	69	162
Garden Lake ...	109	36	103	37	96	42
Clementon Hgts.	162	127	159	118	159	120
Rejected ballots (all districts)	7	1	4	1	5	3
	701	697	675	687	651	698
Rank	1	3	5	4	6	2

There were 20 of the ballots counted by the Assistant Commissioner which were objected to by counsel for the defendants. On each of these ballots there were crosses opposite three or less names, but there was an attempt on the part of the voter to either cross out or erase a mark made in another square; but in each case the intent of the voter seems to be clear. These ballots are marked in evidence from 1 to 20 and when counted contributed to the above result as follows:

Evans	17
Gerow	5
Kirkbride	15
King	3
Simpkins	14
Watson	2

There were 14 ballots counted by the Assistant Commissioner and also objected to by counsel each of which appears to be marked plainly in the squares for three or less candidates, but in addition to the crosses there was on most of such ballots a cross in a square opposite a blank space and in a few cases a plus following the name prefixed by a cross. This group of ballots is numbered serially beginning with 1A and when counted contributed to the total as follows:

Evans	11
Gerow	4
Kirkbride	8
King	2
Simpkins	11
Watson	3

There were 6 ballots rejected in the recount because there was not a cross or plus mark in the square in front of the name, although crosses appeared after the names. Even though it might be considered that the intent of the voter could be ascertained in these ballots, they do not meet the statutory requirement of having the plus or cross mark in the square before the name. This group of ballots is numbered serially beginning with 1B.

There were 7 ballots in which there were four or more crosses before the names of candidates with only three to be elected. There was some discussion as to whether some of these marks were more distinct than others and, therefore, should be counted, but the marks do not in the opinion of the Commissioner clearly show the intent of the voter and the ballots were accordingly rejected. These are numbered serially beginning with 1C.

There was one ballot rejected in the recount which had three crosses in the squares before the names which also had a cross after each of the first four names. These latter crosses were entirely different from those in the squares and indicated marking by another person. This ballot is numbered 1D.

Counsel for the defendants submitted testimony which was not contradicted to show that the ballots, tally sheets and poll lists were not sealed by the

election officials at the respective polling places, but that the ballot boxes were collected by the district clerk, who kept them locked for a day or two, and then wrapped the ballots and proceedings of each district separately and transmitted them to the County Superintendent of Schools. During the recount of the ballots cast in the Lindenwold district, it was noted there was a skip in the numbering of ballots as they were strung, after being counted at the election. The total missing numbers was nine. The person numbering the ballots was given opportunity to testify that she did not make the error while numbering, but she did not so testify.

Counsel also requested the right to submit further testimony to show that the packages when opened for the recount did not reveal the ballots tied in the same manner as they were placed in the ballot boxes by the officials. The right to submit such testimony within ten days from the date of this decision was granted and, therefore, this case may be reopened and a supplementary decision rendered in accordance with the testimony and argument on this point.

From an examination of all the proceedings and a review of the testimony there was in the opinion of the Commissioner no evidence of fraudulent acts, and since George W. Evans, Alexander Watson and Walter G. Gerow received the three highest number of votes for the three-year term, they are hereby declared elected for the term of three years as members of the Clementon Township, Camden County, Board of Education.

March 15, 1929.

WHERE NUMBER OF ILLEGAL BALLOTS CAST IS IN EXCESS OF PLURALITY OF ANY CANDIDATE, ELECTION IS VOID

IN THE MATTER OF THE APPLICATION OF RALSTON WEEKS FOR A RECOUNT OF THE BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition in this case sets forth that there were two vacancies for the three-year term to be filled on the Board of Education of Shamong Township. Through an error in the printing of the ballots, the directions to the voters were "Vote for three" whereas they should have been "Vote for two." The election officers counted all the votes regardless of whether the ballot contained votes for three or for two candidates. Because of the belief of the petitioner that this was not the proper way to count the votes, a recount was requested, which was conducted in the office of the County Superintendent of Schools of Burlington County, Mount Holly, on March 31, 1936, and shows legal votes for the candidates as follows:

Raymond Abrams	92
Harley Wright	82
Lewis Giberson	79
Ralston Weeks	73

There were twenty-four ballots having crosses before the names of three candidates. It is impossible to determine which candidates would have received the votes if the voter had been properly instructed to vote for two only. These ballots were, therefore, rejected so far as they affected the votes for the three-year term. Since no candidates had a plurality in excess of the number of ballots disqualified through the error in printing, the election is hereby declared void. The County Superintendent of Schools is directed to appoint members to serve until the next election in the district in accordance with Chapter 1, P. L. 1903, S. S., Section 25, subsection IV, which reads as follows:

> "To appoint members of the board of education for a new township, incorporated town or borough school district and for any school district under his supervision which shall fail to elect members at the regular time. Such appointees shall serve only until the next election in the district for members of the board of education."

April 2, 1936.

RECOUNT OF ALL BALLOTS CAST AT ANNUAL SCHOOL ELECTION DENIED WHEN REJECTED VOTES ARE INSUFFICIENT TO CHANGE RESULT

IN THE MATTER OF THE APPLICATION OF WILLIAM J. MACINTOSH FOR A RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF RUMSON, MONMOUTH COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

A recount of the ballots cast at the annual school election in the Borough of Rumson was requested by the petitioner who alleges that a person checking the ballots showed a variation of approximately eleven votes in favor of the petitioner from that announced by the judge, that there was a difference of only three votes between the number cast for him and for Dennis K. Byrne who received the least number of votes of those declared elected, that the election board was favorable to his opponent, and that four ballots were rejected for reasons that he did not know.

The recount was opposed by Mr. Byrne principally on the allegation that the ballots remained unsealed from approximately midnight on Tuesday, February 11, until Thursday morning, February 13.

A hearing was conducted in the Court House at Freehold on Friday, March 27, at which time the four rejected ballots were reviewed and determined to have been legally rejected. Since these ballots did not affect the result of the election as announced by the officials, several persons were sworn and testified as follows:

Mr. Richard Rogers, who kept a separate tally, stated that his tabulation gave Mr. MacIntosh fourteen votes above those received by Mr. Byrne; but the petitioner stated that with the exception of a few minutes he watched the chairman count all the ballots and did not object to the ruling upon any vote, and that after the announcement of the result he congratulated Mr. Byrne upon his election. Furthermore, the two election officials who tallied the vote were present at the hearing and the one who was called to testify stated that whenever comparisons were made, both agreed upon the tally for the various candidates. It was also admitted by the petitioner that a member of the Board of Education friendly to him watched the tallying most of the time and made no objection to the recording of any vote.

Due to the fact that a recount of the rejected ballots did not affect the result of the election as announced by the officials, that the testimony showed the petitioner watched the counting of the ballots, and that one of his friends viewed the tallying of the votes and neither found cause for objection, a recount of all the ballots cast was denied. The petition is accordingly dismissed.

April 2, 1936.

THE NUMBER OF PEOPLE DENIED BALLOTS MUST EXCEED PLURALITY TO AFFECT ELECTION OF MEMBER OF BOARD OF EDUCATION

GEORGE E. MASON,

Appellant,

vs.

LACEY TOWNSHIP ANNUAL SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Upon the appeal of George E. Mason the procedure in the annual school election in Lacey Township was reviewed by the Assistant Commissioner of Education at Toms River on March 25, 1930.

The appeal was brought on the grounds that just before the time set for the closing of the polls the supply of ballots became exhausted. The officials in charge of the election considered that the lack of sufficient ballots invalidated the election and accordingly declined to count the ballots. The voters who were unable to secure ballots and who were present in time to be entitled to them were counted by the election officials and the ballot box was then sealed and transmitted to the County Superintendent of Schools.

At the hearing the testimony of Charles H. Jackson, District Clerk, to the effect that there were thirteen people unable to secure ballots was corroborated by William Yarrington and Mrs. Sadie Parker, the president of the Board of Education. Mr. Joseph Parker said he was sure there were not more than fourteen who were denied ballots. There was no one present who would testify to a larger number than that stated by Mr. Parker.

The ballots were counted with the following result:

Three-Year Term

Charles Grant	71 votes
Wilson Jones	51 "
George E. Mason	49 "
Ralph Penn	26 "
Frank Britton	30 "
Harry Bunnell	10 "

One-Year Term

William Yarrington	63 votes
Harry Bunnell	3 "
Ralph Penn	2 "
Adfur Bunnell	1 "

Ballots were rejected as follows: Six ballots with names written in, but without crosses in the squares before them; 4 ballots with crosses before more than three names with only three to be elected; 4 ballots with names written in or crosses made with other than black ink or black lead pencil.

It is the opinion of the Commissioner that in the case of insufficient ballots the will of the people as expressed by the ballots cast should not be affected, unless the number of people denied ballots equals or exceeds the plurality of any of the candidates who received the highest number of votes for the vacancies to be filled. Since the votes cast for Charles Grant, Wilson Jones, and George E. Mason for the three-year term and the votes cast for William Yarrington for the one-year term exceed the number of people denied ballots at the annual school election, they are hereby declared elected for the respective terms as members of the Board of Education of Lacey Township.

March 27, 1930.

ERASURES OR IMPROPER MARKS ON BALLOT DO NOT INVALIDATE LEGAL MARKINGS

CHARLES V. MEYER,

Appellant,

vs.

EAST RUTHERFORD ANNUAL SCHOOL ELECTION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

An appeal for a recount of the ballots cast at the annual school election February 11, 1930, in the Borough of East Rutherford was made by Charles V. Meyer, one of the candidates for an unexpired term of two years, for the

reason that he received 307 votes and Ira J. Davey, another candidate, received 308 votes and a large number of ballots were set aside and not counted because of irregularities in voting for members for other terms or propositions upon the ballot.

A recount of the rejected ballots was conducted by the Assistant Commissioner of Education on March 12, 1930. There were six candidates for the three-year term with the direction on the ballot to vote for three. On ten of the ballots more than three of the names of the six candidates had crosses in the squares opposite the names of the candidates and for that reason the entire ballot was rejected although they were legally marked for the two-year term, the one-year term, and the propositions submitted. Four ballots were rejected because with one to be elected for the one-year term crosses had been placed in squares before two names although the remainder of the ballot was legally marked. Crosses had been erased on three or four ballots and such ballots were rejected because erasures were discernible. One ballot was not counted for the reason that a cross was placed in the square before the name and another cross was placed at the right of the name. All of the ballots that were legally marked for the two-year term were counted by the Assistant Commissioner which includes the one ballot where a cross was placed in the square before the name and a cross following the name.

Sub-section 18 of Section 120 of the 1928 Compilation of the School Law after outlining the procedure in voting for members of the Board of Education and for the propositions upon the ballot reads in part as follows:

> "If the voter makes an X mark in black ink or black pencil in the square to the left of and opposite the word 'Yes,' it shall be counted as a vote in favor of said proposition.
>
> "If the voter shall make an X mark in black ink or black pencil in the square to the left of and opposite the word 'No,' it shall be counted as a vote against such proposition; and in case no marks shall be made in the square to the left of and opposite the word 'Yes' or 'No,' it shall not be counted as a vote either for or against such proposition."

It is the opinion of the Commissioner in accordance with the above provision that a cross must be placed in the square before the name in order that the vote may be counted, but in the absence of a provision that a mark after the name shall disqualify the vote, the cross in the square before the name with a cross following the name should be counted as a vote for the candidate. The general election law, while having no application to the school elections, provides as amended in Chapter 322, P. L. 1926, that a ballot so marked shall be counted unless the district board of election, a Justice of the Supreme Court or other officer conducting the recount shall be satisfied that such mark was intended to identify or distinguish it. It accordingly appears that a ballot marked with a cross made in the ordinary manner after the name with a cross before the name would not be rejected in a general election where a special provision applies to such ballots. In the absence of any provision in the School Law regarding other marks on the ballot or erasures, ballots should be counted if properly marked in the square even though other marks or erasures appear on

the ballot unless the other markings are extremely irregular with intention to make it other than a secret ballot.

A recount of the ballots rejected for the above reasons gave 3 votes in favor of Charles V. Meyer and 13 ballots in favor of Ira J. Davey. Since Mr. Meyer's original vote was 307, the 3 additional votes cast for him gives him a total of 310; and Mr. Davey with an original vote of 308 plus 13 votes from the rejected ballots gives him a total of 321. It is, therefore, the opinion of the Commissioner that since Mr. Davey received the highest number of votes for the unexpired term of two years, he is elected to membership on the Board of Education of the Borough of East Rutherford.

March 27, 1930.

CROSS OR PLUS MARK PRINTED ON PASTER DOES NOT CONSTITUTE VALID VOTE

IN THE MATTER OF THE APPLICATION OF CHARLES H. MOORE FOR A RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN JACKSON TOWNSHIP, OCEAN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The results as announced by the officials at the annual school election held February 13, 1935, in Jackson Township, Ocean County, show votes for candidates for membership on the Board of Education, as follows:

George W. Gibson	93
Charles H. Moore	61
Fay Kutcher	123

Charles H. Moore petitions for a recount of the ballots on the ground that many of the votes cast for Fay Kutcher were by paster upon which the cross was printed in the square before the name, and contends that such votes were illegal and, if they had not been counted, would result in petitioner's election.

A recount was conducted by the Assistant Commissioner of Education in the Court House at Toms River on March 7. Ballots marked with a cross or plus in the square at the left of the name gave to each of the candidates the following vote:

George W. Gibson	93
Charles H. Moore	61
Fay Kutcher	23

There were 99 ballots upon which there were pasters with the name of Fay Kutcher and only a printed cross in the square before his name.

The official ballot, as illustrated under Section 10 of Chapter 211, P. L. 1922, requires that there shall be placed above the names of the candidates instructions to the voters as follows:

> "To vote for any person whose name appears on this ballot mark a cross (X) or plus (+) mark with black ink or black pencil in the place or square at the left of the name of such person."

Furthermore, Section 18 of this act, in which provision is made for other propositions to be submitted to the voters, reads:

> *"If the voter makes an X mark* in black ink or black pencil in the square to the left of and opposite the word 'Yes,' *it shall be counted as a vote* in favor of such proposition."

On these paster votes for Fay Kutcher, the voter did not personally make the mark and, therefore, the votes were not cast in accordance with the statute, and should not have been counted by the election officials. Since there were only two candidates to be elected and George W. Gibson and Charles H. Moore received 93 and 61 votes respectively, they are declared to be elected to membership on the Board of Education of Jackson Township.

March 21, 1935.

USE OF PASTERS ON ANNUAL SCHOOL ELECTION BALLOTS IS LEGAL

WILLIAM PEPPER,
IN RE ANNUAL SCHOOL ELECTION IN TABERNACLE TOWNSHIP, BURLINGTON COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

William Pepper, one of the defeated candidates for membership on the Board of Education of Tabernacle Township, Burlington County, petitions the Commissioner of Education for a review of 64 ballots alleged to have been illegally rejected by the annual school election officials. Appellant contends that the recount of such ballots would result in his election.

Upon notice to all candidates for whom votes were cast at the election, and to each of the election officials, the Assistant Commissioner in Charge of Controversies and Disputes conducted an investigation in the office of the County Superintendent of Schools of Burlington County, and reviewed the 64 rejected ballots. Two were properly rejected because there were crosses before more than three names with only three to be elected. One ballot for Caleb Rogers and Harvey Wells was not counted because there was but a single oblique mark and not a cross before those names. It is the opinion of the Commissioner that the officials properly refused to count these votes for Mr.

Rogers and Mr. Wells. Of the 61 remaining ballots, 59 had a single paster attached bearing the names of Philip Gerber, Clifford Worrell, and William Pepper, with a square printed before each name and a cross made by lead pencil in each of the squares. These ballots were rejected by the election officials for the reason that the paster, instead of being over the three blank spaces below the names of candidates printed on the ballot, covered the names of the four regularly nominated candidates. Two other ballots had pasters with the names of Philip Gerber and William Pepper marked and placed over other names in the manner above described, and these were rejected for the same reason.

The following table shows the election returns as signed by the officers, and the result, if the paster votes had been counted:

	Result Determined by Election Officials	Additional Paster Votes	Total Including Paster Votes
A. Elmer Harvey	78	0	78
William Pepper	43	61	104
Caleb Rogers	60	0	60
Harvey Wells	72	0	72
Philip Gerber	17	61	78
Clifford Worrell	16	59	75

Counsel represented one or more of the candidates declared to be elected. It was his opinion that some of the pasters were marked before they were handed to the voters, and, upon inquiry as to whether witnesses were present to so testify, was informed that they were not. It was counsel's contention that the ballots were properly rejected because the pasters were not placed in the spaces indicated for personal choice candidates. He specifically referred to Section 14 of Chapter 211, P. L. 1922, as amended by Chapter 91, P. L. 1925, which states that the voting shall be in accordance with the instructions printed upon the ballot which reads:

> "To vote for any person whose name appears on this ballot mark a cross (X) or plus (+) mark with black ink or black pencil in the place or square at the left of the name of such person."

The only indications that voters may cast ballots for others than those whose names appear on the ballot are: the form of ballot which is set forth in Section 10 of the above act, and the provision in Section 9, which reads:

> "Immediately after the space allotted to the names of candidates there shall be as many ruled blank spaces as there are members to be voted for. Immediately to the left and on the same line with the name of each candidate and blank space there shall be printed a square * * *"

A decision of the Commissioner of Education, which is binding until reversed (Section 10, Chapter 1, P. L. 1903, S. S.) held in the case of Shearn *vs.* Middlesex Borough (p. 971, 1932 Compilation of School Law Decisions)

that pasters placed in the personal choice spaces with a plus or cross in the square before the name should be counted. It, therefore, appears that the public, from a diffusion of information relative to the above decision, understands that pasters may legally be used in school elections.

The sole question remaining at issue in this case is whether votes could be counted for those candidates whose names appear on a paster with the names and also the squares before them, when placed not in the personal choice space but over the printed names of regularly nominated candidates. It is very clear that persons using the pasters did not intend to vote for those candidates whose names were already printed on the ballot. The Commissioner has held in a number of cases that a ballot cannot be counted unless a cross appears in the square before the name because this is explicitly required by statute, but there is no specific statutory requirement in reference to writing or pasting of the names of personal choice candidates. Since it has been ruled that pasters may be used, voters are left to exercise discretion as to whether they should be over the names of other candidates or in the blank spaces for personal choice. In the absence of a violation of definite statutory provisions, votes should not be invalidated where reasonable discretion on the part of the voters is shown. To hold that these ballots should be rejected, because the paster was over the names of the other candidates rather than a couple of inches lower on the ballot, would be to "void," without justification, the expressed will of approximately 60 people.

Under the conditions above set forth, the votes cast for the candidates on the pasters should have been counted and, accordingly, the three candidates receiving the highest number of votes are:

William Pepper	104
A. Elmer Harvey	78
Philip Gerber	78

and they are hereby declared to be elected for the full term of three years as members of the Board of Education of Tabernacle Township, Burlington County.

March 1, 1934.

BALLOTS MARKED WITH PURPLE INK OR PENCIL VOID

IN THE MATTER OF THE APPLICATION OF WILLIAM B. WARNER FOR A RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, in asking for a recount of the ballots cast at the annual school election in the Township of Chesterfield, Burlington County, at which two members were to be elected for a term of three years, alleges the officials first declared that Howard D. Miller had received 153 votes and that Edward Waln and William B. Warner had tied for the other position with 145 votes each. There was some controversy about rejected ballots and the tallying of a vote, and after a recheck of the rejected ballots and tally, the count was announced as 146 votes for Waln and 145 for Warner. Based upon the foregoing, the recount was granted and was conducted in the office of the County Superintendent of Schools on Tuesday, March 31, and the result announced as follows:

William B. Warner	146
Edward Waln	141

In reviewing the ballots at the conclusion of the recount, it was found that one ballot counted for Mr. Waln was marked "spoiled" and, therefore, should not have been counted. The official count is, therefore:

William B. Warner	146
Edward Waln	140

There were three ballots rejected because a cross or plus was made with purple ink or purple pencil, two of which contained votes for Mr. Waln and the other a vote for Mr. Warner. Another ballot containing a vote for Mr. Waln was rejected for the reason that instead of having a cross or plus, several marks were made in the blank spaces before his name. If the votes on all rejected ballots had been counted, Mr. Warner would still have a plurality of several votes.

Howard D. Miller and William B. Warner are, accordingly, declared to be elected for a term of three years as members of the Chesterfield Township Board of Education.

April 2, 1936.

VALIDITY OF SCHOOL BONDING ELECTION

CHARLES E. MUNDY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above-named appellant on behalf of himself and other taxpayers of the Borough of Metuchen for the purpose of contesting the validity of a special school bonding election held in that borough on November 2, 1925, at which by a majority of forty-eight votes the Board of Education was authorized to bond the school district in the amount of $75,000 for the erection of a new school building therein.

Appellant bases his contest on the ground that instead of producing at the school election in question the registry list of the preceding general election of 1924, as required by law, the district clerk produced the registry list of the general election of 1925; that instead of determining the qualifications of every voter by a reference to such registry list, the latter was referred to in the case of only one voter; and that finally, about fifty persons voted at the school bonding election in question whose names did not appear on the general election registry list of 1925.

A hearing in this case was conducted by the Assistant Commissioner of Education on January 13, 1926, at the Court House in New Brunswick, at which testimony of witnesses on both sides was heard; and since that date briefs on the legal points involved have been filed by counsel for both appellant and respondent.

Section 149, Article VII, page 98 of the 1925 Compilation of the School Law, provides as follows:

> "No action, suit or proceeding to contest the validity of the election ordering the issuing of bonds shall be instituted after the expiration of twenty days from the date of said election."

While the statute in question contains no specific requirement that notice of the contest of a school bonding election be served on the respondent, namely, the Board of Education, within the time limit named such requirement is nevertheless in the Commissioner's opinion plainly implied; and especially in view of the fact that in this State all Court actions are commenced by issuance and service of some writ upon the defendant (Del. River Quarry *vs.* Board of Freeholders of Mercer County, 88 N. J. Eq. 506). Moreover, the very purpose of the section of the School Law above quoted in fixing a time limit for

contests of school bonding elections is, in the Commissioner's opinion, to safeguard proceedings which a board of education may take in pursuance of authority conferred by the district voters, when the twenty days have elapsed without notice of any litigation or contest against the validity of the election. Otherwise, the board of education, even though the statutory time limit had expired, would have no assurance at any time of safety in proceeding under the authority of the voters because of possible litigation of which it had no notice. In 15 Cyc., page 398—it is held that

> "In an election contest the notice is the foundation of the proceeding, and in some jurisdictions, it is not only the foundation of the proceeding, but also serves the double purpose of writ and declaration, or of summons and complaint or petition, as the case may be. No particular form of notice or citation is required in a contested election case, but notice in some form setting forth one or more of the statutory grounds of contest is jurisdictional and is absolutely essential to the validity of the proceeding * * * The intention of the contested election laws is to furnish a summary remedy and to secure a speedy trial. Consequently, the statutes generally provide that anyone desiring to contest an election must file a notice and statement of the grounds of contest within a certain number of days after the election, or the official declaration of the result. These statutes are mandatory and strict compliance with them is jurisdictional. The notice and statement required to be served by the contestant on the contestee constitute the predicate upon which the power of the court is set in motion, and unless served within the time required by the statute, the court has no jurisdicion to hear and determine the contest."

In the case under consideration a letter dated November 12, 1925, and announcing a protest against the school bonding election in Metuchen on November 2, 1925, was filed with the Commissioner of Education by counsel for the appellant on November 18, 1925, but no formal petition of appeal was filed or notice of any kind served upon the Metuchen Board of Education until December 10, 1925, thirty-eight days after the date of the election in question. While the Commissioner accepted the letter above referred to, and allowed the filing of a later formal petition and has in fact continued to exercise jurisdiction over the election, he cannot avoid the ultimate conclusion under the law that he is without authority to extend the twenty-day period following a school bonding election within which the Board of Education of the district involved must be apprised by official notice of any contest or action against the validity of the election and of the grounds on which such action is based. For this reason alone the Commissioner would be obliged to deny the appeal.

With regard to appellant's contention as to the production and use of registry lists, it is true that Section 118 (12) of the 1925 Compilation of the School Law does provide that the clerk of the board of education shall within seven days of the holding of the annual school election (also applicable by the provisions of Chapter 94, P. L. 1925, to all school elections as well) obtain the registry lists of the municipality comprised within said school district, and that no person shall be permitted to vote thereat unless his or her name appears on

said lists as having been registered to vote at the preceding general election or unless his or her name appears on a supplementary registry list to be prepared by the district clerk of the names of those persons who have qualified since the last preceding general election.

In the opinion of the Commissioner the vital intent of the law above quoted was that by requiring the production of and reference to the preceding general election registry list at school elections, unregistered persons would be thereby prevented from voting. Mere failure, however, to produce and refer to such general election registry list in determining voters' qualifications was not in the Commissioner's opinion sufficient ground for setting aside the school election unless such omission had not only resulted in persons voting whose names cannot be ascertained to have been contained in such registry lists, but in their voting in such numbers as to actually change the result of the election. In the case of Lehlback *vs.* Haynes, 54 N. J. L. 77, it was held that mere irregularities in the conduct of the election were not material if they did not interfere with the voting or the count, and it was also held that illegal votes were not in themselves sufficient ground for setting aside the election unless sufficient in number to change the result. Such has also been the decisions in other States and in 15 Cyc., page 372, it is held that:

> "Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election."

In the case under consideration appellant was not able at the hearing before the Assistant Commissioner to prove that the alleged number of approximately fifty persons voted at the election in question whose names did not appear on the 1925 general election registry lists produced thereat, since he could produce no corroborative evidence as to the accuracy of the copy of the poll list which he alone prepared for the purposes of comparison with the registry lists. Appellant, moreover, was unable to produce proof of any kind that there were any persons voting at the bonding election on November 2 in the Borough of Metuchen whose names were not on the preceding general election list of 1924, or on the supplementary registry list required by law to be prepared for each special school election, the only lists on which the law requires their names to be for the purposes of the bonding election on November 2, 1925. No comparison was made whatever by the appellant of the poll list of the special school bonding election in question with the 1924 general election registry list and supplementary registry list above referred to; and it might well be that the names of persons were included in the 1924 registry lists which were not to be found in those of 1925 by reason of persons having moved from the district since the former date.

Because, therefore, of the fact that no protest setting forth the grounds of complaint of which the Metuchen Board of Education had any notice was filed with the Commissioner of Education until more than twenty days had elapsed since the bonding election on November 2, 1925, and because of the fact that

appellant has been unable to prove that irregularities in the way of failure to produce and refer to the preceding general election registry lists of 1924 resulted in any persons voting at such election whose names were not contained in the 1924 general election registry list or in the supplementary list for the special bonding election, the appeal against the validity of such school bonding election in the Borough of Metuchen on November 2, 1925, is hereby dismissed.

January 25, 1926.

DECISION OF STATE BOARD OF EDUCATION

This proceeding was brought to contest the validity of a special school bonding election held in Metuchen on November 2, 1925, at which the Board of Education was authorized by a majority of forty-eight votes to bond the school district in the amount of $75,000 for the erection of a new school building.

Section 149 of Article 7 of the School Law (1925 School Laws, p. 98) provides that no proceeding to contest the validity of such an election "shall be instituted after the expiration of twenty days from the date of said election."

The only way in which such a proceeding can be instituted by filing a petition or notice and making service thereof upon the Board of Education. No such petition was filed or served until December 10, 1925—thirty-eight days after the election. On November 18, 1925, a letter dated November 12, 1925, stating inferentially that such a proceeding would be brought was filed with the Assistant Commissioner. Such a letter is clearly not the institution of the "action, suit or proceeding" required by the statute above referred to. The Assistant Commissioner accepted the letter and allowed the filing of the formal petition on December 10, 1925, as above stated. Nevertheless, as is held in the Commissioner's opinion, he is without authority to extend the twenty-day period provided by statute. He was therefore right in dismissing the petition on that ground.

This disposition makes it unnecessary to discuss the further grounds stated in the Commissioner's opinion for dismissing the proceeding.

On the single ground above stated it is recommended that his decision be affirmed.

April 3, 1926.

POWERS OF AUDITOR OF SCHOOL DISTRICT

THE BOARD OF EDUCATION OF ATLANTIC CITY,

Petitioner,

vs.

BESSIE M. TOWNSEND, ACTING COMPTROLLER OF ATLANTIC CITY,

Respondent.

James H. Hayes, Jr., for the Petitioner.
Theodore F. Schimpf, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, in January, 1909, employed one Edwin Clark to criticize the plans and specifications for a new school building, and said Clark, in May, 1909, rendered a bill for services performed by him under said employment, for the sum of three thousand dollars. Said bill was approved by the petitioner and forwarded, on April 30, 1910, to the then Comptroller of Atlantic City, who, by virtue of the provisions of Section 62 of the General School Law, is the Auditor of the School District of Atlantic City. Later the bill was returned to the petitioner, together with a statement of the reasons why the bill should not be paid.

On November 15, 1912, the petitioner adopted a resolution to pay Clark the sum of two thousand dollars, with interest at the rate of six per cent. from May 5, 1909, to November 15, 1912, in full settlement of his claim.

In accordance with this resolution, a warrant was drawn in favor of said Clark for the sum of $2,424.66, and forwarded to the Auditor, together with the bill of said Clark, duly verified by affidavit. On November 27, 1912, the Auditor returned the warrant and bill, together with a statement of his objections. At a meeting held on November 29, 1912, the petitioner, after considering the objections of the Auditor, adopted a motion that the bill of Edwin Clark be ordered paid, and on November 30, 1912, the Auditor was notified of the action of the petitioner.

The Auditor still refuses to countersign the warrant drawn in favor of Edwin Clark, and the petitioner prays that an order may be issued directing the Auditor to countersign said warrant and deliver the same to said Clark.

Section 62 of the School Law provides that the Comptroller, Auditor or other officer, if there be one, authorized to audit claims against the municipality in which the school district shall be situate, "shall be the auditor of the school district," and that all warrants accompanied by itemized statements of the claims shall be forwarded to said auditor. It further provides that "said auditor shall examine and audit such warrants and statements with a view

to ascertaining whether the sum or sums are proper * * * and if said auditor shall have reason to believe that the claim or demand for which such warrant shall have been issued is incorrect, or for any cause should not be paid, he shall return such warrant and statement to the secretary of the board of education with a statement of the reasons why the same should not be paid, and said secretary shall correct said warrant and statement or present them to the board of education at its next meeting. If said board shall find that the claim or demand for which said warrant was issued was correct and just, it shall, by a majority vote of all the members of said board, order that it shall be paid, and said auditor shall, upon receipt of the warrant and statement thereof, together with a statement of the action of the board of education thereon, countersign the warrant and forward it to the Custodian of School Moneys."

The respondent, in her answer, assigns several reasons for her refusal to countersign the warrant drawn in favor of Edwin Clark.

In order to reach a decision in this case, it is necessary only to consider the eighth objection, which is that the bill is not itemized in accordance with law.

The bill reads as follows:

"For professional services rendered on new Grammar School at Atlantic City and including expenses	$2,000.00
Interest due from May 5, 1909, to Nov. 15, 1912, as allowed by resolution of the Board of Education	424.66
	$2,424.66"

The law expressly requires that all bills presented to the auditor shall be itemized. Unless a bill is properly itemized, it is impossible for the auditor to perform the duty cast upon him by the statute. The bill under consideration does not state the nature of the services rendered nor the time given by Clark in performing his duties under his agreement with the petitioner. Neither does it state the amount of the expenses nor how such expenses were incurred.

The auditor may have been, and probably was, in a general way, cognizant of the nature of the work performed by Clark, but this is not sufficient. He must have clearly stated in the bill he is asked to approve such items as will enable him to act intelligently when he approves or disapproves it.

The bill rendered by Clark and which the respondent refuses to approve does not comply with the statute.

The appeal is dismissed.

May 11, 1914.

DUTY OF CITY AUDITOR TO COUNTERSIGN WARRANTS PASSED BY BOARD OF EDUCATION

BAYONNE BOARD OF EDUCATION,

Appellant,

vs.

STEPHEN E. EVANS, AUDITOR OF THE SCHOOL DISTRICT OF BAYONNE,

Respondent.

Mark A. Sullivan, for Appellant.
Eugene Sharkey, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by the Bayonne Board of Education to protest against the action of the respondent in refusing on or about November 1, 1923, as auditor of the School District of Bayonne, to countersign a warrant in the amount of $17,500, comprising additional compensation for the school architect, Donald G. Anderson, in connection with his services incident to the erection of the Junior High School, and in so refusing to countersign such warrant after it had been presented to him by the Board of Education duly signed by the president and secretary of the Board. Appellant alleges that subsequent to respondent's refusal to countersign the warrant as aforesaid his reasons therefor were duly considered by the Board of Education and the Board on November 5, 1923, passed a resolution to the effect that the claim for which the warrant was given was correct and just, ordered that the same be paid, and returned the warrant to the respondent together with a copy of such resolution; and upon which respondent again refused to countersign the warrant in question.

Respondent defends his action on three grounds: First, that the money for the erection of the Junior High School was appropriated for "construction, equipping, and grading grounds of Junior High School" and that it would be an unlawful diversion of these funds to pay any part of them to an architect whose services were all supposed to be included in an annual salary paid out of the Current Expense Funds of the Board; second, that the architect's bill for $17,500 as aforesaid was not regularly presented and passed upon at a Board of Education meeting; and third, that the warrant was not presented to the auditor in the manner prescribed by the School Law in that it was not accompanied by an itemized statement of the services for which it was drawn.

A hearing in this matter was conducted by the Assistant Commissioner of Education on Friday, February 1, 1924, at the Administration Offices of the Board of Education in Bayonne, at which hearing testimony of witnesses on

both sides was heard. Briefs upon the legal questions involved have also been filed subsequent to the hearing by counsel for both appellant and respondent.

It appears that the Board of School Estimate in making the appropriation for the erection of a Junior High School specifically eliminated the amount fixed by the Board of Education as architect's fees, but did not so restrict the expenditure of the balance of the appropriation. It has been decided in such cases, notably that of Townsend *vs.* State Board of Education, 88 N. J. L. 97, that, although a specific item may have been eliminated by a board of school estimate, if the appropriation of the reduced total amount is not restricted as to such item, but the designated purpose of the reduced appropriation is broad enough to cover it, then such item may be paid out of such balance. The Commissioner, moreover, cannot agree with respondent's contention that because of the architect's annual contract with the Board of Education he could not legally be awarded out of the appropriation for the "construction, equipping, and grading of grounds of Junior High School" additional compensation for what were actually additional services and expenses in connection with the erection of such Junior High School.

The intention of the appropriation for construction, equipping and grading of the Junior High School will in the Commissioner's opinion be determined from the terms of such appropriation and these terms are in his opinion sufficiently broad to cover whatever construction expenses the Board of Education finds it necessary to make including an additional remuneration for the Board architect for special services and for extraordinary expenses entirely incidental to such Junior High School construction. Such special remuneration would be in the nature of an additional agreement separate and apart from his annual contract as school architect.

As far as the presenting of the architect's bill and its being passed upon by the Board of Education is concerned, it appears that after the architect's statement for his fees and expenses in connection with the Junior High School was considered by the Board of Education as a committee of the whole, the amount of $17,500 was duly ordered paid by the Board of Education at a regular Board meeting. This, in the Commissioner's opinion, is a substantial compliance with the statutory requirements. While, moreover, no itemized statement accompanied the warrant when sent to the school auditor, the law was also in the Commissioner's opinion substantially complied with when the general purpose of the warrant was stated thereon. It would hardly seem to be the intent of the statute that a detailed itemizing be made of architect's expenses as would be necessary in case of purchase of goods, etc.

Moreover, the School Law, Section 78, Article VI, is mandatory upon the school auditor to countersign warrants returned to him by the board of education after his objections have been considered and over-ruled by such board of education. The statute gives him no alternative, and in the case at hand the return of the warrant to Mr. Evans, the school auditor, was duly made by the Bayonne Board of Education with a resolution over-ruling the objections previously made by him.

In view of all the facts above set forth, it is hereby ordered by the Commissioner of Education that the respondent, the school auditor as aforesaid, proceed at once to countersign the warrant for $17,500 comprising additional

compensation for the school architect, Mr. Donald G. Anderson, in connection with services and expenses incident to the erection of the Junior High School, and that he proceed to forward such warrant to the Custodian of School Moneys, in accordance with the provisions of the statute.

The appeal is accordingly hereby sustained.

March 17, 1924.

DECISION OF THE STATE BOARD OF EDUCATION

We agree with the conclusions reached by the Commissioner and recommend that his decision be affirmed.

REFUSAL OF AUDITOR TO COUNTERSIGN WARRANT

JAMES H. HAYES, JR.,

Petitioner,

vs.

BESSIE M. TOWNSEND, COMPTROLLER OF THE CITY OF ATLANTIC CITY,

Defendant.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of Atlantic City employed the petitioner to act as its solicitor and attorney for one year from August 1, 1913, at a salary of $1,000.

On November 30, 1913, said Board ordered paid a bill for $250, drawn in favor of the petitioner for salary as solicitor and attorney, for the months of August, September and October, 1913. Said bill, together with a warrant for its payment, was forwarded to the defendant, who, by virtue of the provisions of Section 62 of the School Law, is the auditor of the School District of Atlantic City. Said auditor returned the bill and warrant to the Board of Education with her reasons for refusing to countersign the warrant. At a meeting of the Board, held December 18, 1913, the bill was again ordered paid, and the bill and warrant were again forwarded to the auditor, together with a statement of the action of the Board.

On January 29, 1914, the Board of Education ordered paid a bill for $250, drawn in favor of the petitioner for salary as solicitor and attorney for the months of November and December, 1913, and January, 1914. This bill, together with a warrant for its payment, was forwarded to the petitioner, who returned the bill and warrant to the Board of Education with her reasons for refusing to countersign the warrant. At a meeting held March 19, 1914, the Board again ordered this bill paid, and the bill and warrant were again forwarded to the defendant, together with a statement of the action of the Board.

The defendant still refuses to countersign the warrants, alleging, as a reason for her refusal, that there is no appropriation from which the bills drawn in favor of the petitioner can be paid.

Section 62 of the School Law provides, among other things, that the comptroller, auditor, or other officer, if there be one, authorized by law to audit claims against the municipality in which such district shall be situate, shall be the auditor of the school district, and that the city treasurer, by virtue of his office, shall be the custodian of the moneys of the school district.

The defendant performs her duties as Auditor of the School District of Atlantic City solely by virtue of the provisions of the School Law, and not by any provision of law relating to her duties as Comptroller of Atlantic City.

The duties of the school auditor are clearly defined in Section 62, and are confined to examining and auditing warrants and statements received from the Board of Education, and, if said warrants and statements are found to be correct, to countersign them and forward them to the Custodian of School Moneys for payment. If the auditor has reason to believe that the claim for which any warrant is drawn is incorrect, or, for any reason, should not be paid, he must return the warrant to the Board of Education, accompanied by a statement of his reasons for refusing to countersign the warrant. The section further provides that, if, after a warrant is returned by the auditor, the Board "shall find that the claim or demand for which said warrant was issued is correct and just it shall, by a vote of a majority of all the members of said Board, order that it be paid, and said auditor shall, upon receipt of the warrant and statement thereof, together with a statement of the action of the Board of Education thereon, countersign the warrant and forward it to the Custodian of School Moneys."

The provisions of Section 62 have been strictly complied with in the case of the two bills of the petitioner, except that the defendant refuses to countersign the warrants for their payment after they have been ordered paid by the Board of Education after consideration of the objections made by her.

The defendant attempts to excuse her refusal to perform the plain duty cast upon her by the statute by pleading that there is no appropriation from which the claims can be paid.

Whether or not there is an appropriation available for the payment of the claims is no concern of the defendant. Her responsibility was ended when she returned the warrants to the Board of Education.

It is ordered that the defendant countersign the warrants drawn in favor of the petitioner and forward them to the Custodian of School Moneys.

It was not necessary, in order to reach a decision in this case, to pass upon the point raised by the defendant in her answer, that there was no appropriation from which the bills of the petitioner could lawfully be paid. The point is, however, of such importance that I think it should be passed upon at this time.

Section 74 of the School Law makes it the duty of the board of education in a city school district, annually, to deliver to each member of the Board of School Estimate "an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of the district for the ensuing year," and Section 75 makes

it the duty of the Board of School Estimate, annually, to "fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year."

In the above quotation from section 75, the Board of School Estimate is directed to "fix and determine the *amount of money necessary to be appropriated for the use of the public schools.*"

The language used clearly shows that it was the intent of the Legislature that the annual appropriation should be in bulk and not a separate appropriation for each purpose specified in the itemized statement received from the board of education. Had it been the intent of the Legislature that the appropriation should be itemized, the appropriate language would have been "to fix and determine the several amounts needed for the several purposes specified in the certificate." It should further be noted that, in Section 74, the board of education is directed to prepare "an itemized statement of the amount of money *estimated* to be necessary." The Legislature, evidently, was aware that it was impossible for the board of education to determine the exact amount needed for each purpose, and that all that was intended was that the Board of School Estimate should have before it the information necessary to enable it to act intelligently in determining the amount of the appropriation.

It frequently happens in a large city school district that, owing to an unexpected increase in the number of pupils, additional teachers are required, and that the amount estimated to be necessary for the payment of teachers' salaries is not sufficient. To hold that the board of education was prohibited from employing the necessary teachers because the amount estimated for their salaries was too small, while the total appropriation was ample to meet all demands, would prevent the board from performing the duty cast upon it.

A board of education in a city school district may, in its discretion, use for any item of current expense, moneys appropriated by the Board of School Estimate, without regard to the several amounts estimated as necessary for the several purposes specified in its statement to the Board of School Estimate.

In Exhibit "P. 2," annexed to the Petition, the defendant says that the Board of School Estimate struck out the item for salary of the Attorney of the Board of Education, and that "said action was taken with the view of saving said amount, it being understood that the City Solicitor would act in a like capacity for the Board of Education and Board of Commissioners, at no additional expense to the public."

If that were the reason for reducing the amount of the appropriation, it is evident that the Board of School Estimate did not realize that the city and the school district were separate and distinct municipal corporations, and that the latter was not a department of the city government.

A board of education has no right to demand service from an employee of the City Commission, and no such employee could be compelled to serve the school district. It is true that the City Treasurer is the Custodian of School Moneys, and that the City Comptroller is the Auditor of the School District, but this is by virtue of an express provision of the School Law.

There is no incompatibility or inconvenience in these officers holding dual positions, but it would frequently be impossible for the City Solicitor to act as Attorney for the Board of Education.

In a recent case tried before me, in which the Board of Education of Atlantic City was the complainant and the City Comptroller the defendant, the City Solicitor appeared for the defendant. It is impossible "to run with the hare and hunt with the hounds," and it is equally impossible for one person to appear as attorney for both the complainant and defendant.

The appointment of the petitioner as attorney and solicitor of the Board of Education of Atlantic City was legal, and his salary may be paid from the moneys appropriated by the Board of School Estimate for the current expenses of the schools.

July 24, 1914.

Decision of the State Board of Education

In this case of Hayes *vs.* Townsend it is not denied by the defendant-appellant that a contract was entered into with the petitioner-appellee for legal services; that the services were duly performed, and that the petitioner-appellee earned and is entitled to his money. The defense is that there has been no appropriation of money made for legal services in the budget, and therefore the defendant, as comptroller of the school funds, has no authority to pay the amount claimed. This is more or less of a legal quibble which the Commissioner has disposed of in his decision. The facts remain that there was a contract made and kept by the petitioner-appellee; that he rendered legal services, and that he is entitled to payment therefor. This defendant-appellant countersigned warrants for this same petitioner-appellee, for the same or similar services, under the same or similar contract, during the year immediately preceding this contract. There was no objection made then to there being no appropriation for the specific purpose of a solicitor. The money was taken out of current expenses. There seems no reason why the precedent could not be continued. The defendant-appellant should obey the order of the commissioner and countersign the warrants drawn in favor of the petitioner-appellee, and forward them to the custodian of school moneys.

Decision of the Supreme Court

This writ was to test the validity of a determination of the State Board of Education, affirming a decision of the Assistant Commissioner of Education, directing prosecutrix as comptroller of the City of Atlantic City, and by virtue of the School Law, ex-officio auditor of the school district of Atlantic City, to countersign certain warrants for the salary of James H. Hayes, Jr., as solicitor and attorney for the Board of Education of Atlantic City. The ground of Miss Townsend's refusal was that there was no appropriation from which the warrants could be paid. The reply of the Assistant Commissioner and the State Board was that the warrants might lawfully be, and should be, paid out of moneys appropriated by the Board of School Estimate for the current expenses of the schools, and was predicated on the provisions of section 62 of the School Law (C. S. 4743; P. L. 1903, second special session, p. 23) of

which those pertinent to this case are, that all disbursements of the Board of Education shall be by warrant drawn on the custodian of school moneys; such warrants, accompanied by itemized statements of the claims, shall be forwarded to the comptroller or auditing office of the municipality, who is made ex-officio auditor of the school district; such auditor shall examine and audit such warrants and statements, with a view to ascertaining whether the sum or sums are proper, and if he shall find them correct, shall countersign the warrant and forward it to the custodian of school moneys. The auditor may examine witnesses under oath as to the accuracy and good faith of any claim. If the auditor shall have reason to believe a claim for which warrant has been issued is incorrect, or for any cause should not be paid, he shall return the warrant and statement to the secretary of the Board of Education, with a statement of his reasons and the secretary shall correct the warrant or present it to the Board at its next meeting; and if the Board find it correct and just it shall by a majority vote order it paid, and the auditor on again receiving the warrant with a statement of the action of the Board shall countersign it and forward it to the custodian for payment.

If this section be applicable, and be unaffected by other parts of the act, the rulings of the Assistant Commissioner and the State Board should be affirmed; for it is conceded that the warrants were drawn in due form, and after a first refusal by the auditor re-submitted to the Board of Education, and that body by a majority ordered them paid; the auditor on a second presentation with statement of this action, still refused to pay them.

The claim on the part of the prosecutrix is that section 62 must be read in connection with sections 74 and 75, relative to the estimates and appropriation of moneys required for current expenses and repairing and furnishing the schools for the coming year, and when so read, the refusal of the auditor will appear lawful.

By section 74, C. S. 4746, the Board of Education on or before May 15th is to deliver to the board of school estimate an "itemized statement" of the money estimated necessary for current expenses and for repairing and furnishing the schools for the ensuing school year, and also the amount apportioned to the district by the County Superintendent. With this as a basis (Sec. 75) the board of school estimate fixes and determines the amount necessary to be appropriated for the year, exclusive of the money apportioned by the County Superintendent. This determination, in the form of a certificate, is given to the Board of Education, and also to the municipal council, which appropriates accordingly, subject to certain restrictions not here relevant.

The case shows that pursuant to these sections, the Board of Education made up the itemized statement, totaling $380,320, one of the items of which reads, "Solicitor, $1,000." It is conceded that this was for salary of a solicitor or legal adviser. When this was submitted to the board of school estimate, that body, after discussion, struck out the item, and reduced the total by that amount. Certificate was made accordingly, and it appears plainly from a comparison of the figures of the appropriation and tax ordinance, and the county apportionment, that the city appropriation was made on the basis of the certificate of the board of school estimate, as by law must have been made.

The certificate itself is not part of the return and we are therefore not informed whether it simply called for a lump sum or specified the items, but under section 75 a certificate of a lump sum is plainly sufficient, for all that the board of estimate has to determine is "the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent of Schools." In our view it became the duty of the board of estimate to go over the itemized statement of the Board of Education, and using it as a basis, determine the total amount necessary for the use of the schools. It could reach this result by striking out items or reducing them; but the result reached became a total, and it is such total as modified by the county appropriation that the board of estimate is to certify and the city council provide in the tax levy. As was said by the Court of Errors and Appeals in Common Council of Lambertville *vs.* Board of Education, 87 N. J. L. 93, Atl. 596, 597, "the obvious intent was to enable the board of school estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes;" and while in that case an estimate of the Board of Education combining in one lump sum moneys needed for new schools under section 76 with ordinary repairs to existing schools under section 74 was held invalid, it is important to observe that section 76 authorizes a bond issue for new schools, and the intermixing of the purposes specified in the two sections might result in using the proceeds of bonds for current expenses.

Reading the act as a whole, it would seem that the intent was to substitute for the city council the board of school estimate, a joint body, as the arbiter in fixing the annual appropriation for the schools. This amount when duly certified to the council is mandatory on it. Montclair *vs.* Baxter, 76 N. J. L. 68. That case related to section 76, where the word "may" was used. In section 75 the words are "shall appropriate."

In Newark *vs.* Board of Education, 30 N. J. L. 374, the city charter (P. L. 1857, p. 146, sec. 60) provided for just such an itemized estimate to be submitted by the Board of Education to the common council, and that body were thereby "empowered to raise by tax such sum or sums of money for the support of public schools as they deem expedient and necessary, and all moneys so raised and appropriated shall be expended by the Board of Education for the support of public schools in the City of Newark, according to the provisions of this act." It was held in the case cited that in that disbursement and distribution of the money the Board of Education were given exclusive management and control, and were in no way subject to the direction or interference of the council except in purchasing real estate.

This decision has never been reversed or overruled, and we think it is applicable to the case at bar. The general powers of boards of education under the school act are substantially similar to those in the Newark charter. They may appoint such officers, agents and employees as may be needed, and fix their compensation. Section 50. Whether a permanent solicitor at a fixed salary is needed is a matter primarily for their determination.

We are not unmindful of the damage that might be done by a dishonest school board in estimating moneys for one item and when the appropriation is received, diverting them to other purposes. But we fail to find in the statute that as respects the object specified in Section 74, the Legislature intended that the itemized estimate should be more to the board of estimate than a guide to intelligent action in fixing a total appropriation. The result must be that so long as the total appropriation holds out, the auditor has no option after a rejected claim has come back with the imprimatur of the Board of Education, but to countersign the warrant; and leave the public to its remedies by indictment and otherwise in case of a malfeasance in office by the board.

The order of the State Board of Education is affirmed.

November 17, 1915.

OBLIGATION OF CITY GOVERNING BODY TO RAISE MONEY FOR SCHOOL PURPOSES

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH,

Appellant,

vs.

BOARD OF COMMISSIONERS OF THE CITY OF LONG BRANCH,

Respondent.

John W. Slocum, for Appellant.

Thomas P. Fay, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought from the action of the Board of Commissioners of the City of Long Branch on February 14, 1922, in repealing an ordinance passed by it on January 31, 1922, providing for the raising of $40,000, the amount certified to the Board of Commissioners by the Board of School Estimate as being necessary for the purchase of a site for a school building.

The Board of Commissioners defends its action on the ground, first, that the Commissioner of Education has no jurisdiction over a dispute of this kind arising between a board of education and the appropriating power of a city school district, and that the Commissioner could make no decision which would be binding upon the Commissioners of the City of Long Branch, and secondly, on the ground that the Board of Commissioners is the only elective body in the district and therefore has the right before appropriating any money for a purpose such as described above to decide whether the site in question is satisfactory for such purpose. It is also contended by the respondent that

the Commissioner has lost jurisdiction in this matter by reason of having prejudged the points at issue in a letter.

It is not difficult to dispose of respondent's latter contention. A letter upon the law which governs this case was written by this department to a citizen in Long Branch, but such letter was an informal answer to an inquiry as to the law and written more than two months in advance of the bringing of this appeal. There was, in other words, no case before this office at the time the inquiry was answered.

The right of the Commissioner of Education to assume jurisdiction in a case of this kind has been decided by the Supreme Court in the case of the Town Council of Montclair *vs.* Charles J. Baxter, State Superintendent. In this case the same question was involved, namely, the refusal of the Common Council of a city to appropriate money certified to it by the Board of School Estimate. Justice Swayze in writing the opinion held "that this case involved a controversy arising under the school law; that the State Superintendent had jurisdiction; that the prosecutors should have exhausted their remedy by appeal to the State Board of Education, and that, as they failed to do so, the certiorari was allowed prematurely."

In this case also the second contention of the respondent in the present case was also decided by Justice Swayze, namely, as to whether it is mandatory upon the appropriating power to raise the amount certified to it by the board of school estimate. His opinion upon this point was as follows: "Each (section of the law) authorizes the Board of School Estimate to fix and determine the amount necessary for the purposes of that section. These words 'fix and determine,' seem to us intended to place the power of determining the amount in the Board of School Estimate without its being subject to review by the town council."

It has also been decided by the Commissioner of Education in a number of cases before him that it is mandatory upon the appropriating power in a city school district to raise the money certified to it by the Board of School Estimate within the 3% of the taxable valuation limitation fixed by statute. Such was the decision in "The Board of Education of the City of Bridgeton *vs.* The Common Council of the City of Bridgeton," reported on page 452, 1921 Edition of the School Law; "The Board of Education of the City of South Amboy *vs.* The Common Council of the City of South Amboy," reported on page 454, 1921 Edition, School Law, and "The Board of Education of the City of Lambertville *vs.* The Common Council of the City of Lambertville," reported on page 447, 1921 Edition, School Law. The Commissioner's decision in the latter case was affirmed by the State Board of Education, and in that case it was decided that "whether the plot is or is not suitable is not to be determined by the Common Council. The law gives this power solely to the Board of Education. The Common Council has no discretion in such cases, its sole duty being to provide the amount of money fixed and determined by the Board of School Estimate."

In view of the decisions in the cases cited it is the opinion of the Commissioner of Education that he has jurisdiction in the case at hand as being a dispute arising under the School Law, and it is further his opinion that

since the amount asked for by the Board of Estimate, namely, $40,000, is within the 3% of the taxable valuations of the district fixed by statute, it is mandatory upon the Board of Commissioners to raise the money aforesaid, and that the matter of selecting the proposed site is a function solely of the Board of Education and not of the Board of Commissioners.

The appeal is accordingly hereby sustained and said Board of Commissioners of the City of Long Branch is hereby ordered to appropriate and raise at once the $40,000 fixed and determined by the Board of School Estimate as necessary for a school site and duly certified to such Board of Commissioners.

Dated June 14, 1922.

REFUSAL OF COMMON COUNCIL TO RAISE AMOUNT ORDERED FOR SCHOOL PURPOSES BY BOARD OF SCHOOL ESTIMATE

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,

Appellant,

vs.

THE COMMON COUNCIL OF THE CITY OF BRIDGETON,

Respondent.

Jacob B. Jones, City Clerk, for the Appellant.

George W. McCowan, Secretary Board of Education, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It appears that the Board of Education of the City of Bridgeton requested the Board of School Estimate to appropriate the sum of $75,000 for the purpose of erecting a new high school building in said city and that the Board of School Estimate appropriated said amount and certified its action to the Common Council, the body having the power to make appropriations of money raised by the tax in said city, on August 19, 1913. The said amount has not been raised and the Board of Education has applied to the Commissioner of Education for relief.

It does not appear that there was any irregularity in the proceedings of the Board of Education or the Board of School Estimate, but the Common Council has neglected to provide the amount appropriated and has adopted a preamble and resolutions requesting certain information from the Board of Education. Said preamble and resolutions read, in part, as follows:

> "WHEREAS, The City Council of the City of Bridgeton is vested with the power to make appropriations of money raised by tax, and is responsible for said appropriations when so made.

> *"Resolved,* That it is the opinion of the City Council of the City of Bridgeton that, as the body responsible for the city finances and for the tax burdens placed upon the people, the City Council is entitled to have full and accurate knowledge of a situation which demands, in addition to the large annual school expenses, an appropriation of $75,000."

It is evident from the above quotations that the City Council is mistaken as to its powers and duties with reference to the public schools. It appears to be under the impression that the Board of Education is a department of the city government and, therefore, subject to the supervision of the City Council.

There are two classes of school districts, known respectively as "City School Districts" and "Township, Incorporated Town and Borough School Districts." City School Districts are governed by the provisions contained in Article VI of the School Law.

Bridgeton, being a City School District, is governed by the provisions of said article, and the Board of Education is incorporated under section 45 of the School Law, and is a municipal corporation separate and distinct from the city government.

The intent of the law to keep the finances of the School District entirely separate from those of the municipality in which the School District is situate is clearly shown in the provisions contained in section 185, which reads as follows:

> "'Nothing in this article shall be construed as giving to the township committee, common council or other governing body of any municipality any control over moneys belonging to the school district in the hands of the custodian of the school moneys of said district, but said moneys shall be held by such custodian in trust, and shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the board of education; any ordinance, by-law or resolution of a township committee, common council or other governing body of any municipality attempting to control such moneys, or which shall, in any way, prevent the custodian of school moneys of the school district from paying the orders of the board of education as and when they shall be presented for payment shall be absolutely void and of no effect,' and in section 246, which provides that school districts shall be governed solely by the provisions of the general school law."

It is very evident from the above quotations that the Common Council has no control over school moneys, and that whatever powers and duties it has in relation to the public schools are such as are conferred or imposed upon it by the School Law.

These powers and duties are found in sections 73, 75 and 76. Section 73 provides for the appointment of two members of the Common Council as members of the Board of School Estimate; section 75 makes it mandatory upon the Common Council to raise the amount certified to it by the Board of School Estimate as necessary for the maintenance of the schools, and section

76 directs the Common Council to raise, either by direct tax or by the issue of bonds, the amount certified to it by the Board of School Estimate as necessary for the purchase of land for school purposes and for erecting, enlarging, repairing or furnishing schoolhouses.

In the case of The Town Council of Montclair *vs.* The State Superintendent, 47 Vr. 68, the Supreme Court held that "Under section 76 of the School Law, when the Board of School Estimate has fixed and determined the amount necessary for the purchase of land and erection of a school house, it is mandatory upon the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax or to borrow the same and secure its payment by the issue of bonds."

The Board of Education and the Board of School Estimate having complied with all the requirements of the law, and the amount of the appropriation having been determined by the Board of School Estimate, the failure of the Board of Education to forward to the Common Council the information requested in the resolutions above referred to does not constitute a valid excuse for the failure of the Common Council to perform the duty imposed upon it by section 76 of the School Law.

The Common Council has no power to increase or decrease the amount certified, the right to determine the amount necessary to be raised for school purposes being vested solely in the Board of School Estimate; neither is it in any wise responsible for expenditure of school moneys.

It is the duty, therefore, of the respondent immediately to raise and place to the credit of the appellant the sum of seventy-five thousand dollars for the erection of a high school building.

October 31, 1913.

REFUSAL OF COMMON COUNCIL TO RAISE AMOUNT ORDERED FOR SCHOOL PURPOSES BY BOARD OF SCHOOL ESTIMATE

BOARD OF EDUCATION OF THE CITY OF LAMBERTVILLE,

Appellant,

vs.

THE COMMON COUNCIL OF THE CITY OF LAMBERTVILLE,

Respondent.

W. Holt Apgar, for the Appellant.

Walter F. Hayhurst, L. H. Sargent and George H. Large, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, at a meeting held on August 29, 1912, adopted resolutions requesting the Board of School Estimate to appropriate $75,000 for the purchase of land and the erection of a schoolhouse.

The Board of School Estimate, at a meeting held on September 9, 1912, fixed and determined the sum of $75,000 as necessary for the purposes named in the resolutions of the appellant.

The respondent has neglected and refused to provide the amount fixed and determined by the Board of School Estimate, and pleads in justification the following:

1. That the certificate of the Board of School Estimate was presented to the Common Council of 1912, and was not properly before the Common Council of 1913.

The evidence is that the resolution was presented to the Common Council in September, 1912, and that no action for raising the $75,000 certified to it by the Board of School Estimate was taken by the Common Council prior to its reorganization in January, 1913. The certificate of the Board of School Estimate is now before the Common Council, and, if the proceedings on which such certificate is based were legal, the Common Council must raise said sum of $75,000 and place it at the disposal of the Board of Education.

2. The second contention is that the Board of Education was not a legally constituted body.

The members of the Board of Education were appointed under the provisions of Chapter 233, P. L. 1911. This law was declared to be unconstitutional in the case of Sheridan *vs.* Lankering, 83 A. R. 641, but no action has been taken to remove said members, and until they have been removed by due process of law they continue to act as *de facto* members and their acts are legal.

3. The third point is that Archibald G. Smith, who acted as a member of the Board of School Estimate at the meeting of September 9, 1912, was not a member of said Board.

Smith was appointed a member of said Board on February 7, 1912. The minutes of the meeting of the Board of Education held April 24, 1912, contain the following:

> "The President named the following Committee according to the new By-laws—Board of Estimate, Mr. Malloy and Mr. Bowne."

Section 73 of the School Law provides for the appointment annually of two members of the Board of Education as members of the Board of School Estimate. These appointments are to be made during the month of January. Chapter 233, P. L. 1912, removed from office on January 31, 1912, all members of the Board of Education in office on that date. The appointment of Mr. Smith in February was, therefore, to fill a vacancy.

Section 73 further provides that "in case of any vacancy occurring in any such Board of Estimate by reason of the resignation, death or removal of any member thereof such vacancy shall be immediately filled by the body which originally appointed such member." There is nothing to show that Mr. Smith resigned and in the absence of such resignation there was no vacancy. Mr. Smith was a member of the Board of School Estimate on September 9, 1912. Even if there had been a vacancy the appointment of Mr.

Bowne was null and void. The law prescribed that such vacancies shall be filled by the Board. The power cannot be delegated to the President.

There is some question as to whether Mr. Smith was notified of the meeting of the Board of School Estimate called for September 9, 1912. The secretary of the Board testified that he notified Mr. Bowne. Mr. Smith declined to testify that a notice of the time and place of said meeting was given or sent to him. He testified, however, that he knew of the meeting, and thought he prepared the original resolution. A special meeting of a board is not legal unless all the members have had notice of the time, place and purpose of the meeting, but the law does not state how such notice shall be given. Mr. Smith was present at the meeting of the Board of Education held August 29, 1912, at which the resolution requesting the Board of Estimate to appropriate the $75,000 was adopted, and was also present at the meeting of the Board of Estimate on September 9. Had he not been present at the meeting on September 9, there might be a question as to the legality of the action taken on that date. The fact that he was present is sufficient proof that he received proper notice.

4. The fourth point is that the resolution adopted by the Board of Education on August 29, 1912, was irregular in that it did not state separately the sum needed for each purpose.

Section 76 of the School Law reads in part as follows:

> "Whenever a city board of education shall decide that it is necessary to raise money for the purchase of lands for school purposes, or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, it shall prepare and deliver to each member of the Board of School Estimate of such school district a statement of the amount of money estimated to be necessary for such purpose or purposes."

It is evident from the language used that a statement of the total amount needed for all the purposes named in the statement is sufficient. Had it been the intention of the Legislature that the amount named for each item should be stated separately, the same language would have been used as in section 74, which provides the method of making appropriations for the current expenses of the schools. In that section it is expressly provided that the statement shall be itemized.

5. The fifth point is that the Common Council was unable to raise the money for the reason that the amount fixed and determined by the Board of School Estimate was in excess of the amount which the Common Council was authorized to raise by the issue of bonds for school purposes. The law prohibited the Common Council from issuing bonds for school purposes in excess of a sum equal to three per centum of the taxable property in the district, but the law gives to said council the option of raising the amount fixed and determined by the Board of School Estimate, by the issue of bonds, by direct tax or both. The evidence shows that the borrowing capacity was about $67,000. Bonds could be issued for that amount and the balance of $8,000 raised by direct tax. The Supreme Court in the case of Montclair *vs.* State Superintendent, 47 Vr. 68, held that it was mandatory upon the body having the power to make

appropriations raised by taxes to cause the amount to be raised by tax or to borrow the same and secure its repayment by the issue of bonds.

The Common Council further attempts to justify its refusal to act on the ground that the plot selected by the Board of Education was unsuitable, and was unsatisfactory to the people of the district. Whether the plot is or is not suitable is not to be determined by the Common Council. The law gives this power solely to the Board of Education. The Common Council has no discretion in such cases, its sole duty being to provide the amount of money fixed and determined by the Board of School Estimate.

It is ordered that the Common Council immediately take such action as will place at the disposal of the Board of Education the $75,000 fixed and determined to be necessary by the Board of School Estimate at its meeting held September 9, 1912.

April 8, 1913.

Decision of the State Board of Education

In August, 1912, the Board of Education of the City of Lambertville adopted resolutions requesting the Board of School Estimate to appropriate $75,000 for the purchase of a certain tract of land "and for constructing thereon a new school building and furnishing same and for repairs to existing school buildings."

In September, 1912, the Board of School Estimate certified to the Common Council of the City of Lambertville that it had appropriated the sum of $75,000 for the purpose of purchasing a certain site and for the purpose of erecting a school building thereon and that such sum of money was requested for such purposes, for furnishing the building and for repairs to existing school buildings.

The Common Council was requested to take proper measures to raise said sum of money for such purposes.

Section 74 of the School Law makes it the duty of the Board of Education of each City School District on or before the fifteenth day of May of, each year to prepare for the Board of School Estimate an itemized statement of the amount of money necessary for current expenses of and for repairing and furnishing the public schools of the district for the following year.

Section 75 makes it the duty of the Board of School Estimate between the fifteenth of May and the first of June to fix and determine the amount of money necessary for the use of the public schools for the following year and to certify the same to the Common Council, Board of Finance or other body in the city having power to make appropriations.

By the same section it is provided that the Common Council or other body "shall upon receipt of said notice, appropriate, in the same manner as other appropriations are made by it, the amount so certified as aforesaid."

Section 76 provides that when a City Board of Education decides that it is necessary to raise money for the purchase of land for school purposes or for erecting, enlarging and repairing or furnishing a schoolhouse, it shall prepare for the Board of School Estimate a statement of the amount of money estimated to be necessary for such purpose or purposes.

By the same section it is made the duty of the Board of School Estimate to fix and determine the amount necessary and to certify such amount to the Common Council or other financial body.

By the same section it is provided that:

> "said Common Council, Board of Finance or other body may appropriate such sum or sums, for such purpose or purposes, in the same manner as other appropriations are made by it."

It will be noticed that it is provided that the Common Council *shall* appropriate moneys necessary for the annual running expenses, but that for the purchase of land and erection of buildings the Common Council *may* appropriate the moneys.

In this case the Common Council evidently believed that it rested within its discretion whether to appropriate $75,000 or not for the purchase of a site and the erection thereon of a school building, for furnishing same and for repairs to other school buildings. It did not agree with the Board of Education about the site selected by the latter and for the purpose of ascertaining the wishes of the people it caused a ballot to be taken, which had no binding effect, but which was purely advisory. At such ballot 412 votes were cast, 46 of which were in favor of the site selected by the Board of Education, 353 in favor of the site preferred by the Common Council, while 13 were rejected.

Following this vote, the Common Council refrained from appropriating $75,000 requested by the Board of Education and fixed and determined by the Board of School Estimate. Proceedings were instituted before the Commissioner by the Board of Education to compel the Common Council to raise the $75,000. In such proceedings the Common Council offered to prove that the site selected by the Board of Education was not a proper site. The Commissioner declined to receive the evidence on the ground that the Common Council had no discretionary rights or powers in the matter, that its sole duty was to raise the money, the amount of which was fixed and determined by the Board of School Estimate.

In the case of Montclair *against* Baxter, 47 Vroom 68, the Court in the course of its opinion wrote that when the Board of School Estimate has fixed and determined the amount of money necessary for the purchase of land and the erection of a schoolhouse, the Common Council, notwithstanding the use of the word "may" in Section 76, has no discretion, but must make the appropriation. While, in view of the actual decision rendered, the language of the court might be viewed as a mere expression of opinion, still it has been assumed since 1908, when it was written, to be the law and to be binding upon common councils.

In view of this decision and of the peculiar facts of this case, it has been strongly urged that proceedings on the part of the Board of Education and the Board of School Estimate for the purpose of raising the money for the purchase of land and the erection of a building thereon must literally and strictly comply with the statute. In short, counsel for the common council herein contends that a strict rather than a substantial compliance with the

statute is necessary. We cannot ignore the fact that boards of education are not composed of technical lawyers and in the absence of a decision of the court we are unwilling to lay down a rule which would require a microscopical analysis of proceedings for the raising of money for school improvements. To us it seems sufficient if the provisions of the statute, fairly construed, are complied with.

This case was very fully argued before the Committee, and while many points, chiefly of a technical nature, were presented, special stress was laid upon one. It was urged that as the resolution of the Board of Education and also of the Board of School Estimate called for the purchase of a particular site, the Common Council was justified in declining to appropriate the money in view of the decision in the case of the Board of Education *against* Montclair, 47 Vroom 59. In that case the resolution of the Board of School Estimate fixed and determined the amount of money necessary for the erection of a schoolhouse at $75,000, "on condition that a school building containing 20 units shall be erected." The Court held that the resolution by its very terms was conditional upon a certain kind of a school building being erected. The Court, therefore, held that the resolution did not fix and determine the amount as required by Statute and that the Common Council was right in refusing to appropriate the money.

In this case the Common Council of Lambertville contends that the resolution of the Board of School Estimate was conditional in that it fixes $75,000 for the purchase of a particular site, etc. As we understand its argument, it is that the resolution is the equivalent of a resolution fixing and determining $75,000 for the purchase of a site and the erection of a building thereon on condition that a particular site be secured. Its theory is that if it is conditional to fix an amount provided a certain kind of a building can be secured for it, it is just as conditional to fix an amount provided a certain site can be secured.

In this case the Board of School Estimate absolutely fixed and determined the amount of money necessary to carry out the objects of the Board of Education and such objects included the purchase of a particular site. In the Montclair case the Board of School Estimate did not, as the Court held, fix and determine the amount necessary for the objects expressed by the Board of Education. In that case the Board of School Estimate in effect said: We fix and determine the sum of $175,000 on condition that a certain result can be accomplished.

In this case the sum was fixed absolutely as required by statute and presumably the Board of School Estimate, before fixing it, ascertained that the amount of $75,000 was adequate for the purchase of the particular site and for the other purposes expressed in the resolution of the Board of Education.

The decision of the Commissioner is affirmed.

July 10, 1913.

Affirmed by the SUPREME COURT, 9 Atlantic Reporter 242.

DECISION OF THE COURT OF ERRORS AND APPEALS

We agree with the Supreme Court in the matters specifically decided by that court. We differ on one point which was probably overlooked because not emphasized in the brief, although raised in the reasons. The resolution submitted by the Board of Education to the Board of Estimate asked that $75,000 be appropriated "with which to purchase, or take and condemn the above mentioned tract of land, and for constructing thereon a new school building and furnishing same and for repairs to existing school buildings."

As pointed out by the State Board of Education in its decision, the school law makes a distinction between the appropriation for current expenses and for repairing and furnishing the schools, which is to be made under section 74, and the appropriation of money for the purchase of lands for school purposes or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, which is to be made under section 76. Under section 74 an itemized statement of the amount of money estimated to be necessary must be delivered to each member of the Board of Estimate. Under section 76 the statement is not specifically required to be itemized. Repairs are provided for in both sections, but it is evident that the Legislature contemplated a distinction between repairs under section 74 and repairs under section 76. A sensible distinction is that under the former only ordinary current repairs are meant, such as would naturally form part of the current expenses of the schools; under the latter are meant those more important repairs which may properly be likened to the enlarging of a schoolhouse. The maximum *noscitur* a *sociis* is applicable. The repairs for which the present appropriation is sought are undoubtedly of the character of current expenses, since they are repairs to existing school buildings and it is not shown that any but ordinary necessary repairs are contemplated. The amount asked therefor should have been separately stated.

Moreover, although section 76 does not in terms require an itemized statement, it requires the Board of Education to deliver to each member of the Board of Estimate a statement of the amount of money estimated to be necessary for the purpose or purposes. The obvious intent was to enable the Board of Estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes. It would be quite impossible for the Board of Estimate to act intelligently upon a certificate which included in a lump sum the amount necessary for purchase of land and erecting a new schoolhouse, and the amount necessary for repairs to existing schoolhouses. An appropriation made in that way would put it in the power of the Board of Education to expend the whole appropriation for repairs.

For these reasons we think the judgment should be reversed and a judgment entered in the Supreme Court setting aside the proceedings, with costs.

ANNUAL SCHOOL APPROPRIATION DISCRETIONARY WITH CITY GOVERNING BODY ABOVE STATUTORY LIMITATION

THE BOARD OF EDUCATION OF SOMERS POINT,

Appellant,

vs.

COMMON COUNCIL OF THE CITY OF SOMERS POINT,

Respondent.

Mark Townsend, Jr., for Appellant.

L. A. Higbee, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the Board of Education of Somers Point appealing from the action of the Common Council of Somers Point, on March 6, 1923, in re-appropriating as the amount to be expended for manual training purposes in the schools for the coming year, 1923-1924, the unexpended balance of $500 already on hand in the Manual Training Account instead of adding such amount in accordance with the certification of the Board of School Estimate to the total appropriation of $11,475 fixed by the council as the amount to be raised by taxation.

In an earlier action brought by the Somers Point Board of Education against the Common Council of that city to contest the legality of this same annual appropriation for 1923-1924, the Common Council made in the pleadings, filed with this office the uncontradicted statement, that the ratables in the district as shown upon the assessor's books and turned in to the County Board of Taxation for the year 1923, amounted to $825,889.96. Section 91, Article VI, of the New Jersey School Law, moreover provides that "Any amount (annual school appropriation in city districts) in excess of three-fourths of one per cent of the taxable valuation of the real and personal property, shall be appropriated only with the concurrence and consent of said common council, board of finance or other body expressed by its resolution duly passed."

In accordance with the above provision of law, it is apparent that the Board of Education of Somers Point, is entitled only to the sum of between $6,000 and $7,000 or $6,194.17, to be exact, as its annual appropriation for school purposes for 1923-1924, unless the consent of the common council is obtained to an amount in excess of ¾ of 1% of the $825,889.96, comprising the taxable valuations of the district.

In view of the above facts therefore and of the fact that the amount of $11,475 appropriated on March 6, 1923, by the common council and to be raised by taxation is already considerably in excess of $6,194.17, the maximum

amount it can legally be compelled to appropriate, the Commissioner deems it unnecessary to go into the merits of the Common Council's refusal to add the desired $500 for manual training purposes to its appropriation of $11,475, to be raised by taxation. Since the council has already appropriated an amount in excess of the ¾ of 1% of the taxable valuations which it is compelled to appropriate, its reasons for refusing to appropriate additional money are immaterial and its refusal cannot in the Commissioner's opinion be interfered with.

The appeal is accordingly hereby dismissed.

October 18, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

In February, 1923, the Board of School Estimate of Somers Point fixed the amount to be appropriated for the current expenses for the school year, 1923-1924, and to be raised by taxation, the sum of 13,475, after deducting the estimated State school moneys to be received. This was "in excess of three-fourths of one per cent. of the taxable valuation of the real and personal property" and therefore could be "appropriated only with the concurrence and consent of the Common Council." (New Jersey School Laws, Art. 6, Sec. 91.) The Common Council refused to vote this amount but passed a resolution reducing it to $11,475, stating in its resolution that an item of $500, for manual training, which was included in the resolution of the Board of School Estimate, should be taken from an unexpended balance of that amount then on hand from the previous year and placed to the credit of the appropriation for the year 1923-1924. The Board of Education appealed to the Commissioner only with respect to the direction of the Common Council concerning this particular item, claiming that the Council had no right to control the expenditure of the funds of the Board of Education.

This contention of the Board of Education is, as a matter of law, correct, but in this case it is immaterial since, inasmuch as the annual school appropriation was in excess of three-fourths of one per cent. of the taxable valuations of the City of Somers Point, no amount in excess thereof could be appropriated without the consent of the Common Council, and any reasons given by it for its action or methods used in arriving at its decision are of no consequence.

The Board of Education has not raised the question whether the council could, by resolution, fix the amount of the school appropriation, in place of the Board of School Estimate, which is the body designated by law to make the appropriation, and therefore that question is not before us for determination.

It is recommended that the Commissioner's decision dismissing the appeal on the ground above stated be affirmed.

REFUSAL OF CITY COMMISSIONERS TO RAISE AMOUNT CERTIFIED BY BOARD OF ESTIMATE

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE,

Appellant,

vs.

THE CITY COMMISSIONERS OF THE CITY OF MILLVILLE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On May 17, 1916, the Board of School Estimate of the City of Millville fixed and determined the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing year, exclusive of the amount which would be apportioned by the County Superintendent of Schools. This was in accordance with the law constituting the Board of School Estimate as the authority to determine the amount of money to be raised for the ensuing year for school purposes. It appears that at the close of the school year there was a balance of some $3,795 in the hands of the custodian of the school district of Millville. The matter in dispute centers on this balance. In making the assessment levy for taxes the City Commissioners deducted this balance in the hands of the custodian from the amount of money certified to them by the Board of School Estimate. There seemed to prevail an assumption that the balance of $3,795 belonged to the funds of the city because the City Treasurer was also the Custodian of School Moneys. Hence it was argued that the City Commissioners could lapse into the moneys of the city this balance that belonged to the Board of Education of the School District of Millville.

The Board of Education appeals from this action and demands that the total amount of money certified by the Board of School Estimate shall be paid to the Custodian of School Moneys regardless of the amount of the balance remaining in the hands of the custodian at the close of the school year.

It must be understood that a school district is a separate corporate entity. The board of education, representing the school district, makes up a budget needed for the current expenses and presents such budget to the Board of School Estimate, which meets each year between the 15th day of May and the 1st day of June. The amount of money needed is made up of several items and is presented by the board of education to the Board of School Estimate for its consideration. The Board of School Estimate makes up in bulk and certifies in bulk under the law the total amount of money to be raised. The law reads:

> "The Board of School Estimate shall, on or before the last named date (June 1), make two certificates of said amount signed by at least three of the members of said Board, one of which certificates shall be delivered to the board of education of said school district and the other to the common council, board of finance or other body in the city having the power to make appropriations of money raised by taxation in such city. Said common council, board of finance or other body shall upon receipt of said notice appropriate in the same manner as other appropriations are made by it the amount so certified as aforesaid and said amount shall be assessed, levied and collected in the same manner as moneys appropriated for other purposes in such city shall be assessed, levied and collected; provided that any amount in excess of three-fourths of one per centum of the taxable valuation of the real and personal property shall be appropriated only with the concurrence and consent of the said common council, board of finance or other body expressed by its resolution duly passed."

This section is mandatory in its terms. The governing body of a city has no election but to have ordered, assessed and collected the amount of money certified to it by the Board of School Estimate and to pay the full amount certified to the board of education through its custodian.

In the case of Townsend *vs.* State Board of Education, 88 N. J. L. 100, the Court expressed itself upon this question as follows:

> "Reading the act as a whole it would seem that the intent was to substitute for the city council the Board of School Estimate, a joint body, as the arbiter in fixing the annual appropriation for the schools. This amount when duly certified to the council is mandatory on it."

It will thus appear that the governing body of the city has no authority nor control over the amount of money that shall be raised for school purposes in the City of Millville, unless the amount certified for current expenses, for building and repairing, and for manual training is in excess of three-fourths of one per centum of the taxable valuation. This question has not been raised in the petition or answer before me.

I therefore conclude in this case that the Board of Education is entitled to receive from the governing body of the city the total amount of money certified by the Board of School Estimate in May, 1916, without any deduction therefrom, notwithstanding there was failure to assess and collect the full amount.

April 24, 1917.

BOARD OF ESTIMATE CANNOT CHANGE AMOUNT ONCE CERTIFIED

BOARD OF EDUCATION OF RAHWAY,
Appellant,
vs.
BOARD OF SCHOOL ESTIMATE OF RAHWAY,
Respondent.

For the Appellant, F. C. Hyer.
For the Respondent, Francis V. Dobbins.

DECISION OF THE COMMISSIONER OF EDUCATION

On the 27th day of May, 1914, the Board of School Estimate of Rahway fixed and determined $27,830.99 as the appropriation for maintaining the schools in the School District of the City of Rahway, for the school year beginning July 1, 1914. This amount was certified to the Board of Education and the Common Council, as required by law. At a meeting of the Common Council held June 23, the ordinance providing for raising the amount of said appropriation was laid over, the Council alleging as a reason for such action that the Board of School Estimate in fixing and determining the amount of the appropriation had not taken into account an unexpended balance to the credit of the Board of Education. On August 3, the Board of School Estimate met, reconsidered the resolution adopted May 27, and adopted another resolution fixing and determining the amount of the appropriation for the school year beginning July 1, 1914, at $24,260.59. This meeting was held pursuant to a call signed by three members of the Board, and without any previous action by the Board of Education. At a meeting of the Common Council held August 4, an ordinance was passed ordering that there be raised by tax the reduced amount appropriated by the Board of School Estimate.

There are three issues raised in this controversy. First. Has the Board of School Estimate the power to reduce the amount fixed and determined by it after the certificates have been filed with the Board of Education? Second. Can a legal meeting of the Board of School Estimate be held except in pursuance of a request from the Board of Education? Third. Had the Common Council power to postpone action?

Section 74 of the School Law makes it the duty of the Board of Education to deliver to each member of the Board of School Estimate, on or before the 15th day of May, "an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of such district for the ensuing school year, and also the amount which shall have been apportioned to such school district by the County Superintendent," and section 75 makes it the duty of the

Board of School Estimate, between the 15th day of May and the 1st day of June, to "fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the County Superintendent of Schools." The section further provides that a certificate of said amount shall be delivered to the Common Council and to the Board of Education, and that "said Common Council, board of finance or other body shall, upon receipt of said notice, appropriate * * * the amount so certified as aforesaid."

The Board of School Estimate has fifteen days after the receipt of the statement of the Board of Education to determine the amount of the appropriation for the ensuing school year. Each member of the Board is furnished with a copy of the statement, and has ample opportunity to make such investigation of the school conditions as will enable him to act intelligently in determining the amount necessary to be appropriated. The respondent claims that it was misled by the failure of the Board of Education to state that there would be a balance at the end of the school year on June 30th. The Secretary of the Board of Education is also the Secretary of the Board of School Estimate. As Secretary of the Board of Education he is its general accountant, and has charge of the books and financial papers of the Board. Any information as to the finances of the Board of Education could have been furnished by him. The law specifies the items which shall be included in the statement furnished by the Board of Education, and while the appellant could have included the amount of the balance, it could not be compelled to do so. The Board of School Estimate having, prior to June 1st, certified to the Common Council and to the Board of Education the amount of the appropriation, the matter was beyond its control, and the action taken on August 3d, attempting to reduce the amount of the appropriation, is null and void.

Can a legal meeting of the Board of School Estimate be held except in pursuance of a request from the Board of Education?

The powers of the Board of School Estimate are limited to acting upon requests for appropriations by the Board of Education. Having acted upon a request of the Board of Education and adjourned, it cannot reconvene until another request is received.

Had the Common Council power to postpone action?

In the case of Montclair *vs.* State Superintendent, 47 Vr. 68, the Court held that "when the Board of School Estimate has fixed and determined the amount necessary for the purchase of land and erection of a schoolhouse, it is mandatory upon the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax or to borrow the same." This decision construed section 76 of the School Law. The language of section 75, providing for appropriations for maintaining the schools, is quite as mandatory, and the decision of the Court applies with equal force to that section. The Common Council cannot refuse to provide the money, for the reason that, in its opinion, the amount fixed and determined is larger than necessary. Neither can it postpone action. Section 75 directs the Common Council *"upon receipt of such notice"* to appropriate the amount certified to it by the Board of School Estimate.

It is ordered that the Common Council of the City of Rahway appropriate to the use of the Board of Education the sum of $27,830.99.

December 15, 1914.

MONEY TRANSFERRED BY BOARD OF SCHOOL ESTIMATE FOR SPECIFIC PURPOSE MAY BE USED ONLY FOR SUCH PURPOSE

THE MAYOR AND COMMON COUNCIL OF THE CITY OF PLEASANTVILLE, AND CHARLES E. JACKSON, EDWARD ABBOTT, WILLIAM BIGGS, GEORGE ENGELHARDT, POWELL HUDSON, GEORGE PAINTER, D. RUSSELL THATCHER AND JOHN VAN SANT, as residents and taxpayers of said city,

Appellants.

vs.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, JOHN C. HERRMANN, CHELSEA TITLE AND GUARANTY COMPANY, a corporation of the State of New Jersey, and PLEASANTVILLE NATIONAL BANK, a banking corporation of the United States of America,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

The Mayor and Common Council of the City of Pleasantville as officers and also as residents and taxpayers of said city bring this appeal to contest the validity of an attempted purchase of land for school purposes by the Board of Education of the City of Pleasantville.

On August 7, 1930, the Board of Education passed a resolution as follows:

> "WHEREAS, This Board has in hand in the Current Expense Account an unexpended balance; and
>
> "WHEREAS, The sum of $60,000.00 is needed for outlay in the capital outlay account; therefore, be it
>
> "*Resolved,* That the Board of School Estimates of Pleasantville, N. J., is hereby requested to meet and consent to the expenditure of said sum of $60,000.00 from the Current Expense Account"; etc.

On August 14 a meeting of the Board of School Estimate was held in compliance with the request contained in the above quoted resolution of the Board of Education, at which meeting the Board of School Estimate fixed and de-

termined that the amount of $60,000.00 be transferred from the unexpended balance of the current expense account to the capital outlay account. Notice of the transfer was duly forwarded to the Common Council of the City.

At a meeting of the Common Council held on September 2, 1930, the following action was taken:

> "WHEREAS, At the meeting of August 18 there was ordered received and filed certification of Board of School Estimates consenting to transfer of $60,000.00 from the Current Expense Account of the Board of Education to the Capital Outlay Account of said Board, and this body desires to consent to and concur in said transfer; therefore, be it
>
> *"Resolved,* That this body do hereby consent to said transfer of said sum as above stated and concur therein."

The president of the Board of Education, who had on several occasions previously intimated to Lewis L. Mathis, agent for John C. Herrmann, who owned a large tract of land near the high school building, that the Board was interested in the purchase of land for an athletic field, was approached by Mr. Mathis, who offered for sale the Herrmann tract in the Ansley Park development at a much lower price than he had previously quoted. The president presented the offer made by Mr. Mathis at a meeting of the Board of Education held September 10, 1930, at which meeting the Board by resolution decided to purchase from the funds transferred by the Board of School Estimate heretofore mentioned a tract described by lots and boundaries for the sum of $36,000. The president and secretary were authorized to enter into an agreement for the purchase.

At a meeting of the Common Council held on September 15, 1930, a resolution was adopted that the taxes on the property acquired by the Board of Education for an athletic field (being the property in dispute) be remitted as of January 1, 1930, and that the said premises thereafter be classified as property of the Board of Education and thereby exempt from taxation.

The president and secretary of the Board of Education entered into the agreement with Mr. Herrmann on September 12 and on September 15 the Board of Education completed the transfer of the property at the office of the Chelsea Title and Guaranty Company. At said settlement a check in the sum of $35,614.85, signed by the president and secretary of the Board of Education and the custodian of school moneys, drawn on the Pleasantville, National Bank, was delivered to the Title Company and a deed was executed, acknowledged and delivered by John C. Herrmann, conveying said land to the Board of Education of the City of Pleasantville. The deed was taken on the day of settlement to the County Clerk of Atlantic County at Mays Landing, N. J., and recorded. Payment of the check of $35,614.85 was ordered stopped by the Mayor and Custodian of School Moneys, and has not been honored by the bank.

On September 18, 1930, at a special meeting of the Common Council the resolution of September 15, 1930, exempting from taxation the land purchased by the Board of Education, was rescinded. A further resolution was adopted providing that since in the opinion of the Council the price paid for the land is exorbitant, that the land is not necessary at the present time, and its purchase

is against the policy of cutting down municipal expenses in order to aid the taxpayers, council be employed to appeal to the Commissioner of Education or take other proceedings to test the authority of the attempted purchase.

Appellants ask that the resolution of September 10, 1930, by the Board of Education to purchase land for athletic purposes from John C. Herrmann be set aside for the reasons that the funds for the purchase were not legally authorized and that the purchase price is exorbitant.

At a hearing held January 5, 1931, in the Pleasantville High School, no testimony was offered relative to the actual value of the land. There remains, therefore, to be determined only whether the transfer of the money by the Board of School Estimate from the current expense to the capital outlay account under the conditions above set forth, authorized the Board of Education to use the funds so transferred for the purchase of land.

Chapter 12, Section 1, P. L. 1928, provides:

> "Whenever a city Board of Education *in a city of the third class of this State* shall decide that it is necessary to raise money for the purchase of lands for school purposes or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, it shall prepare and deliver to each member of the Board of School Estimate of such school district a statement of the amount of money estimated to be necessary for such purpose or purposes; said Board of School Estimate shall fix and determine the amount necessary for such purpose or purposes;"

Chapter 1, Section 76, P. L. 1903 Special Session, and Chapter 12, Section 1, P. L. 1928, with the exception that the former relates to all cities and the latter relates to cities of the third class, which includes the City of Pleasantville, are synonymous in so far as their provisions apply in this case, and the decisions of the Supreme Court and Court of Errors and Appeals hereinafter cited which refer to Section 76, have entirely the same application to the third class city statute above quoted. Boards of Education in township, town and borough school districts have power:

> "To purchase, sell and improve school grounds; to erect, lease, enlarge, improve, repair or furnish school buildings, and to borrow money therefor with or without mortgage; provided, that for any such act it shall have the previous authority of a vote of the legal voters of the district." (P. 87, 1928 Compilation of School Law.)

It is to be noted that in this type of school district (Article VII) the purchase of school grounds must be authorized by the legal voters without regard to whether the necessary funds are on hand in a capital outlay account or whether the board is authorized to raise money for that purpose.

In the (Article VI) city district, the statute provides that when it is necessary to raise money for the purchase of land, the amount shall be determined by the Board of School Estimate.

In township, town and borough districts (Article VII) where boards are elected by the people, the purchase of land must be authorized by the voters, and in districts where boards are appointed by the chief executive officer, the Legislature has provided for representatives elected by the people to act with the Board in determining the amount which may be raised for the purchase of land.

In the statute applying to this case, the Legislature said: "When it is necessary to raise money for the purchase of land." It did not say "When it is necessary to purchase land." While it used the former rather than the latter expression, which is similar to the provisions for Article VII districts, it appears that the Legislature considered the situations identical. It would be expected under a good budgeting plan that when land is to be purchased there would be a need to raise money for that purpose. It was not contemplated that balances would be sufficiently large to permit of the purchase of land. It is provided in section seven of the statute applying to this case, that the proceeds of bonds for land and buildings cannot be used for any other purpose than that for which the bonds were issued except for the expense incident to the issuing and the selling of the bonds, and the Board is authorized to transfer any such balance to the building and repair account which is an annual budget account. It is evidently the legislative intent that definite amounts for specific purposes in the capital outlay account are not to be used for any other than the specific purpose and the small balances which remain after the purpose is accomplished are to go to an annual appropriation account to decrease the amount to be raised in succeeding annual appropriations.

When money is to be raised for land, the Board of Education must deliver to each member of the Board of School Estimate a statement of the amount estimated to be necessary for that purpose. There is in the opinion of the Commissioner no legal difference between the right of a Board of School Estimate to raise or to transfer money. The rules of the State Board of Education provide for the transfer of money. When money is to be raised or transferred, the purpose or purposes must be set forth. Of course, it may be argued that the Board of School Estimate in transferring money to the capital outlay account, without the definite purpose or purposes for which the transfer was requested being set forth, waived its right to determine what part if any of the amount transferred could be used for the purchase of land. The evidence shows that the Board of Education at the time of requesting the transfer did not contemplate the purchase of land. The members of the Board of Education, who were also members of the Board of School Estimate, individually informed the councilmen on the Board of School Estimate that the money was needed for the equipment of a cafeteria, manual training department, domestic science department, and other equipment for the new high school building. While it is true that the amount transferred was rather large for the purchase of the above-mentioned equipment, there was no indication that either the Board of Education or the Board of School Estimate contemplated the purchase of land.

The general legal rule governing appropriations for the purchase of land by city boards of education is set forth in the following citations:

New Jersey Supreme Court in the case of Newark *vs.* Board of Education, 30 N. J. L. 374:

> " * * * But in the disbursement and distribution of the money the Board of Education were given exclusive management and control, and were in no way subject to the direction or interference of the council except in purchasing real estate."

Court of Errors and Appeals in the case of Lambertville *vs.* State Board of Education, 87 N. J. L. 197:

> "Moreover, although Section 76 does not in terms require an itemized statement, it requires the Board of Education to deliver to each member of the Board of School Estimate a statement of the amount of money estimated to be necessary for the purpose or purposes. The obvious intent was to enable the Board of Estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes."

Court of Errors and Appeals in the case of Wendel *vs.* Board of Education of Hoboken, 76 N. J. L. 501:

> "It seems quite plain, from a perusal of these provisions, that the principal function of the Board of School Estimate is to supervise the expenditures proposed to be incurred by the Board of Education, and that the latter Board is powerless to enter into a valid contract for the purchase of lands for school purposes until after action by the Board of School Estimate fixing and determining the amount to be expended in such purchase. * * * The power of the Board of Education of the city of Hoboken to acquire the lands of the prosecutor and the jurisdiction of the justice to make the order under review depend upon whether the Board of School Estimate has fixed and determined the amount of money necessary to be expended for that purpose."

In view of the above rulings of the Supreme Court and the Court of Errors and Appeals, it is the opinion of the Commissioner that when city boards of education desire to purchase land, the money which may be expended for that purpose must be determined by the Board of School Estimate, and unless the latter board has determined an amount which may be used for such purpose, the expenditure of funds is illegal.

Since the Board of School Estimate for the school district of the city of Pleasantville did not determine an amount for the purchase of land by the Board of Education of said district, the resolution of September 10, 1930, made by the Board of Education is illegal. The contract between the Board and Mr. Herrmann is accordingly void.

February 17, 1931.

DECISION OF STATE BOARD OF EDUCATION

The appellees brought this proceeding before the Commissioner of Education to contest the validity of an attempted purchase of land for school purposes by the Board of Education of the City of Pleasantville, without the express sanction and authority of the Board of School Estimate. After a full hearing the Commissioner filed an opinion in which the facts are fully stated and the conclusion is that since the Board of School Estimate of Pleasantville did not determine the amount for the purchase of said land by the Board of Education of the district, the resolution of September 10, 1930, made by the Board of Education providing for the purchase, is illegal, and the contract between the Board and the vendor of the land, Mr. Herrmann, is accordingly void.

We think his conclusion is correct, and recommend that the decision, as stated in the last paragraph of his opinion, be affirmed.

May 9, 1931.

USE OF SCHOOL BUILDINGS FOR OTHER THAN SCHOOL PURPOSES

FRED KLEIN, ET AL.,

Appellant,

vs.

BOARD OF EDUCATION OF JERSEY CITY,

Respondent.

John J. Mulvaney, for the Appellant.
Warren Dixon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellants charge that the respondent permitted the use of the auditorium in the high school building under its control for lectures, meetings, and purposes other than those directly connected with the regular school course, and pray that the action of the respondent be declared illegal, and that the use of said auditorium for other than school purposes be prohibited.

Article VI of the School Law provides for the government of city school districts. Section 50 of said law gives to the Board of Education in a city district "supervision, control and management of the public schools and public school property in its district," and section 51 gives to said board power to "make, amend and repeal rules, regulations and by-laws not inconsistent with this act, or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district."

Article VII provides for the government of township, incorporated town and borough school districts, and section 86, paragraph XI, gives to a Board of Education in such district power "to permit a schoolhouse to be used for other than school purposes when the board shall consent thereto."

There is no express provision in Article VI authorizing the use of school buildings for other than school purposes, but an examination of Articles VI and VII discloses that in the latter the powers of the Board of Education are prescribed with considerable detail, while in Article VI they are expressed in general terms. I am unable to discover any reason for permitting the use of a schoolhouse in a borough district for other than school purposes and prohibiting such use in a city district, and I am of the opinion that it was the legislative intent to give to the boards of education in both classes of districts like powers in the control and management of school buildings.

The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. A board of education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions.

The appeal is dismissed.

November 20, 1912.

BOARDS OF EDUCATION MAY REFUSE REQUESTS BY CIVIC ASSOCIATIONS FOR UNLIMITED USE OF SCHOOL BUILDINGS

North Bergen Taxpayers' and Civic Association, Incorporated,

Appellant,

vs.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

For the Appellant, George Rothstein.

For the Respondent, Nicholas Schloeder.

Decision of the Commissioner of Education

The petitioner, an incorporated association of citizens of the Township of North Bergen, on February 14, 1933, requested of the respondent Board of Education the use of the auditorium of the Horace Mann School for meetings of the association on the first Monday evening of each month.

At a regular meeting of the Board of Education held on March 9, 1933, a motion or resolution was adopted providing that the use of the schools of the township would be granted for the purpose of holding rallies. On March 14, 1933, the Board of Education notified the petitioner that its request for the use of the auditorium in the Horace Mann School for regular monthly meetings the first Monday evening of each month had been denied. Upon receipt of this communication the petitioner appealed to the Commissioner asking that an order be issued requiring the Board to permit the use of the auditorium on the first Monday evening of each month in accordance with its request of February 14, 1933.

A hearing was conducted in the Hudson County Court House at Jersey City at which the testimony discloses a reluctance on the part of the Board of Education to grant the application of the petitioner principally on the grounds that the request was indeterminate and it believed it to be unwise to assign for indefinite periods specific nights for the use of a building by organizations other than those directly connected with the schools.

Chapter 342, P. L. 1930, provides that a board of education may, subject to reasonable regulations to be adopted by said board, permit the use of any school building and rooms therein for various purposes when the facilities desired are not needed for school activities.

The Commissioner of Education in the case of Klein *vs.* Board of Education of Jersey City, p. 317, 1928 Compilation of School Law Decisions, said:

> "The custom of giving the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. The board of education must use reasonable discretion in the exercise of this power and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school session."

The request by a large organization for the use of a building on a specified night, monthly, is not unreasonable because it precludes the necessity of sending written notices to the members. However, a board of education may not deem it wise to grant such a request without any limitation as to its duration. While the Board of Education refused the use of the building for an indeterminate period, the Commissioner is of the opinion that it could have granted the request of the appellant with the understanding that the privilege could be withdrawn at any time upon reasonable notice; but that the use for a specific night would not be withdrawn between the time of the last meeting and the date set for the one immediately succeeding.

Since the petitioner made a request for the use of the auditorium for an unlimited time, and the respondent had no rules pertaining to the use of school buildings by organizations desiring regular meeting nights, the Board of Education of the Township of North Bergen acted within its legal rights in refusing to grant the use of the auditorium of the Horace Mann School for an indeterminate period. The appeal is dismissed.

May 20, 1933.

BOARDS OF EDUCATION HAVE DISCRETIONARY RIGHT TO DENY USE OF BUILDINGS FOR OTHER THAN SCHOOL PURPOSES

AMERICAN LEAGUE AGAINST WAR AND FASCISM, PERTH AMBOY BRANCH,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Julius Kass.

For the Respondent, John E. Toolan.

DECISION OF THE COMMISSIONER OF EDUCATION

The Perth Amboy branch of the unincorporated association known as the "American League Against War and Fascism" applied to the Board of Education of Perth Amboy on July 9, 1936, for the use of the high school auditorium on November 19, 1936, for a lecture to be delivered by Major General Smedley Butler on the topic of "War is a Racket." The Board of Education by resolution adopted July 17, 1936, authorized the secretary to inform the petitioner of its decision not to grant the use of the auditorium. The resolution was communicated to the petitioner in a letter dated July 20. The application was repeated on August 5, 1936, and the petitioner was notified by letter under date of August 14 that after careful consideration the Board had resolved that it must again refuse the application for the use of the high school auditorium on the evening of November 19, 1936.

Counsel for petitioner contends that the action of the board: (1) Defeats the purpose of subsection XI, Section 86, Chapter 1, P. L. 1903, S. S. (2) Is capricious, and an unreasonable exercise of discretion of the Board based on passion, bias, and prejudice. (3) Violates the United States Constitution guaranteeing the right of peaceable assembly and free speech. (4) Is in contravention of the decision of the Commissioner of Education in the case of West New York Tax Payers and Rent Payers Association *vs.* Board of Education of the Town of West New York, decided January 30, 1934.

Subsection XI, Section 86, Chapter 1, P. L. 1903, S. S., provides that the board of education of any school district may subject to reasonable regulations adopted by said board permit the use of a schoolhouse or rooms therein when not used for school purposes for public assemblies, for the giving or receiving of instruction in any branch of education, public library purposes, social, civic and recreational meetings, polling places, and political meetings, and that any action taken by a board under this subsection shall be subject to appeal to the

Commissioner of Education. By the use of the word "may" the Legislature has given to boards of education not only the right to formulate rules and regulations about the use of buildings but to decide whether their use shall be permitted. If the refusal to grant the use of the building under the prescribed regulations is not due to prejudice or to capricious motives, but is the result of a reasonable discretion, the action of the Board must be sustained.

The members of the Board testified that while they have no objection to an address by Major General Butler, who on a previous occasion has spoken in one of the school buildings, it is their opinion that with the heterogeneous population of the City of Perth Amboy, which includes sectional groups immigrating in recent years from several European countries, any discussion under the auspices of the American League Against War and Fascism might as a result of strong difference of opinions lead to extreme disorder or violence, and that it was solely for these reasons that the use of the building was denied. It is to be noted that the petitioner is an unincorporated association and as such might not be held financially liable for damages to property or for disorder occurring in the building. In permitting the use of a school building, it may be advisable for boards to require that petitions be made by responsible citizens or incorporated organizations which have reasonable financial standing.

It is true that under Article I of the amendments to the United States Constitution, there is guaranteed freedom of speech and the right of people to peaceable assembly to petition the Government for redress of grievances, but these rights are not issues in this case since there is no indication that the Board of Education has attempted to prohibit the petitioners from assemblying elsewhere in the city for the purpose of expressing their views in relation to the discussion of "War is a Racket." The Board contends that other available places in the city could be utilized for the purpose and that its refusal of the building in no wise affects petitioner's constitutional rights. There is no constitutional question involved in this case before the Commissioner of Education, but only the determination as to whether the Board of Education is required to permit the use of a school building for a public assembly when in its judgment such use may lead to a disturbance with possible damage to the building.

In the case of West New York Tax Payers and Rent Payers Association, referred to by the petitioners, the denial of the use of the building was based on two reasons: (1) That the incorporated association had recommended the nonpayment of taxes, but in this connection it was shown that no such recommendation had been made for two or three years previous to the application, and, in fact, the organization had for the last year or two urged the payment of taxes; (2) That at some meetings certain local officials had been characterized by uncomplimentary names. In this decision the Commissioner held:

> "The Commissioner is inclined to the view that a board of education would be justified in refusing the use of school buildings to a group whose purpose is to discourage the payment of taxes which are essential to the functioning of government, since the continuance of governmental agencies depends upon tax receipts. The action of the Board in December, 1933, in denying the use of the building for this reason is not justified when it

is shown that many months had elapsed since the nonpayment of taxes as advocated and in the meantime the organization had encouraged tax payments by all of its members.

* * * * * * *

"While schools are erected primarily for the education of children between the ages of five and twenty years, they should serve a much broader purpose and, where adaptable, they should be the center of adult educational and civic activities of the community. With proper restrictions, their use should be made readily available for at least all the purposes set forth in Chapter 342, P. L. 1930, * * * In many communities, school buildings are used only between the hours of 8:00 A. M. and 5:00 P. M., and, after being erected at great public expense, are not profitably used by the citizens. Their use should be encouraged rather than discouraged by boards of education, and this view is supported by the Commissioner of Education in the case of Klein *vs.* Board of Education of Jersey City, 1928 Compilation School Law Decisions, p. 318, in which he said:

" 'The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. A board of education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions.' "

The action of the Board in the West New York case was reversed for the reasons set forth in the decision, as follows:

"The testimony shows that respondent's refusal of the use of the building for appellant's meetings is not justified by the facts, but motivated by passion and prejudice * * *"

While the Commissioner may not agree with the action of the respondent in this case and may believe that the trouble anticipated would not materialize, he cannot be positive that the Board's views are erroneous and accordingly substitute his judgment for that of the Board.

The Supreme Court in the case of Hoar *vs.* Preiskel, 128 At. 857, held:

"Where the judgment of the trial court is fairly supported by the record, its findings of fact will not be disturbed by the appellant court," and "Even if it were possible to reach a different conclusion, they will not review the testimony upon which a municipal officer was dismissed."

and in Reilly *vs.* Mayor and Board of Aldermen of Jersey City, 64 N. J. L. 508, the Court said:

"In reviewing the action of a board of police commissioners, this court will not weigh the evidence taken before them for the purpose of reaching

an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong, this court will not interfere."

Since the reasons of the Perth Amboy Board of Education for the refusal of the use of the high school building by the American League Against War and Fascism, Perth Amboy Branch, on November 19, 1936, establish a rational basis for the respondent's decision, the petition is dismissed.

November 7, 1936.

BOARD OF EDUCATION MAY EXERCISE REASONABLE DISCRETION IN PERMITTING USE OF SCHOOL BUILDINGS

EDGEWATER REGULAR DEMOCRATIC CLUB,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,

Respondent.

For the Appellant, Irwin Rubenstein.

For the Respondent, Milton T. Lasher.

DECISION OF THE COMMISSIONER OF EDUCATION

The Edgewater Regular Democratic Club holds a certificate of incorporation issued by the State of New Jersey, dated January 17, 1934. On March 22, 1934, this organization requested the respondent's permission "to hold its next two regular meetings in the Eleanor Van Gelder School on Wednesday, April 4, and on Wednesday, May 2, 1934," which request was denied on March 29. The appellant petitions the Commissioner of Education to cause the respondent to grant that request and to also require the Board to permit the use of the auditorium for the holding of its political meetings.

At the hearing the appellant attempted to show that the meetings on April 4 and May 2, for which it made application for the use of the building, were not regular meetings of the club as set forth in the application, but political mass meetings. The board members testified that the matter of mass meetings was not before them, but that it has been the general policy of the Board to permit the use of the school auditorium for mass meetings under auspices of community organizations, and to deny the privilege for regular club meetings.

While it is now a moot question as to whether the Board should have granted the use of the building for the meetings on the dates named, it may be well for the Commissioner to rule upon the questions of whether organizations of this type must be permitted to use the school building as a regular meeting place and whether a board is required to permit the use of the buildings for political mass meetings.

Counsel for appellant quotes the Commissioner of Education in the cases of Klein *vs.* Board of Education of Jersey City, 1928 Compilation of School Law Decisions, p. 317, and West New York Tax Payers and Rent Payers Association *vs.* Board of Education of the Town of West New York, decided January 30, 1934. It is to be noted that in the former decision the Commissioner said:

> "The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. *I think such use should be permitted* unless there is an express statutory prohibition."

and in the latter:

> "While schools are erected primarily for the education of children between the ages of five and twenty years *they should serve a* much broader purpose and where adaptable, *they should be the center of adult education and civic activities* of the community. With proper restrictions, *their use should be made readily available* for at least all the purposes set forth in Chapter 342, P. L. 1920, * * *"

In the above citations the word "should" is used rather than "must," indicating a recommendation of the Commissioner, but not a mandate. Subject to appeal to the Commissioner of Education, boards of education are given discretionary powers as to the use of buildings for other than school purposes; and while the Commissioner urges their liberal use for the development of the civic or social life of a community, it is not his purpose to set aside the determination of a board where it shows reasonable discretion and is not motivated by ulterior reasons. The overruling of the Board of Education in the West New York case was due to the fact that the Board refused the use of the building because uncomplimentary remarks about the municipal officials were made at such meetings, and not because of a general policy or rule adopted by the board. In the present case the appellant requested the respondent to permit the use of one of its schools for regular meetings which was denied in harmony with the Board's policy and with which ruling the Commissioner will not interfere.

The further request is that the Commissioner order the respondent to permit the use of this building for political meetings, which requires a ruling upon the policies of the board for the future. This, the Commissioner is unable to do, although it is his opinion that there should be no discriminating rules in reference to the use of school property when requested under similar conditions, unless, and until, the privilege is abused.

The Board of Education of the Borough of Edgewater having arrived at its decision by the exercise of a reasonable discretion, the Commissioner will not interfere with its determination. The petition is dismissed.

June 21, 1934.

PREJUDICE OF BOARD OF EDUCATION NOT VALID REASON FOR DENYING USE OF SCHOOL BUILDING TO CIVIC ORGANIZATIONS

WEST NEW YORK TAX PAYERS AND RENT PAYERS ASSOCIATION,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Respondent.

For the Appellant, Irwin Rubenstein.

For the Respondent, Reinhold Hekeler.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant is an incorporated association having a membership of seventeen hundred citizens, not all of whom pay dues. The attendance at regular meetings generally exceeds one thousand in number. During the last eighteen months, these meetings have been held in Public School No. 6, the use of which was granted by the respondent upon specific application prior to each meeting. On November 6, 1933, the association made a written request and enclosed the usual fee for the use of the building for a regular meeting to be held December 7, 1933, which request was denied by the Board of Education. The building is used by other organizations under rules applying to the previous use by the Tax Payers and Rent Payers Association. The appellant holds that the Board's action is in violation of Chapter 342, P. L. 1920, while the respondent contends that it has a discretionary right to refuse the building, and in the instant case is justified in its action for the following reasons:

Speakers at the meetings of the association have openly and repeatedly insulted and vilified officials of the town of West New York, and the Mayor and other citizens have entered protests and requested that the board deny the association further use of the building;

Speakers have repeatedly urged their audience to refrain from paying taxes;

There are a number of privately owned halls in West New York which the organization could easily afford to rent.

No evidence was introduced to indicate an abuse of the building by persons attending meetings of the association.

It is admitted that the terms "barnacles," "leeches," "parasites," and "shysters" have been applied to the municipal officials or their employees and that on one occasion a speaker referred to two citizens as "filthy individuals." At another meeting a member stated that some local officials were in office as the result only of bribery and of trickery. Remarks of similar nature were made at various meetings. In referring to the board of education, one of the association members said: "Let them cut out the ten per cent graft the Board of Education gets on all contracts for materials;" but the testimony shows no derogatory statements about the Board of Education after the meeting in February, 1933. It is also admitted that members were urged not to pay their taxes and were satisfied that the movement be called a "tax strike," but this appears to have been in relation to the 1932 taxes. After February, 1933, however, the payment of taxes was strongly advocated by the various speakers.

The respondent's contention that there are in West New York other halls which could accommodate the membership of the Tax Payers Association is not denied.

There are three questions to be decided in this case: (1) Is the Board of Education justified in denying the use of the building because of the recommendation of non-payment of taxes, the uncomplimentary characterizations of municipal officials, and derogatory statements about the Board of Education?

The Commissioner is inclined to the view that a Board of Education would be justified in refusing the use of school buildings to a group whose purpose is to discourage the payment of taxes which are essential to the functioning of government, since the continuance of governmental agencies depends upon tax receipts. The action of the Board in December, 1933, in denying the use of the building for this reason is not justified when it is shown that many months had elapsed since the non-payment of taxes was advocated and in the meantime the organization had encouraged tax payments by all of its members.

The statute provides for the use of a school building for political meetings, at which it is not uncommon for public officials to be rather severely criticized. If the use of buildings is confined to organizations which will only commend public officials, protection would often be afforded to those who should be exposed. While participants in public meetings are supposed to talk sanely, the freedom of speech in denouncing the acts of public officials should not be suppressed. If libelous statements are made in public against an official, he has due recourse in our civil courts. The use of buildings should not be denied because members of an association make uncomplimentary remarks about public officials, their employees, and the Board of Education.

(2) May a board of education deny the use of school buildings to an incorporated organization on the ground that privately owned buildings are available which it may afford to rent?

While schools are erected primarily for the education of children between the ages of five and twenty years, they should serve a much broader purpose and, where adaptable, they should be the center of adult educational and

civic activities of the community. With proper restrictions, their use should be made readily available for at least all the purposes set forth in Chapter 342, P. L. 1920, among which are: Assembling therein for the purpose of learning the arts including the science of agriculture, horticulture and floriculture; public library purposes; for the holding of social, civic and recreational meetings; entertainments of various kinds; political meetings; and for polling places for general or special elections. In many communities, school buildings are used only between the hours of 8:00 A. M. and 5:00 P. M., and, after being erected at great public expense, are not profitably used by the citizens. Their use should be encouraged rather than discouraged by boards of education, and this view is supported by the Commissioner of Education in the case of Klein *vs.* Board of Education of Jersey City, 1928 Compilation of School Law Decisions, p. 318, in which he said:

> "The custom of permitting the use of school buildings for other than school purposes is well established and has existed almost from the time of the erection of the first schoolhouse. I think such use should be permitted unless there is an express statutory prohibition. A board of education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions."

(3) Does permission to use a school building in cases of this kind rest entirely upon the discretion of the Board of Education?

Chapter 342, P. L. 1920, reads in part as follows:

> "1. The board of education of any school district may subject to reasonable regulations to be adopted by said board, or upon notification by the Commissioner of Education, permit the use of any schoolhouse and rooms therein, and the grounds and other property of the district when not in use for school purposes, for any of the following purposes:
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> . . . . . .
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> . . . . . .
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> (c) For holding such social, *civic* and recreational meetings and entertainments and for such other purposes as may be approved by the board of education;
>
> . . . . . .
>
> (e) For polling places, for holding elections and for the registration of voters and for holding *political meetings;*
>
> 2. Any action taken by a board of education under the provisions of this act shall be subject to appeal to the Commissioner of Education, as provided in section ten of the act to which this act is a supplement."

In accordance with section one of the above statute, it is to be noted that the board may, subject to its own regulations or upon notification by the Commissioner of Education, permit the use of its buildings. Under that section discretion appears to be vested entirely in the board of education; but

section two provides that an action taken by a board shall be subject to appeal to the Commissioner of Education. This clearly indicates that the Commissioner, the State Board of Education or the Supreme Court may overrule the action of the board if it was not a reasonable discretion, justified by the facts, or was the result of passion or prejudice.

In cases where the board sits as a judicial body and is required to consider the evidence before it, the State Board has held:

> "As the procedure prescribed by the statute was followed, but two questions arise: First, was the charge such as, if found true in fact, would justify dismissal; and, second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice." (Conrow *vs.* Lumberton Township, New Jersey School Law Decisions, 1928 Edition, p. 186.)

and again,

> "This Board will not disturb the findings of a local board on a question of this kind provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part." (Cheesman *vs.* Gloucester City, 1928 School Law Decisions, p. 159, affirmed by the Supreme Court, id. 159.)

Since the action of the board in the present instance was not a judicial determination, it is even more evident that it could be set aside by the Commissioner if, in his opinion, it was not an honest judgment or was the result of passion or prejudice. When a building may be used must, of course, be left to the discretion of the board of education, and in ruling upon this point in the case of North Bergen Taxpayers and Civic Association *vs.* North Bergen Board of Education, the Commissioner said:

> "The request by a large organization for the use of a building on a specific night, monthly, is not unreasonable because it precludes the necessity of sending written notices to the members. However, a board of education may not deem it wise to grant such a request without any limitation as to its duration. While the board of education refused the use of the building for an indeterminate period, the Commissioner is of the opinion that it could have granted the request of the appellant with the understanding that the privilege could be withdrawn at any time upon reasonable notice; but that the use for a specific night would not be withdrawn between the time of the last meeting and the date set for the one immediately succeeding."

The testimony shows that the respondent's refusal of the use of the building for appellant's meetings is not justified by the facts, but motivated by passion and prejudice resulting from uncomplimentary statements made by members of the association. The Board of Education of the Town of West

New York is, therefore, directed to permit the West New York Tax Payers and Rent Payers Association, upon application, to use the auditorium in No. 6 School, when it is not utilized for school purposes or previously engaged by others; provided, the privilege is not abused by the damage or destruction of school property and the meetings are not inimical to the public welfare or do not impede the proper functioning of government.

January 30, 1934.

PERSON WHO IS NOT LOWEST BIDDER AND WHO IS NOT TAXPAYER OF THE DISTRICT MAY NOT CONTEST AWARD OF CONTRACT

CARL L. FURNER,

Appellant,

vs.

BOARD OF EDUCATION OF THE REGIONAL HIGH SCHOOL DISTRICT OF PENNS GROVE AND UPPER PENNS NECK, SALEM COUNTY,

Respondent.

For the Appellant, Mark Marritz.

For the Respondent, S. Rusling Leap.

DECISION OF THE COMMISSIONER OF EDUCATION

In compliance with an advertisement, the respondent received bids on September 27, 1934, for the erection of a high school under plans and specifications made available to all bidders.

The specifications include the following provisions:

Page 20: "All contracts and subcontracts are subject to the approval of the Government Engineer."

Page 29: "Each contractor when estimating on these plans and specifications shall take into consideration that all work must be completed within the time stated in bid, *as this will be considered along with the other parts of bids in the awarding of contracts.*"

Page 31: "The successful bidder on each branch of the work execute a contract with the owner in the form attached to these specifications within five days of the award to him, in default thereof the owner *may* award the contract to the next lowest bidder, holding the defaulting bidder liable for the loss thereby entailed."

The bids were opened on the above date and the board announced that all would be taken under consideration and the results thereof later announced. Appellant testified that a few days thereafter he happened to be in the office of the attorney for the board and heard him say over the telephone that from all appearances the bid on the general contract would be awarded to Carl L. Furner that evening, but at this meeting all bids were rejected for the reason that some of the bidders did not specify the time of completion as prescribed in the second specification. Mr. Furner's bid was among those lacking in this particular.

The architect testified at the hearing that the bids exceeded by $30,000 the appropriation legally available. The minutes of the Board of Education, which were admitted into evidence, show under date of October 1st, the following:

> "A full discussion of the present plans and specifications for the new building was held with due consideration being given to any changes which might be made in the same to reduce the cost of the building to a point within the appropriation available."

Parts of the minutes of October 3d read:

> "The solicitor, S. Rusling Leap, advised by formal letter, that all general construction bids must be advertised for again because some of the previous bids did not specify the time required to complete the building as specifications required them to do. . . . Dr. William Kirk moved, and it was regularly seconded and carried, that all bids be re-advertised for and the necessary changes to secure a low set of bids be made in the plans and specifications. . . . Motion carried that all certified checks attached to the bids received on September 27, 1934, be returned."

On October 18th, bids were received on the revised plans and specifications, which provide that the work be completed within a maximum of two hundred and fifty working days under penalty of $100.00 for each day above the maximum. Among the bids received was that of the appellant who had accepted the certified check which accompanied his previous bid.

On October 21st, the Board announced that the lowest bid upon the general construction, based on alternates, was submitted by A. W. Funk & Company, Inc., and the contract was accordingly awarded to that firm. While the contract was evidently signed prior to November 14, 1934, it bears that date. The contracting company requested an extension of ten days for the filing of a bond, and at the meeting of the Board on November 12th, it was resolved that the bond must be delivered to the attorney for the Board not later than four o'clock on Thursday, November 15, 1934, with which resolution the contractor complied. The contract was forwarded to the Government Engineer of the Public Works Administration in accordance with the first specification cited, and bears the stamp of approval dated November 26, 1934.

Mr. Furner, who is a non-resident of the district and who submitted the next lowest bid, petitions the Commissioner to set aside the award to A. W. Funk

& Company, Inc., but he does not make that firm a co-respondent. Appellant asks that the contract be awarded to him for the following reasons:

(1) His original bid could not be legally rejected.

(2) The contract with A. W. Funk & Company, Inc., awarded under the second advertisement is invalid because a bond was not filed within five days from the time the contract was actually awarded, and he is, therefore, entitled to it as the next lowest bidder.

1. Appellant is not entitled to the award of the contract on his bid of September 27th, for the following reasons:

(a) The second specification cited above shows that no definite time was fixed for the completion of the building so that all bidders could submit proposals on the same basis. The award of the contract under such conditions would have been illegal. In Armitage *vs.* Newark, 86 N. J. L. 5, the Court held:

> "I refer to the recommendation of the advertisement that each bidder must specify the number of days he will require to finish the work. According to all our cases, if this element of time is to enter into the competitive scheme, it should be the same for all, not left for each bidder to fix for himself and thereby estimate his bid upon a basis different from that of any other bidder. . . . No contract can be properly upheld under proposals which do not require competitive bids upon the same definite basis."

(b) Appellant's bid, having failed to include a time provision, was subject to rejection for non-compliance with the specifications.

(c) The bids exceeded the appropriation in more than $30,000.00. It is well established in law that a public body cannot award bids where the amount thereof exceeds the appropriation legally available.

(d) The Board had a right to reject all bids if revision was desirable, although in this case it did so because of the time element in the specifications, and also because the bids exceed the appropriation.

(e) Appellant accepted the returned check which accompanied his first bid and, without protest, submitted a bid in compliance with the second advertisement, thereby waiving any rights to contest the former.

2. The failure to file a bond within five days after the award of the contract did not invalidate it. The specifications provide that the Board of Education "may" award the contract to the next lowest bidder if the successful bidder fails to file a bond within five days after the award of the contract to him. The specifications do not require the award of the contract to another, but merely reserve the board's right to do so. The contract was not valid prior to November 26th, the date of approval by the Public Works Administration. The bond of A. W. Funk & Company, Inc., was received by the Board of Education in compliance with the Board's supplementary instructions that it be presented on or before November 15th. The filing of a bond was not a precedent condition to the award of the contract, but a subsequent requirement.

Failure to file the bond could invalidate the contract at the option of the Board, but the acceptance of the bond after the specified time was discretionary with the Board.

Appellant was denied an opportunity at the hearing to offer testimony to establish the irresponsibility of A. W. Funk & Company, Inc. A contractor is deemed to be responsible until his irresponsibility is determined by the Board upon notice to him and an opportunity to be heard. Kelly *vs.* Freeholders, 90 N. J. L. 411; Peluso *vs.* Commissioners of Hoboken, 98 N. J. L. 706. A bond was furnished by the successful bidder to assure the performance of the contract. The Board's act in awarding the contract to him admits his responsibility. The unsolicited opinion of an unsuccessful bidder is immaterial.

Respondent asks for the dismissal of the case for the reasons that appellant was neither a citizen nor taxpayer of the district, was not the lowest bidder, and did not make the successful bidder a co-respondent to his petition.

The eligibility of a person, who is not a taxpayer of the district nor the lowest bidder, to contest the award of a contract by a public body is ruled upon by the Supreme Court in the case of Home Coal Company, Inc., *vs.* Board of Education of Bayonne, 12 Misc. Rep. 728. A petition, attacking the award of a contract to the lowest bidder, is dismissible unless he is made a party thereto. Home Coal Company, Inc., *vs.* Board of Education of Bayonne, 12 Misc. Rep. 728; Stanley *vs.* Passaic, 60 N. J. L. 392 Livermore *vs.* Millville, 72 N. J. L. 221.

Since Carl L. Furner's original bid was legally rejected and he has no valid claim to the contract under the second advertisement, the motion of respondent's counsel is granted, and the appeal is accordingly dismissed.

December 22, 1934.

LACK OF JURISDICTION OF COMMISSIONER IN CASE INVOLVING NO DISPUTE UNDER SCHOOL LAW

THE CITY OF MILLVILLE AND IRWIN W. KIRK, Director of Revenue and Finance of the city of Millville,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF MILLVILLE IN THE COUNTY OF CUMBERLAND; MARK BRANNIN, President and HAROLD HEADLEY, Secretary of said Board; GEORGE W. SHANER, GEORGE B. SHANER, EDGAR F. SHANER, AND ARTHUR H. SHANER, co-partners, trading as George W. Shaner and Sons; JACKSON ELECTRIC CO., J. H. HUTCHINSON; JOHN SHEARMAN AND PERCY H. THOMPKINS, co-partners, trading as Shearman & Thompkins, and GEORGE B. WORSTALL, custodian of school funds of the city of Millville,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above-named appellants to contest the legality of proceedings taken by the Millville Board of Education on January 27, 1926, in awarding to the above-named contractors the full amounts due them under their several contracts for the construction of a new high school building in the City of Millville without any deduction from such amounts as a result of delay in the completion of the work of the liquidated damages required by the contracts to be deducted in the event of such delay.

The court presided over by the Commissioner of Education is a special tribunal for the settlement of school controversies, and Section 17, Article II of the 1925 Compilation of the School Law, provides that:

> "The Commissioner of Education shall decide, subject to appeal to the State Board of Education and without cost to the parties, all controversies and disputes that shall arise under the school laws or under the rules and regulations of the State Board of Education."

In the opinion of the Commissioner of Education the allegations of the appellants in the case under consideration involve no violation of any of the school laws or rules of the State Board of Education regulating the control

and management of the public schools of this State, but on the other hand the case appears to involve general questions of law belonging properly to a court of law.

On the ground of lack of jurisdiction, therefore, of the subject matter of the dispute, the appeal is accordingly hereby dismissed.

February 4, 1926.

Affirmed by the State Board of Education without opinion.

PAYMENT OF PREVAILING WAGE REQUIRED ON PUBLIC WORK

STONEBACK AND NASE COMPANY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Borough of Washington, Warren County, advertised on May 7 and 14, 1931, for bids for the general construction of a new high school building in said borough. In compliance with the advertisement, bids were received on May 25, 1931, from Stoneback and Nase Company, the appellants, who submitted a base bid of $81,790.00 and H. E. Stoudt and Company, whose base bid was $88,520.00.

On the evening of June 15, 1931, the date set for the awarding of the contract, the Board of Education had a conference with Jacob L. Stoneback, who was Secretary-Treasurer of the appellant company. The Board asked him if his firm would give reasonable and proper consideration to local labor as stipulated in the advertisement, to which he replied that he would bring the backbone of the organization with him, and if other laborers were needed, he would employ them locally. He was further asked whether his concern would pay the prevailing rate of wages for work of a similar nature in that locality, and whether his firm would sign a contract embodying such provision. According to appellant's testimony, he requested additional time to consider the latter question, but the preponderance of testimony is to the effect that he definitely refused to sign any agreement by which he would be required to pay the prevailing rate of wages for the laborers and mechanics employed by his company.

There is no law requiring a contractor to agree to employ local labor. Therefore, the refusal of appellant to consent to such employment was not in itself ground for denying the award of the contract to the Stoneback and Nase Company.

Chapter 253, P. L. 1913, provides:

> "All contracts made by or on behalf of the State of New Jersey, or by or on behalf of any county, city, township or other municipality of said State * * * for the performance of any work, * * * not less than the prevailing rate of per diem wages in the locality where the work is performed shall be paid to such laborers or workmen * * *"

Chapter 242, P. L. 1931, provides:

> "That every contract in excess of $5,000.00 in amount, to which the State or any political sub-division thereof is a party, which requires or involves the employment of laborers or mechanics * * * shall contain a provision to the effect that the rate of wages for all laborers and mechanics * * * shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division * * * "

Both of the above quoted laws require contractors to pay the prevailing rate of wages, and the latter makes mandatory the inclusion of a provision to that effect in all contracts made pursuant to bids which were invited after its passage. The invitations for bids on May 7 and 14, 1931, were requested subsequent to April 27, 1931, the date of the approval of Chapter 242, P. L. 1931, and, therefore, the embodying of the "wage" provision in the contract was compulsory.

Mr. Stoneback's refusal to sign the contract embodying such provision justified the Board of Education in awarding the contract to Stoudt and Company, whose officers agreed to pay the prevailing rate of wages and sign a contract drawn in accordance with the above cited statutes.

The contract was, therefore, legally awarded to H. E. Stoudt and Company.

September 30, 1931.

LEGALITY OF PAYMENT OF ARCHITECT'S FEES BY BOARD OF EDUCATION

JOHN MAHONEY AND JESSE R. FIFER,

Appellants,

vs.

LYNDHURST BOARD OF EDUCATION,

Respondent.

Shaffer & Conkling, for Appellant.

Francis S. Sastyglone, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by petitioners on four grounds: First, the alleged illegal action of Respondent in appointing at a regular meeting on March 21,

1921, from which meeting two members had retired, one Frank A. Schneider, who had at said meeting resigned as a board member, to the office of Clerk of the Works in connection with the construction now under way of the new school building; second, the alleged illegal action of the respondent in appointing on September 27, 1920, one Max Simon as counsel to the board of education at a time when it is alleged no suit was pending either in law or equity to justify such appointment; Third, the alleged illegal action of respondent in voting at a regular meeting on June 21, 1921, to pay to Dominick J. Livelli, district clerk of the Board, a bonus of $200, and, fourth, the alleged illegal payment on or about March 21, 1921, by respondent of the sum of $1,600 to one Anton L. Veglianti, an architect, for preparing plans and specifications in connection with a school building proposition actually defeated by the voters in July, 1920, and payment for which, appellants contend, was made contingent in the contract governing the transaction upon the consent of the voters to the building proposition.

It is the understanding of the Commissioner of Education that there is no disposition on the part of appellants to insist upon the first three grounds of appeal, and upon careful investigation of the facts as set forth in the pleadings no actual illegality is apparent on the part of the respondent in its action appointing Frank A. Schneider Clerk of the Works, and Max A. Simon counsel to the board of education and in awarding a bonus of $200 to Dominick J. Livelli in further compensation for his services as district clerk. The first three grounds of complaint are therefore dismissed.

Objection is made by Respondent to the jurisdiction of the Commissioner of Education to consider any appeal involving a money judgment on the ground that such a case is cognizable only by a court of law. This contention is not supported by the statute which authorizes the Commissioner of Education to decide, subject to appeal to the State Board of Education, all disputes and controversies arising under the School Law, and the case in question clearly involves a dispute arising under the School Law. Furthermore, the issue in the fourth ground of complaint being entirely one of law the Commissioner finds it unnecessary to grant any hearing for the purpose of taking testimony.

From the facts as set forth in the pleadings concerning the main ground of complaint, namely, the payment of $1,600 to Anton L. Veglianti, the architect, it is apparent that on February 9, 1920, the Lyndhurst Board of Education entered into a contract with said Veglianti engaging his services as architect in connection with the proposed new school building to be erected upon a site described in the contract. By the terms of this contract the architect was to receive a fee of 6% based upon the actual cost of the building and to be paid in the installments described therein. Paragraph 2 of said contract further provided that the payment as aforesaid should be conditioned upon the authorization by the legal voters of the district of a bond issue for the construction of the proposed school building. Paragraph 9 of the agreement provided that the building might be increased or decreased in size without invalidating the contract and that the compensation of the architect should in every case be controlled by the terms mentioned in Paragraph 2.

The proposition for the erection of the school building and the bond issue was submitted to the voters and defeated by them June 25, 1920. On June 28, 1920, the architect submitted sketches and plans for a smaller schoolhouse to the Board of Education and this proposition, when submitted to the voters on July 23, 1920, was also defeated. On August 30, 1920, resolutions for a new $210,000 school building were passed by the Board and this proposition was passed by the voters September 22, 1920. On December 7, 1920, a new contract of employment was entered into by the Board of Education and the architect in connection with the $210,000 proposition which had just been passed by the district voters.

The question to be decided therefore is this: Was the architect entitled to be paid $1,600 for the sketches and plans prepared by him for the building proposition which was defeated by the voters on July 23, 1920, or was his right to compensation in that case governed by the provisions of the original contract by which he was employed and according to the terms of which he was to receive no compensation unless the construction and bond issue should be authorized by the voters?

The submission of the school building proposition to the voters each time included the same site as that described in the contract with the architect, and it is also very clear to the Commissioner that the people voted each time not upon the contract but quite in conformity with the contract, which provided for the submission of modified building propositions without impairing the contract or its requirement that the consent of the voters must be had. It is the opinion of the Commissioner of Education that the contract of February 9, 1920, between the Lyndhurst Board of Education and Anton L. Veglianti with its provision requiring the previous consent of the voters to the building proposition before the latter should be entitled to any compensation governed the services rendered by him in connection with the proposition defeated by the voters on July 23, 1920, and, therefore, made any payment to such architect for such services illegal.

Aside from the question of contract Section 120, Paragraph IV of the School Law requires that for the erection of any school building the Board of Education shall have the previous authority of a vote of the legal voters of the district. It is, therefore, the opinion of the Commissioner of Education that regardless of contract a board of education would exceed its statutory authority in making any payment to an architect for services in connection with a building proposition not consented to by the district voters.

In view, therefore, of the law and the governing contract it is the opinion of the Commissioner of Education that the payment by the Lyndhurst Board of Education of $1,600 in March, 1921, to Anton L. Veglianti was illegal, and it is hereby ordered that such payment of $1,600 be credited on the payments yet due the architect on the construction work on the new school in which he is now engaged and which was duly sanctioned by the district voters, or, if this is not possible because of completion of payments to the architect on the new construction work, it is hereby ordered that the sum of $1,600 illegally paid as aforesaid be returned to the Custodian of School Moneys for the School District of Lyndhurst by the members of the Board of Education who voted to make such payment in March, 1921.

Dated January 3, 1921.

DECISION OF THE STATE BOARD OF EDUCATION

On February 9, 1920, the Board of Education of the Township of Lyndhurst, in Bergen County, employed Anton L. Veglianti as architect to prepare plans and specifications for a school building which it was proposed to erect in the said township. The architect having prepared preliminary plans or sketches for a building which it was estimated would cost $310,000 and the Board of Education having submitted the proposition for the erection of such a building to the voters of the township, the proposition was defeated on June 25, 1920. The architect was then employed to prepare new plans and specifications, and having done so a proposition to build a smaller building according to said plans, to cost $275,000, was submitted to the voters on July 23, 1920, and likewise defeated. Thereafter, the architect prepared plans for a $210,000 building, which was approved and passed by the voters. Mr. Veglianti submitted a bill for his plans and specifications for the second proposed building condemned by the voters on July 23, 1920, and after some proceedings which it is unnecessary to describe, the Board of Education paid his bill, which amounted to $1,600. The petitioners, who are taxpayers in Lyndhurst, brought this proceeding to compel the members of the Board of Education to repay to the Custodian of Funds for the School District the said sum of $1,600 which they allege was illegally paid to Veglianti.

The Board of Education denied that the payment was illegal and set up that the Commissioner had no jurisdiction in the premises. The Commissioner took no testimony on the pleadings held (1) that the case involved a dispute arising under the School Law, and that therefore he had jurisdiction; (2) that the payment to Veglianti was illegal, and, (3), ordered that said amount of such payment, viz., $1,600, be credited on the payments due him on the construction work on the new school sanctioned by the voters, or if that was not possible, that that sum be returned to the custodian of school moneys by the Board of Education.

First: That matter in dispute, in our opinion, involves a question arising under the School Law and therefore the Commissioner had jurisdiction to determine whether or not the Board of Education had the right to pay Mr. Veglianti for his preliminary plans or sketches for the building condemned by the voters on July 23, 1920. He did not, however, have power or authority to direct that the sum of $1,600 should be withheld from future payments due Veglianti under his present contract for the erection of the school buildings subsequently authorized, Veglianti not being a party to the proceeding, and neither the Commissioner nor this Board having any authority in law to award what amounts to a money judgment against a stranger to the proceeding and to the school system of the State.

Second: There is very little in the record concerning the nature of the second series of plans or sketches prepared by Mr. Veglianti, but the members of the Board of Education attended before us with their Minute Book, and it appeared therefrom and was admitted by all concerned at the argument, that these plans or sketches were not detailed or working drawings, but preliminary sketches, sometimes called plans, which were prepared for the pur-

pose of enabling the Board of Education to make a substantially accurate estimate of the probable cost of the building which could be submitted to the voters. In our opinion, the architect was entitled to compensation for these plans and the Board of Education had the power and authority under the law to pay for them. There is no allegation or proof of fraud or dishonesty in connection with the payment, nor is there any showing that the Board did not have sufficient funds in its general appropriation to cover the amount paid. In our opinion, Boards of Education have the power to employ architects to prepare preliminary plans or sketches upon which the Boards may estimate the cost of school buildings for submission to the voters of their districts, and to pay for such services out of their general funds. They may, by contract with the architect, provide for payment out of the funds provided for the building when voted, but such a contract did not exist with respect to the plans involved in the present case.

The decision of the Commissioner is therefore reversed with instructions to dismiss the petition. Our disposition made of the case makes it unnecessary to pass upon the petition filed with us by Anton L. Veglianti for leave to intervene.

PURCHASE OF SCHOOL FURNITURE BY SAMPLE IN COMPETITIVE BIDDING

McPherson Furniture and Carpet Company
and L. E. and E. C. Stone,

Appellants,

vs.

Bridgeton Board of Education and
N. Snellenburg and Company,

Respondents.

Rex A. Donnelly, for Appellants.

Walter H. Bacon and Leroy W. Loder, for Respondents.

Decision of the Commissioner of Education

This appeal is brought by appellants to contest the validity of the action of the Bridgeton Board of Education on February 27, 1923, in awarding to N. Snellenburg & Company, of Philadelphia, one of the above named Respondents, a contract for supplying the Board of Education with 935 auditorium seats or chairs at a total cost of $3,985.50.

Appellants contend that they offered through the medium of their bids and samples goods superior in quality and lower in price than those of N. Snellenburg & Company, the respondent; and that one of the samples presented by the respondent, N. Snellenburg & Company, and upon which the contract was

awarded, was received at least two hours after the time stated in the board's advertisement for the opening of bids and the receiving of samples. Appellants further contend that respondent, the said N. Snellenburg & Company, afterward varied its bid by delivering with the chairs in question certain extras such as name plates, hat wires, etc., free of charge, in spite of having previously named an additional amount for such extras in its bid.

A hearing in this case was conducted by the Assistant Commissioner on Tuesday, October 9, 1923, at the Court House in Bridgeton, at which hearing testimony of witnesses on both sides was heard. Since the hearing, moreover, briefs upon the legal questions involved have been filed by counsel for both appellants and respondents.

From the facts in the case it appears that the following advertisement for bids and samples was made by the Bridgeton Board of Education:

"SEALED PROPOSALS

Sealed proposals will be received by the Board of Education of the City of Bridgeton for

1,000 chairs for auditorium of new high school,
200 of the same to have tablet arm rest,
6 teachers' desks,
150 pupils' study desks, No. 1 and 2
and the same number pupils' study chairs.

Samples will be received and bids will be opened at City Hall on Monday evening, February 26, 1923, at 8 o'clock. The Board of Education reserves the right to accept or reject any or all bids.

D. S. Blew,
Chairman of Building Committee."

It further appears that when the bids and samples were duly presented at the City Hall at 8 o'clock on February 26th for the two types of chairs mentioned in the advertisement, the only sample submitted at that hour by N. Snellenburg & Company was a chair designated by them in their bid as Chair No. 9033 with tablet arm attached. Although other samples from N. Snellenburg & Company arrived somewhat later in the evening, the testimony shows that at no time were such late-arriving samples examined or considered by the Bridgeton Board of Education.

It appears that the sample chair submitted by N. Snellenburg & Company at the time the bids were opened and designated in the bid as Chair No. 9033 with tablet arm attached was, with a slight variation on one side for the purpose of attaching the arm, precisely the same as the chair of that number without tablet arm. The board of education was consequently able to purchase both types of chair from the one sample on hand, since such sample adequately represented both types. It was, moreover, the uncontradicted testimony of all the Board of Education members who were present at the City Hall on the evening of February 26th that the chair actually purchased by the board of

education was the chair submitted by N. Snellenburg & Company at the hour prescribed by the advertisement for the opening of bids and the receiving of samples, except that part of the chairs so purchased did not have the tablet arm as did the sample chair above referred to.

N. Snellenburg & Company's bid for the chair without tablet arm was $4.10 and for the chair with tablet arm $4.86 or a total of $3,013.50 for 735 of the former and $972.00 for 200 of the latter, while appellants' bid for the two types respectively included $4.12 for the former and $5.12 for the latter or totals of $3,028.20 and $1,024.00 for 735 of the former and 200 of the latter respectively.

The testimony shows that the board of education contracted with N. Snellenburg & Company for both types of chairs at prices in both instances lower than those asked by appellants without any reference whatever to extras such as hat wires, name plates, etc., which the bid merely stated might be added if desired, and with no agreement whatever for the purchase of such extras as shown by the contract offered in evidence; and it could consequently be considered no variation in the bid of N. Snellenburg & Company when such extras were afterward included upon delivery of the goods free of charge.

The testimony further shows that on February 26th, when bids and samples were received and agents of both appellants and respondent were heard as to the merits of their respective chairs, the Board of Education made a thorough examination of the samples submitted by appellants and of the one sample practically identical for both types of chair submitted by respondent; and the testimony also shows that the Board made on the following day another examination of the same samples and then determined in the exercise of its best judgment that respondent's sample was for both types of chair superior to samples offered by appellants from the point of view of price in relation to quality, health, comfort, durability and in fact all the essential qualifications.

In consideration, therefore, of the fact that both types of chair offered by N. Snellenburg & Company and as contracted for by the Board of Education were lower in price than those offered by appellants, and in the absence of any evidence whatever of abuse of discretion in the decision made by the Board of Education as to the superior quality of the chairs offered by the respondent, it is the opinion of the Commissioner of Education that the award by the Bridgeton Board of Education of the contract for 935 auditorium seats or chairs at a total cost of $3,985.50 to N. Snellenburg & Company was entirely legal and should be sustained.

The appeal is accordingly hereby dismissed.

November 5, 1923.

Decision of the State Board of Education

Unsuccessful bidders for the contract to supply the Board of Education with auditorium chairs for a new high school building in Bridgeton appeal from the action of the Board in that city in awarding the contract to Snellenburg & Company. The facts in the case are clearly and fully set forth in the opinion of the Assistant Commissioner of Education and need not be stated in detail here. At the time stated in the advertisement of the Board of Education for

the opening of bids and the receiving of samples, Snellenburg & Company submitted a sample chair, which was inspected by the Board of Education along with the samples submitted by the other bidders. After careful examination it was approved by the Board of Education and as Snellenburg & Company were the lowest bidders the contract was awarded to them. Appellants charge that there were some differences in detail between the sample chair submitted by Snellenburg & Company and the chairs provided under the contract, but we find no substance in these criticisms for reasons which are contained in the opinion of the Assistant Commissioner. There is no showing whatever of any unfairness or abuse of discretion by the Board of Education. The award of the contract to Snellenburg appears to have been in all respects proper and in compliance with the law. It is therefore recommended that the decision of the Commissioner be affirmed.

CONTRACTS AWARDED TO LOWEST RESPONSIBLE BIDDER EXCEPT FOR GOOD CAUSE SHOWN

JAMES REID,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, AND JOSEPH P. MURPHY,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the City of Bayonne advertised for proposals for the installation of an oil storage and oil burning system for the Woodrow Wilson School in that city and at a meeting of the Board on October 1, 1931, bids were received in accordance with the advertisement as follows:

Higgins Oil Heating Corp.	$9,580	Enterprise Oil Burning System
	9,200	
William C. Devlin (Alternate) .	8,100	Hobby Oil Burner
Joseph P. Murphy	7,784	Heavy Fuel Oil System
Frank P. Farrell	7,550	
A. A. MacNeille	9,415	
The John R. Proctor Co.	8,730	Standard Ray System
James Reid	7,185	

The Committee on Buildings and Repairs met on October 22, 1931, to examine the bids submitted on October 1st and interviewed James Reid, Frank P. Farrell, and Joseph P. Murphy, the three lowest bidders. The committee did not question the financial responsibility of the three firms who were represented at that time, but questions were asked by members of the committee about the type of burners upon which the bids were based and the kind of fuel to which

they were adapted. Mr. Zeller, Chairman of the Buildings and Grounds Committee, and Mr. O'Brien, another member of the committee, testified that Mr. Reid stated that he did not know the kind of fuel that was adapted to the Simplex Burner and could not name any schools where one had been installed. Mr. Richards, who represented Mr. Farrell, stated that the latter had not decided on the type of equipment he would install but had bid in accordance with the specifications. For these reasons and the further fact that the Todd Burner had been used in other schools of the District with success, the Board recommended the award of the contract to Joseph P. Murphy, whose bid was the highest of the three lowest submitted. Certified checks accompanied all proposals and the bidders agreed to sign contracts to fulfill the requirements of the specifications.

Chapter 1, P. L. 1903, S. S. Section 53, reads as follows:

> "No bid for the building or repairing of schoolhouses or for supplies shall be accepted which does not conform to the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder."

The Supreme Court in the case of Faist *vs.* Hoboken, 34 Vroom 361, where a contract was required to be awarded to the lowest responsible bidder giving satisfactory bonds as surety for the faithful performance of the work, said:

> "It is in the interest of the public that the lowest bid, though it be irregular, be accepted, and, if necessary, that the bidder have opportunity to correct an irregularity, while not changing the substance of his bid. * * *
>
> "This view is in no way affected by the fact that the proposal reserves the right to the city to reject any or all bids. Such reservation confers no right to reject a lower and accept a higher bid. The officials may, under it, reject all bids if they deem none of them for the interest of the city, or they may reject the bid or any bidder irresponsible or unworthy for any just cause shown, after hearing; but they cannot, under such a reservation of a right to reject 'any or all bids,' reject at will the bid of a lower and accept that of a higher bidder, all other things being equal. If such a proposal conferred such power, it would nullify the statute as to awarding contracts to the lowest bidder."

If it had been determined by the Board of Education after all bids were received that the specifications were not clear as to the type of oil which could be used, then all bids should have been rejected and proposals requested upon new specifications.

The testimony given by Mr. Zeller, Chairman of the Building Committee, (p. 21 of the record) reads:

> "Q. You say in your judgment Reid and Farrell did not comply with the plans and specifications? A. Yes.
>
> "Q. Because they intended to put in other burners outside of the Todd? A. Yes.
>
> "Q. You don't know whether the Simplex was equal before the time of your action? A. No.
>
> "Q. And don't know today? A. No."

The fact that the Board used a certain burner in one of its schools and was satisfied with its performance is not sufficient grounds for refusing to award the contract to the lowest bidder who proposes to furnish another type of burner which meets the requirements of the specifications.

Clifton L. Butler, Treasurer of the Simplex Oil Heating Corporation, New York City, a graduate of Lehigh University engineering course, holder of a professional engineer's license in New York City, and who has been in the heating business in relation to oil burners since 1918, offered expert testimony to the effect that Simplex Burners meet the specifications upon which the bids were submitted, and his testimony was not refuted.

It appears that the sole reason for the Board's action in awarding the contract to Joseph P. Murphy was satisfactory experience with the Todd Burner. The Board secured no expert advice nor did it know whether the Simplex Burner was inferior, equal, or superior to the Todd Burner. The rights of the bidders submitting prices on other than the Todd Burner were, therefore, prejudiced by the experience of the Board with a certain burner without experience with or knowledge of others. While the members of the Board of Education may use discretion as to the relative value of various commodities offered in response to advertisement, the selection should be based upon reasonable knowledge and consideration of them; and bids should not be rejected for the mere reason that the Board is not familiar with an article when information about it could readily be procured.

The Board of Education could have granted reasonable time within which Reid and Farrell could furnish references as to the successful performance of the burners they intended to install. This information together with the Board's experience with Todd Burners would have permitted the consideration of the merits of the respective burners in relation to the bids. The Board could then have chosen within an honest exercise of discretion the bid which it considered to the best interest of the school district.

In the case of Hammonton *vs.* Elvins, 101 N. J. L. 38, the Supreme Court held:

> "Our examination of the specifications of the respective bidders, which are quite voluminous, satisfied us that the council was justified in concluding that the town would get both better engines and better service from the LaFrance Company, and that all things considered, its bid was the lowest. It was an honest exercise of the discretion vested in the council. The purpose of competitive bidding is to prevent dishonesty, chicanery and fraud. It was never intended that such a course of procedure would throttle the exercise of an honest judgment within prescribed limits."

Since the financial responsibility of the bidders is not questioned by the Board and the contract was awarded to other than the lowest bidder without good cause having been shown, it is the opinion of the Commissioner that the contract was illegally awarded and accordingly void. The Board of Education of the City of Bayonne is, therefore, directed to either award the contract to appellant or to award it within its discretion after a reconsideration of the bids with sufficient information about the various burners upon which to render an honest judgment.

January 21, 1932.

IN ABSENCE OF STATUTORY REQUIREMENT, CONTRACT FOR SCHOOL EQUIPMENT MAY BE AWARDED TO OTHER THAN LOWEST BIDDER

CAMDEN MOTOR TRUCK COMPANY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON,

Respondent.

For the Appellant, Leonard H. Savadove.

For the Respondent, Charles M. Phillips.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent Board of Education in response to advertisement and the furnishing of specifications, received on August 2, 1934, proposals for the furnishing of a bus to be used for the transportation of its pupils.

After consideration of the bids received, the contract was awarded to the Hammonton Auto Station on its bid of $2,534.80 for a Reo bus. The petitioner, who submitted a bid of $2,099.00 for a G.M.C. bus, asks that the award of the contract be declared null and void and that the Board of Education be required to award the contract to it as the lowest responsible bidder.

Counsel for the appellant fails to show any statute applicable to boards of education which requires that body to award such contract to the lowest responsible bidder.

The Commissioner of Education in the case of Mendham Garage Company *vs.* The Mendham Township Board of Education held:

> "The authorities in this State in matters of this kind hold that where there is no statutory requirement that a contract be awarded by a municipality to the lowest bidder, a municipality after inviting bids or proposals may disregard the lowest bid and award the contract to a higher bidder, providing such action is taken in the exercise of a fair discretion and with a view to the welfare of the municipality."

In the case of James Oakley and the Electric Light Company of Atlantic City, Prosecutors, *vs.* the City of Atlantic City and John H. Rothermel, defendants, 34 Vroom 127, the Supreme Court ruled on the same point as follows:

> "I think it has been quite clearly established in this Court that, under the statute of 1894, even where proposals more or less general in their character are advertised for and received, the municipality is not bound to award the contract to the lowest bidder or even to award the contract

upon such bids. No statute has been cited applicable to Atlantic City which requires such a course, and in the absence of such restriction it cannot be imported into this statute by construction when the power to contract is so absolutely conferred. I can find no violation of any legal principle in awarding a contract if it be done according to other prescribed formalities, in a municipality taking advantage of the information received by such a course of proposals, and in awarding a contract quite independent of them if it be done in the exercise of an honest discretion and judgment, and without the abuse of the discretion vested in the municipal body possessed of authority."

There is no evidence submitted to show that the Board fraudulently awarded the contract, or reached its conclusion except by honest discretion as to which bus was the better value in relation to the price. Even if the statute had required a contract for such school equipment to be awarded to the lowest responsible bidder, the Board had the legal right to use its discretion in determining which of the two automobiles would be the better value at the bids quoted, but in the absence of such statutory requirement, and without evidence of bad faith, the Board of Education of Hammonton, in accordance with the above cited authorities, legally awarded the contract to the Hammonton Auto Station.

The appeal is dismissed.

October 23, 1934.

UNLESS SPECIFICALLY SET FORTH IN ADVERTISEMENT, BOARD CANNOT BE REQUIRED TO AWARD CONTRACT FOR EQUIPMENT TO LOWEST BIDDER

BERTHA HALPERN, TRADING AS COUNTY SUPPLY COMPANY,

Petitioner,

vs.

BOARD OF EDUCATION OF PASSAIC TOWNSHIP, MORRIS COUNTY,

Respondent.

For Petitioner, Edward Sachar.

For Respondent, David F. Barkman.

DECISION OF THE COMMISSIONER OF EDUCATION

On August 14, 1935, the respondent received bids for furnishing manual training equipment and supplies and referred them to a special committee who reported to the Board on September 4 that it had investigated the responsibility of the lowest bidder, the County Supply Company, and as a result

recommended that the contract be awarded to L. V. Ludlow & Company. Upon petition of Bertha Halpern, trading as The County Supply Company, the award was set aside November 1, 1935, by the Commissioner of Education on the ground that the Board did not establish the irresponsibility of the lowest bidder before rejecting the bid.

On November 15, 1935, the Board of Education rejected all proposals received on August 14 and readvertised for bids on a revised list, part of the supplies and equipment having been purchased from L. V. Ludlow & Company after the award of the contract to that firm on September 4 and prior to the decision of the Commissioner on November 1, 1935. Petitioner appeals from this latter action of the Board on the ground that while the advertisement might have reserved the right to reject any or all bids, the resolution of the Board did not include that provision and, therefore, the respondent was without power to reject the bids and should be required to award the contract to the County Supply Company, the lowest bidder. Evidently, the district clerk followed the custom of the Board in advertising by reserving the right to reject any and all bids, and the Board appears to have ratified this action of its agent.

Counsel for respondent stresses a point which was not considered in the previous case; namely, that while the advertisement called for bids on manual training equipment and supplies, the list as advertised is practically all equipment and very few of the items can be classified as supplies. It is true, as pointed out by him, that Section 90, Chapter 1, P. L. 1903, S. S., as amended by Chapter 48, P. L. 1930, requires advertisement for supplies in excess of $250, and for repairs to buildings in excess of $500, but the statute fails to mention equipment and, therefore, in the absence of statutory requirement the award in such case is discretionary with the Board of Education.

The Commissioner of Education in the case of Mendham Garage Company *vs.* Mendham Township Board of Education, 1928 Compilation of School Law Decisions, 267, where a transportation contract was awarded to other than the lowest bidder prior to the enactment of Chapter 262, P. L. 1933, requiring such contracts to be awarded to the lowest responsible bidder, held:

> "In the case under consideration the Mendham Township Board of Education was under no statutory obligation to award the contract to the lowest bidder, namely the Mendham Garage Company; and while there was no reservation in the advertisement of the right to reject bids, neither was there any promise to award the contract to the lowest bidder. In view of these facts it is the opinion of the Commissioner that the Board had the right to treat the proposals it had advertised for and received as merely information for its guidance and consequently to award the contract without regard to the lowest bidder."

In support of this ruling the Commissioner cited Oakley et als. *vs.* City of Atlantic City et als., 34 Vroom 127, and Murray et als. *vs.* Mayor and Common Council of the City of Bayonne et als., 44 Vroom 313.

In the absence of statute requiring advertisement for bids for equipment and the award of the contract to the lowest bidder, the Board of Education

was not required to advertise and, therefore, even if it did advertise, it was not bound to award the contract to the lowest bidder. As a matter of business policy, it may be advisable for boards of education to purchase equipment in the manner prescribed by statute for the purchase of supplies, but such procedure is discretionary.

Since the Passaic Township Board of Education had purchased part of the equipment named in the original list, there was good cause for rejecting the former bids and advertising anew on the revised list which eliminated the items purchased from L. V. Ludlow and Company. The rejection of all of the original bids could, therefore, be declared legal even if the Board had been required to purchase the equipment in accordance with the statute governing supplies and building repairs.

For the reasons above set forth, the petition is dismissed.

January 8, 1936.

COAL CONTRACT MUST BE AWARDED TO LOWEST RESPONSIBLE BIDDER

ZELESNICK BROTHERS,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRIDGEWATER, SOMERSET COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Respondent, after advertising for proposals for the furnishing of coal for the schools of Bridgewater Township for the school year 1933-1934, received bids at its meeting on June 12, 1933, and although Zelesnick Brothers bid ten cents per ton less on one grade of coal and with the same quotation on all other grades as Sargeant Brothers, the second lowest bidder, the contract was awarded to the latter. The Board of Education appears to have been dissatisfied with the service and quality of coal furnished by Zelesnick Brothers for the preceding year and concluded that the appellants were not responsible bidders without giving them an opportunity to be heard as to their responsibility to meet the requirements of the proposal.

In the case of Jacobson et als. *vs.* Board of Education of the City of Elizabeth et als., 64 Atl. Rep. 609, Justice Swayze in writing the opinion of the Court said:

> "The return to the writ shows that the contract was not awarded to the lowest bidder, and the defense made by the Board of Education is that the lowest bidder was not responsible. The evidence indicates that the

> Board would have been justified, upon proper proceedings, in adjudging that the lowest bidders were not proper persons to have the contract, for it arouses strong suspicions of fraudulent conduct on their part in previous dealings with the Board, but a determination against the responsibility of a bidder is a judicial matter, requiring notice to him, and such notice does not seem to have been given. * * * The record failed to show that any notice or hearing was had upon this subject, or that the prosecutors were afforded any opportunity prior to the award of the contract to vindicate themselves in this respect."

While there were other features to the above case, the Court held that for the reasons above stated the contract was illegal.

Since the Board of Education of Bridgewater Township did not give to Zelesnick Brothers an opportunity to be heard in relation to the rejection of their bid, the contract was illegally awarded to Sargeant Brothers and is, therefore, void. The Board is hereby directed to rescind its resolution so awarding the contract and to proceed to purchase coal as if such resolution had not been adopted.

July 27, 1933.

BOARD OF EDUCATION IN ASKING FOR PROPOSALS FOR FURNISHING COAL MAY LIMIT THEM TO COAL OF ONE TRADE NAME

ALBERT BIDWELL,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of East Rutherford advertised for sealed proposals for furnishing coal for the schools of that district for the year 1932-33 and specified that the proposals should be based upon furnishing No. 1 Pittston Coal.

The petitioner asks that the advertisement be declared illegal and that the Board be required to readvertise for proposals for "Pittston Coal or equal," so that he can bid on an equivalent brand of coal, as he does not handle coal bearing the trade name "Pittston."

The respondent claims a number of coal companies in East Rutherford and vicinity handle the Pittston coal and that many competitive proposals were received. The Board contends that such competition accomplishes the purpose of Chapter 48, P. L. 1930, which provides:

> "No bid for building or repairing schoolhouses, or for supplies shall be accepted which does not conform with the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder."

The Commissioner in the case of Black Diamond Coal Company *vs.* Board of Education of the Town of Bloomfield, in a decision rendered today said:

> "As a matter of public policy, boards of education requiring large quantities of coal should in their specifications set forth standards as to size and elements, or require that certified analyses of coal be furnished with each proposal so that all reliable coal dealers of the vicinity may bid and thereby make possible a greater financial saving to the district. Limiting proposals to one or two brands of coal with trade names and thereby excluding all others may be legal, but such limitations are in many cases unfair to dealers as well as to the taxpayers.
>
> "It is true that boards of education want to protect themselves and the public by purchasing coal of high grade from responsible dealers, but this purpose should not be attained by closed specifications or narrowly restricted bidding, as boards can determine the reliability of companies or may require bonds for the fulfillment of the provisions of their contracts."

In view of the Supreme Court decisions in the cases of International Motor Company *vs.* Board and Common Council of the City of Plainfield, 96 N. J. L. 364, and Armitage *vs.* Newark, 86 N. J. L. 5, it appears that the Board of Education complied with the provisions of the law and it, therefore, may legally award the contract for Pittston coal to the lowest responsible bidder.

The appeal is accordingly dismissed.

July 27, 1932.

BOARD OF EDUCATION FOR GOOD REASON MAY REJECT ALL BIDS FOR THE FURNISHING OF COAL FOR SCHOOL DISTRICT

BLACK DIAMOND COAL COMPANY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD,

Respondent.

For the Respondent, Randoph C. Barrett.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Town of Bloomfield received bids on May 13, 1932, for the coal supply for that school district for the school year 1932-33.

The advertisement for proposals reserved the right to reject any or all bids and specified the furnishing of "commercial buckwheat coal, Lehigh Valley, Pittston or Scranton coal, well screened and weighed on the scales of the

D. L. & W. Coal Co., Bloomfield, or the scales of the Bloomfield Coal & Supply Co., Bloomfield," delivered at the convenience of the Board.

Among the seven bids received, the lowest was that of $5.78 from the Black Diamond Coal Company, the petitioner in this case, and the next lowest was $6.56 per ton. In its bid the Black Diamond Coal Company stated "the coal will be weighed by a certified weighmaster on the scales of our yard at 286 Dodd Street, Orange," etc.

Chapter 48, P. L. 1930, reads in part as follows:

> "No bid for building or repairing schoolhouses, or for supplies shall be accepted, which does not conform with the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder."

The Board, apparently believing that as the bid of the Black Diamond Coal Company was more than 11% lower than that of any other dealer, it might be offering an inferior grade of coal. Respondent, therefore, decided to readvertise for proposals, specifying only brands of coal about which it had definite knowledge. All the bidders of May 13 were notified that proposals received on that date had been rejected and that a second advertisement for bids would be published June 1. The new specifications limited the proposals to commercial buckwheat coal, Pennsylvania Coal Company, Pittston, or D. L. & W. Scranton Coal, and continued the requirement that the coal be weighed either on the scales of the D. L. & W. Coal Company or the Bloomfield Coal & Supply Company. Six bids were received and opened on June 6, all of which quoted the price of $6.56 per ton. The Black Diamond Coal Company did not submit a second proposal for the following reasons: It claims to have been legally entitled to the contract under the first bid, and contends the second advertisement was illegal in that by using trade names rather than specifying quality, the coal handled by that company was excluded.

Counsel for respondent contends that the Board acted within its authority in rejecting all bids and cites the case of Armitage *vs.* Newark, 85 N. J. L. 5, in which the Court held that if a public body decides to change the terms of advertised competition, it has a right to reject the bids received thereunder and to advertise for new ones. Since the bid of the Black Diamond Coal Company did not fully comply with the original specifications, counsel further cites the case of International Motor Company *vs.* Board and Common Council of the City of Plainfield, 96 N. J. L. 364, in which the Court held the lowest bidder within a statute requiring municipalities to award contracts to the lowest bidder, must be a bidder who conforms to the requirement in the notice to bidders and not one who proposes a substitute not conforming to the published specifications.

As a matter of public policy, boards of education requiring large quantities of coal should in their specifications set forth standards as to size and elements, or require that certified analyses of coal be furnished with each proposal so that all reliable coal dealers of the vicinity may bid and thereby make possible a greater financial saving to the district. Limiting proposals to one or two brands of coal with trade names and thereby excluding all others may be legal,

but such limitations are in many cases unfair to dealers as well as to the taxpayers.

It is true that boards of education want to protect themselves and the public by purchasing coal of high grade from responsible dealers, but this purpose should not be attained by closed specifications or narrowly restricted bidding, as boards can determine the reliability of companies or may require bonds for the fulfillment of the provisions of their contracts. Companies of established reputation should not be humiliated by the requirement that they weigh their coal upon the scales of their competitors.

It appears from the above cited cases, however, that the Bloomfield Board of Education acted within its legal authority in rejecting all bids under the first advertisement for the reason that it felt it advisable to further protect itself by receiving bids for well-known types of coal, and for the further reason that the bid of the Black Diamond Coal Company set up a condition at variance with those submitted by the Board in its advertisement. Since the Black Diamond Coal Company did not submit a bid in accordance with the second advertisement, the appeal is dismissed.

July 27, 1932.

BOARD OF EDUCATION MAY REJECT ALL BIDS FOR COAL IN ACCORDANCE WITH ITS ADVERTISEMENT

CROUSE COAL COMPANY,

Appellant,

vs.

RARITAN TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of Raritan Township, Middlesex County, advertised for sealed proposals for which coal would be furnished for the school year 1931-32. In conformity with the advertisement bids were submitted to the Board of Education at its meeting on May 18. The minutes of the Board disclose the following:

> "It was moved that coal bids be received for supplying coal for the coming school year. It was moved and carried that the receipt of bids be closed and opened. The following bids were received:
>
> Joseph Colojay
> Stove Coal ..... $11.00 per net ton
> Buckwheat Coal ..... 6.50 per net ton
>
> Crouse Coal Company
> Stove Coal ..... 10.78 per net ton
> Buckwheat Coal ..... 6.43 per net ton

"Motion by Disbrow second by Troger prevailed that both bids be rejected as not sufficient competition. The roll call to reject was Troger, Closson, Kirkpatrick, Disbrow, O'Hara—total 5. Against rejecting Thompson and Drake—total 2.

"Motion prevailed to readvertise for bids for coal to be received until 8:30 P. M. Daylight Saving Time at a meeting of the Board to be held June 1 next at No. 3 School."

The Crouse Coal Company appeals from the action of the Board in rejecting all bids and prays that the Commissioner of Education order the Board of Education of the Township of Raritan to award to it the contract for the supply of coal in accordance with its bid.

Counsel for appellant contends that the award should have been made to the Crouse Coal Company as the lowest bidder, and that the appellant's rights have been affected by the readvertisement as he has been deprived of the opportunity to submit a proposal in accordance with the second advertisement of the Board because the submission of such proposal would affect his prosecution of this case.

The advertisement for proposals by the Board of Education contained the following: "The Board reserves the right to reject any or all bids." As only two bids were submitted, the Board could reject the bids for the reason that there was not sufficient competition.

The Commissioner cannot agree with counsel for appellant that the Crouse Coal Company could not submit proposals in response to the second advertisement without prejudice to its rights in this case. Appellant could have protested the action of the Board in reference to the rejection of bids and also have submitted estimates in response to the second advertisement without impairing its claim in this appeal.

The Commissioner agrees with the appellant in that it would have been better procedure for the Board to have returned the proposals unopened if it considered there was not sufficient competition. The rejection of these bids after being made public is to a certain extent unfair to the Crouse Coal Company. The appellant, however, submitted its proposal with the knowledge that the Board reserved the right to reject all bids, and having presented its bid in accordance with the advertisement the Crouse Coal Company cannot now contest the right of the Board to act under its reservation. If appellant refrained from submitting a second proposal, it did so at its own peril. The Board of Education has not refused to accept further proposals from the bidders at the meeting of May 18. The Board acted within its legal right when according to the provisions of the advertisement it decided to reject all bids.

The appeal is hereby dismissed.

June 23, 1931.

THREE-YEAR CONTRACT OF CITY SUPERINTENDENT OF SCHOOLS VALID

FLORENCE D. SCULL,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT,

Respondent.

For the Appellant, Edison Hedges.

For the Respondent, E. A. Higbee.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Florence D. Scull, was appointed City Superintendent of the Schools of Somers Point on January 10, 1933, for a term of three years from January 16, 1933, on which date a written contract was executed between the petitioner and the respondent. Under the provisions of this contract Mrs. Scull was to receive an annual salary of $2,150 for each of the three years.

On February 23, 1933, the Board of Education adopted the following resolutions:

> "RESOLVED, That the office of City Superintendent of Schools of Somers Point be and the same is hereby abolished and discontinued to take effect immediately.
>
> "That the District Clerk be instructed to immediately notify Florence D. Scull that the said office has been abolished, effective immediately."

The preamble to the first resolution sets forth that the action was taken because of the economic conditions existing in the City of Somers Point. Mrs. Scull received notice from the Board in accordance with the provisions of the resolution and since that time has been denied an opportunity to serve as City Superintendent.

The petitioner asks that the Commissioner issue an order setting aside the resolution of February 23, 1933, and directing her reinstatement as City Superintendent pursuant to the contract of January 16, 1933.

It is the contention of counsel for appellant that the resolution of the Board abolishing the position of City Superintendent was not bona fide for the purpose of economy, but an attempt to void the liability imposed by the contract, and, furthermore, that the Board cannot impair the obligation of the contract.

The evidence supports the good faith action of the Board in attempting to effect economies in school administration by abolishing the position of Superintendent of Schools. The case is, therefore, to be decided upon the validity of the appointment and contract of January 16, 1933.

It has been held that the appointment to and acceptance of an *office* in a municipality do not constitute a contract or create a contractual relationship. City of Hoboken *vs.* Gear, 27 N. J. L. 265; Uffert *vs.* Vogt, 65 N. J. L. 377, affirmed Id. 621. On the other hand, the appointment to and acceptance of a *position* in a municipality constitute a contract. Horan *vs.* Orange, 58 N. J. L. 533; Hardy *vs.* Orange, 61 N. J. L. 620. Under the cases cited, if appellant held an office, she has no legal claim against the Board if such office was legally abolished, but if the work of a Superintendent of Schools constitutes a position, then the appointment by the Board and the acceptance by the appellant created a valid contract which is binding and cannot be disavowed on the grounds of the abolition of the position without the consent of the appellant.

The Court of Errors and Appeals held in the case of Hardy *vs.* Orange:

> "The appointment for a specified time to a position in municipal service whose term is not fixed by law and acceptance of such appointment constitute a contract between the municipality and its appointee, the terms of which are binding upon both of the parties to it."

The Supreme Court in the case of Fredericks *vs.* Board of Health, 82 N. J. L. 220, defined offices and positions, but none of these definitions specifically applies to a school superintendency, the work of which is of a professional nature. Dillon on Municipal Corporations, 5th Ed. Vol. 1, Section 424, p. 734, in classifying types of employment, says:

> "But where the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed sum for that period, has been held to be a contract, and not subject to be impaired by the corporation. Thus the appointment or election by a city council, for a fixed and definite period, of a city officer—for example, a city engineer, for one year, at the rate of one thousand dollars per year—if accepted by him, constitutes, in the opinion of the Supreme Court of Massachusetts, a contract between him and the city; and the city, in such a case, has no authority, unless expressly conferred or reserved, to abolish or shorten the term of office, so as to deprive the officer, without his consent, of the right to compensation for the full period, unless for misbehavior or unfitness to discharge the duties of the place." (Citing in the footnote "Chase *vs.* Lowell, 7 Gray (Mass.) 33; Bell *vs.* New York, 46 N. Y. App. Div. 195; citing text; and see Caverley *vs.* Lowell, 1 Allen (Mass.) 289, as to ordinance constituting a contract with city attorney.)" Paragraph 425 continues "The principles embodied in the previous section have their natural application to those persons in the municipal service who are properly to be regarded as employees rather than as public officers. It has been said that the essential element in a public office is that the duties to be performed shall involve the exercise of some portion of the sovereign power, whether great or small, but in the development of municipal affairs it has been

found necessary to an extent which is steadily increasing to employ persons who cannot fairly be regarded as officers, but who occupy positions which are merely employments."

Attorney for appellant holds that there can be no difference between *the appointment* of a city engineer (Chase *vs.* Lowell), a city attorney (Caverley *vs.* Lowell) cited above, or *the appointment* of a City Superintendent of Schools, as in this case. He contends that in each instance the services are professional and directed almost entirely by the employing body, and, furthermore, the city superintendent, as well as the city engineer or city attorney must have special educational and professional training.

Chapter 1, P. L. 1903, S. S., Sections 50, 64 and 67, provide as follows:

"50. Every such board shall have the supervision, control and management of the public schools and public school property in its district, and shall keep such property insured. *It shall appoint a person to be its secretary,* and *may appoint a Superintendent of Schools,* a business manager and other officers, agents and employees as may be needed, and may fix their compensation and terms of employment, but no such appointee, officer, agent or employee, other than the secretary, shall be a member of said board."

"64. Whenever a Superintendent of Schools *shall be appointed,* it shall be by a majority vote of all the members of the board of education *for a term not to exceed five years."*

"67. *The Superintendent of Schools shall, when required by the Board of Education,* devote himself exclusively to the duties of his office. He shall have general supervision over the schools of the district and shall examine into their condition and progress and report thereon from time to time as directed by the board of education. *He shall have such other powers and perform such other duties as may be prescribed by said board."*

The above statutes provide that a board of education *shall appoint* a secretary and *may appoint* a superintendent. The duties of a secretary are set forth in the statute and no provision is made for the assignment of additional duties by the board of education. His designated duties are essential to the provision of public education, but the functioning of the schools is not likewise dependent upon a Superintendent of Schools. One *may be appointed,* and when appointed he shall have supervision of the schools and perform such other duties as may be prescribed by the board of education. He is not an officer with responsibilities to the public, but a professional employee working in relation to the education of pupils and under the immediate direction of his employer. In a district with but one teacher, that person performs all the professional and administrative duties connected with the educational program. When the district has one building with several teachers the work is divided so that the clerical, co-ordinating, and administrative work is allotted to one person, designated the principal, and the other teachers devote practi-

cally their entire time to instruction. When a system has a large pupil enrollment, the program becomes more varied and complicated and the personnel is augmented by the employment of principals, supervisors and a supervising principal (Article VII, School Districts) or a superintendent (Article VI, School Districts) who co-ordinately perform their allocated duties under the direction of a board of education.

In the school system of Somers Point there are but twelve full-time and two part-time teachers; therefore, the duties of the Superintendent of Schools in Somers Point are the same as they would be if the person were designated Principal of the Somers Point School.

The statutes relating to public schools provide for teachers, principals, supervising principals, and superintendents. They authorize boards of education to contract for the services of teachers and principals (Section 106, Chapter 1, P. L. 1903, S. S.) and to *appoint* a supervising principal (Section 87 Ibid.) and to appoint a Superintendent of Schools (Section 64 Ibid.). The duties and regulations respecting these employees are to some extent enumerated in the statutes. (Teachers and principals—Section 109, 111, Ibid.; and Chapter 263, P. L. 1916; Supervising Principals—Section 87, Chapter 1, P. L. 1903, S. S., and Rule of State Board of Education, p. 513, 1931 Comp. of School Laws; Superintendents—Section 67, Chapter 1, P. L. 1903, S. S.) All must be qualified for their positions by meeting the requirements of the statutes and the rules and regulations of the State Board of Education, and must hold valid certificates for their respective employments. (Teachers' certificates—Section 113; Ibid.; Supervising Principals'—Section 87 Ibid.; Principals' Chapter 243, P. L. 1909; Superintendents'—Section 66, Chapter 1, P. L. 1903, S. S.) Since all of these employees are required to meet prescribed educational requirements to qualify them for their work and the employment of each is permitted by statute with certain duties specified therein, if any *one* of these holds an office or position, then *all* must likewise be classified. It is the opinion of the Commissioner that all of these employments constitute *positions* as distinguished from *offices*.

That the work of a City Superintendent constitutes a position and therefore a board of education is authorized to contract with such employee was ruled upon by the State Board of Education in the case of Carr *vs.* Bayonne in which it held:

> "In this case there is no doubt but that Mr. Carr was employed for a term of three years. The point is made that such employment was subject to a right of dismissal at any time by the Board. If that is so, then the Legislature in one section authorized the Board to make a contract with Carr and in another section deprived it of the right to fix one of the essential elements of the contract; viz., its duration. The Legislature would seem to have been inconsistent. We cannot assume any such intent on its part." (1921 Compilation School Laws, page 578.)

In accordance with the decision of the State Board of Education, and other authorities herein quoted, appellant, Florence D. Scull, held a position, and

her contract is, therefore, valid. The Board of Education of Somers Point is hereby directed to reinstate appellant as City Superintendent of Schools and to pay her salary in accordance with the provisions of the contract.

June 19, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

Somers Point is a city school district. It has a Board of Education consisting of five members. It employs fourteen teachers, twelve of whom serve full and two part time. On December 27, 1932, the then Board of Education elected the appellant below, Florence D. Scull, as supervising principal, although it does not appear in the evidence that approval as required by Rule 85 of the State Board was obtained, or that such approval was not necessary. On January 10, 1933, the appellant was elected as Superintendent of Schools for a term of three years, three members voting in favor and two against making the appointment. On January 16, 1933, a contract was executed by the Board and Miss Scull, whereby she was employed as City Superintendent of Schools for a term of three years, beginning on that day, at a salary of $2,150.00, for the school term. On the same day and presumably when the contract was signed, Miss Scull resigned as supervising principal. On February 1, the personnel of the Board changed, and at a meeting of the new board, held on February 23, a resolution was adopted, by a vote of three against two, which recited the election of Miss Scull as city superintendent, before her resignation as supervising principal; that the present economic conditions created an emergency that required the Board to economize; that the Board for three months past had been unable to pay its classroom teachers, school janitors and bills for tuition, and is without funds, and that the Board could dispense with the office of City Superintendent of Schools, and then provided that the office of City Superintendent of Schools be abolished and discontinued, to take effect immediately. Miss Scull promptly appealed to the Commissioner of Education, maintaining that the action of the Board of Education in abolishing the position of City Superintendent was not taken in good faith for purposes of economy, but to avoid liability imposed upon it by the contract of January 16, 1933. That her appointment and contract created an obligation which the Board could not impair. The Board answering her contentions says its predecessor board was without power to make a contract to employ a Superintendent of Schools. That a Superintendent of Schools holds an office and that the office may be abolished. Evidence was heard by the Commissioner and briefs submitted. The Commissioner of Education held that the evidence supports the good faith of the Board in attempting to effect economy by abolishing the position or office of City Superintendent of Schools, but that the appointment and contract created an obligation which it could not impair. That Miss Scull occupies a position and not an office, and therefore the resolution abolishing "the office" of Superintendent of Schools, is abortive. He directed the Board to reinstate Miss Scull as City Superintendent of Schools, and to pay her salary in accordance with the provisions of the contract.

From that decision the Board of Education appeals to this board.

The Commissioner of Education rightly held the case must be decided upon the question whether appellant below held a position under contract or was she an officer. If she is an employee under a valid contract, the Board is without power to abolish her position.

The School Law, P. L. 1903, Section 50, provides, with respect to city boards of education:

> "Every such board shall have the supervision, control and management of the public schools and public school property in its district, and shall keep such property insured. It shall appoint a person to be its secretary, and may appoint a Superintendent of Schools, a business manager and other officers, agents and employees as may be needed, and may fix their compensation and terms of employment," etc.

Section 51 authorizes such boards to make rules for its own government and the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers.

Section 64, as amended by P. L. 1931, page 682, provides:

> "Whenever a Superintendent of Schools shall be appointed, it shall be by a majority vote of all the members of the board of education for a term not to exceed five years. He shall receive such salary as said board shall determine, which salary shall not be reduced during his employment. After a period of employment rendered prior or subsequent to the passage of this act, a board of education may appoint such superintendent either for a term not to exceed five years, or without term to continue at the pleasure of the board. Under such employment without term the superintendent may be removed by a majority vote of all the members of said board. He shall have a seat in said board and the right to speak on all educational matters, but shall not have the right to vote. Nothing in this act shall be construed as conferring permanent tenure."

By subsequent sections boards are authorized on the nomination of the Superintendent of Schools to appoint assistant superintendents, and by Section 67:

> "The Superintendent of Schools shall, when required by the board of education, devote himself exclusively to the duties of his office. He shall have general supervision over the schools of the district, and shall examine into their condition and progress and report thereon from time to time, as directed by the board of education. He shall have such other powers and perform such other duties as may be prescribed by said board. He may appoint and remove clerks in his office, but the number and salaries of such clerks shall be determined by said board. Said superintendent shall render annually, on or before the first day of August, to the Commissioner of Education, and in the manner and form prescribed by him, a report of such matters relating to the schools under his supervision as shall be required by said Commissioner of Education."

Section 69 authorizes the Superintendent of Schools, with the approval of the president of the board of education, to suspend any assistant superintendent, principal or teacher, etc.

It is sometimes a matter of some difficulty to determine whether or not a given employment is an office within the meaning of a particular statute. Each case must be determined by a consideration of the particular facts and circumstances involved, and of the intention and subject matter of the enactment. Great diversity exists in the adjudications on this question throughout the several States, probably due to the fact that the decisions are based upon local statutes. The leading case where the question was considered in the Courts of New Jersey, is Fredericks *vs.* West Hoboken Board of Health, 82 N. J. Law, page 200. In that case the plaintiff was appointed by the defendant board of health, a sanitary inspector for the term of three years, at a salary of $1,500.00 a year. He was paid that salary for a number of months, when the board resolved that the salary of the sanitary inspector be fixed at $1000.00 a year. Three months thereafter the plaintiff brought an action against the board to recover three months' salary at $125 per month, and recovered judgment in his favor, the trial court holding, "there existed upon his acceptance, a contractual relation that can not be subsequently vitiated by the conduct of one of the parties." The Supreme Court, on appeal, reversed the judgment, holding that Fredericks was a public officer. From previous decisions it deduced the following definitions of an office and of a position: "An office is a place in a governmental system created or recognized by the law of the State, which either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties." "A position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office in that its duties may be non-governmental and not assigned to it by any public law of the State."

Tested by the foregoing, it seems clear that the City Superintendent is a public officer. The administration of the public school system is a part of the law of the State. It is based on the mandates of the Constitution and the laws of the State. A City Superintendent of Schools is an important officer in the school system. The office is recognized and its duties prescribed by law. The duties of the office are certain, continuous and permanent.

The acceptance of a public office by the appointee does not constitute a contract, or create any contractual relationship. City of Hoboken *vs.* Gera, 27 N. J. L. 225; Love *vs.* Mayor, etc., of Jersey City, 40 N. J. L. 456; Uffert *vs.* Vogt, 65 N. J. L. 377. A written contract, however, was executed by the Board of Education and the appellant below. In our opinion, such contract not being authorized by law is a nullity. The statute gives every board of education the right to appoint its officers, and such board would have a right to abolish such officers where it, in good faith, desired to effect economies. The writing added no force to the resolution making the appointment. Greene *vs.* Freeholders of Hudson, 44 N. J. L. 388.

The good faith of the Board of Education in abolishing the office to effect economy is sustained by the Commissioner of Education. Counsel for the appellant below cites the case of Carr *vs.* Bayonne, decided by this Board on

April 1, 1916, and found in the School Law Compilation of 1921, on page 577, as authority for his contention the action of the Board abolishing the office of City Superintendent is illegal. In our opinion the case is not pertinent. That case held a City Superintendent could not be dismissed during the term for which he was appointed. The present case does not involve the question of dismissing the incumbent, but the right to abolish the office. We conclude the abolition of the office of City Superintendent of Schools by the Board of Education was within its powers, and that such action was in good faith to effect economy.

It is recommended the decision of the Commissioner of Education be reversed; that the appeal of the respondent Board be sustained, and the petition of appellant below dismissed.

November 4, 1933.

CLAIM OF CITY SUPERINTENDENT FOR EXTRA COMPENSATION

WILLIAM G. SULLIVAN,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

William G. Sullivan, who for a number of years prior to July 15, 1926, had been Superintendent of Schools of the City of Pleasantville, brings this appeal to require the Board of Education of Pleasantville to pay to him the sum of $300 and interest which he claims is due him in accordance with resolutions of the Board of Education.

The case is submitted on petition of appeal, answer to the petition and stipulation of counsel which disclose the following agreement of facts:

For the school year 1922-23 the petitioner received a salary of $3,200.

On January 16, 1923, the Board of Education and Mr. Sullivan entered into a contract wherein and whereby the appellant was employed as Superintendent of Schools of the City of Pleasantville for the term of three years from July 15, 1923, at an annual salary of $3,200.

The following appear in the minutes of the Board of Education:

April 4, 1923. "On motion the following teachers be elected for the coming year: Superintendent of Schools, William G. Sullivan, Principal Charles O. Wilson, Sara Van Gilder, Emory Helfirch———Nettie Adams, Prin.——— Charles Ingersoll, Principal———Special teachers Irma Stiles, Laura Carpenter, Anna Uzzell, Thomas F. Barnes, Roy W. Ayres." (———Used instead of naming other teachers shown in the minutes.)

April 18, 1923. "On motion all teachers now employed and re-elected for the coming year receive an increase in salary of $100 per school year."

Petitioner did not receive an increase in salary for the year 1923-24 although he protested to the secretary of the Board that his salary check was not in accord with the action of the Board of Education.

May 6, 1924. "On motion the following teachers be re-elected at an increase of salary of $100, carried.

William G. Sullivan, Superintendent
High School, Charles O. Wilson, Principal
" " Charlotte Kacobs

School No. 1, Nettie Adams, Principal
" " Carrie Bowen

School No. 2, Charles Ingersoll, Principal
" " Mary Blackus
School No. 3, Hazel Haxton, Principal
" " Mina Leeds

School No. 4, Tillman Johnson, Principal
" " Helen G. Lull."
(———Used instead of other teachers names.)

Petitioner received a salary of $3,300 for the year 1924-25.

The name of the petitioner does not appear among those employed for the school year 1925-26, although he continued to serve during that year and received a salary of $3,300.

At the meeting of July 22, 1926, petitioner made claim for $100 for each of the school years 1923-24, 1924-25, 1925-26, with interest—a total of $300 with interest.

Counsel for appellant contends that the action of the Board in January, 1923, in making a contract for three years was *ultra vires* and could not bind the Board which organized February 1, 1923. It was held by the Commissioner of Education in the case of Albert S. Davis *vs.* Board of Education of the Town of Boonton, decided December 24, 1925, that a contract for three years though plainly voidable by a succeeding board is nevertheless capable of subsequent ratification either express or implied. The Commissioner is of the opinion that the minutes do not show an express or implied acceptance of the January, 1923, contract as the name of appellant appears among the list of teachers employed by the board for the year 1923-24 and also for the year 1924-25, and therefore the superintendent's employment was from year to year; and in the absence of resolution for 1925-26, the employment is deemed to be under the same conditions as the preceding year.

Counsel for Respondent while claiming the validity of the contract, suggests that under the doctrine of estoppel that after having accepted the benefits of the contract, the appellant is estopped from claiming it is illegal and void.

The Commissioner cannot agree with counsel that appellant accepted the benefits of the three-year contract. Mr. Sullivan did, however, accept employment and receive compensation which the board intended to be paid for his services.

Appellant made no protest to the board that the compensation was not in his opinion in full of the amount to which he was entitled. It is true that Mr. Sullivan told the secretary soon after receiving his first salary installment for the year 1923-24 that he had not drawn the check in accordance with the Board's resolution. The objection to the secretary appears to be quite informal. There is no evidence that Mr. Sullivan made any protest to the board that the payments were not in full of the amounts he deemed to be due him until after the expiration of the three years referred to, when he was no longer under the employ of the board. The actual date of the protest was, in fact, July 22, 1926.

The New Jersey Supreme Court held in the case of Love *vs.* Mayor, &c., of Jersey City (40 N. J. L. 456), as follows:

> "My opinion is, that by the power of appointment and control given to this board in the case of this officer, they had such authority; but it is not necessary to decide this point, for it will never be tolerated that a municipal officer shall receive his pay at a fixed rate without dissent, hold his office for his full term, and at the end demand a higher rate named in some prior act. If he was not satisfied he should have offered his resignation, and the city would have found some one to take his place for the reduced salary. His continuance in office was an assent to the reduction of his salary, and his receipt of monthly warrants and payments during the whole term is an estoppel against any error in the mode of reduction, or the amount fixed by the board of finance and taxation. * * * The production of a circular of prior date with other terms of compensation did not alter the case. A public officer is no less strongly bound by his active consent to the terms of his employment, where he has every month received his salary at a reduced rate, with nothing more than an informal notice to some member of the board of finance and taxation that he shall claim greater compensation. He had the simple remedy in his own hands, if he felt aggrieved by the action of the Legislature and board of finance. If he continued in office his acquiescence establishes his consent to the terms fixed by the board."

In the case of City of Lexington *vs.* Renick (105 Ky. 785), the opinion was in part as follows:

> "There is another objection to a recovery of appellees. They accepted their salaries as reduced by the ordinance of March 7, 1896, until they were discharged, on May 27th of the next year without making any objection or setting up a claim that more was due them. When they did this, they knew that if they set up such a claim, it might endanger their future tenure of office; and after accepting the smaller salary, and continuing to enjoy the office, they are estopped to claim money which they elected not to ask for.

> "In Alexander *vs.* Woodford Spring Lake Fishing Company, 90 Ky. 222 (14 S. W. 80), this court said: 'When a man with full knowledge, or at least with sufficient notice or means of knowledge of his rights and all the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of a transaction or acts in a manner inconsistent with the repudiation, * * * the transaction although originally impeachable, becomes unimpeachable in equity.'"

In the case of City of Lexington *vs. Renick,* 105 Ky. 785, on petition for rehearing the court said:

> "The distinguished counsel also insists that there can be no estoppel in this case, because an estoppel never arises from the acceptance of part of a debt in payment of the whole. This is not the doctrine on which the opinion rests. Appellees knew at the end of each month that the city thought it was getting their services at the reduced salary. They also knew that, if they refused to serve the city at the reduced price, it might exercise its pleasure of discharging them at will. Knowing this, they accepted the reduced salary to avoid the risk of losing their places, and the city continued them in its service from month to month upon the supposition that they were willing to serve it for the amount paid. To allow them now to hold the city liable for their original salaries is to allow them to put the city in a worse position, and inflict a loss on it which it might have avoided had they not misled it by their conduct."

The cases of Boyle *vs.* Ogden, 24 Utah 443, and Commissioners *vs.* Sewell, 3 Okla. 281, seem to be to the same effect.

According to the legal authorities above cited, it is the opinion of the Commissioner that after accepting during the three years the salary paid by the Pleasantville Board of Education without a protest to the board, appellant is now estopped from claiming that a balance of salary is due him.

The case is hereby dismissed.

November 30, 1926.

Affirmed by State Board of Education without written opinion, February 5, 1927.

DISMISSAL OF CITY SUPERINTENDENT

JOHN W. CARR,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

James Benny, for the Appellant.

Daniel J. Murray and Aaron A. Melniker, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the city of Bayonne, on June 3, 1915, passed resolutions asking for the building of a high school to cost $260,000. On the 16th of September following resolutions were passed for $75,000 for the building of an addition to School Number Three, and on the 20th of September similar resolutions were passed providing for a new building to cost $146,000, making a total of $481,000 for building these schoolhouses. The Board of School Estimate granted all these amounts.

An architect was to be chosen to provide plans and specifications and to superintend the construction of these buildings. The president of the Board of Education requested Superintendent Carr, the appellant in this case, to prepare questions and submit them to architects, with a view of obtaining the best possible professional service in this line. This was done by Superintendent Carr, but before he had received many answers to his inquiries the Board of Education, by resolution at a meeting held October 7, 1915, appointed McKim, Mead & White, of New York City, to act as architects, at the usual rate of five per cent. of the cost of construction. On October 11, 1915, the secretary mailed a notice of appointment to this firm. On October 13, 1915, McKim, Mead & White accepted the appointment. On October 14, 1915, the Board of Education, at a special meeting, passed a resolution rescinding the appointment of McKim, Mead & White as architects, without giving any reason for its action.

The foregoing facts are stated with particularity of date, etc., because upon action thus taken by the Board is based the excuse for the action taken by the appellant in this case, and which led to formal charges being made against him by the Board of Education. Superintendent Carr was not satisfied with this hasty and vacillating course of action on the part of the Board in selecting an architect. This unusual haste, as he thought, shutting out opportunity for investigation of the character and ability of the different firms of architects with whom communication had been carried on, coupled with some rumors which had been floating about in certain circles in Bayonne, led him to be suspicious that all was not well.

The Board of Education held a meeting on October 23, 1915. Just previous to the meeting a conference was held by three members of the Board, namely, President Melniker and two Board members, Thomas Herbert and Samuel Kovascy. Superintendent Carr attended that conference. He told these Board members that a member of the Board of Education had told him that another member of the Board had approached the first member and had suggested to him that it was the usual thing that a portion of the architect's fees should be divided among members of the Board of Education. He suggested to these members that investigation should be made of this and other matters which had been rumored concerning the taking of graft in connection with the building of the proposed schoolhouses. No action was taken at the Board meeting following to investigate the truthfulness of the rumors which the Superintendent stated had come to his knowledge. On October 27, Superintendent Carr addressed a communication to the Mayor of Bayonne in which he stated that it was his opinion that the Board of School Estimate should take immediate steps to rescind the resolution passed by that body at a recent date appropriating the sum of $529,000 for the purpose of purchasing additional school lands and the erection of additional school buildings. On the following morning, October 28, 1915, Superintendent Carr appeared before the Board of School Estimate, of which the Mayor is a member. At this meeting he made a statement in writing in which he recited the facts connected with the selection of an architect, and charged that in his opinion the proper care in selecting this important officer had not been exercised by the Board of Education. He further stated to the Board of School Estimate that a member of the Board of Education had come to him and told him in detail how another member of the Board had come to the first member's house and had proposed to this member to join with the other member in a grafting scheme in the employment of an architect for the erection of the new buildings contemplated. He explained to the Board of School Estimate further that this was the reason why he had asked the Mayor to cause to be rescinded by the Board of School Estimate the resolutions providing for the raising of moneys. This action he claimed was taken in the interest of the taxpayers and the schools.

At a meeting of the Board of Education on the evening of October 28 a firm of architects was appointed by the Board. On November 8 the Board of Education met and made formal charges against Superintendent Carr which in general recited that he had been making false public statements that reflected upon the Board of Education, that he had made these statements before the Board of School Estimate, and, generally speaking, he was charged with interfering with the orderly business method of procedure of the Board of Education. On these charges he was tried and, after taking of testimony and argument by counsel, he was found guilty by a vote of seven to two and was removed as superintendent at the same meeting by a vote of six to three.

An appeal was taken from this finding and action to the Commissioner of Education. The case was submitted on the basis of the testimony taken at the Board hearing. Counsel was heard and briefs on both sides of the case were submitted.

At the hearing before the Board of Education, Mr. Connors, a member of the Board, testified that an architect told him that a fellow member of the Board, Mr. Hatton, was to receive $2,000 from the architect. Superintendent Carr and Mr. Gavin were to receive the same. Mr. Hatton testified that the president of the Board, Mr. Melniker, came to him and said: "It is a custom for architects to give a part of their fees in order to secure the job. Since the architect is willing to surrender a part of his fees I cannot see any harm in it." This testimony was denied by Mr. Melniker, but he admitted that he told Hatton: "That efforts were being made and would be made to line up this Board by different architects and that all sorts of influences would be brought to bear to get the votes of the Board, and that some of them wouldn't hesitate to split their fees to get this job; it was a big job and they wouldn't hesitate to divide their fees with members of the Board to get it." The architect Pelton testified that in an interview with Mr. Connors he said to Pelton: "You ought to give us $10,000 out of your fee and in addition to that of course you would have to draw the plans and specifications the way we told you to and we ought to get $50,000 more out of that."

These things were known to Superintendent Carr, some of them as early as August. Mr. Hatton had told him the Melniker story at that time. The Pelton story was told him later. With all these things in the mind of Mr. Carr, some of them coming to him so direct, it is little wonder that he did think there were dishonest things about to be consummated. He first divulged them to a committee of the Board of Education and told that committee that he felt alarmed about them. He next wrote to the Mayor, suggesting to him that the Board of School Estimate should rescind its action in voting the appropriations.

If Superintendent Carr honestly believed that there was danger of dishonest expenditure of any of the school moneys appropriated for the building of schoolhouses, or if he had sufficient reason to suspect even that such was the case, or that such a thing was in contemplation, he would be justified in sounding such an alarm or giving the matter such publicity as would stay the hand of evil intent before any overt act was actually committed.

It would be a sad condition of affairs in the civic life of any city if a superintendent of its schools who had reason to believe that corrupt propositions were entertained by members of the Board of Education should have to close his eyes and seal his lips for fear he would lose his place.

It is my opinion that John W. Carr did not act in any way in a manner unbecoming a superintendent of schools as shown by the evidence given in this case. The appeal, so far as the charges made against him are concerned, is hereby sustained.

The removal of the appellant as superintendent of schools of Bayonne, while closely connected with the charges made against him, involves a question that must be considered by itself. A city superintendent does not come under the teachers' tenure of service act. His term of service is regulated by the statute as found in Article VI of the School Law and by the by-laws and rules made by the Board of Education constituted as herein provided.

Claim is made by the Appellant that under a by-law of the Board of Education providing for appointment of the superintendent for a term of three years a dismissal could not be made until his term of office would have expired, which is in September, 1916. The by-law is as follows:

> "He (superintendent) shall be appointed for a term of three years, except in case of his first appointment as superintendent of schools in this city, when he shall be appointed for one year. He shall receive such salary as may be fixed by the Board of Education, which salary shall not be decreased during his term."

The respondent answers that the Board of Education, acting under its statutory rights, may dismiss arbitrarily a superintendent with or without first preferring charges.

Article VI, section 71, of the School Law, edition of 1914, reads:

> "Whenever a superintendent of schools shall be appointed, it shall be by a majority vote of all of the members of the Board of Education. He shall receive such salary as said Board shall determine, which salary shall not be reduced during his employment. He may be removed by a majority vote of all the members of said Board."

The question is, which shall prevail in this case, a by-law which provides for an appointment of superintendent for a period of three years, or the statute law which says that: "He may be removed by a majority vote of all the members of said board."

Here is a statutory right given boards of education to enact by-laws not inconsistent with the act. A by-law made by a corporate body can neither limit nor extend the power granted that body in the statute law. It must conform to the statute. Hence a by-law could not take away from a board of education any right given by the Statute, even though a by-law made by the board itself operated to do so.

John W. Carr was removed as superintendent by a majority vote of the Board of Education on October 28, 1915, after the Board had found him guilty of charges. The Board had a right to remove him under the School Law regardless of its findings. The removal, being by a vote of six to three, was by a majority of the whole Board, and was clearly lawful.

The petition, so far as the removal as superintendent goes, is hereby dismissed.

January 10, 1916.

Decision of the State Board of Education

For some six years prior to November 11, 1915, John W. Carr was superintendent of schools of the city of Bayonne. On that day, at the conclusion of a trial, the Board by a vote of seven to two found him guilty of having

publicly made statements which reflected on the integrity of the Board or some of its members and also of having tried to coerce one of its members to resign. By a vote of six to three he was thereupon dismissed.

Mr. Carr appealed to the Commissioner of Education and urged that no just cause existed for his dismissal and that therefore it was a violation of his contract of employment, which was for a term of three years, viz., from September 1, 1913, to September 1, 1916.

The Commissioner decided, in effect, that no just cause existed for the dismissal, but that under the law cause was not necessary and that therefore the dismissal was legal.

From the conclusion that no just cause existed for the dismissal, the Board of Education of the city of Bayonne appeals to this Board, while from the conclusion that it was within the power of such Board of Education to arbitrarily dismiss him Mr. Carr appeals.

If, under the law, the Board of Education of the city of Bayonne could, without cause, at any time dismiss Mr. Carr, then it is unnecessary for us to further study or discuss this appeal. Such was the conclusion of the Commissioner. He based his conclusion on section 71 of the School Law, which is as follows:

> "Whenever a superintendent of schools shall be appointed, it shall be by a majority vote of all of the members of the Board of Education. He shall receive such salary as said Board shall determine, which salary shall not be reduced during his employment. He may be removed by a majority vote of all the members of said board. He shall have a seat in said Board and the right to speak on all educational matters, but shall not have the right to vote."

As the Commissioner reads this section, a board of education of a city school district cannot deprive itself of the right at any time to arbitrarily dismiss its superintendent. If such interpretation is correct, then no matter how formal a contract may be made, it is purely unilateral and subject to termination at any and all times by the board. Whether such a contract would be binding on a superintendent it is unnecessary for us now to consider. We must address ourselves to the question, can a board of education of a city school district employ a superintendent for any definite term? If we decide that it cannot, and we are not reversed by the courts, then, unless the Legislature changes the law, it would be well-nigh impossible for city school districts henceforth to secure superintendents.

It is a matter of common knowledge that superintendents are usually recruited from the ranks of principals or secured from other States. Most principals in this State are protected by the tenure of service act. What principal would abandon such protection or what man would come here from another State if he knew that, no matter what his qualifications might be, a city board, if he did not at all times humor its members, defer to their judgment and possibly even dress to suit their whims, might arbitrarily dismiss him and possibly blast his entire career? Few men of strength and individuality would accept a position as a city superintendent unless assured

a term sufficient for them to demonstrate their worth. The success of a city school district is largely dependent on its superintendent. He is the expert who is supposed to have the special knowledge and ability required to secure the best results. Can it be that the Legislature intended to place such districts in a position where it would be difficult, if not impossible, to secure the very best talent? We cannot assume such intent. It is therefore necessary for us to carefully examine the law to ascertain what was the intention of the Legislature and whether the language of section 71, read in connection with other sections of the law, means what has been decided by the Commissioner.

Section 71 is part of article VI, which relates to city school districts. In that article provision is made for members of the board of education, for a secretary of the board, for a superintendent of schools and for a business manager.

Sections 57 and 58 read as follows:

> "57. Every such board shall have the supervision, control and management of the public schools and public school property in its district, and shall keep such property insured. It shall appoint a person to be its secretary, and may appoint a superintendent of schools, a business manager and other officers, agents and employees as may be needed, and may fix their compensation and terms of employment, but no such appointee, officer, agent or employee other than the secretary, shall be a member of said board.
>
> "58. Such board shall make, amend and repeal rules, regulations and by-laws not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district, and also for the employment and discharge of principals and teachers."

What is the meaning of the phrase "fix their compensation and terms of employment"? The word "term" has many meanings. It is derived from the Latin and its primary meaning is a bound or limit. If the Legislature used "term" in this sense, then it conferred upon the city boards power to fix the limit or duration of service as well as the compensation of the secretary, the superintendent and the business manager. In the same article the duties of each are defined. It would seem, therefore, that the Legislature by the above provision intended to confer upon city boards of education the power to employ a city superintendent, at a compensation and for a term to be agreed upon, to perform the duties prescribed by the act and by such rules and regulations as the local board might make and which were not in conflict with the law or the rules and regulations of the State Board of Education.

If the word "term" was not used in its primary sense, the only other meaning which it seems to us should fairly be ascribed to it is that which is generally accepted when the word is used as in the statute in connection with employment. The average person understands "terms of employment" to mean an agreement in regard to the services to be performed.

In whichever sense the word "term" is used in section 57, it would seem as though the Legislature conferred power upon local boards to enter into an agreement with city superintendents. In this case there is no doubt but that Mr. Carr was employed for a term of three years. The point is made that such employment was subject to a right of dismissal at any time by the board. If that is so, then the Legislature in one section authorized the board to make a contract with Mr. Carr and in another section deprived it of the right to fix one of the essential elements of the contract, viz., its duration. The Legislature, therefore, would seem to have been inconsistent. We cannot assume any such intent on its part. It is our duty to reconcile, if possible, the provisions of the law.

As stated above, in article VI of the School Law, the Legislature makes provision for and defines the duties of members of city boards of education, of the secretary, of the superintendent and of the business manager. It has also made provision with regard to their removal. A member who fails to attend three consecutive regular meetings of the board without good cause may be removed by the board. If no provision had been made for the removal of the secretary, superintendent or business manager, it might have been argued that the Legislature did not intend to confer power upon the board to remove such officials. The Legislature, however, did intend to confer power upon the board to remove such officials, and it therefore provided with regard to each that he might be removed "by a majority vote of all the members of said board." No cause is specified. This provision is entirely different from that providing for removal of members. Members can be removed only for one cause. There is no such limitation on the power of the board to remove the secretary, the superintendent or the business manager. For the cause stated by the Legislature a member may be removed "by said board." A secretary, superintendent or business manager can be removed, however, apparently for any cause, but only "by a majority vote of all the members of said board."

It does not seem to us, therefore, that the Legislature in conferring the power of removal upon city boards intended to limit the power conferred by a preceding section to enter into contracts with superintendents. Such power was conferred not for that purpose, but for the purpose of making it clear that secretaries, superintendents and business managers could be removed for any cause, but only by a vote of a majority of all the members of the Board.

The ordinary employer has the right to appoint his employees and also to remove them. He may make a contract with an employee for a definite term and may discharge him before the end of the term, but if he does so without cause he must stand the legal consequences. A city board of education has the power, in our opinion, to employ a superintendent for a definite term, and also to discharge him, but if it does so without cause the removal is unlawful and the city superintendent has a right to have it so declared.

Was the discharge of Mr. Carr without cause? The reasons for his discharge are fully set forth in the record; in fact a trial was held. The Commissioner has found that there was no just reason for the discharge.

We agree with such conclusion. We have read all the testimony and its reading leads us irresistibly to the conclusion that the action of the Board of Education of the city of Bayonne was the result of prejudice and not of disinterested judgment.

It is therefore adjudged that the removal of Mr. Carr as superintendent of schools was in violation of the terms of his contract, and therefore unlawful, and that the decision of the Commissioner of Education in so far as it declared such dismissal legal be reversed.

April 1, 1916.

ABOLITION OF OFFICE OF SUPERVISING PRINCIPAL

ALBERT H. GORDON,

Appellant,

vs.

JEFFERSON TOWNSHIP BOARD OF EDUCATION,

Respondent.

U. G. Davenport, for Appellant.

King & Vogt, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above-named appellant, Albert H. Gordon, a supervising principal employed jointly by the Jefferson Township and Mount Arlington Township Boards of Education to contest the legality of the abolition of such office as far as Jefferson Township School District is concerned by a resolution by the Board of Education of the latter district adopted April 30, 1923. Following is the text of the resolution passed by a vote of five to three, a majority of the whole number of the board:

> "That the office of Supervisor of Schools in Jefferson Township be discontinued at the end of the present school year, June 30, 1923, and the present incumbent notified at once to that effect and that a request for the services of a helping teacher throughout this township for the coming year be sent immediately to the County Superintendent."

The appellant contends that in view of the fact that a supervising principal was employed jointly by the school districts of Mount Arlington and Jefferson Townships and approved by the county superintendent, the Commissioner and the State Board of Education, such office cannot legally be abolished except by joint action of the two boards of education approved by the county superintendent, the Commissioner and the State Board of Education.

The appellant, who is under the protection of the Teachers' Tenure Law, further contends that the abolition of the office of supervising principal was not made in good faith by the Jefferson Township Board of Education, but that such action was entirely the result of personal animosity and political antagonism on the part of various board members against appellant; and that the proposed performance in the future of the same duties by a helping teacher is virtually a dismissal of appellant without compliance with the provisions of the Teachers' Tenure Law as to charges and a hearing and the appointment of someone else in his place.

A hearing in this matter was conducted by the Assistant Commissioner of Education on June 18, 1923, at the Court House in Morristown, at which hearing the testimony of witnesses on both sides was heard.

The Commissioner cannot agree with appellant's contention that a school district joining with another in the appointment of a supervising principal cannot dispense with such office as far as the former district is concerned without the consent of the latter district and without the approval of the County Superintendent, the Commissioner and the State Board of Education. While the law allows joint action by districts in making such an appointment and requires the approval of the county superintendent, the Commissioner and the State Board for such action, there is nothing in the statute which makes such an office permanent for both or either of the districts or which would prevent both or either from afterward abolishing the office. Neither does the testimony in the present instance disclose any terms of an agreement between the two districts by which joint action is required before the supervising principal's office can be dispensed with.

The testimony before the Commissioner failed to support the contention that the action taken by the Jefferson Township Board of Education in abolishing the office of supervising principal was directed against Albert H. Gordon, the incumbent of the office, or was actuated by personal animosity or political antagonism. It appears from the evidence and especially from the sworn statements of four out of five of the board members voting for such abolition that such action was taken in the bona fide belief that the duties hitherto performed by the supervising principal could be just as efficiently performed by a helping teacher; and that no further expenditure towards such helping teacher's salary would be necessary than the district is already making while receiving at the present time no benefit of her services. It appears that the board members voting for the abolition of the supervising principal's office expected to be able to save for the district approximately $800 a year and at the same time in no way decrease the efficiency of the school system.

According to 28 Cyc. 445,

> "The statutes requiring a hearing or opportunity to explain apply only where the removal is for incompetency, misconduct or other reason personal to the individual removed, and not where the removal is made in good faith from motives of economy, as where the services are no longer needed, or there is not a sufficient appropriation to pay salaries, but to make a compliance unnecessary the office must be abolished in good faith."

The justice's opinion in the case of Benjamin Evans *vs.* Board of Chosen Freeholders of Hudson County (53 Law 587) holds that

> "Whenever for economical reasons arising from governmental policy it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course that the exertion of the power to disestablish must be bona fide, for it is manifest that if it should appear that a formal act purporting to abolish such an office or employee, while the officer or position practically still remains in existence, such a subterfuge would be of no avail."

In George F. Sutherland *vs.* Board of Street and Water Commissioners of Jersey City (61 Law 436) the opinion contains the following statement:

> "But it is settled that statutes of this nature (Veterans' Acts) are not designed to prevent the abolition of an office and the transfer of its duties to another official, when such a course is taken bona fide for economical reasons or for the promotion of greater efficiency in the public service."

A similar opinion was rendered in the case of William Boylan *vs.* Board of Police Commissioners of the City of Newark (58 Law 133) wherein it was held that the provisions of the Police Tenure Act were not sufficient to prevent the abolition of the offices of nine police sergeants and the transfer of their duties to four men denominated "Roundsmen" and a consequent saving of $5,000 per annum in salaries.

It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties to another official such office may be abolished even though the incumbent be protected by a tenure of service statute.

In the case under consideration the testimony shows a bona fide belief on the part of the Board of Education of Jefferson Township that economy could be practiced and no efficiency lost by the abolition of the office of supervising principal and the transfer of its duties to a helping teacher, and in view of such a bona fide belief the abolition of the office was in the Commissioner's opinion legal.

The good faith of the action taken by the Jefferson Township Board of Education in transferring the duties of the supervising principal to a helping teacher is supported by the fact that the district in question is not the type which requires the entire time and attention of a supervisor, in which latter type the services of the helping teacher would not prove adequate by reason of the necessity of dividing her time between two or more districts.

In view of the absence therefore of any proof of a personal action against the incumbent of the office of supervising principal in Jefferson Township, but, on the other hand, in view of the abolition of the office for bona fide reasons, it is the opinion of the Commissioner of Education that the action of the Jefferson Township Board of Education was legal and should be sustained.

The appeal is accordingly hereby dismissed.

Dated July, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, Albert H. Gordon, was employed as supervising principal by the Board of Education of Jefferson and Mount Arlington Townships in Morris County for a number of years under annual contracts. On April 30, 1923, by a vote of five to three the Jefferson Township Board passed a resolution to the effect that the office of supervisor of schools in the township be discontinued at the end of that school year, and that the county superintendent be asked to provide a helping teacher to supervise the schools of the township. Mr. Gordon appealed to the Commissioner, who, after hearing testimony, has held in an opinion in which the facts are fully stated, that the Board had the right to abolish the position of superintendent, notwithstanding the appellant's tenure of office, unless in so doing it was prompted by motives of animosity or prejudice, and on that point the Commissioner finds that the weight of the evidence before him is that the action of the Board was in good faith and was not the result of animosity, passion or prejudice, but that, on the contrary, "the testimony shows a bona fide belief on the part of the Board of Education of Jefferson Township that economy can be practiced and no efficiency lost by the abolition of the office of supervising principal and the transfer of its duties to a helping teacher." The record shows that this finding of the Commissioner is justified by the evidence and should not be disturbed. Also we agree with the conclusions of law stated in his opinion and therefore recommend that it be affirmed.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

IN THE MATTER OF THE APPLICATION OF JARED BARHITE TO BE REINSTATED AS SUPERVISING PRINCIPAL OF THE SCHOOL DISTRICT OF THE TOWN OF WEST NEW YORK.

Tennant & Haight, for the Appellant.

Francis H. McCauley, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner was employed by the respondent as supervising principal of schools continuously for the four years ending June 30, 1910. He was dismissed from his position as supervising principal without charges having been preferred against him or a hearing given him as required by Chapter 243, P. L. 1909.

If the petitioner was protected by the provisions of said law the action of the respondent was illegal and null and void.

In the case of Marsteller *vs.* The Board of Education of Pleasantville, the State Board of Education held that a principal or teacher who rendered services

after September 1, 1909, was protected by the provisions of Chapter 243, P. L. 1909, even though he was serving under a contract entered into prior to said date, and which contract did not expire until after said date.

The petitioner was employed by the respondent in 1907 and continued to serve without interruption until June, 1910. He was, therefore, protected by the law above referred to, and the action of the respondent in discharging him was null and void.

April 2, 1913.

Decision of the State Board of Education

This is an appeal by the Board of Education of the Town of West New York from a decision of the Commissioner to the effect that its act in discharging Mr. Barhite was null and void.

No evidence was taken in the case. Mr. Barhite was a supervising principal in the public schools of the Town of West New York for four successive years prior to June, 1910. In that or the preceding month a successor was appointed in his place. Mr. Barhite protested against this act and thereafter wrote a letter to the Superintendent of Public Instruction, Mr. Charles J. Baxter. He received in reply a letter setting forth the rulings of the department in regard to the Tenure of Service Act, one of which was contrary to his contention that his discharge was unlawful. Mr. Barhite's application to the Superintendent of Public Instruction was informal. There was, however, nothing in the law which prescribed any particular form in which school controversies should be presented to the Superintendent of Public Instruction. Neither is there anything now in the law which prescribes any particular form in which matters must be presented to the Commissioner of Education for his decision. Mr. Barhite sought the rulings of the Superintendent of Public Instruction with regard to the Tenure of Service Act. He received such rulings and there is no suggestion in the papers, neither was there upon the argument, that he did not understand that one of the rulings was contrary to his contentions. He did not appeal to the State Board, but acquiesced in the determination of the superintendent, and did nothing further until after the ruling of this Board in the Marsteller case.

The Board of Education of the Town of West New York had every reason to believe that Mr. Barhite acquiesced in the rulings of Mr. Baxter. We believe Mr. Barhite has had his day in Court and that the Commissioner erred when he allowed him again to attempt to litigate the matter.

July 10, 1913.

Concurring Opinion of Dr. John C. Van Dyke

Whether action was begun in this case by Barhite in 1910 and decided by the State Superintendent against him seems uncertain. The papers do not indicate the exact facts about this. Apparently there was an informal petition made which was answered by the State Superintendent in a letter enclosing certain decisions of the State Superintendent under the Tenure of Service Act. Barhite seems to have accepted these decisions as covering his case, and

abandoned any further thought of action. If he did not, what became of his suit? If he started one, why did he not press it? If decided against him, why did he not appeal to the State Board of Education at that time? Action now, before a new tribunal, after the lapse of three years, certainly argues negligence for which the appellee alone should be held responsible. The argument of counsel for appellant on that point seems well grounded. Barhite was guilty of *laches* or negligence in not pressing his cause. It is unreasonable to suppose that the appellant, the Board of Education of West New York, could or should wait three years upon the movement of the appellee.

Again, if the appellee bases his present claim upon the ground that he has not been heard in Court; that his case has never been adjudicated, and that he expressly reserved all his rights in his protest against his dismissal in 1910, the same question arises. Why did he not urge his claim before the State Superintendent in 1910. Actions must be begun within a reasonable time.

The Statute of Limitations was established for the very purpose of barring actions not started within a reasonable time. Can the appellee contend that three years is a reasonable time to put forth his claim? The appellant had to make new contracts or go on with the old one, and it was not possible for the Board of Education of West New York, the appellant, to wait such a length of time upon the appellee's movements. The matter could have been decided in three months, and the appellee should have pushed his claim to a decision. The consequences of his not doing so should fall upon his own head rather than upon the head of the Board of Education of West New York. Whatever rights he may have had in 1910 under the Tenure of Service Act he has lost by his own negligence, either by failure to start a suit in the first place, or failure to press his right of appeal in the second place.

The decision of the Commissioner is reversed.

The Supreme Court, under date of February 18, 1914, dismissed the appeal.

Affirmed by *Court of Errors and Appeals,* 86 N. J. L. 674.

ILLEGAL DISMISSAL OF SUPERVISING PRINCIPAL UNDER CONTRACT

ALBERT S. DAVIS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF BOONTON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts in this case as indicated by testimony taken at a hearing before the Assistant Commissioner of Education at Morristown on November 12, 17, and 21, 1925, are as follows:

Appellant was appointed under a written contract dated June 4, 1923, as supervising principal of the schools of Boonton for a term of three years, commencing July 1, 1923, and ending June 30, 1926, at a salary of $4,000 for the first year, $5,000 for the second year and $5,500 for the third year. Appellant continued to serve under the appointment as aforesaid and to receive his salary until August 28, 1925, upon which date at a meeting of the Boonton Board of Education a resolution was passed abrogating the contract. On or about September 1, 1925, application was made by appellant to the Boonton Board of Education for the same position of supervising principal at a salary of $458.33 per month from September 1, 1925, until April 1, 1926, but this application was rejected at a meeting of the Board of September 11 by a vote of eight nays with the ninth member present refraining from voting. Appellant thereupon at once presented an appeal to the Commissioner of Education, in which he demanded reinstatement in his position of supervising principal of the Boonton Schools, under the three-year contract as aforesaid, and the payment of his salary from the date of his dismissal, namely August 28, 1925.

The respondent, the Boonton Board of Education, defends its action on the ground that the three-year contract under which appellant was originally employed was an attempt on the part of the then Board of Education to bind its successors and therefore not legally binding upon it as one of such succeeding Boards, that such contract was incapable of ratification, that appellant, moreover, acquiesced in the abrogation of the contract by the Board on August 28, 1925, as aforesaid, by application on or about September 1, 1925, for a short term appointment as supervising principal, thus constituting an estoppel of the present action; and finally, respondent contends that appellant's conduct of his office during his incumbency demonstrated his unfitness as supervising principal, thus further justifying the action taken by the Board of Education at its meeting on August 28, 1925.

In the case of Serina M. Brown *vs.* Oakland Board of Education, reported on page 656 of the 1925 Compilation of the New Jersey School Law, it was held by the Commissioner of Education, whose decision was sustained by the State Board, that as Boards of Education are non-continuous bodies, one board could not by a three-year appointment of a teacher legally deprive a succeeding board of its right to appoint her successor, and that such appointment was accordingly voidable by such succeeding board. In a more recent case, namely, Noonan and Arnot *vs.* Paterson City Board of Education (reported on page 527, 1925 Compilation of School Law), which was also sustained by the State Board of Education, the Commissioner held that since boards of education were non-continuous bodies (Gulnac *vs.* Board of Chosen Freeholders, 74 L. 543), a board was not bound *per se* by rules adopted by a preceding board. In the Brown case above referred to the Commissioner was supported in his conclusion that a board of education cannot make an appointment for such a term as to divest future boards of the power to appoint whom they may desire by Illinois cases, namely, Stevenson *vs.* School Directors, 87 Ill. 255, and C. C. Cross *vs.* School Directors, 24 Ill. App. 191. The Brown case differed somewhat from the one under consideration in that it involved action by an out-

going board of education to supersede a contract expiring during the life of the succeeding board with a three-year agreement which would automatically deprive such succeeding board of its right of appointment. It is the opinion of the Commissioner, however, that the three-year appointment of Mr. Davis by the Boonton Board of Education, dating from July 1, 1923, may be considered by its terms just as effectively to divest future boards including the present board of all power to appoint his successor.

It is also the opinion of the Commissioner, however, that an appointment such as that of appellant, even though plainly voidable by a succeeding board of education, is nevertheless capable of subsequent ratification either express or implied, since it involved no collusion or fraud or elements which could render it void. In the recent case of Noonan and Arnot *vs.* Paterson Board of Education, above referred to, it was held that rules adopted by a preceding board of education and not *per se* binding upon a new board were nevertheless to be considered as ratified and adopted by such new board, if acted under or referred to by it as the rules governing such board.

In the case under consideration the testimony shows that the Boonton Board of Education, which came into office on the first Monday in April, 1925, and which later on August 28, 1925, rescinded appellant's three-year contract, actually paid the latter his salary for the months of April, May, June, July and August until the date of actual dismissal, namely, August 28, 1925. The testimony also shows many official acts of recognition of appellant as supervising principal during the months above enumerated, on the part of the Board of Education which came into office in April, 1925, as aforesaid, such as the payment of appellant's expense allowances, receipt of his various official reports, adoption of his recommendations, etc. It is, therefore, the opinion of the Commissioner that the Boonton Board of Education, which came into office in April, 1925, by its own acts adopted and ratified, so far as it was concerned, the three-year contract entire and indivisible in its terms, by which on July 1, 1923, appellant was appointed as supervising principal of the Boonton Schools.

It remains to be considered whether the respondent's dismissal of appellant on August 28, 1925, was justified on the ground of the former's inefficiency or unfitness for his office of supervising principal. In the opinion of the Commissioner the testimony does not support the contentions of the Board of Education in this regard. The lack of proper supervision of the schools under appellant is not established by the testimony nor was there shown any failure on his part to keep the Board of Education informed by means of reports as to the condition and progress of the schools under his supervision. The schools, moreover, were shown by the testimony to have a high standard of efficiency during appellant's incumbency. The incidents which were proved indicating somewhat of discord and friction between the appellant and the Board of Education, even though viewed in a light unfavorable to appellant, were not in the Commissioner's opinion of sufficient gravity or importance to be considered as an impairment of appellant's efficiency or fitness for his office, and thus to justify his dismissal.

The Commissioner does not consider that appellant can be deemed to have acquiesced in his dismissal of August 28, 1925, as claimed by the respondent

merely because of his having applied in September for a new appointment as supervising principal until April, 1926. Such an application, never accepted by the respondent, could be considered nothing more than an offer of compromise, which when rejected by the Board of Education could in no way act as an estoppel of appellant or to the prejudice of his right to appeal from the dismissal action of August 28, 1925, as aforesaid.

The remedy to which appellant is entitled, therefore, for what the Commissioner finds to be an illegal dismissal and a violation of contract alone remains to be considered. Section 165, Article VIII, page 109 of the 1925 Compilation of the School Law, provides as follows:

> "In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and the Board of Education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the Board of Education whether such teacher shall or shall not teach for the unexpired term."

It is true that in the above quoted section of law the term "teacher" is used, while the office held by appellant was that of supervising principal. Article VIII, of the School Act of 1903, of which the above quoted provision is one of the sections, while entitled "Teachers", nevertheless provides in its opening sentence that "a Board of Education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment and the promotion and dismissal of such teachers and principals, the salaries, and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations." It is the opinion of the Commissioner, therefore, that the term "teacher" as used thereafter in the remaining sections of Article VIII has a broader significance than the term itself would imply and includes both teachers and principals. In other parts of the School Law such as that dealing with salary schedules (Sec. 319, Art. XXVI, of the 1925 School Law Compilation) the term "teacher" is used in a comprehensive sense to include both the teachers and principals specifically enumerated in the beginning of the article.

In the dismissal action of the Boonton Board of Education on August 28, 1925, there is involved no actual tenure which had been violated and, moreover, the July 1, 1923, contract which was broken need not necessarily, after the expiration of the term of the present Board in April, 1926, inevitably result in tenure protection, since the three-year contract was an entirety and when adopted by a succeeding Board is binding only through its own official term. Accordingly, the matter is not one for the application of remedies prescribed by the Teachers' Tenure Law.

The Commissioner is without authority under Section 165, Article VIII, page 109, of the 1925 Compilation of the School Law, above referred to, to fix any damages, as appellant suggests in his brief, by deducting the amount appellant has been earning since the date of his dismissal from the compensation due him. Such fixing of damages would be a function of a Court of Law

and not of the Commissioner, who, under the section of the School Law above referred to, is authorized in the case of an unlawful dismissal of a teacher under contract to award the entire compensation from the date of dismissal until the end of the term.

It is, therefore, hereby ordered by the Commissioner of Education that in accordance with the provisions of Section 165 above referred to, the Boonton Board of Education proceed at once in its discretion either to reinstate appellant in his position of supervising principal of the Boonton Schools and to pay him his salary from August 28, 1925, at the rate stipulated in the contract for the third year; or, if the Board does not desire the continuance of appellant's services, that it proceed at once to pay him his salary at the rate stipulated for the third year as aforesaid from the date of his dismissal on August 28, 1925, and during that part of the remainder of appellant's contract term which is binding upon the present Board of Education, namely, until the first Monday in April, 1926.

December 24, 1925.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

RUSSELL M. FITCH,

Appellant,

vs.

THE BOARD OF EDUCATION OF SOUTH AMBOY,

Respondent.

Thomas Brown, for the Appellant.

Samuel Schleimer, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant has been the Supervising Principal of the Schools under the control of the respondent for more than three years, and is therefore protected by the provisions of Chapter 243 of the Laws of 1900, commonly known as "The Teachers' Tenure of Service Act," and is liable to dismissal only for "inefficiency, incapacity, conduct unbecoming a teacher, or other just cause," and upon written charges and after a hearing by the Board of Education, at which he may be represented by counsel.

Charges of inefficiency were preferred against the appellant, and after a hearing the respondent found the charges to be true in fact, and thereupon adopted a resolution dismissing him from his position as supervising principal.

From this action he appeals, and prays that the action of the respondent be declared null and void:

1. Because the action taken was not in accordance with the provisions of the Teachers' Tenure of Service Act; and,
2. Because the charge of inefficiency was not sustained by the evidence.

The Tenure of Service Act provides, in part, as follows:

> "No principal or teacher shall be dismissed or subjected to reduction of salary except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause * * * and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

It appears that written charges were filed against the appellant, that a copy was served upon him, and that he received notice to appear, on a certain date, before a Committee of the Board of Education, at which time a hearing on the charges would be held. It also appears that he applied for, and was furnished with, blank subpœnas for such witnesses as he desired to have summoned, that he appeared at the time and place stated in the notice, and that witnesses produced to sustain the charges were cross-examined by his counsel. There is nothing before me to show whether or not witnesses were produced in his behalf, or that any person refused to appear and testify for him. It also appears that the committee is composed of all the members of the Board of Education, that all the members were present, and that the President of the Board presided.

The appellant asks that the action of the Board of Education in dismissing him be declared null and void, for the reason that the hearing was held before a committee of the Board and not before the Board itself in regular session.

In view of the fact that all the members of the Board were present at the hearing, and that his counsel cross-examined witnesses then present, and the further fact that at the hearing before me he had full opportunity to present witnesses in his behalf, and to cross-examine those produced by the respondent, I am of the opinion that there was a substantial compliance with the provisions of the act, and that his rights have not in anywise been jeopardized.

After a careful study of all the evidence, I am of the opinion that the appellant has been inefficient in the discharge of his duties as supervising principal.

The appeal is dismissed.

October 13, 1913.

Decision of the State Board of Education

Mr. Fitch was supervising principal in the employ of the Board of Education of South Amboy and protected by the provisions of the Teachers' Tenure of Service Act. On or about the 2d of April, 1913, written charges were preferred against him. On the 11th of April he was notified that the Teachers' Committee would hold a hearing upon the 16th, and he was requested to submit, by the 14th, a list of any witnesses whose presence he desired, so that subpœnas could be prepared. A trial was held, the Committee rendered a report, and the Board, on or about the 30th of April, unanimously adopted a resolution sustained the charges. The Board also unanimously resolved that Mr. Fitch's services would not be required after the close of the school year 1912-1913.

Mr. Fitch appealed to the Commissioner of Education, and evidence was taken *de novo*. The record and briefs submitted to us aggregate about six hundred pages, and we have carefully examined same. The record does not include a transcript of the proceedings on the trial before the Teachers' Committee. From the record, however, we assume that substantially the same facts excepting those relating to the defense of Mr. Fitch were brought out upon that trial as upon the hearing before the Commissioner. The Commissioner considered various objections urged in behalf of Mr. Fitch and overruled same. With regard to the merits, he wrote:

> "After a careful study of all the evidence, I am of the opinion that the appellant has been inefficient in the discharge of his duties as supervising principal."

Twenty-nine grounds are urged as reasons for the reversal of the determination of the Commissioner and of the Board of Education of South Amboy. We have examined all. Those on which the most reliance is placed are three-fold.

First: That the written charges were insufficient.

Second: That the hearing should have been held by the Board of Education of South Amboy and not by any committee.

Third: That the evidence failed to establish that Mr. Fitch was inefficient.

We do not understand that any claim is made that Mr. Fitch was misled as to the meaning of the charges preferred against him. It was not necessary that such charges should have been prepared with the precision of an indictment. In our opinion, the charges were sufficient if Mr. Fitch was by them so apprised of the complaints against him, that he understood their nature, and could, if he so desired, prepare to meet them. A reading of the charges clearly shows that the complaints against Mr. Fitch were that there was no system, supervision or help to the teachers, that the schools were not up to the standard, and that they had been deteriorating for a period extending over three years. The charges could perhaps have been drawn with greater precision, but their meaning was quite clear, and to the average mind would indicate that Mr. Fitch was charged with inefficiency and incapacity.

The second objection which has been strongly urged is that the hearing was conducted by the Teachers' Committee and not by the Board of Education. The Commissioner carefully examined this objection, and we see no reason to differ from the conclusion reached by him. The Committee is composed of all the members of the Board of Education. All the members of the Board were present at the hearing, and the President presided. Under such circumstances we cannot see that the labelling of all the members of the Board as a Teachers' Committee, rather than as a Board, vitiated the proceedings.

The third objection relates to the merits. In a word, the serious charge against Mr. Fitch was that he was a supervisor who did not supervise. The Board unanimously decided that the charge was sustained. Upon a new hearing before the Commissioner he also was of the opinion that Mr. Fitch had been inefficient in the discharge of his duties as supervising principal. Mr. Fitch now urges that we should be convinced "beyond a preponderance of evidence"

that he was inefficient and incapable. As we have today indicated in another case, it is our opinion that we should not interfere with the determination of a local board of education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local board of education, and that if such board finds they are true in fact, the teacher may be dismissed. The Legislature has imposed the duty of determining if the charges are true in fact upon the local board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature. Where a board unanimously decides that a supervising principal is inefficient and where the Commissioner after a very careful trial likewise concludes that he is inefficient, we should be slow to interfere. From an examination of the evidence we cannot say that the conclusion that Mr. Fitch was inefficient was the result of passion or prejudice rather than of honest judgment.

The decision of the Commissioner of Education is affirmed.

January 3, 1914.

DISMISSAL OF SUPERVISING PRINCIPAL UNDER TENURE

ASBURY FOUNTAIN,

Appellant,

vs.

THE BOARD OF EDUCATION OF MADISON TOWNSHIP,

Respondent.

Jacob R. Van Mater Lefferts, for the Appellant.

Charles T. Cowenhoven, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Asbury Fountain, the appellant in this case, was supervising principal in Madison Township, Middlesex County, up to June, 1916. He had occupied this position for more than three years.

In April, 1916, charges were made against the appellant by citizens of Madison Township. The principal charges against Mr. Fountain are that he has not been sufficiently diligent in visiting the schools of the township and that on his visits to the schools he did not remain for a sufficient length of time to make any examination of the progress that the pupils in the schools were making in their studies and that he could not in so short a time while

visiting ascertain the character of the tuition that was given or the qualifications of the teachers to impart knowledge.

These charges were regularly served upon Mr. Fountain. An appointed time was set and a hearing given by the Board of Education. At this hearing counsel appeared for Mr. Fountain and also for the persons making the charges. Several witnesses were called on both sides and sworn testimony was taken by an official stenographer. In Madison Township there are eight teachers to be supervised. A supervising principal is supposed to give his whole time during school hours to his duties as a supervisor. Among the witnesses sworn were the eight teachers. After hearing the testimony the Board of Education found the appellant guilty of the charges preferred.

From this finding an appeal has been taken to the Commissioner, the case being submitted on the testimony taken before the local Board. An opportunity was given for oral argument before the Commissioner based on this testimony. At this hearing, although both sides had notice, only the counsel for the respondent appeared.

After carefully reading all the testimony offered, I have reached the conclusion that a fair hearing has been granted the appellant, and that the findings of the Board of Education are in accordance with the evidence in the case.

The appeal is hereby dismissed.

March 21, 1917.

Decision of the State Board of Education

James F. Fielder, for the Appellant.
Charles T. Cowenhoven, for the Respondent.

The appellant in this case was supervising principal of the schools in Madison Township, Middlesex County, up to February 3, 1916. At that time he resigned and was immediately reappointed to the same position. No one pretends to know or say why he resigned, not even the appellant himself, but the effect of his resignation was to cut him off from the benefit of the tenure of service act. Two months or more later charges were brought against the appellant. Waiving the question whether he was entitled to a trial under the tenure of service act, he was duly tried by the Board of Education of Madison Township, found guilty, and dismissed from service. He appealed to the Commissioner of Education, and his appeal was dismissed. He is now before this State Board of Education on appeal from the Commissioner of Education.

The trial was more or less informal, as is usually the case with trials before school boards; incompetent and inconsequent evidence was admitted from both sides, and of the twelve charges against the appellant several were dropped and several others were not sufficiently substantiated by the evidence. The chief charges, however, "that he was not sufficiently diligent in visiting the schools of the township and that on his visits to the schools he did not remain for a sufficient length of time to make any examination of the progress

that the pupils in the schools were making in their studies, and that he could not in so short a time while visiting ascertain the character of the teaching that was given or the qualifications of the teachers to impart knowledge"—these charges have been sufficiently proven by the evidence in the case. In summarizing the evidence, appellant's counsel makes it appear that 98 visits were made to six schools in 180 days. We quote from counsel's brief:

> "This covers a period of approximately six months, or 180 days. Deducting 55 days for Saturdays, Sundays and holidays, leaves about 125 school days. The teachers who testified represented six schools, and as there are eight schools in the district, two teachers were not called to testify. It must be assumed that Fountain paid the average number of 13 visits to the other two schools, otherwise the complainants would have called the teachers to testify against him, so that the total number of visits to the eight schools were 124 for the 125 school days, or one school visited each day. Besides these specific visits, each teacher testified that he visited her school a number of times when he did not enter the school building. If the records showed that the teacher was managing her school properly, she did not require many visits. In addition to visiting schools, a supervising principal has many other duties to perform, such as acting as truant officer, preparing and filing state reports, county superintendent reports, and united attendance reports for each month; he must inspect toilets, deliver necessary supplies, and pay persons employed on school work. It would therefore appear that with the number of school visits actually testified to he must have been an exceedingly busy man if he performed his other duties, and that he did perform them is apparent from the absence of charges on that score. The township in question is seven miles wide and fourteen miles long, and the schools are three or four miles apart."

It is thus claimed that the appellant "visited one school a day for 125 school days." On the witness stand Fountain himself said that his visits were from fifteen minutes to an hour and a half each, but this is not substantiated by the testimony of six teachers in the schools who say that the visits were from fifteen minutes to half or three-quarters of an hour, or with one witness from fifteen minutes to an hour. But taking Fountain's testimony at its face value the visiting of a school a day from fifteen minutes to an hour and a half does not constitute adequate or sufficient supervision on the part of a supervising principal whose whole time is supposed to be devoted to his office. In apportioning school moneys for a supervising principal article XVII, section 223, I. (a) of the School Law (1914) reads: "The sum of six hundred dollars to each district in which there shall have been employed a supervising principal or city superintendent of schools who shall have devoted his *entire time* to the supervision of the schools in such district." The duty of a supervising principal is primarily the supervision of instruction in the classroom. His other duties are of minor importance and call for no such expenditure of time as counsel suggests.

The best that the appellant can claim in his testimony is that he was engaged in his duties of his office not more than an hour a day. This is such utterly inadequate service under the statute that it amounts to neglect of duty and on this count alone we think the respondent, the Board of Education of Madison Township, was justified in dismissing the appellant from service.

The decision of the Commissioner of Education is affirmed.

December 1, 1917.

LEGALITY OF REMOVAL OF SUPERVISING PRINCIPAL

JOHN S. MCCURDY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MATAWAN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is presented for the purpose of contesting the legality of the action of the Matawan Township Board of Education in notifying appellant on April 23, 1926, that in accordance with the terms of his employment of April 23, 1925, his services as supervising principal would terminate on June 1, 1926, and that he was in no way to act as supervisor after that date.

Appellant contends that his employment as supervising principal from July 1, 1925, to June 1, 1926, under the resolutions of the Board of Education of April 23, 1925, was invalid in that there was no written contract of employment and an entire absence of any rules and regulations for the employment and government of its teachers adopted by the Matawan Township Board of Education in lieu of such written contract, and that subsequent thereto, namely, on March 17, 1926, he was legally employed under written contract as supervising principal of the Matawan Township schools for the term of one year from March 20, 1926, at an increase of $200, which contract has not yet expired.

Respondent on the other hand insists that the office of supervising principal to which appellant was appointed on April 23, 1925, was not an office for which the law requires a written contract or rules and regulations in lieu thereof, that consequently the employment of April 23, 1925, was entirely valid, that there was no vacancy in the office of supervising principal in March, 1926, and that therefore the action taken by the Board of Education on March 17, 1926, was an illegal attempt to fill an office not yet vacant and which would not become vacant until June 1, 1926, after the expiration of the official life of such Board. Respondent further contends that the resolution of March 17, 1926, under which the appellant claims valid employment failed to

receive the vote of a majority of the whole membership of the Board of Education as required by law, that appellant's employment as supervising principal was also illegal because of the fact that such an office did not exist in the School District of Matawan at that time, and finally that in any event appellant's notification on April 23, 1926, of the termination of his services was a compliance with the mutual termination provision of the very contract of March 17, 1926, under which he claims his office.

Hearing in this case was conducted by the Assistant Commissioner of Education on September 17, 1926, at the Court House in Freehold, at which testimony of witnesses on both sides was heard, and since that date briefs on the legal points involved have been filed by counsel for both appellant and respondent.

The Commissioner cannot agree with respondent's contention that appellant's employment of April 23, 1925, was valid and that there was consequently no vacancy in the office on March 17, 1926. Article VIII, Section 163, of the 1925 Compilation of the School Laws provides in part as follows:

> "A board of education may make rules and regulations governing the engagement and employment of teachers and principals * * * The employment of any teacher by such board, and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto. If a board of education shall not have made rules and regulations as aforesaid, then no contract between such board of education and a teacher shall be valid unless the same be in writing, or partly written and partly printed, in triplicate, signed by the president and district clerk or secretary of the board of education and by the teacher."

Article VIII of the School Law above quoted, while entitled "Teachers," expressly refers to both principals and teachers, and was held by the Commissioner of Education in the case of Davis *vs.* Boonton Board of Education (decided December 24, 1925), to even include supervising principals. The Commissioner is not prepared therefore to say that even if appellant had been appointed in 1925 to the office of an approved supervising principal, he would not have been subject in like manner to the requirements of either a written contract or rules and regulations of the Board of Education in lieu thereof prescribed by Article VIII, Section 163, above quoted. When it is considered however that the office of supervising principal for the Township of Matawan was not authorized by the county superintendent and approved by the Commissioner and State Board of Education until September 11, 1926, and the office to which appellant was appointed in April, 1925, was merely that of an unapproved supervising principal or principal with supervisory duties, there is in the Commissioner's opinion not the slightest question but that full compliance with the statutory requirements as to the formalities of employment was essential to the validity of such employment. Instead, however, of any such written contract and with the entire absence of any rules and regulations of the Board of Education in lieu thereof, it appears that

appellant was appointed supervising principal on April 23, 1925, by resolution only. As in the case of Herman Shapiro *vs.* Board of Education of the City of Paterson, decided April 7, 1926, such an employment was in the Commissioner's opinion invalid and there consequently existed on March 17, 1926, a vacancy which the then Board of Education of the Township of Matawan was legally authorized to fill.

There then remains to be considered the question among others of whether the resolution of the Board of Education of March 17, 1926, by which appellant was appointed supervising principal for one year from March 20, 1926, received a majority vote of all the members of the Board as required by law.

Section 130, Article VII, of the 1925 Compilation of the School Law, provides as follows:

> "No principal or teacher shall be appointed, transferred or dismissed, nor the amount of his salary fixed * * * except by a majority vote of the whole number of members of the board of education."

It appears from the testimony in this case that at the meeting of the Board of Education on March 17, 1926, 8 members, including the president, were present, that upon a roll call, which did not include the president, the motion for appellant's appointment as supervising principal for one year from March 20, 1926, duly seconded, received 4 affirmative and 3 negative votes, and that thereupon the president announced that the motion was carried. While the decisions are numerous to the effect that in the case of a tie the chairman's announcement that the motion has carried is equivalent to a casting vote (Small *vs.* Orne, 79 Me. 78; Rushville Gas Company *vs.* City of Rushville, 121 Ind. 212, etc.), the case of Roberts *vs.* Dancer, 93 S. E. 297, decided by the Court of Errors and Appeals of Georgia and cited by appellant's counsel seems to be the leading authority upon the effect of such an announcement by the chairman in a situation such as that under consideration, where the resolution without the vote of the chairman received a majority vote but one vote less than a majority of the whole Board, as required by law. In the Georgia case above referred to the Court held as follows:

> "In the present instance we think concurrence must have been evidenced in some more active and positive manner than by aquiescence, which is altogether implied, and that in some way actual and positive manifestation of such intent must have been given. It is our opinion that the statement of the chairman, in declaring the resolution carried, when the circumstances were such that his vote became necessary to its adoption, was equivalent to the express and formal casting of his vote therefor."

In the case under consideration the president of the Matawan Township Board of Education announced the motion for the appointment of appellant as supervising principal carried "when the circumstances were such that his vote became necessary to its adoption" by a 5 to 3 vote or a majority of the whole number of the Board. He must be deemed in such case to have known

the majority necessary to carry the motion, and in the Commissioner's opinion his announcement of its having carried was therefore in the light of the above authorities equivalent to "the express and formal casting of his vote therefor." In this particular instance, moreover, the announcement of the carrying of the motion was the first opportunity the president had had to cast his vote, since his name was not included in the roll call upon the motion. The cases which respondent's counsel cites, namely, 42 Conn. 32, and 60 Iowa 391, are not in the Commissioner's opinion in point, since in one case the chairman announced that a candidate had been elected who not only had not received a majority vote but for whom a majority could not have been effected even by the vote of the chairman, and in the other case the chairman announced a resolution defeated because it had not received a three-fourths majority when the majority it had received was sufficient according to law to carry it. In neither of the above cases could the result have been in any way affected by any action of the chairman, as in the case under consideration. In referring to the Tennessee case upon which respondent's counsel also relies, the Court of Appeals of Georgia in Roberts *vs.* Dancer, above quoted (93 S. E. 297), concluded with the following statement: "We find that the Tennessee Supreme Court in Lawrence *vs.* Ingersoll, 88 Tenn. 32, 12 S. W. 422, 6 L. R. A. 309, 17 St. Rep. 870, has laid down a contrary rule; but we think the doctrine here followed is founded upon the better reason, and it is therefore adopted."

In the Commissioner's opinion there is no merit in respondent's contention that appellant's appointment on March 17, 1926, was illegal because the office of supervising principal had not at that time been duly authorized in Matawan by the County Superintendent and approved by the Commissioner and State Board of Education. The office known in school districts as an unapproved supervising principal is generally recognized and considered to be a type of principal with supervisory duties, for whom an apportionment of $400 is allowed as in the case of all other school principals, instead of the $600 apportionment to which a district is entitled for an approved supervising principal. The appointment of such a principal with supervisory duties is, therefore, in the Commissioner's opinion, in no way invalidated by the specific designation of supervising principal.

The notice given appellant by the Matawan Board of Education on April 23, 1926, to the effect that his services as supervising principal would terminate on June 1, 1926, cannot in the Commissioner's opinion be considered, as respondent claims, the exercise of a mutual termination clause in the March 17, 1926, contract, since the notice itself specifically stated that appellant's services were being terminated in accordance with the terms of his April 23, 1925, appointment, by which he was employed from July 1, 1925, until June 1, 1926. Moreover, without in any way ruling that the termination clause in the March, 1926, contract was intended to be effective, since a line was drawn through the blank specifying the number of days notice, the Commissioner is in any event of the opinion that the respondent is estopped from claiming to have exercised a clause in a contract the validity of which it has all through the same action absolutely denied.

It is therefore the opinion of the Commissioner that appellant's appointment as supervising principal of Matawan from July 1, 1925, until June 1, 1926, was invalid for lack of a written contract or rules and regulations of the Board of Education in lieu thereof, that there consequently existed a vacancy which on March 17, 1926, was legally filled by the appointment of appellant to the position of so-called supervising principal for one year from March 20, 1926, and that such contract of March 17, 1926, was violated by the notice of the Board of Education of April 23, 1926, by which appellant's services were to terminate on June 1, 1926. In the Commissioner's opinion such notice constituted not only a violation of contract but a violation of appellant's potential tenure rights, since the contract of one year since March 20, 1926, would place appellant under tenure on July 1, 1926. Appellant is therefore entitled to the remedies of the Teachers' Tenure Law.

It is, therefore, hereby ordered that the Matawan Township Board of Education proceed at once to reinstate appellant in the position from which he was illegally removed on June 1, 1926, with salary from that date at the rate which was specified in the March 17, 1926, contract.

Dated, October 19, 1926.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Matawan Township Board of Education from a decision of the Commissioner directing it to reinstate the respondent, John S. McCurdy, in his position as supervising principal. The Commissioner holds that he was illegally removed. The facts and questions of law involved are stated and discussed at length in the Commissioner's opinion. We agree with his conclusions and recommend that they be affirmed.

February 5, 1927.

DECISION OF LOCAL BOARD IN TENURE CASE REVERSED UPON EVIDENCE OF PREJUDICE OF THE BOARD

MARION B. REIN,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE,

Respondent.

For Appellant, Joseph Beck Tyler.
For Respondent, Robert Peacock.
For Appellant before Supreme Court, Robert H. McCarter.

DECISION OF THE COMMISSIONER OF EDUCATION

Marion B. Rein, who for a number of years has been supervising principal of the schools of the Township of Riverside, Burlington County, and thereby

protected in her position by the Tenure of Office Act, was dismissed from employment by the Board of Education of that school district on January 2, 1932, at the conclusion of a hearing before the Board upon charges presented by Amos C. Henry, a former principal of the Riverside High School.

Mrs. Rein appeals to the Commissioner of Education for reinstatement as supervising principal on the grounds that the testimony did not support the charges and that the conclusion of the Board was the result of prejudice.

The testimony discloses that Mrs. Rein, as supervising principal, advised the Board of Education during the school year 1930-1931 that she considered the work of the high school principal, Mr. Henry, inefficient and she complained of his failure to make reports or to give information when and as requested. The Board admonished the high school principal in regard to the complaints of Mrs. Rein and as the admonition did not bring satisfactory results, she was directed to prefer charges against Mr. Henry. These charges were heard by the Board during August or September, 1931, which resulted in its finding Mr. Henry guilty of the charges and his dismissal.

During the hearing of his case, he claimed his work was adversely affected by the lack of co-operation of the supervising principal. In the course of the same meeting at which the high school principal was dismissed, the Board, evidently provoked by the apparent unsatisfactory condition of the schools as indicated by the testimony, requested the supervising principal's resignation which she refused to give. Thereupon Mr. Henry, apparently at the instigation of the Board and with its co-operation, formulated charges against Mrs. Rein and presented them to the Board. The Board assigned to Mrs. Rein the organization of the high school for the year 1931-1932, and then after the completion of the organization of the high and elementary schools, she was notified to answer the charges made by Mr. Henry. The Board began to hear testimony in her case on December 14, 1931, and continued at frequent intervals for several days. Mrs. Rein was represented by counsel and the Board of Education provided counsel for the appellant. More than 1,100 pages of testimony were taken at the hearing before the Board of Education, following which Mrs. Rein was found guilty of the accusations and dismissed. Upon her appeal to the Commissioner of Education the Board submitted a transcript of the testimony for his review, and counsel for both sides subsequently presented argument upon the evidence.

In reviewing the findings of local boards where teachers under tenure have been dismissed, the State Board of Education has held as follows:

> In the case of Conrow *vs.* Lumberton Township, New Jersey School Law Decisions, 1928, Ed. page 186, "As the procedure prescribed by the statute was followed, but two questions arise: first, was the charge such as, if found true in fact, would justify dismissal; and, second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice."
>
> In the case of Fitch *vs.* South Amboy, New Jersey School Law Decisions, 1928 Ed. pages 173-176, "As we have today indicated in another case, it is our opinion that we should not interfere with the determination of

a local board of education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local board of education, and that if such board finds they are true in fact, the teacher may be dismissed. The Legislature has imposed the duty of determining if the charges are true in fact upon the local board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature."

In the case of Cheeseman *vs.* Gloucester City, New Jersey School Law Decisions, 1928 Ed. page 159, "This Board will not disturb the finding of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part." (Affirmed by the Supreme Court.)

In accordance with these citations the judgment of the local board should not be set aside unless it is shown by the testimony that its decision was the result of passion or prejudice, or that the findings were so clearly against the weight of evidence as to lead to the conclusion that there was not an exercise of honest judgment.

Most of the testimony presented against Mrs. Rein before the Board of Education is that of Amos C. Henry, the deposed high school principal, and, therefore, a prejudiced witness. The only witness called by Mr. Henry who could be considered an expert was Howard Dare White, Assistant Commissioner of Education, but Mr. White did not testify for Mr. Henry as an expert, but only in reference to the approval by the State Board of Education of the Riverside High School.

Mrs. Rein not only brought local witnesses to refute the testimony presented by Mr. Henry, but introduced the evidence of expert witnesses as to her qualifications and work and to show that her acts and recommendations were endorsed by outstanding educational authorities. These expert witnesses testified in part as follows:

Lambert L. Jackson, First Assistant Superintendent of Schools of Newark, and formerly Assistant Commissioner in Charge of Secondary Schools in New Jersey, testified (page 859) that he would not have recommended Mr. Henry for the principalship of the Riverside High School because of knowledge of his work at Woodbine, New Jersey, which had come under the former's supervision as Secondary Commissioner. He stated that his observation of Mrs. Rein's work caused him to rate it as "very satisfactory."

Howard Dare White, now Assistant Commissioner of Education in Charge of Secondary Schools, has not come in contact with Mr. Henry's work because the latter has not been connected with any high school during his administration as Assistant State Commissioner. He testified

(pages 409-410) that he considers Mrs. Rein qualified as a supervising principal and believes she has promoted the best interest of the schools of Riverside.

Mr. William P. Uhler, Assistant State Director of Health Education, testified that he approved the plans and recommendations of Mrs. Rein in relation to the assignment of pupils to the gymnasium and the erection of partitions in it. This testimony further corroborated that of the appellant in reference to the physical training work.

Mr. Louis J. Kaser, County Superintendent of Schools of Burlington County, who is by law authorized to advise boards of education, and required to supervise schools of the county, said (pages 562-563) that he did not recommend Mr. Henry to the high school principalship for the reason that in his observation of Mr. Henry's work in the grades it was his opinion that he did not demonstrate the ability necessary for a high school principal. It was the opinion of Mr. Kaser that Mrs. Rein conducted her office as required by law.

Mr. George C. Baker, Supervising Principal of Moorestown and at present a Vice-President of the National Education Association, testified (pages 617 and 748) in support of the methods used by Mrs. Rein in her administration of the schools of Riverside, and stated that several years ago she was principal of one of the schools under his charge and during that time he found her work satisfactory.

Mr. Robert C. B. Parker, Supervising Principal of the Mount Holly Schools (page 759), classified as good procedure the organization and administration of the schools as planned by Mrs. Rein. He held it was within her authority to determine the relative standing of pupils.

The allegations made by Mr. Henry against Mrs. Rein indicate that he searched for grounds of complaint rather than presenting charges upon outstanding situations which would naturally provoke them.

The general type of complaint is shown by the charge that Mrs. Rein did not conduct fire drills—a responsibility by law of the principal of the building and not the supervising principal of schools. Mr. Henry had, as high school principal, been found guilty by the Board of not having conducted the drills. The testimony shows that Mrs. Rein, as supervising principal, had on numerous occasions emphatically called to the attention of the building principal the necessity of having fire drills.

Very insignificant circumstances about the certification of teachers are set forth to indicate illegal procedures of the supervising principal. The testimony shows that there might have been a misunderstanding on the part of certain applicants for teaching positions in the Riverside schools as to the certification requirements of the State Board of Education for such positions. It would be very difficult to deduce from the evidence that the supervising principal intentionally employed teachers who were not properly certificated, or recommended employments detrimental to the school system.

Most of the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in

school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature.

The findings of the Riverside Board of Education are against the weight of evidence and are indicative that the decision was the result of passion and prejudice because of feelings resulting from the hearing of charges against the high school principal. The decision of the local Board is therefore reversed and it is hereby directed to reinstate the appellant as supervising principal with pay from the date of her dismissal.

May 10, 1932.

DECISION OF STATE BOARD OF EDUCATION

For some years prior to September, 1931, Marion B. Rein was supervising principal of the schools of the Board of Education of the Township of Riverside. In September, 1931, various charges were preferred against her. At the conclusion of a trial she was dismissed. She appealed to the Commissioner of Education who reversed the judgment of dismissal. From such reversal the Riverside Board appeals to this Board. Such appeal was argued at length before your committee on September 28 and subsequently briefs were submitted by both parties.

In behalf of Mrs. Rein it was and is urged that the decision of the local Board was the result not of unbiased judgment but of passion and prejudice. In behalf of the local Board it was and is urged that the dismissal should stand because there was evidence upon which it was reasonably based and that upon such evidence there was room for an honest difference of opinion in which event it was its province to decide. The local Board also urged that counsel for Mrs. Rein placed undue weight on the testimony of professional experts and that in rendering his decision the Commissioner placed what is termed "considerable stress" upon their testimony. It is true that in his opinion the Commissioner refers to the following whom he described as expert witnesses: (1) Lambert L. Jackson, First Assistant Superintendent of Schools of Newark and formerly Assistant Commissioner in charge of Secondary Schools in New Jersey; (2) Howard Dare White, now Assistant Commissioner of Education in charge of Secondary Schools; (3) William P. Uhler, Assistant State Director of Health Education; (4) Louis J. Kaser, County Superintendent of Schools, Burlington County, in which county Riverside is; (5) George C. Baker, Supervising Principal of Moorestown and at present a Vice-President of the National Education Association, and (6) Robert C. B. Parker, Supervising Principal of the Mount Holly Schools.

It was evident to your committee as it was to counsel for both parties that our report would require an examination of the entire record because this Board time and again has ruled that where on a trial of a teacher, principal, or supervising principal protected by tenure of service, the evidence of incapacity, conduct unbecoming a teacher, or other just cause is such that there is room for an honest difference of opinion the conclusion of the local board

is final. Though the record consisted of 1,106 pages of testimony and many papers and exhibits we have read it all. It discloses that for the school year 1930-31 the Riverside Board, though the members knew that the county superintendent and its supervising principal did not approve, appointed Amos C. Henry principal of its high school. While the Board passed no formal resolution on the subject the supervising principal was given to understand: (1) that Mr. Henry believed he would be successful in his work if she allowed him to exercise his own judgment, and (2) that she should afford him that opportunity. Long before the school year was over the judgment of the county superintendent and the supervising principal was vindicated and the members of the Board apparently without exception realized that the appointment of Mr. Henry was a mistake. Following the close of the year the Board determined that charges should be preferred against him. Its attorney advised that they should "be signed and presented by the supervising principal" so the Board by unanimous resolution on August 5, 1931, resolved that "the supervising principal in her official capacity be and she is hereby authorized and instructed to sign and present the written charges formulated by Walter Carson (the Board attorney) in connection with his investigation." Mrs. Rein in accordance with the Board's resolution signed the charges. A trial ensued. At its conclusion early in the morning of September 17, Mr. Henry was dismissed.

Under date of September 19 the district clerk wrote Mrs. Rein.

> "I am directed by the Board of Education to write to you and ask for your resignation due to your lack of co-operation with our last year's principal of the high school and not making any special effort to make our high school a success. The Board desires your resignation effective October 19, 1931."

Mrs. Rein declined to resign. The high school situation as disclosed by this record was not satisfactory while Mr. Henry was principal. He had been dismissed after a trial on charges formulated by the Board's attorney signed however on his advice by Mrs. Rein in her official capacity as supervising principal. Mrs. Rein was not tried simply on the charges stated in the district clerk's letter to her of September 19. Mr. Henry after his dismissal was allowed to prefer charges and the Board retained his attorney to prosecute them. They were seven in number. The first that Mrs. Rein did not conduct her office as required by State law had four sub-divisions and the third that she did not have the qualifications to act as supervising principal had eleven. The total number was in reality twenty-two and embraced not only the two stated in the district clerk's letter to her but many other matters. It is on such charges that this trial was held and 1,106 pages of testimony taken. The title of the minutes of the trial is somewhat descriptive. It is, "Amos C. Henry, Petitioner, *vs.* Marion B. Rein, Defendant. Before the Board of Education Township of Riverside." Why Mr. Henry who had been dismissed after a trial on charges nominally preferred by the supervising principal should have been selected or permitted to make charges against her and

why his attorney rather than the Board's should have been retained and promised payment for their prosecution is not clear. Such facts however perhaps explain why much time was devoted on the trial to some matters which boards ordinarily ignore. On our part we realize that if supervising principals and principals are to be encouraged in efforts to promote efficiency and to maintain discipline charges made by and evidence submitted against them by former subordinates who may think they have a grievance must be examined with care. Perhaps there is not an efficient supervising principal or principal in this or any State who at some time has not had to prod a subordinate and the fact that all have some one or more who are or were under them and who have a fancied grievance may explain why the State Teachers' Association had eminent counsel appear before us to plead the cause of Mrs. Rein.

There are a few matters to which we will call attention. Mr. Neal, who had been a member of the Board for 27 years and who at the time of the appointment of Mr. Henry, as principal, was its president, testified in part: "My understanding was Mrs. Rein was to keep her hands off and give him a chance to see what he could do with the high school for one year." In January, 1931, when the Board determined that Mr. Henry should be subordinate to Mrs. Rein he added "by that time we realized that we made a terribly big mistake" and we made it clear to him that he was subordinate to her "because in the meantime we found out that the high school was in a terrible condition." He also said that with regard to the high school "the Board had more or less taken it in their own hands" and that while "technically" Mrs. Rein was given control "Mr. Henry wouldn't do the things that the Board told him not alone what Mrs. Rein told him." Mr. Neal was one of the three who voted against the dismissal of Mrs. Rein. Mr. Meeks, a member of the Board and its clerk for many years, also voted against her dismissal. He was asked on cross-examination by her counsel

> "In your contact with her and your observation of her as a supervising principal would you consider that the work she has performed here has promoted the best interests of the high school under her jurisdiction?"

He replied: "I feel under the full conditions of the situation she has." Under, to use his phrase "the full conditions of the situation," the charges against her failed and in our opinion her dismissal was unjustified. The record creates the impression that consciously or unconsciously a majority of the Board had prejudged the case. We do not think the record leaves room for a difference of unbiased minds. On the contrary it is quite convincing that if Mrs. Rein could be dismissed then the position of no supervising principal or principal is secure. For them the word tenure would be a mockery. It does not surprise us that the professional schoolmen referred to in the opinion of the Commissioner rallied to her support. Neither does it surprise us that the State Teachers' Association came to her aid.

We recommend that the decision of the Commissioner be affirmed.

November 5, 1932.

Affirmed by Supreme Court without written opinion.

RESIGNATION OF SUPERVISING PRINCIPAL

ELSIE B. NICHOLSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF SWEDESBORO,

Respondent.

J. Warren Davis and Frank S. Katzenbach, for the Appellant.

David O. Watkins, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant in this case appeals from the action of the respondent accepting, on April 3, 1911, her resignation as Supervising Principal of Schools, said resignation having been previously rejected at a meeting of the Board of Education held March 31.

Miss Nicholson had for some years been in the employ of the Board of Education of the Borough of Swedesboro as Supervising Principal of Schools, and on February 8, 1911, she presented to the Board her resignation "to take effect when the work of the present school year will have been completed." The resignation was received and laid over.

At a meeting of the Board held March 31 a motion was adopted "that the resignation of the supervising principal be not accepted."

At a meeting of the Board held April 3, 1911, the minutes of the meeting were "read and approved except motion as to supervising principal's resignation" and at the same meeting the following motion was unanimously adopted: "That the supervising principal's resignation be accepted."

At meetings of the Board held on August 31 and September 18, 1911, it was ordered that Miss Nicholson be again notified that her resignation had been accepted and that she was no longer in the employ of the Board.

Section 238 of the School Law (P. L. 1903, Special Session) provides that the school year shall begin on the first day of July and end on the thirtieth day of June. The resignation, when accepted, would, therefore, go into effect on or about June 30.

The appellant has produced evidence that subsequent to the date when her resignation would become effective, she rendered service to the Board by furnishing lists of textbooks and supplies needed for the coming school year, but there is no evidence that such lists were furnished at the request of the Board.

If the Board of Education had power on March 31 to act on the resignation of Miss Nicholson, then the subsequent action taken on April 3 was null and void. The first question to be determined, therefore, is, did the Board of Education on that date have power to act on a resignation which was not to go into effect until about June 30?

Section 79 of the School Law (P. L. 1903, Special Session) provides that an annual meeting for the election of members of a board of education incorporated under Section 84 of said act shall be held on the third Tuesday in March, and Section 85 of said act, as amended (P. L. 1907, p. 283), provides that the Board shall organize on the first Monday in April.

The Board of Education in the Borough of Swedesboro is incorporated under Section 84 and is composed of nine members, three members being elected each year who take office on the first Monday in April.

The Supreme Court in the case of Gulnac *vs.* The Board of Chosen Freeholders of Bergen County, 45 Vroom 543, said, "Although only a portion of a board of freeholders goes out of office each year, the body itself is not a continuous body (State *vs.* Rogers, 27 Vroom 480). The reasons which led to the decision that the Senate of New Jersey is not a continuous body are quite as cogent in the case of a board of freeholders." The same reasoning applied to a board of education leads to the conclusion that it is not a continuous body.

In the case of Pryor *vs.* Norton, 38 Vroom 23, the Supreme Court said, "The general rule is that the resignation of a municipal office, to be complete, must be accepted by the authority having the power to fill the vacancy thereby created," and in the case of Fitch *vs.* Smith, 28 Vroom 526, it said, "Assuming for the present purposes that the position of principal of a public school is, as the relator insists, a public office, still it appears that when the relator was chosen to that office by the former board of trustees, the office was held by an incumbent whose term would not end until after the expiration of that Board and the organization of a new board. Such a choice could give the relator no title to the office, as the power of appointment belonged to the board which would be in existence when the office became vacant."

The Board of Education which, on March 31, refused to accept the resignation of the appellant ceased to exist on the third day of April, and the action taken, in view of the decisions above quoted, was null and void.

The Board of Education which ceased to exist on April 3, 1911, having no power to act on the resignation of Miss Nicholson, the next question to be considered is could the Board which organized on that date act on said resignation?

The resignation not having been withdrawn it was properly before the Board of Education as soon as it had organized and said Board was acting within its powers when it accepted Miss Nicholson's resignation.

The appeal is dismissed.

November 10, 1911.

Decision of the State Board of Education

This is a appeal by Miss Nicholson from a decision of the Commissioner of Education sustaining the acceptance of her resignation by the Board of Education of the Borough of Swedesboro and its refusal to continue her employment.

In May, 1907, Miss Nicholson was elected Supervising Principal of the Schools of Swedesboro and thereafter yearly contracts were made with her.

On the eighth of February, 1911, at which time she was protected by the Tenure of Service Act, she wrote the Board of Education as follows:

> "I hereby tender my resignation as Supervising Principal of Schools in the District of the Borough of Swedesboro, to take effect when the work of the present school year will have been completed, to those members of the Board who have aided me in the discharge of my duties as supervising principal, I am most grateful, wishing you success in all your undertakings of the future."

This letter was presented at a meeting of the Board held on February 8, the day of its date, and "read and laid over." The Board consisted of nine members, three being elected annually on the third Tuesday in March for a term of three years from the first Monday in April. On March 21 a school election was held. Thereafter on Friday, March 31, three days prior to the first Monday in April, the Board at a meeting by a vote of five to four resolved not to accept her resignation, and she was notified by letter dated April 1. On April 3, that being the first Monday in April, the new Board convened. Seven members were present, and they unanimously resolved to accept her resignation. Notice of such acceptance was given her by letter dated April 4. Miss Nicholson testified that on receipt of the notice of April 1 she concluded that her position in Swedesboro was secure, and she ceased all attempts to obtain other employment. Such conclusion she did not communicate to the new Board, and, so far as the record discloses, in no way did she protest against its resolution of April 3. Between April 4 and the close of the school year neither she nor the Board referred to her resignation. Before the close of the school year the district clerk, in pursuance of his usual custom, requested her to prepare a list of supplies for the ensuing year. On August 2 the district clerk wrote her that the school would open on September 5. On August 15 he wrote her that supplies for the next term had been delivered, and he requested her to check them. She did so. His letters of August 5 and 15, and her checking, were not authorized by the Board, and were never approved. On August 31, in pursuance of a resolution of the Board, the district clerk wrote her calling attention to its acceptance of her resignation, the notice to that effect written her on April 3, and informing her that she was no longer in the employ or under contract with the Board. On September 18, in pursuance of a resolution of the Board, the district clerk wrote her as follows:

> "You are hereby again notified that you are not under contract with nor in the employ of the School Board of the District of the Borough of Swedesboro, your resignation having been duly and properly accepted by the said Board. You will, therefore, please not trespass upon the said school property, and, if you persist in so doing, it will be necessary for the Board to take proper action to prevent such trespass."
>
> "Done by order of the School Board of the District of the Borough of Swedesboro."

Such are the facts of the case. Miss Nicholson claims that she is still in the employ of the Board, and bases her claim briefly on the following propositions:

(1) That she rendered to the Board a list of textbooks and supplies for the school year 1911-1912.

(2) That the refusal of the Board on March 31 to accept her resignation was final; that the new Board had no right or authority to accept it, and that as a matter of law there was no resignation before it on which to act.

As for the first proposition, it seems clear that the list of textbooks and supplies was furnished during June, 1911; that is, prior to the close of the school year, and that no service after the close of the year was rendered by Miss Nicholson with the knowledge or approval of the Board.

The second proposition was very carefully considered by the Commissioner. He decided that a resignation can be acted on only by the body which can fill the vacancy which results, that the Swedesboro Board of Education was not a continuous body, that the Board of Education which on March 31, 1911, refused to accept the resignation, ceased to exist on April 3, 1911, that it had no power to fill a vacancy to occur on June 30, 1911, that its attempt to act on a resignation to take effect on that day was null and void, and that the resignation as it had not been withdrawn, was therefore properly before the Board which came into existence on April 3, and that as it accepted the resignation, Miss Nicholson is not now in its employ.

The authorities seem to support such conclusions, and we might well rest a recommendation of affirmance on the opinion of the Commissioner. It may be said that such a decision is technical, but we find that to support the claim of Miss Nicholson legal theories as abstruse, if not more so, are advanced.

There is one aspect of the case aside from legal refinements which impressed us. Miss Nicholson in February, 1911, was in the employ of the Board serving under a contract for a term of one year from July 1, 1910, to June 30, 1911. The Tenure of Service Act was a part of that contract. It in effect gave her an option to serve the Board during succeeding years. At the end of her yearly contract, she could leave the Board or stay with it as she chose. If she chose to leave, the Board could not interfere with her wishes. In February, 1911, she wrote in effect that she would leave on June 30, 1911. Had she offered to leave before the expiration of her contract, the Board, by a rejection of her offer, might have held her liable for damages if she did so. When, however, she said she would leave at the expiration of her contract, the Board was powerless to prevent her. By no act could it compel her to stay. She could leave on June 30, and her testimony shows that she knew she could, no matter what the Board did. On February 8, 1911, she tendered her resignation to take effect at the close of the school year. Knowing as she did that the Board was powerless to prevent her from carrying out her intention, it was only fair if she changed her mind to say so. When, on April 4, the new Board, the Board that she knew would be required to re-employ her or to engage her successor, notified her that her resignation was accepted, it seems to us that she should have made clear her position unless she was still determined to stop at the close of the year. Possibly she thought that the action

of the old Board was equivalent to an actual destruction or revocation of her resignation. She should at least have said so. Instead, she remained silent. Her resignation was on file with the Secretary of the Board at the close of the school year. The Board had nothing before it to indicate that her wishes were then any different from those expressed in it. The Board did not re-employ her, and in view of her resignation unrevoked by any act on her part, it was not obliged to do so.

February 3, 1912.

Reversed by SUPREME COURT, 54 Vr. 36.

DECISION OF THE SUPREME COURT

By this certiorari Elsie B. Nicholson challenges the validity of the action taken on April 3, 1911, by the Board of Education of Swedesboro accepting her resignation as supervising principal. This action which was taken at the first meeting of the new Board was based upon a communication that had been sent to the old Board and acted upon by it, the new Board differing from the old in that three old members went out and three new ones came in on April 1, 1911.

The action complained of started at the first meeting of the new Board on April 3, 1911, with the reading of the minutes of the last meeting of the old Board held on March 31, 1911, by which it appeared that "It was regularly moved and seconded that the supervising principal's resignation, which was laid over at a meeting held on February 8, be accepted. After careful discussion the president ordered votes cast, the Board going on record as follows (5 no; 4 yes). The motion being lost the president declared the supervising principal's resignation not accepted."

The minutes which contained the foregoing were "approved except motion as to supervising principal's resignation," with respect to which "it was then regularly moved and seconded that the supervising principal's resignation be accepted, which was unanimously carried and the president ordered the supervising principal's resignation accepted."

The resignation on which this action of the new Board was based and to which the rejected minute of the old Board referred was as follows:

"Swedesboro, N. J., February 8, 1911.

To the Board of Education of the District
of the Borough of Swedesboro, Swedesboro, N. J.:

Gentlemen—I hereby tender my resignation as Supervising Principal of Schools in the District of the Borough of Swedesboro, to take effect when the work of the present school year will have been completed. To those members of the Board who have aided me in the discharge of my duties as supervising principal I am most grateful. Wishing you success in all your undertakings of the future, I am,

Very truly yours,

(Signed) ELSIE B. NICHOLSON."

The action taken upon this communication by the old Board on March 31, 1911, was officially communicated to the supervising principal by the clerk as follows:

"Swedesboro, N. J., April 1, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—At a regular meeting held March 31, the Board, after carefully considering your resignation, decided not to accept it.

Very respectfully,

(Signed) C. S. CRISPIN, (Seal)
District Clerk."

The action of the new Board on April 3, 1911, was officially communicated to the prosecutrix as follows:

"Swedesboro, N. J., April 4, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—At a regular meeting held April 3, your resignation previously rejected, was accepted.

Very respectfully,

(Signed) C. S. CRISPIN, (Seal)
District Clerk."

Upon receipt of this notice prosecutrix being advised by and acting through her counsel, notified the Board that its action was illegal and that she would continue her said office which she did without further communication from the Board until August 31, 1911, when the following was received:

"The Board of Education of the School
District of the Borough of Swedesboro.
Swedesboro, N. J., August 31, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Dear Madam—In accordance with our notice to you of the third day of April, A. D. 1911, you are hereby again notified that your resignation as Supervising Principal of the Schools in the District of the Borough of Swedesboro was regularly and duly accepted by the Board of Education of the District of the Borough of Swedesboro on the third day of April, A. D. 1911.

You are therefor no longer in the employ of, or under contract with said Board as supervising principal or otherwise.

Done by order of the Board of Education of the District of Swedesboro.

Yours truly,

(Signed) C. S. CRISPIN,
Clerk of the Board."

Later the following was also received:

"The Board of Education of the School
District of the Borough of Swedesboro.
Swedesboro, N. J., September 18, 1911.

Miss Elsie B. Nicholson,
Salem, N. J.:

Madam—You are hereby again notified that you are not under contract with, nor in the employ of the School Board of the District of the Borough of Swedesboro, your resignation having been duly and properly accepted by the said Board. You will, therefore, please not trespass upon the said school property, and, if you persist in so doing, it will be necessary for the Board to take proper action to prevent such trespass.

Done by order of the School Board of the District of the Borough of Swedesboro.

Very respectfully,

(Signed) C. S. CRISPIN,
District Clerk."

These excerpts from the testimony which show the action of the defendant of which the prosecutrix complains and the effect ascribed to its action by the defendant present the question in controversy, which is whether or not on April 3, 1911, there was pending before the Board of Education a resignation by the prosecutrix of her office of supervising principal that required nothing but its acceptance by the Board to constitute a concurrence of the two parties to the voluntary relinquishment of her office by the incumbent, which is both the legal and the ordinary meaning of a resignation.

If the resignation was pending before the Board on April 3, 1911, it was because it was placed before them either by the prosecutrix herself or by some one acting in her behalf either in fact or by imputation of law.

The language in which the prosecutrix tendered her resignation, the date at which she tendered it, the action taken by the Board thereon and the communication of that action to the prosecutrix on April 1, 1911, being fixed facts the only remaining question of fact is whether she or any one acting for her placed her resignation again before the Board after she had been notified of its decision not to accept it. As there is no claim made that this was done, the proper inference to be drawn from the incontroverted facts is that the resignation of the prosecutrix was not as matter of fact before the new Board on April 3, 1911.

The defendant, however, contends that nevertheless the resignation was as matter of law before the Board on that date, relying for this conclusion upon the difference being a continuous and a not continuous body pointed out in Rogers *vs.* The State (56 N. J. L., p. 480) and in Gulnac *vs.* Bergen Co. (45 Vroom, p. 543).

The argument is that inasmuch as the old Board could not have filled the vacancy that would have resulted from the acceptance of the proffered resignation, it was without power to decline to accept it and hence in legal contem-

plation did not so decide but in legal effect transmitted it to the new Board; in fine, that the legal effect of what happened was exactly the opposite of what actually happened—which leads one to remark that it is most unfortunate when the conduct of people who have acted upon their ordinary understanding of what they are doing is given a totally different meaning by force of technical legal rules of which they never heard or dreamed.

I shall not discuss, still less pass, upon the several important legal propositions included in this argument for the reason that conceding the ultimate doctrine for which counsel contends and applying it impartially to the case in hand it strengthens rather than weakens the conclusion that the prosecutrix' resignation was not before the Board on April 3 either by her own act or by that of her agent in fact or by the legal imputation suggested.

The ultimate doctrine for which the defendant contends as stated in the carefully prepared brief of counsel (the case being presented on written briefs) is as follows: "The old Board to which the resignation was presented served only as a messenger or conduit pipe to convey the resignation to the Board of Education of the District of Swedesboro, which was organized on the first Monday of April, 1911."

If this be so and if this legal rule is to be applied to the present case regardless of what the parties actually did and intended to do, it follows that the only purpose for which the old Board could accept the prosecutrix' resignation was for the purpose of acting as such messenger or conduit from which it imperatively follows that the Board decided not to accept the resignation for this purpose and hence its notification to the prosecutrix that her resignation was not accepted was a declaration to her that it would not be transmitted to the new Board through the old Board acting as her messenger.

Whether the Board was right or wrong in this decision is of no consequence upon the question we are considering—for Miss Nicholson clearly did not herself lay her resignation before the new Board and it is equally clear that the agent imputed to her by the legal rule contended for by the defendant declined, according to such rule to accept the special agency and hence did not act as her agent even by imputation.

Of course, if we regard what the old Board actually did and intended to do by its decision not to accept the resignation, the case presented is that of a quasi-judicial determination which rendered the resignation *functus* after the expiration of the body that had thus acted upon it.

So that whether we regard the case as one of fact as the parties themselves understood it or whether we regard it under the technical legal rule advanced by the defendant, equally and in either case there was no presentation of a resignation to the new Board by the acceptance of which the office in question became legally vacant.

It is perhaps needless to add that with Miss Nicholson's willingness to submit her resignation to the Board as constituted at the time she tendered it and her unwillingness to have it passed upon by the Board as constituted at a subsequent period, we have nothing whatever to do, although her motive may be surmised from the outcome. The status of the resignation after it had been adversely acted upon by the outgoing Board is the sole matter of present legal concern.

If I thought that I was wrong in the foregoing conclusion as to such status both on the facts and the law I should still consider the action under review to be invalid as an exercise of a quasi-judicial function without notice to the party affected or an opportunity to be heard. The Board was charged with knowledge of its own minutes and of the official acts of its officers, the question therefore whether notwithstanding these acts the prosecutrix was still tendering her voluntary retirement from office for acceptance was to say the least an open question that lay at the foundation of the jurisdiction of the Board in the premises; the common fairness that enters into the judicial rule upon this subject therefore required that before deciding that question the party affected should have had notice that such a question touching her rights was under consideration and should have been accorded an opportunity to be heard in her own behalf.

I entertain no doubt as to the right of the prosecutrix to prosecute this writ notwithstanding the adjudication of the domestic tribunals erected under the School Laws whose judgments are reversed by the judgment of this Court vacating and setting aside the action of the Board of Education brought up by this writ. The judgment may be entered with costs.

May 21, 1912.

NO AUTHORITY FOR THE SUSPENSION OF SUPERVISING PRINCIPAL

WILLIAM F. CONWAY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, William F. Conway, Supervising Principal of the School District of the Borough of Edgewater, Bergen County, brings this appeal against the action of the Board of Education in suspending him from the duties of the supervising principalship in accordance with a resolution passed by the Board of Education May 8, 1928, which reads as follows:

> "WHEREAS, At a special meeting held this 8th day of May, 1928, to investigate a complaint made by one of our teaching staff, that she had been grossly insulted by our supervising principal, Mr. Conway, on the 1st day of May, 1928, we find that he did, in a loud and boisterous voice and in a discourteous and most ungentlemanly manner insult the complaining teacher, Miss I. V. Lyon,
>
> *"Therefore, Be It Resolved,* That William F. Conway, supervising principal, be and hereby is suspended from all his duties in our school system. The same to take effect as of this date."

The appellant has held the position of supervising principal in that district for a number of years and clearly comes within the protection of the Tenure of Service Act, which provides in part as follows:

> "No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not."

Attorney for respondent contends that the Board acted within the powers conferred upon it by the statutes and cites Section 125, sub-division III, page 80 of the 1925 Compilation of the School Law which reads:

> "The board of education shall have power:
>
> "To make, amend and repeal rules, regulations and by-laws not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district, and also for the employment and discharge of principals and teachers."

and further refers to the rules of the State Board of Education relative to supervising principals which contains no provision upon the suspension of supervising principals. It is, therefore, the argument of respondent that since the Board of Education is empowered to make its rules not inconsistent with this act or with the rules of the State Board of Education and since the rules of the State Board have not restrained a local board from suspending a supervising principal, it is therefore within the power of the Board to make such suspension.

It is the Commissioner's opinion that the State Board of Education cannot be deemed to have conferred in its rules a specific power upon local boards of education merely because it has not prohibited such power in those rules. Moreover, neither the State Board nor a local board of education has any authority to make a rule investing a local board with a definite power, such as that of suspension, which is not conferred by the School Law itself. In the Commissioner's opinion, therefore, any such rule providing for the suspension of a supervising principal under tenure by either the State Board or a local board of education would be inconsistent with "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof," etc. Section 165 of the 1925 Compilation of the School Law in its provision for teachers under contract

and who have not yet attained tenure in a school district provides that it shall be optional with a board of education whether such teacher shall or shall not teach for the remainder of her contract in the case of dismissal by the board before the termination of such contract. In this statute permission is given to the board of education to suspend a teacher from service.

The Legislature confers the power to suspend in the case of janitors. Section 382 provides for janitor tenure as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such board."

No provision in relation to suspension is contained in the Teachers' Tenure of Service Act, which provides for dismissal for cause.

Since the statutes confer upon a board of education the power to suspend teachers under contract and janitors and makes no provision for suspension under the Teachers' Tenure of Service statute, the action of the Board in suspending its supervising principal who is under tenure, is in the opinion of the Commissioner inconsistent with the act and is therefore illegal.

> 16 Mo. App 48 holds that "The suspension from office of an officer by the tribunal before whom he is to be tried pending his trial in due form upon charges, a conviction of which would involve his dismissal from office, is not an arbitrary or improper exercise of authority." 88 N. W. 412; 89 Am. State, 534; 36 Eng. Reprint, 821.

It was also held in 29 Cyc. 1405 that:

> "Where the power of removal is limited to cause, the power to suspend made out of a dismissal power on pending charges, is regarded as included within the power of removal."

While the power of suspension was held in both of the above authorities to exist incident to the power of removal and merely pending the trial of charges which have been pending, it was held in 29 Cyc. 1405

> "Where no express power to suspend has been granted, the courts do not recognize that the power is included within the arbitrary power to remove, for the exercise of power to suspend will produce an interregnum in office. The ends of discipline in such a case may be sufficiently subserved by the exercise of the power of removal and do not require the recognition of a power to suspend."

The law does not contemplate the punishment of supervising principals, who have attained tenure, by suspending them. If the conduct of a supervising principal or teacher under tenure is unbecoming to the profession, such principal or teacher may be dismissed and in conformity with the above decisions suspension may be included in a dismissal pending the hearing.

It is therefore the opinion of the Commissioner of Education that the suspension of appellant by the Board of Education was illegal, and the Board is accordingly hereby directed to immediately reinstate appellant to the position of Supervising Principal of the School District of the Borough of Edgewater.

June 27, 1928.

POSITION OF PRINCIPAL MAY NOT BE ABOLISHED WHEN SCHOOL ORGANIZATION CONTINUES

JAMES H. C. KELLY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,

Respondent.

For the Appellant, Patrick H. Harding.

For the Respondent, Frank H. Wimberley.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was first employed by the respondent "as principal and to teach in the Lawnside Public Schools" under contract for the term of one year from the first day of July, 1927, at a salary of $1,600. Under contracts issued to him subsequent to the above, he was employed "to teach in the public schools" and his salary for the year 1931-1932 was fixed at $1,800, which amount he was receiving at the close of the school year on June 30, 1933.

At a meeting of respondent Board on June 6, the following resolution was adopted:

> "In the interest of economy the position of eighth grade teacher in the Lawnside School is hereby abolished."

A resolution of June 14th fixing the salaries for the other teachers employed in the district reads in part:

> "The Board having in the interest of economy abolished the position of eighth grade teacher, the committee recommends that the present teacher of that grade, Mr. James H. C. Kelly, be not employed for the ensuing school term."

Appellant was notified of the above actions of the Board of Education in a letter to him from the district clerk under date of June 15, 1933, and appeals for reinstatement as principal and teacher in the Lawnside School.

Counsel for respondent argues that since appellant entered into a contract for the school year 1931-1932 containing a bilateral clause for written termination, he waived his tenure right by accepting a definite term and, furthermore, the right to terminate his services on written notice continued thenceforth. Counsel further holds that since it was necessary to reduce educational costs in this district, the Board acted within a legal discretion in abolishing the position of the appellant which automatically terminated his services. The testimony shows that Mr. Kelly was recorded in the minutes as being under tenure after his employment under the above-mentioned contract and was not asked to sign a contract for the year 1932-1933. Even if a definite term contract had been signed by appellant subsequent to his coming under the protection of Chapter 243, P. L. 1909, he could not be held to have waived his rights to tenure, since protection under that act was established by the Legislature as a public policy for the welfare of the State, and not as a personal privilege to be waived at the discretion of the employees enumerated therein.

The petitioner, having served for more than three years in the district, his services could not be terminated except in the manner provided by Chapter 243, P. L. 1909 (Carroll *vs.* Matawan, 152 Atl. 339) unless his position was legally abolished.

The first contract of the appellant engaged him "as principal and to teach," and while subsequent contracts did not include the designation of principal, the testimony clearly shows the salary paid to him was much larger than that of other teachers for the reason that he was the principal teacher in the school, he was always recognized by the Board as principal of the school, and he performed the duties of principal as prescribed by the School Law and as assigned to him by the Board.

The position of principal of a school building is one recognized by what may be termed "the common law of public schools." One person in each school is recognized as being in authority in the administration of the educational program. Our statutes impose definite duties upon principals in requiring that they shall:

1. Make an annual report to the county or city superintendent on blanks furnished by the Commissioner of Education (P. L. 1903, S. S., Chapter 1, Section 109);
2. Suspend pupils and report same to board of education (P. L. 193, S. S., Chapter 1, Section 111);
3. Conduct fire drills and see that furnace room and fire doors are closed during school hours, and require teachers to keep doors and exits unlocked (P. L. 1919, Chapter 154):
4. Arrange for lectures on accident prevention and industrial, home and school hygiene (P. L. 1913, Chapter 269, Section 3);
5. Act as member ex-officio of free public library board, if there is no superintendent or supervising principal (P. L. 1927, Chapter 290);
6. Act (or superintendent may) in collecting and depositing savings of school pupils (P. L. 1916, Chapter 13).

That a principal has power not specifically granted by law was made evident in the decision of the Commissioner of Education in the case of Gebhart *vs.* Hopewell Township, affirmed by the State Board of Education, which reads in part as follows:

> "In the absence of other rules by the board of education or supervising principal it is well within the inherent power and duty of his office for the *principal* to make reasonable rules for the proper organization of his school. Such power on the part of the *principal* to make reasonable rules for the effective organization of his school is recognized as the common law of school procedure. * * * It is therefore the opinion of the Commissioner that in the absence of rules of the board of education or supervising principal, the *principal* had the authority and it became his duty to make reasonable rules as to the time the teachers should arrive at school before sessions or to remain at school after sessions and also to make rules in relation to the type of reports to be made by teachers and the time of filing such reports; and that upon failure to appeal to a higher authority against such rules so formulated by the *principal,* the teacher is bound to observe them." (School Law Decisions, 1932 Edition, page 893.)

Since the law contemplates a principal in each school building, may a board of education abolish that position?

It was held by the Commissioner in the case of Vincent P. Horan et als. and Viola Cooke et als. *vs.* Board of Education of the Town of Kearny, decided by the Commissioner and affirmed by the State Board of Education on April 1, 1933, that a reorganization of the schools for the purpose of economy the number of teachers might be decreased by abolition of positions even though there is no diminution of pupils as comprehended by Chapter 243, P. L. 1909. However, in the opinion of the Commissioner, the position of principal cannot be abolished since the statutes require such designation of one member of the faculty in each school building, and the removal of the principal's duties from one teacher would cause them to devolve upon another. Under the guise of economy, higher salaried teachers protected in their employment by the Teachers' Tenure of Office Act cannot be removed and their positions filled by those receiving lower salaries when the positions, in fact, continue to exist; nor is an attempt to eliminate the higher salaried teachers justified since the Legislature has under the provisions of Chapter 12, P. L. 1933, granted authority to boards to decrease the salaries of employees.

While the Lawnside Board of Education, by its resolutions of June 6 and 14, may have intended to abolish the principalship or position held by appellant in the Lawnside School, it is the opinion of the Commissioner that the resolution does not definitely so provide; and, furthermore, the Board could not legally abolish the position of principal. The respondent is, therefore, directed to reinstate Mr. Kelly as principal of its elementary school.

July 31, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant-respondent, James H. C. Kelly, was engaged by the Board of Education of the Borough of Lawnside, on May 10, 1927, by a contract in writing of that date, "as principal and to teach in the Lawnside public school * * * for the term of one year from the first day of July, 1927." That contract expired on June 3, 1928. Although appellant-respondent continued in the employ of the Board during the years 1928-1929, 1929-1930, 1930-1931, no other written contract seems to have been entered into between the parties until May 5, 1931, when a contract was executed by which appellant-respondent was engaged "to teach in the public schools of Lawnside for one year from July 1, 1931." On June 7, 1932, the Board adopted a resolution "that contracts be extended to the seven teachers now under tenure, namely, * * * Kelly, * * * at the same salary as received in the current year."

On June 6, 1933, respondent-appellant board adopted a resolution that:

> "In the interest of economy, the position of eighth grade teacher in the Lawnside school is hereby abolished."

On June 14, 1933, it adopted a resolution whereby it fixed the salaries of teachers employed in the district, which included the following language:

> "The Board, having in the interest of economy, abolished the position of eighth grade teacher, the committee recommends that the present teacher of that grade, Mr. James H. C. Kelly, be not employed for the ensuing school term."

Mr. Kelly appealed to the Commissioner of Education from the foregoing action. In his petition he alleges "that from the day the said appellant became principal in said school under and in pursuance of the first contract herein referred to, he continued to be principal and teacher in said school until his discharge and dismissal without cause as hereinafter mentioned." This allegation is expressly admitted by appellant-respondent in its answer to said petition.

The Commissioner heard the evidence submitted by the parties and considered their arguments as contained in their respective briefs. He decided that appellant-respondent, by his employment for more than three calendar years, as principal and teacher in the district of Lawnside, had acquired tenure. In his decision he points out that under the school law of this State, certain definite duties are imposed upon principals of schools, thereby implying that each school must have a principal. In this connection, attention is directed to Section 217 in the Compilation of 1931 of the School Law, which requires the filing of a report on a blank "furnished by the principal" where the school has more than one teacher. Also to Rule 87 of the State Board of Education, found on page 513, of the same compilation, which requires that in any school in which more than one teacher is employed, "the principal thereof," shall file registers and reports. That inasmuch as the law appears to require that each

school shall have a principal, such position cannot be abolished by a board of education. That the resolution of the appellant-respondent adopted June 6, was therefore ineffective to abolish the position of principal of the Lawnside School. That indeed, its language did not definitely so provide. He sustained the appeal of appellant-respondent and directed that he be reinstated as principal of its elementary school.

From the decision of the Commissioner, the Board of Education appeals to this board. We have carefully read the evidence submitted and the briefs of counsel and have considered the questions involved. We are of the opinion that the decision of the Commissioner should be affirmed, with the proviso, however, that the Board of Education revise the salary of appellant-respondent, as of July 1, 1933, if it so desires. Appellant-respondent having been relieved of his duties as teacher of the eighth grade, the Board may consider that his duties as principal may not justify the same compensation as was paid him for performance of service as principal and teacher of the eighth grade.

December 9, 1933.

PRINCIPALSHIP MAY NOT BE ABOLISHED. MARRIAGE DOES NOT CONSTITUTE GOOD GROUNDS FOR DISMISSAL OF TEACHER UNDER TENURE OF OFFICE ACT

ALINE SHEFFEY WALKER,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

Respondent.

For the Appellant, Merritt Lane (Eugene Blankenhorn, of counsel).

For the Respondent, Harry Tenenbaum.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was employed as a teacher in the Wildwood schools from February, 1915, until June, 1927. She received a letter from the respondent's secretary, relative to her employment thereafter, which reads as follows:

> "At a recent meeting of the Board of Education a motion was passed by which you were elected principal of School No. 4 at a salary of $1,700 per term for 1927-28. You were elected as a teaching principal."

MARRIAGE DOES NOT CONSTITUTE GROUNDS FOR DISMISSAL

Appellant continued as a teaching principal in the respondent's schools until her services were terminated by the following resolution adopted September 15, 1934:

> "WHEREAS, It is deemed practical and in the interest of economy to re-arrange and consolidate the classes in School No. 4,
>
> *"Now, Therefore, Be It Resolved,* By the Board of Education of the School District of the City of Wildwood, that the classes in School No. 4, Youngs and Arctic Avenues, in the School District of the City of Wildwood, be consolidated and that the position eliminated by the consolidation, and held by Mrs. Aldine Scheffy Walker, be and the same is hereby abolished, to take effect September 28, 1934.
>
> *"And Be It Further Resolved,* That the Superintendent of Schools notify the said Aldine Scheffy Walker of the abolition aforesaid and that the secretary of the said Board of Education serve a copy of this resolution by registered mail upon the said Aline Scheffy Walker."

Appellant is a married teacher and the reason for her dismissal upon consolidation of classes is indicated by the following resolution adopted three days prior to the above;

> *"Be It Resolved by the Board of Education of the School District of Wildwood, in the County of Cape May, State of New Jersey, that*
>
> "WHEREAS, There are resident within the School District of Wildwood, a number of unmarried, able and qualified school teachers, unable to obtain teaching positions; and
>
> "WHEREAS, There are now employed within the said school district married female teachers, whose husbands are regularly employed; and
>
> "WHEREAS, The unmarried unemployed teachers within the said school district are unable to obtain employment in other occupations; and
>
> "WHEREAS, The lack of obtaining employment by the said unemployed unmarried teachers creates a hardship upon the immediate families who have made sacrifices in order that the said teachers may acquire qualifications sufficient for them to teach; and
>
> "WHEREAS, The present economic conditions has created an emergency requiring an equitable distribution of employment; now, therefore,
>
> *"Be It Resolved,* By the Board of Education of the School District of Wildwood, New Jersey, that whenever, in the judgment of the said members of the Board of Education, it shall be determined after investigation that the spouse of any married teacher in the said district is employed in gainful occupation, and whose income therefrom or otherwise, is sufficient to maintain the said teacher and the minor children of the said marriage, then the position of the said married teacher shall be declared vacant, by giving to the said teacher ten days notice in writing, and the said position so declared to be vacant shall be filled by some able, qualified teacher, unmarried and residing within the said school district."

Appellant taught school on Friday, September 28, and returned on Monday, October 1, when her services were refused, and Mr. Chalmers, the Superintendent of Schools, verified the fact that she had reported for duty and was denied an opportunity to teach. She appeals to the Commissioner of Education for restoration to her position as a teacher in the Wildwood schools and such other further relief as may be proper in her case.

The testimony shows that there are four teachers employed in School No. 4, which enrolls colored pupils exclusively. For a number of years, up to the date of appellant's dismissal, four teachers were employed in this school building. There were enrolled in School No. 4 in September, 1933, 78 pupils, and in September, 1934, 79. There was, therefore, no diminution in the enrollment, but there is very clear evidence that the number of teachers in relation to the number of pupils justified the reorganization of this school and the abolition of one of the positions. The testimony, however, discloses that at the time of the hearing in this case there were employed in the elementary schools of the district at least four teachers whose length of service did not entitle them to protection under the Tenure of Office Act. The Supreme Court in the cases of Seidel *vs.* Ventnor City, 110 N. J. L. 31; Downs et als. *vs.* Hoboken, 12 Misc. Rep. 345, and Cooke, Horan et als. *vs.* Kearny, 11 Misc. Rep. 751, held that a tenure teacher may not be dismissed except under the provisions of Chapter 243, P. L. 1909, if there is a position held by a non-tenure teacher which the former is competent to fill.

It is admitted that the Board of Education did not dismiss the appellant upon charges and a hearing as provided in the tenure act. Moreover, Mrs. Walker was principal of School No. 4, a position which could not be abolished while the school continues. It was held by the Commissioner of Education in the case of Kelly *vs.* Lawnside, decided July 31, 1933, and affirmed by the State Board of Education December 9, 1933:

> "The position of principal of a school building is one recognized by what may be termed 'the common law of public schools.' One person in each school is recognized as being in authority in the administration of the educational program."

The Commissioner sets forth certain duties imposed upon principals under the provisions of Chapter 1, P. L. 1903, S. S., Section 109. 111, Chapter 269, P. L. 1913; Chapter 13, P. L. 1916; Chapter 154, P. L. 1919; Chapter 290, P. L. 1927. He further held:

> "However, in the opinion of the Commissioner, the position of principal cannot be abolished since the statutes require such designation of one member of the faculty in each school building, and the removal of the principal's duties from one teacher would cause them to devolve upon another,"

Appellant's position, being that of a principal, could not be abolished, she could not be dismissed even if her position were abolished since there are non-tenure teachers employed in the system whose positions she was qualified

to fill, and she was not dismissed under the provisions of the Tenure of Office Act, therefore, she was illegally dismissed. The Board of Education of the City of Wildwood is direted to reinstate her as principal of School No. 4 and to pay her salary from September 28, 1934.

February 18, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from the decision of the Commissioner of Education, directing the appellant, Board of Education of Wildwood, to reinstate Mrs. Aline Sheffey Walker, the respondent, as principal of School No. 4, of the City of Wildwood.

Respondent was engaged by appellant as a teacher in 1915, and has served continuously as a teacher in and principal of School No. 4 of appellant until October 1, 1934, when she was dismissed. In 1927 she was named as teaching principal. In addition to her duties as principal, she taught the fifth and sixth grades.

During September, 1934, appellant adopted a resolution reciting it had come to the attention of the Board of Education that respondent was married to John Walker, who is engaged in gainful occupation; that investigation had disclosed that said John Walker was earning sufficient from his said occupation to maintain his wife; therefore, that the position occupied by respondent within the school district be declared vacant as of September 22, 1934, and that she be given ten days' notice of the action taken. Further, that the position of respondent be filled by some duly qualified teacher, who shall be unmarried and residing within the said district. No notice of this resolution was communicated to respondent, although it has not been rescinded by the Board of Education. A few days after the adoption of the foregoing resolution, another was adopted by the Board of Education which reads as follows:

> "WHEREAS, It is deemed practical and in the interest of economy to rearrange and consolidate the classes in School No. 4, Youngs and Arctic Avenues, School District of the City of Wildwood; now, therefore,
>
> *"Be It Resolved,* By the Board of Education of the School District of the City of Wildwood, that the classes in School No. 4, Youngs and Arctic Avenues, in the School District of the City of Wildwood, be consolidated and that the position eliminated by the consolidation, and held by Mrs. Aline Scheffy Walker, be and the same is hereby abolished to take effect September 28, 1934; and
>
> *"Be It Further Resolved,* That the Superintendent of Schools notify the said Aline Scheffy Walker of the abolition aforesaid and that the secretary of the said Board of Education serve a copy of this resolution by registered mail upon the said Aline Scheffy Walker."

Respondent was notified of this action on September 27. She taught on the 28th, which was a Friday, and upon her return to school on Monday, October 1, she found her position occupied by another teacher and was in-

formed her services were no longer required. She appealed to the Commissioner of Education, contending that she had been dismissed in violation of the Teachers' Tenure Law, and that her position had not in fact been abolished. The appellant answered the petition insisting that her dismissal was justified, in that by reason of a diminution of the number of pupils in School No. 4, classes were rearranged and the position of respondent thereby made vacant, and that such action was in the interests of economy. The Commissioner of Education heard evidence submitted by the parties, and thereafter made the order from which this appeal has been taken.

The record discloses that School No. 4 contained grades one to six, divided into four classes. Respondent taught grades five and six and the remaining four classes were taught by three other teachers. Although we deem it immaterial in the view that we take of this case, it may be pertinent to note that the attendance in School No. 4 in September, 1933, was 78 and rose from that number to 87 in May, 1934, then declined to 81 in October, 1934. There was apparently no diminution in attendance, as the number was greater at the end than at the beginning of the year from September, 1933.

A careful reading of the evidence taken before the Commissioner fails to reveal that by the alleged rearrangement of classes the position of respondent was vacated or abolished. It does not appear that the fifth and sixth grades were rearranged or consolidated with other grades. Other than the statement contained in the resolution of September 25, that it was deemed practical and in the interests of economy to rearrange the classes and the evidence of the Superintendent of Schools, who was sworn as witness, that "we have only two grades to a room," there is nothing to show a rearrangement or consolidation of classes. Respondent says that when she reported for work on October 1, a Miss Adams had taken her place. She had her class. The inference is that grades one to four were rearranged in such manner that one teacher was given grades one and two, and another teacher grades three and four, which abolished the position of one of the three teachers other than respondent, who was then dismissed that her position might be given to the teacher whose position was abolished.

We have had occasion in two recent cases, i. e., Bartlett *vs.* North Bergen, decided May 11, 1935, and Fusek *vs.* Garfield, decided on this day, to declare that a teacher under tenure cannot be dismissed in order that her position might be given to a teacher whose position was lawfully abolished. There is no doubt that a position, although occupied by an incumbent who is under the protection of tenure of office laws, may be abolished to effect economy or improvement in the public service. Our courts have uniformly sustained such action. It is equally well established that such abolition must be bona fide. It must not be a mere device resorted to for the purpose of removing an incumbent, while the office or position still remains in existence. Such a subterfuge will not avail. It must not be a mere colorable abolition. Hunziker *vs.* Kent, 111 N. J. L. 565 (on page 567).

"It is a matter of course that the power to dis-establish must be bona fide, for it is manifest that if it should appear that a formal action, purporting to abolish such an office or position, is only a device for the purpose of remov-

ing an officer or employee, while the office or position practically still remains in existence, that such a subterfuge would be of no avail." Evan *vs.* Freeholders of Hudson, 53 N. J. L. 585 (on page 587). It seems to us manifest that the foregoing language is applicable to the present case. Nothing appears in the evidence to show that the position of respondent was done away with or that the duties performed by her have been altered or merged into those of any other position. Her position remains in existence and the only effect of the resolution of the Board of Education was to dismiss her in violation of her rights under the Teachers' Tenure Law.

We have not discussed the alleged diminution in the number of pupils in School No. 4 or the question whether respondent is entitled to a position in the school district occupied by a non-tenure teacher at the time of her dismissal for the reason that we do not consider these questions are pertinent to this controversy.

Our view of the facts and the law applicable thereto applies equally to respondent's right to continue in her position as principal. We recommend that the decision of the Commissioner of Education be modified to conform to the views herein expressed; that the Board of Education of the City of Wildwood be ordered to reinstate respondent to the position which she held at the time of her dismissal and to pay her the salary of the position from that time.

July 20, 1935.

DECISION OF THE SUPREME COURT

No. 224, May Term, 1936

Submitted May 5, 1936: decided , 1936.

Certiorari, and not mandamus, is the proper method of reviewing the validity of the resolution discharging a school teacher or abolishing the position; and mandamus will not lie for reinstatement and back salary until the favorable termination of the *certiorari*.

On rule to show cause for a mandamus.
Before Justices Parker, Lloyd and Donges.
For the Relator, Eugene Blankenhorn.
For the Respondent, Harry Tenenbaum.

The opinion of the Court was delivered by *Parker, J.*

The rule laid before us in this case, which is dated and was served on September 19, 1935, requires respondent to show cause at the October, 1935, Term of this Court, "why a writ of mandamus, alternative or peremptory, should not issue commanding the said respondent to reinstate the relator as a teacher or teaching principal of the School District of the City of Wildwood, Cape May County, New Jersey, and commanding the said respondent to pay over to the said relator any and all sums of money which have accrued to her as salary since September 28, 1934."

The case shows several resolutions adopted by the respondent board, the first of which was adopted on September 12, 1934, a year before the rule was made. This places the discharge of relator on the ground of her being married. On September 15, 1934, there was another resolution consolidating the classes in the school in which Mrs. Walker had been serving, and declaring that "the position eliminated by the consolidation, and held by Mrs. Walker, be and the same is hereby abolished, to take effect September 28, 1934."

Relator took the statutory appeal to the Commissioner of Education, apparently with reasonable promptness; and that officer held, in an order dated February 18, 1935, that relator had been illegally dismissed, and directed that she be reinstated with pay. The Board appealed to the State Board of Education, whose opinion is before us. It modifies the decision of the Commissioner in certain respects not now material, but adjudges that the local board "be directed to reinstate respondent to the position which she held at the time of her dismissal and to pay her the salary of the position from that time." This was on July 20, 1935. Apparently the local board made no attempt at a judicial review, but under date of September 4 the secretary wrote to Mrs. Walker: "I have been instructed to notify you that you have been reinstated by order of the State Board of Education." However, before school opened, viz., on September 11, the local Board resolved that "to effect a real and badly needed economy" certain rearrangements be made in the schools, and further "that the position of fifth and sixth grade teacher, occupied by Aline Sheffey Walker, be and the same is hereby abolished." The next day, September 12, the secretary notified Mrs. Walker accordingly. The rule to show cause followed on the 19th, returnable, as we have said, at the October term.

So far as relates to the decision of July 20 directing reinstatement with pay, and the status of relator until September 11, 1935, the decision of the State Board, unchallenged, should manifestly be enforced. Hence, a peremptory writ will be allowed, commanding payment of salary from the date of dismissal in September, 1934, until September 11, 1935. But as to the subsequent period, the resolution of September 11, 1935, not challenged directly by *certiorari*, bars the way to a mandamus either to restore Mrs. Walker to her former status, or to require payment of salary from and after September 11, 1935. Whether, in case of annulment by *certiorari* of the resolution of September 11, 1935, and consequent restoration of status, salary after September 11, 1935, should be ordered paid, is questionable: for not only did Mrs. Walker fail to apply promptly for a *certiorari*, but even this suit in mandamus has been allowed to lie dormant for two terms of this Court; and some adequate explanation of the delay would be in order. However, in the interest of practical justice, the court would look favorably on an application to award a *certiorari*, using the present record as a return, and consider and decide it on the briefs now before us; but as matters now stand, the validity of the resolution of September 11, 1935, is now properly before us for review. As to that branch of the case, and as to salary after September 11, 1935, the rule will be discharged, but without costs and without prejudice.

Filed July 27, 1936.

LEGALITY OF APPOINTMENT OF PRINCIPALS

KATHRYN D. NOONAN AND LIDA A. ARNOT,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

Michael Dunn, for Appellants.

Randall Lewis, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The facts in this case, as disclosed by the pleadings and by the testimony taken by the Assistant Commissioner on November 12 in the City of Paterson, are as follows:

Miss Kathryn D. Noonan was first employed as a teacher in the Paterson Public Schools in March, 1901. From 1901 until the Paterson Normal School was taken over by the State, July 1, 1923, she filled the position first of critic teacher and then of unassigned teacher in the latter school. At the time of the taking over of the Normal School by the State, Miss Noonan, under a leave of absence from the Paterson Board of Education by which she was to suffer no loss of rights or standing as a teacher in the city schools, continued in her position as unassigned teacher in the Normal School under the jurisdiction of the State Board of Education.

On December 13, 1923, at a regular meeting of the Board of Education of the City of Paterson the following resolution was adopted by a vote of 6 to 2:

> "*Resolved,* That Miss Kathryn D. Noonan be and is hereby appointed to the position as principal of School No. 2 at a salary of $2,800 per annum, dating from December 15, 1923, with annual increases of $200 up to a maximum of $3,800 per annum as per schedule of salaries for principals of primary schools adopted October 13, 1921, and effective September 1, 1922."

Miss Noonan continued to occupy the position of principal of School No. 2 until March, 1924, when she was notified that she had been dismissed as principal of School No. 2 and had been assigned to the Boys' High School as an unassigned teacher. The salary in the latter position was $2,600 per annum and involved a reduction of $200 from that which she had been receiving as principal of School No. 2 and Miss Noonan entered upon her duties under protest and brought this action.

Miss Lida A. Arnot, it appears from the facts of the case, was first appointed a teacher in the Paterson Public Schools in 1898 as a critic teacher and served as such until she subsequently received the appointment of head of the English Department in the Paterson Normal School. When the Normal School came under the jurisdiction of the State Board of Education in July, 1923, as stated above, Miss Arnot was given a leave of absence similar to that granted Miss Noonan under which without loss of rights as a Paterson Public School teacher she continued to serve as a teacher of English in the State controlled Normal School.

On December 13, 1923, at the regular meeting of the Paterson Board of Education above referred to the following resolution was adopted by a vote of 5 to 4:

> *"Resolved,* That Miss Lida A. Arnot be and is hereby appointed to the position as principal of School No. 17 at a salary of $2,800 per annum dating from December 15, 1923, with annual increases of $200 up to a maximum of $3,800 per annum as per schedule of salaries for principals of Primary Schools adopted October 13, 1921, and effective September 1, 1922."

Miss Arnot entered upon the duties of principal of School No. 17 and served until March, 1924, when she was ordered to report to the Boys' High School as a teacher of English at an annual salary of $2,600, a reduction of $200 in the salary received as principal of School No. 17. Miss Arnot in like manner, as the other appellant, Miss Noonan, entered upon her duties at the Boys' High School under protest and brought this appeal.

Both the above named appellants possessed at the time of their appointments as principals of Schools Nos. 2 and 17, respectively, on December 13 ,1923, the State certificate qualifications which under the New Jersey School Law entitled them to hold such positions.

Prior to the adoption of the resolutions appointing Miss Noonan and Miss Arnot school principals as aforesaid on December 13, 1923, at the regular Board meeting the following resolution was adopted by a vote of 6 to 3:

> *"Resolved,* That rules concerning the appointment of principals be rescinded for this meeting only."

At the regular meeting of the Board of Education of the City of Paterson of February 14, 1924, the following resolution was adopted:

> "WHEREAS, The attempted suspension at the December meeting of the rules of this Board relative to the appointment of principals was illegal and void, not being in conformity with the rules of this Board and Cushing's Manual of Parliamentary Procedure, and
>
> "WHEREAS, By reason thereof the attempted appointment of principals for schools Nos. 2 and 17 was illegal and void the said appointees not having complied with the rules of this Board governing the appointment of principals, therefore

> *"Be It Resolved,* That this Board hereby rescinds and sets aside the said attempted appointment of principals for Schools Nos. 2 and 17 and hereby declares these positions to be vacant, this resolution to take effect immediately."

It was under the above resolution that the action of assigning Miss Noonan and Miss Arnot to positions in the Boys' High School at a reduction of $200 in annual salary was taken.

Subsequent to the hearing of this case by the Assistant Commissioner as aforesaid briefs upon the legal points involved were filed by counsel for both appellants and respondent.

The respondent defends its action on February 14, 1924, in rescinding the December, 1923, appointment of both appellants on the ground that Cushing's Manual of Parliamentary Procedure, which the Board had adopted bearing upon the suspension of rules and which requires a unanimous vote, had been violated by the Board when it suspended the rules by a vote of 6 to 3; that the rules alleged to be illegally suspended, namely, the rule relating to Principal's License No. 17 and Rule 26 and prescribing qualifications or requirements with which appellants did not comply were vital to the appointment of appellants thus made on December 13, 1923. Respondent further contends that the above-mentioned rules while not specifically adopted by the then Board of Education of the City of Paterson but existing prior to its organization had the effect of an ordinance and remained in full force and effect and binding upon the Board of Education until specifically repealed.

The Commissioner cannot agree with respondent's contention that the rules of a previous board of education are binding per se upon a subsequent board merely because they have not been repealed, since according to the legal authorities (Serina M. Brown *vs.* Oakland Board of Education, School Law 623) boards of education and boards whose organization is similar (Gulnac *vs.* Board of Freeholders of Bergen County, 74 Law 543) are non-continuous bodies and the rules of one board do not, unless adopted by it, bind the subsequent board. However, authorities on corporations generally agree that by-laws although never specifically adopted by the board of directors will be considered as adopted if such by-laws are referred to and treated as the corporation by-laws by the board of directors at its meetings. (Graevner *vs.* Post, 119 Wis. 392.)

While the Board of Education of the City of Paterson in 1923 had never specifically adopted the rules in question it had apparently by constant reference to them accepted them in the conduct of its business. Moreover, the Board's very reference to the rules in question at its meeting on December 13, 1923, when it voted to suspend them admitted its tacit adoption of and governance by such rules. The language of the resolution itself declaring the rules suspended "for this meeting only" admits the existence and control of the rules.

The Commissioner cannot, however, agree with the respondent that the qualifications imposed and prescribed by the rules alleged to be illegally suspended are mandatory or essential prerequisites to the principalship of Schools

Nos. 2 and 17, to which appellants were respectively appointed. The rule stating that Principal's License No. 17 may be granted upon competitive examination is not mandatory in such examination requirement. While the word "may" undoubtedly means "must" when used by the Legislature in a statute prescribing for subordinate agencies a duty in which the public is interested, there can be no such mandatory meaning attached to the word "may" when it is used by a public corporation in a rule for regulating its own affairs. Such a rule so worded is a plain reservation by the corporate body of discretion in the matter dealt with by its rule. Moreover, there is nothing in the rule dealing with Principal's License No. 17 which makes the possession of such license essential to the principalship in question. The license is apparently prescribed in connection with the salary schedule, and while the rule provides that principals holding it may be placed in charge of primary schools, it distinctly fails to provide that other principals must hold such license in order to be placed in charge of such schools. Similarly, there is nothing in Rule No. 26 which definitely requires for the appointment of teachers and principals the recommendation of the committee on education or the Superintendent of Schools. The rules provide merely that the committee upon the recommendation of the City Superintendent shall recommend from time to time persons for appointment, promotion or transfer, but does not prevent the board from acting in making appointments without the committee's and superintendent's recommendation.

The question now arises as to whether the suspension of its rules by the Board of Education by a vote of 6 to 3 in making appellants' appointments on December 13, 1923, was valid in view of the parliamentary procedure outlined in Cushing's Manual and Adopted by the Paterson Board of Education, by which a unanimous vote is necessary for the suspension of the rules. Upon this subject, as indicated by appellants' brief, 28 Cyc. 352 holds as follows:

> "Municipal governing bodies usually adopt or recognize parliamentary law as their rules of order and proceeding, yet the courts unless positively required by express statutory provision will not annul or invalidate an ordinance enacted in disregard of parliamentary law providing the enactment is made in a manner required by statute."

Again, 29 Cyc. 1692, states

> "Where a deliberate body adopts rules of order for its parliamentary governance the fact that it violates one of the rules so adopted does not invalidate a measure passed in compliance with statute."

Another particularly relevant citation in appellants' brief is that of 19 R. C. L., page 189, which states that

> "A municipal council has inherent power to make rules of procedure for its government, provided such rules are not inconsistent with the Constitution or with any statute of the State. Such rules cannot have the effect of limiting the powers of the municipal council as established

by statute, and an enactment which is actually adopted by a municipal assembly in accordance with its statutory powers is not invalid because its own rules of procedure were not complied with, where they were in term suspended or waived or merely tacitly ignored."

In the case cited by appellant moreover of Barnert *vs.* the Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, the Board of Aldermen attempted to determine that a resolution of the Board passed by a majority vote of the quorum failed of passage because of a rule of the Board by which a greater vote than a mere majority of the quorum was required for passage of resolutions, by-laws and ordinances. The Court held that in the absence of a charter provision to the contrary a majority of a Board of Aldermen according to the general law constituted a quorum and a majority of a quorum was all that was required by law for passage of a resolution; and that no matter what the Board's rule required in the way of a vote, the effect of the action of the Board upon the resolution would be determined according to the existing law. The resolution was accordingly determined to have carried in spite of the Board's rule.

In the case before us, therefore, the School Law requires but a majority vote of the Board of Education in making, amending or suspending its rules. If therefore according to the authorities above cited the Board at its meeting on December 13 in connection with appellants' appointments suspended its rules by the vote required by law, namely, a majority vote, the validity of such suspension is unaffected by the violation of the Board's own adopted parliamentary procedure, by which the unanimous vote was required for suspension of rules. In the Commissioner's opinion, therefore, in the light of the numerous authorities upon the subject the rules of the Paterson Board of Education were legally suspended at the December 13, 1923, meeting.

Even however should the rules of the Board of Education be deemed not to have been suspended at such meeting but in full force and effect and presenting an insuperable barrier in the way of absolute requirements as to qualifications with which appellants could not comply, appellants' brief cites convincing authorities to prove that appointments legally made by a public board or body of persons qualified under the law for the positions in question are valid without regard to the violation of the Board's rules prescribing other than statutory qualifications. A case in point is that of Barnert *vs.* Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, above cited, and of Michaelis *vs.* Board of Fire Commissioners of Jersey City, 49 N. J. L. 154. In the latter case the Board attempted to evade an appointment made by it of an engineer on the ground of a violation of a rule of the Board in that the appellant was appointed without having filed a sworn application with physician's certificate attached. The Court held that since the appointment was made according to law the Board would be deemed to have waived its rule in question and accordingly upheld the appointment.

In the case under consideration therefore since the appointments of appellants on December 13, 1923, were made in the manner required by the School Law, namely, a majority of all the members of the Board, and of persons

admitted to possess statutory qualifications for the positions in question, it is in the Commissioner's opinion immaterial that appellants may have lacked qualifications prescribed by rules of the Board of Education and that the violation of such rules in no way affected the validity of the appointments.

To sum up the case therefore it is the Commissioner's opinion that the qualifications and recommendations prescribed by rules of the Paterson Board of Education were not intended by such rules to be prerequisites as shown especially by the use of the word "may" in connection with the holding of License No. 17 by a primary school principal and the holding of an examination for such license; that in any event such rules were properly and legally suspended by such Board in spite of the violation of its parliamentary procedure for suspending its rules and that even had the rules existed at the time of the appointment of appellants and prescribing prerequisites to appointments with which appellants could not comply, nevertheless such appointments made according to law, namely, by a majority vote of the Board of persons qualified under the statute, were entirely legal and should be sustained.

Finally, both appellants were, it is admitted, protected by the Teachers' Tenure of Service Law and according to the Court of Errors and Appeals in the case of O'Neil *vs.* Bayonne, 1 Misc. 475, cited by appellants' brief, a person protected by the Tenure of Office Act and appointed by a regularly constituted board is protected in his position and is entitled to have a notice and hearing in the attempt to prove his ineligibility for the position.

It is therefore the Commissioner's opinion that the appellants' appointments by the Paterson Board of Education as principals of Schools Nos. 2 and 17, respectively, on December 13, 1923, were entirely legal and such appointments are hereby sustained. Accordingly the action of the Paterson Board of Education on February 14, 1924, in rescinding such appointments is hereby declared to be illegal and void. It is further the Commissioner's opinion that even had the appointments of December 13, 1923, been illegal, appellants were entitled to have been heard under the Tenure of Office Act upon the question of validity of their appointments before any action such as that of the Paterson Board of Education in February, 1924, in rescinding the previous appointments could legally be taken.

It is therefore hereby ordered that appellants be reinstated in their positions as principals of Schools Nos. 2 and 17 respectively, and their salaries be paid from the date of their dismissal in March, 1924.

January 7, 1925.

Decision of the State Board of Education

This is an appeal from a decision of the Commissioner which sustained the petition of the respondents which alleged that they had been demoted from their positions as principals of schools in the City of Paterson, in violation of the Tenure of Office Act. The facts will be found fully stated in the Commissioner's opinion and will be only briefly summarized here. Miss Noonan and Miss Arnot have been for many years, and now are, qualified teachers in the school system of the City of Paterson. They were formerly members

of the faculty of the City Normal School, the teachers of which were, by resolution of the Paterson Board of Education, retained as teachers of the Paterson system after that school became a State school. Some time after that they resigned from the normal school and on December 13, 1923, by resolutions duly passed by the Paterson Board of Education by a vote, in the case of Miss Noonan of six to two and in the case of Miss Arnot of five to four, were appointed principals of elementary schools at salaries of $2,800 each.

At the time this resolution was passed the Paterson Board of Education was acting under a set of rules, some of which were not followed in making the appointments.

Accordingly prior to the adoption of the above resolutions, a resolution was passed by a vote of six to three, rescinding, for that meeting only, the rules concerning the appointment of principals.

Miss Noonan and Miss Arnot entered upon the performance of their duties as principals and received their salaries as such, until their demotion, which took place as follows:

On February 14, 1924, the Board of Education passed the following resolution:

> "WHEREAS, The attempted suspension at the December meeting of the rules of this Board relative to the appointment of principals was illegal and void, not being in conformity with the rules of this Board and Cushing's Manual of Parliamentary Procedure, and Whereas, by reason thereof the attempted appointment of principals for Schools Nos. 2 and 17 was illegal and void, the said appointees not having complied with the rules of this Board governing the appointment of principals, therefore,
>
> *"Be It Resolved,* That this Board hereby rescinds and sets aside the said attempted appointment of principals for Schools Nos. 2 and 17 and hereby declares these positions to be vacant, this resolution to take effect immediately."

Pursuant to this resolution Miss Noonan and Miss Arnot entered upon their new duties as teachers under protest and some time later started this proceeding.

We shall confine ourselves to the more important questions discussed and decided in the Comimssioner's opinion.

First: He holds that the suspension of the Board's rules by a vote of six to three was valid, notwithstanding a rule of the Board required it to follow Cushing's Manual which requires a unanimous vote for the suspension of the rules.

It was held in Barnert *vs.* The Mayor and Board of Aldermen of the City of Paterson, 48 N. J. L. 395, that in the absence of a charter provision to the contrary, a majority of a Board of Aldermen according to the general law constituted a quorum, that a majority of a quorum was all that was required for passage of a resolution, and that no matter what the Board's rule required in the way of a vote, the effect of the action of the Board upon the resolution would be determined according to the existing law.

The school law requires but a majority vote of the Board of Education in making, amending or suspending its rules. Accordingly, under the case above cited and other cases in which it has been followed by the Courts of New Jersey, the appointments were valid whether or not the local board violated its own rules of procedure.

Furthermore, in Michaelis *vs.* The Board of Fire Commissioners of Jersey City, 49 N. J. Law 154, the plaintiff was promoted to the position of engineer. Later on the Board attempted to transfer him to a position with decreased wages, claiming that his original appointment was invalid because of the violation of a rule of the Board that no appointment should be legal without the filing of an application properly sworn to, with a physician's certificate attached. The Court held that after permitting the appointee to exercise his employment and receive pay it could not be said that they had not waived the performance of the rule and the demotion was held illegal.

This rule applies directly to the present case.

Second, it has recently been held by the Court of Errors and Appeals, in the case of O'Neil *vs.* Bayonne, 1 Misc. 475, that a person protected by a Tenure of Office Act and appointed by a regularly constituted board is entitled to the protection of the act, notwithstanding he may have been ineligible at the time of his appointment. The Court said:

> "The presumption is in favor of the lawfulness of the appointment until the contrary is made to appear. Unless this be so the incoming board can arbitrarily oust any appointee lawfully appointed by an outgoing board upon a mere assertion in a resolution or otherwise that this or that appointee was ineligible to hold the office for the reason that the appointment was not made in compliance with the provisions of a statute or ordinance relating to such an appointment."

The case of Mager *vs.* Yore, 75 N. J. 198, seems to be to the same effect.

The cases above cited apply to the Teachers' Tenure of Office Act as well as to the act relating to police officers involved in these cases. Accordingly even though the appointment of the respondents as principals by the resolution of December 13, 1923, was invalid, they could not be discharged on that ground without notice and a hearing, as provided in that act. As they had received no such notice and been given no such hearing, the action of the Paterson Board on February 14, 1924, rescinding such appointment was a violation of the Tenure of Office Act and therefore illegal and void.

Counsel for the appellants have not filed briefs or appeared before us in this appeal or either of the two appeals decided herewith so that we have not had the benefit of argument and citation of authority in behalf of the Board of Education.

Without referring to the other points discussed in the Commissioner's opinion, it is recommended, on the grounds above stated, that his decision be affirmed.

DISMISSAL OF PRINCIPAL ON CHARGES

EDWIN W. OLIVER,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE CITY OF HOBOKEN,

Respondent.

Collins & Corbin, for the Appellant.

John J. Fallon, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was principal of school No. 9 in the City of Hoboken and had served as such for more than three consecutive years previous to the time of his dismissal. He therefore comes under the operation of the tenure of service act relating to teachers' employment. This act in part provides that no principal or teacher can be dismissed or be made subject to reduction of salary except for inefficiency, incapacity or conduct unbecoming a teacher or other just cause. It also provides that a principal or teacher must be given the opportunity of being heard after charges have been preferred aganist him or her.

In this case charges of conduct unbecoming a principal were preferred against Mr. Oliver, the appellant, by two citizens of the City of Hoboken who were not members of the Board of Education. A hearing was held, at which appeared counsel for Mr. Oliver and for the persons making the charges. Under the law the Board of Education is constituted a sort of jury before whom charges against teachers are tried. The hearing in this case lasted during several night sessions. The testimony taken in the case was, by consent of counsel, largely that which had been taken in the Court of Chancery in a trial brought by A. J. Demarest, who had sued his wife for divorce. Mr. Oliver was named as co-respondent in this unsuccessful divorce proceeding. A transcript of this testimony was read. Some additional testimony was also taken.

A transcript of the testimony thus taken before the Board of Education of the City of Hoboken was submitted in the appeal taken to the Commissioner of Education. A hearing was held by the Commissioner in which argument was made by eminent counsel representing both sides of the case. A transcript of the original charges, made up of several separate specifications, was submitted. The first specification was that the appellant had alienated the affections of Mrs. Demarest from her husband. This was reasserted in some of the other specifications. The specification alleging the alienation of affections was a result of conduct set forth in the other enumerated specifications in the charge. Proof of conduct unbecoming the

appellant as principal of a school is set forth in numerous instances of meetings with Mrs. Demarest. These meetings were prearranged and were without the consent or knowledge of Mr. Demarest, who was living apart from his wife at the time.

The thing to be considered is not whether there was an alienation of affections, because this is a matter that must be reached as a conclusion based upon certain circumstances, but whether there was conduct unbecoming a teacher. The evidence that would show that Mrs. Demarest's affections were separated from her husband must in its nature be circumstantial. It is difficult to penetrate into the realm of the emotions, only on the basis of speculation. Moreover, it is not the essential thing in this case, only as it may appear as a result of the conduct of the appellant.

The great bulk of testimony taken in this case, some 800 pages, must be considered in its entirety. The appellant admitted that he did frequently meet Mrs. Demarest even after he had been ordered not to visit the Demarest home, as had been his custom. It was admitted that Mr. Oliver consented, somewhat reluctantly as he says, to watch Mr. Demarest, at the request of Mrs. Demarest, who suspected her husband of improper conduct.

These many meetings and the unusual situations connected therewith were such as, standing without explanation, must be considered as conduct unbecoming a principal of a school. Both Mr. Oliver and Mrs. Demarest give explanations which are intended to excuse if not justify the unusual things in their conduct. For instance, the necessity for clandestine meetings was explained on the ground that reports had to be made by Mr. Oliver to Mrs. Demarest in regard to what he saw and what he knew of the conduct of Mr. Demarest. These meetings were usually on Saturdays, when the report of the week would be given. The meetings, always prearranged, were at times in restaurants in New York, on ferry boats, and in a few instances were followed by automobile drives.

It is not charged that there were unlawful happenings in any of these meetings or any unseemly conduct that would indicate in itself anything unlawful. It is, however, in connection with other admitted happenings, that these meetings should be considered. There is no evidence to show the purpose of the meetings to be to heal the family troubles. On the contrary, there is evidence to show that the breach was widened between husband and wife.

The important question in the final analysis is, are the explanations of the clandestine meetings and the unusual situations in which the appellant was found consistent with good morals, professional fidelity, and the common standard of social ethics. The Board of Education decided without a dissenting vote that these explanations were inconsistent and found Mr. Oliver guilty of conduct unbecoming a teacher. As a result he was dismissed from service as principal of the school. It is my opinion that this conclusion was a fair one.

The action of the Board of Education is sustained and the appeal is hereby dismissed.

May 22, 1917.

DISMISSAL OF HIGH SCHOOL PRINCIPAL UPON CHARGES

JOHN C. GROOME,

Appellant,

vs.

BOARD OF EDUCATION OF GLOUCESTER CITY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant is a graduate of Dickinson College and received his M.A. degree from Teachers College, Columbia University. He has had sixteen years of public school experience—six as teacher, and ten as principal. In September, 1926, Mr. Groome was employed by the Gloucester City Board of Education as principal of the four-year high school with approximately three hundred pupils and ten or eleven teachers. In 1927 that school was organized as a junior-senior school, and in the year 1931-1932 more than seven hundred and fifty students were enrolled with thirty-one teachers. On February 1, 1930, due to the resignation of the former superintendent, Albert M. Bean, to become Superintendent of Schools of Camden County, Mr. Groome, while continuing to hold the title of high school principal, was appointed acting superintendent and served until August 11, 1931, when Charles G. Madeira was elected superintendent; whereupon Mr. Groome resumed the full time administration of the high school until his suspension on August 13, 1932, pending a hearing on charges preferred against him which resulted in his subsequent dismissal, from which action he appeals to the Commissioner of Education.

This case was heard by the Gloucester City Board of Education over a period of six months, and consisted of thirty-six sessions totaling, according to appellant's brief, approximately one hundred twenty hours; which means that in the average court day of five hours, an equivalent of twenty-four full days was required for the taking of the three thousand eight hundred and ninety-four pages of testimony. This record was submitted to the Commissioner for review.

Mr. Bean testified that upon his resignation as City Superintendent, he told the Board that Mr. Groome was qualified to fill that position. He further stated that he was satisfied with Mr. Groome's ability both as an administrator and as a supervisor of instruction, and to his mind Mr. Groome was a capable disciplinarian. Mr. Bean said that Mr. Groome's co-operation was highly satisfactory, his veracity and integrity were unquestioned, the general tone of the school was decidedly improved after he took charge, and he did not recall any occasion when a member of the faculty came to him with a complaint about Mr. Groome as principal. Howard Dare White, Assistant Commissioner of Education in Charge of Secondary Schools, testified (page 2854) that during the four years he supervised Mr. Groome's high school adminis-

tration, his attention had not been called to any dereliction of duty; that when Mr. Groome believed he would be offered the superintendency, he (Mr. White) advised his continuance as high school principal, assigning the following reasons as the bases for such advice (page 2897):

> "I wanted him to continue in the high school administration as a secondary school specialist—that was my chief reason—I wanted the high school to have his services as a practical administrator." (Page 2898) "Because I considered he was especially gifted and especially able to do that well and I wanted his influence in the high schools of New Jersey."

From this apparent successful high school experience without any controversy existing between Mr. Groome and the former City Superintendent of Schools, and with evidence of approval of the Board of Education, in that Mr. Groome was appointed acting superintendent, we come to a condition of bickering, quarreling, and fault-finding between the Board, the superintendent, and a teacher by the name of Wendell P. Sooy on one side, and the high school principal on the other, leading within a year after Superintendent Madeira's appointment to the twenty-eight formal charges being preferred against the principal and his subsequent dismissal.

In consideration of the expert testimony of Assistant Commissioner White and the County Superintendent of Schools, it is reasonable to inquire the cause of this change from harmony to discord. The testimony intimates that during the period of appellant's assistant superintendency, he was being considered by the Board for the regular appointment as superintendent and Mr. Sooy also aspired to that position. This rivalry became unfriendly due to certain acts of Mr. Sooy which resulted in considerable antagonism between the two with some attempt on the part of each to discredit the other. An unusual number of the routine duties formerly performed by the various high school teachers were assigned by the superintendent to the principal with instruction that they must receive his personal attention. These minor details hindered the principal in giving important supervision made more necessary by the employment of a number of new teachers. Supervision, which is an important function of the high school principal, appears to have been transferred to Mr. Sooy; and while Mr. Groome was performing detail duties, the latter was devoting his time principally to work that should have been performed by appellant, or at his direction. There appears to have been two definite factions on the Board. Mr. Black, whose term expired during the past year, was the last of the faction which gave thorough co-operation to Mr. Groome and his former assistant, Miss Shaner. At the conclusion of the Board of Education meeting held in the high school on the evening of June 30, 1931, some uncomplimentary remarks were made by Mr. Stetser, one of the members, regarding Miss Shaner and there followed an altercation between Mr. Murphy, another member, and Mr. Groome, during which the latter characterized the former as "a rat." The testimony indicates a strong desire on the part of certain Board members to terminate the services of Mr. Groome at the time of the abolition of Miss Shaner's position as assistant principal; and it is not entirely clear whether appellant's consideration for the superin-

tendency was a plan to place him in an unprotected position and subject to dismissal at the conclusion of a year's employment, or whether it was a bona fide testimonial of his ability. Since that plan did not materialize, it appears that there was a co-ordinated attempt made by certain Board members, the superintendent, and Mr. Sooy to embarrass, harass, and confuse Mr. Groome to the extent that he became discouraged and provoked which made him resentful and non-co-operative.

The twenty-eight charges against appellant are fully set forth in the petition of appeal and may be summarized as follows: No. 1 was preferred by Mr. Murphy as a member of the Board of Education and No. 2 to No. 4 inclusive by him as a member of the teachers' committee of the Board; No. 5 to No. 10 inclusive by Mr. Sooy, a teacher in the high school; and No. 11 to No. 28 by Mr. Madeira, Superintendent of Schools. During the hearing No. 4, No. 8, No. 9, No. 15, and No. 26 were dismissed; and at its conclusion appellant was found not guilty of No. 1, No. 18, No. 21, No. 25, No. 27, and No. 28, and guilty of the remaining seventeen. A number of the charges of which the appellant was adjudged guilty are of an incidental nature and refer to his threatening a teacher who refused to make a written statement of an incident happening in the school, failing to maintain proper discipline in an assembly held after the regular school hours, accepting the assistance of an alumnus of the school to secure information for a report, filing of a report a few days after it was due, locking of two boys in a toilet room where they had hidden (which was considered by all concerned a joke rather than an offense), disobeying minor orders of the superintendent by asking teachers to handle certain discipline cases rather than sending all to the office, and a few other charges similar in nature to those referred to in the case of Rein *vs.* Riverside, of which the Commissioner said:

> "Most of the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in the school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature."

However, all of the charges against appellant cannot be classified as incidental, among which are:

Charge No. 22 (that the principal refused to change the high school schedule at the request of the superintendent) is set forth as constituting insubordination to a professional superior, and charge No. 1 (that the appellant characterized a Board member as "a rat"), and No. 2 (that Mr. Groome wrote a number of newspaper articles exhibiting a hostile and unprofessional attitude with the purpose of undermining the Board in its administration of the schools) are held to be not only insubordination but conduct unbecoming a principal. While the offense as charged in No. 1 may be mitigated on the ground that the characterization was made in the heat of passion, all the newspaper articles under No. 2 could not well be held to have been prepared under such circumstances. While appellant sets forth that they were written

by him in response to certain queries in the newspaper which he attributes to a Board member, he did not limit his attacks to any individual, but criticized the entire Board in some instances, specifically referred to two members by name, and discredited the superintendent and Mr. Sooy. Even though there may be evidence of Mr. Sooy's disloyalty to his immediate superior, Mr. Groome, and on several occasions his acts were sufficient to provoke the appellant, there appears to be no justification for Mr. Groome to attack Mr. Sooy in the press; and granting that Superintendent Madeira endeavored to embarrass the appellant in his high school administration, we find no testimony which shows an attempt of the superintendent to discredit Mr. Groome in the newspapers.

There is some evidence in support of appellant's contention that Mr. Murphy was personally prejudiced against him and an indication of some prejudice on the part of Mr. Stetser, but there is no proof that this applies to other members of the Board. While certain rulings in reference to the admission of testimony might be held to be adverse to the appellant, the record discloses the later admission of all such material testimony. The Teachers' Tenure Law permits boards of education to make charges as well as to hear them, and according to 35 Cyc. 1093:

> "Where a school board constitutes the only tribunal authorized to try charges against a teacher, there is no ground of objection to a trial before them that they are accusers rather than judges and because of their prejudice; * * *"

The fact that an individual member was prejudiced against an employee on trial before the Board would not affect the Board's decision. Moreover, the prejudice of a majority of the members would not be grounds for setting aside the decision, unless it resulted in the exclusion of admissible testimony adversely affecting the rights of the employee, or unless the evidence before the Board did not afford a rational basis for its judgment.

In Martin *vs.* Smith, 100 N. J. L. 50, Justice Minturn said:

> "But the settled rule of law is that if there be evidence upon which the trial tribunal may reasonably found its conclusion of guilt or innocence, this Court will not reverse the judgment by weighing the testimony for the purpose of forming an independent judgment. If the judgment of the trial court can be fairly supported by the record, the duty of this Court is at an end so far as further investigation is concerned."

In Reilly *vs.* Mayor and Board of Aldermen of Jersey City, 64 N. J. L. 508, Mr. Justice Gummere, speaking for this Court (on page 510), says:

> "In reviewing the action of a board of police commissioners, this Court will not weigh the evidence taken before them, for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be

weak or strong, this Court will not interfere. Dodd *vs.* Camden, 56 N. J. L. 258," Other cases to the same effect are Devault *vs.* Camden, 48 Id. 433; Ayers *vs.* Newark, 49 Id. 170; Cavanagh *vs.* Police Commissioners, 59 Id. 412; Alcut *vs.* Police Commissioners, 66 Id. 173.

The record in this case shows that appellant was given a fair hearing and the evidence reasonably supports the judgment of the Board in finding him guilty of conduct unbecoming a principal. The Gloucester City Board of Education, therefore, legally dismissed Mr. Groome under the provisions of Chapter 243, P. L. 1909. The petition of appellant for reinstatement is accordingly denied.

June 21, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from the decision of the Commissioner of Education wherein he sustains the respondent in its dismissal of the appellant on charges of insubordination and conduct unbecoming his position of principal of its high school.

The judgment of respondent is based upon its finding of "Guilty" upon 17 specifications or charges of alleged misconduct. Five (5) specifications or charges were dismissed during the hearing and there was a finding of "Not guilty" upon six (6) others at its conclusion.

The record comprises 3,894 pages of testimony taken; the appellant's brief of 330 typewritten pages and that of respondent of 85 pages, besides the petition of appeal and answer, and numerous exhibits. The reading of such a record and its consideration imposes an unjustifiable task both upon the Commissioner of Education and this Board. If counsel expect an appellate body to give that careful consideration to the cause of their clients to which they are entitled, the case should be presented as succinctly as possible, both before the trial tribunal and on review. After reading the entire record it seems to us that it contains a great deal of testimony that was unnecessray and immaterial and an inexcusable amount of arguments and discussion of counsel, to the detriment of the taxpayers, besides imposing a great deal of fruitless effort on the Commissioner and the Law Committee.

The Commissioner of Education has so well summarized the situation which led to the making of the charges against appellant, and the charges, that to avoid repetition, we refer to the opinion. We agree with the Commissioner of Education that while there were extenuating circumstances with reference to the charge numbered (1) viz., that appellant characterized a member of the Board of Education as "a rat," the language having been used in the heat of passion following or during a personal altercation with the Board member and not at, although immediately following, a Board meeting, charge numbered (22) presented a question of fact which there was competent evidence to support; that with reference to charge numbered (2), there was evidence upon which the Board might properly find, as it did, that the series of articles which appellant caused to be published in a newspaper in Gloucester City, were

of such a character as would tend to bring the Board of Education in public disrepute and undermine its administration of the public school system in its district. In these articles he criticized individual members of the Board of Education as well as the Board itself and a Mr. Sooy, a teacher in the high school and the Superintendent of Schools. In one, published May 5, 1932, referring to an alleged incident in connection with Mr. Sooy, he said, "This incident is what I call a sample of some of the dirty work that has been going on in the high school during this year." In another, published May 19, 1932, it is said, speaking of a certain action of the Board of Education, "The circumstances surrounding the dropping of four high school teachers this year are such as will not be able to withstand the inspection of the public, because they will be revolting to the public's sense of fair play and fair dealing." In still another, he charges two members of the Board of Education with having given false testimony at the hearing before the Board of a certain case involving the position of a Miss Shaner.

It is established "that where the trial court has considered evidence offered by the parties, has had the benefit of observing the witnesses while testifying, and it has reached the conclusion of fact, an appellate body will not disturb such finding where there is any evidence to support it." Faux *vs.* Willett, 69 N. J. L., page 52.

Appellant contends that he did not have a fair trial; that the judgment of the Board of Education is the result of bias and prejudice. In this connection he points out there were 943 rulings in favor of the prosecution upon objections of counsel to the admission or rejection of evidence, whereas of rulings favorable to appellant there were only 56. No significance is attached to these figures. It will suffice to say that many of the objections were frivolous and many were sustained by the Board for the apparent reason that the evidence offered related to collateral matters, the consideration of which would have made the trial of the cause interminable.

Mr. Murphy, one of the members of the Board who sat in judgment, had also made a number of the charges. Specific objection is made to alleged bias and prejudice on the part of Mr. Murphy. The record does not sustain this contention. Mr. Murphy did not participate in the rulings of the Board while the charges made by him were being presented and defended, nor did he vote with the other members of the Board on such charges. The fact that an accuser was also a member of the trial body does not affect the validity or propriety of the judgment. Hamilton *vs.* Board of Education of the Town of Irvington, Supp. School Law Decisions 1928, on page 862. In our opinion the decision of the Board of Education was not the result of bias or prejudice.

For the foregoing reasons and because we agree with the conclusions of the Commissioner of Education it is recommended that his decision be affirmed.

January 12, 1935.

WHERE TESTIMONY AFFORDS RATIONAL BASIS FOR DISMISSAL OF A PRINCIPAL UNDER TENURE, APPELLATE COURT WILL NOT INTERFERE

FLOYD HOEK,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

Respondent.

For Appellant, Addison P. Rosenkrans.

For Respondent, Harold D. Green.

DECISION OF THE COMMISSIONER OF EDUCATION

In September, 1930, appellant began service as principal of a grammar school in the School District of the Township of Teaneck, Bergen County, and continued in that position until January, 1934, when he was appointed vice-principal of the Junior-Senior High School, in which position he served until his dismissal on November 1, 1934, following a hearing upon charges of inefficiency and conduct unbecoming a teacher and vice-principal preferred on July 25, 1934, by Charles L. Steel, Jr., principal of the Junior-Senior High School. From this dismissal action Mr. Hoek appealed to the Commissioner of Education for a reversal of the decision of the local Board and his reinstatement as vice-principal under the following contentions:

(1) The Board should have found him "not guilty" of the charges.

(2) The judgment of the Board was invalid in that a member, who was not present at all the hearings, participated in the discussion of the testimony by the members, following which Mr. Hoek was found guilty and dismissed.

Mr. Hoek was tried on charges of inefficiency and conduct unbecoming a teacher and vice-principal. The testimony discloses that he instructed teachers not to make cases of truancy in the school register, which he knew to be a requirement of the State Board of Education, but definitely directed that truant pupils be marked "absent," believing such to be justified on the ground that the record of truancy would be a stigma on the pupil; that tardiness of pupils, and especially the cutting of classes, increased to such an extent as to affect the morale of the school; that he attempted to discredit his superior, the supervising principal, and used profane language in speaking about him to other members of the faculty; that he failed to carry out the instruction of his immediate superior, the principal of the high school, directing him to check

the home-room books of teachers, and to prepare at the proper time the list of ninth grade graduates; that he failed to maintain the respect of the teachers of the high school, resulting in a letter from the president of the Teaneck High School Teachers' Organization to Mr. Charles L. Steel, principal of the high school, setting forth:

> "The organization passed, with only one dissenting vote, a motion asking their president to declare to you 'a permanent lack of confidence in the administrative abilities of Mr. Hoek.'"

A preponderance of evidence establishes Mr. Hoek's guilt of all of these charges, and while some of the above are of minor importance, the testimony reasonably supports the judgment of inefficiency and conduct unbecoming a vice-principal.

In the case of Hoar *vs.* Preiskel, 128 Atl. Rep. 857, the Court decided:

> "Where the judgment of the trial court is fairly supported by the record, its findings of fact will not be disturbed by the appellate court," and that "Even if it were possible to reach a different conclusion, they will not review the testimony upon which a municipal officer was dismissed."

In the case of Martin *vs.* Smith, 100 N. J. L. 50, Justice Minturn said:

> "But the settled rule of law is that if there be evidence upon which the trial tribunal may reasonably found its conclusion of guilt or innocence, this Court will not reverse the judgment by weighing the testimony for the purpose of forming an independent judgment. If the judgment of the trial court can be fairly supported by the record, the duty of this Court is at an end so far as further investigation is concerned."

In Reilly *vs.* Mayor and Board of Aldermen of Jersey City, 64 N. J. L. 508, Justice Gummere, speaking for the Court, said:

> "In reviewing the action of a board of police commissioners, this Court will not weigh the evidence taken before them for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong, this Court will not interfere."

Counsel for appellant contends that the charge of misrecorded truancy is the only one, if any, of major importance, and asks the question: "Should this prove to be the only fault of any gravity on the part of Mr. Hoek, would not a reprimand or a warning from the Board have been appropriate and just?"

In the case of Eggers *vs.* Board of Education of Elizabeth, 1932 Compilation of School Law Decisions, 934, in which the Commissioner of Education held that the dismissal of a janitor for one act of insubordination was not justified, the State Board of Education, in reversing the Commissioner, said:

> "The statute * * * vests in the local board the authority to determine the punishment to be imposed if the charges are sustained * * * The record here contains ample support for the findings of the Board in the present case and the opinion of the Commissioner, in effect, so admits. That being the case and the local Board having authority to prescribe the particular statutory punishment to be inflicted, there is no ground for interfering with its decision and action unless it appears that the respondent did not have a fair trial or that the Board acted with prejudice * * * This Board has frequently held that in such cases the decision of a local board will not be reversed."

While the truancy charge is of major importance, of greater significance is the lack of confidence of practically all of the high school faculty in appellant's administrative ability. Moreover, the charges in this case were brought by the high school principal and, therefore, it is evident that he believed appellant inefficient as vice-principal.

The responsibility of the principal for the work of the vice-principal and other members of the faculty is set forth by H. H. Foster, Professor of Education, Beloit University, in his work on high school administration, in which he says:

> "As the responsible head of the school, the principal must see that the results for which the school exists are forthcoming. This means that he must be an organizer and supervisor of instruction as well as of management; that he must know what things should be done, how they should be done, and that they are done * * * In fact his position is to see that things get done."

W. A. Cook, Professor of Education, University of South Dakota, in his work upon the same subject states that:

> "The principal sets the standard of discipline for the school. * * * The principal must establish a general standard of discipline for corridor and study hall. * * * His form, wherever seen about the school, is the shibboleth and reminder to all of the general and specific requirements which the school lays upon conduct. * * *"

As to a Board of Education member, who did not attend all the hearings in the trial of the appellant, participating in the judgment, testimony was heard by the Assistant Commissioner of Education in the Court House at Hackensack on January 30, 1935, which shows the charge to be erroneous, since the member neither participated in the discussion of the testimony nor voted upon the findings of the Board.

Since there is no evidence of prejudice on the part of the Teaneck Township Board of Education or illegal participation in the judgment, and the testimony affords a rational basis for its conclusions, the Board's determination is final. The appeal is dismissed.

April 5, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

The facts in this case are fully stated in the decision of the Commissioner and need not be repeated here. The appellant was a high school vice-principal, was tried by the Board of Education and found guilty of charges of inefficiency and conduct unbecoming a teacher and vice-principal. He appealed to the Commissioner, who took testimony on one branch of the case and examined the record of the trial before the Board. After so doing, he has held that the acts charged against the appellant, and of which he was found guilty, were sufficient to warrant his dismissal by the Teaneck Board; that there is no evidence of prejudice on the part of the Board and that the "testimony affords a rational basis for its conclusions."

We have examined the record of the trial and of the testimony taken before the examiner on the subject of the right of participation of certain members of the Board in its decision and agree with his conclusions in all respects. It is therefore recommended that his decision be affirmed.

July 20, 1935.

PRINCIPAL UNDER TENURE MAY BE REMOVED FOR INEFFICIENCY IN ADMINISTRATION AND SUPERVISION

MATTHEW C. HAMILTON,
Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case involves the dismissal on January 29, 1929, by the Irvington Board of Education of Matthew C. Hamilton, the appellant, who was at that time under tenure as principal of the Berkeley Terrace School of Irvington and against whom charges of conduct unbecoming a principal had been duly presented by R. L. Saunders, the City Superintendent of Schools, and heard by the Board.

The case being one of review of action taken by the local Board of Education under the Teachers' Tenure Law is accordingly submitted for decision by the Commissioner of Education on the transcript of testimony taken before the Irvington Board at hearings conducted on November 7th and 21st and December 10th, 1928, and January 14th and 19th, 1929, together with briefs and oral argument of counsel.

It is contended by the appellant that he could not legally be dismissed on the ground of conduct unbecoming a principal under the Teachers' Tenure Law which referred only to conduct unbecoming a teacher. It is also the contention of the appellant that the evidence before the local Board of Education failed to sustain the charges preferred against him and that prejudice on the part of the Irvington Board of Education against appellant was such as to prevent his securing a fair trial before that body.

Section 179, page 120 of the School Law, known as the Teachers' Tenure Law, provides in part as follows:

> "No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, etc."

The Commissioner cannot agree with appellant's argument that "conduct unbecoming a principal" is not the subject of charges under the tenure law above quoted. In the Commissioner's opinion the term "teacher" as used in the section of law referred to is a generic one and covers both principals and teachers. The statutory title of the entire Article VIII including such section is "Teachers," although such article deals specifically with both principals and teachers. Moreover, there has never been any contention that principals could not be licensed under that other section of the School Law, namely, Section 4, page 11, which deals with the making of rules for the granting of "Teachers' Certificates."

The Commissioner has carefully examined and considered the record of the hearings conducted by the Irvington Board of Education in this case consisting of some six hundred pages of testimony, exhibits, etc., and the testimony does not in his opinion show much actual interference with appellant's school work by visits of creditors, etc., as stated in the charges. It does indicate, however, that appellant had financial transactions involving the borrowing of money or sale of stocks with school janitors and with a number of the teachers under his supervision, a proceeding highly improper in the opinion of the Commissioner. It was also proved before the local Board of Education that appellant was extremely slow in paying certain school bills which he, as principal, was supposed to pay and that he did not actually do so until the matters had been brought by the creditors to the attention of the Secretary of the Board of Education. This fact, together with the fact that through his own numerous obligations or those of his wife which he had assumed, he was known throughout the community to be constantly in financial arrears, was bound to impair his

high standing as a school principal and his usefulness as such and to reflect indirectly discredit on the Irvington school system.

It is, moreover, the opinion of the Commissioner that contrary to appellant's contention the testimony before the Irvington Board does sustain the charges of inefficiency and neglect of duty by the appellant in the conduct of his office of school principal. Numerous instances of lateness for the opening of school on the part of the appellant were testified to by the former Assistant Superintendent of Schools and teachers, and appellant produced no evidence in support of his own testimony that he was engaged at the time on school business. Testimony of three witnesses (two teachers and the President of the Home and School Association) to the effect that appellant endeavored during school hours to sell to them or interest them in the sale of the stocks of various companies was not rebutted by appellant except by his own testimony. The fact that the appellant did not include in his work what is commonly recognized as a basal part of a supervisory program such as the study and criticism of lesson plans, conferences with the teachers with reference to plans and comments upon them, and review with the teachers of lessons taught, as well as the giving of demonstration lessons, is clearly evidence of inefficiency and is fully supported by the testimony. Moreover, the testimony indicates that the appellant failed to comply with the regulations concerning lesson plans and their criticism issued by the Superintendent. There was also strong testimony to the effect that truancy slips prepared by the teachers, notably in the case of a pupil named Strohmeier, were not turned over by the appellant as principal to the attendance officer. The teacher in this instance, Miss Dorothy Moyer, testified that she had prepared some fourteen truancy slips for that particular pupil in one month, but according to the testimony of the truant officer only two slips were received by him for this boy in a period of three years, and it was only upon the final intervention of Assistant Superintendent Taylor that the boy was ultimately returned to school. A somewhat significant fact in connection with this incident and indicated by the testimony was that Mr. Hamilton or his wife later borrowed money from the Strohmeier family.

All of this testimony in the Commissioner's opinion plainly justified the conclusion of the Irvington Board of Education as to the inefficiency and neglect of duty of appellant in his office as school principal and the improper methods employed by him in his financial affairs. It is true that some of the testimony against the appellant before the Irvington Board of Education dealt with instances too remote in appellant's period of service in the district to have much bearing upon the situation at the time of his dismissal. However, the testimony also contained numerous instances and transactions of later years, which viewed either alone or in their cumulative effect were in the Commissioner's opinion entirely sufficient to effectively support the charges against the appellant of inefficiency and misconduct as a school principal.

The Commissioner cannot, moreover, conclude that appellant was in any way denied a fair trial. Some indications of hostility to the appellant on the part of individual Board members do appear in the record, but the Commissioner is unable to conclude that appellant's rights were impaired or that he was thereby

deprived of an opportunity to fully present his defense. The Teachers' Tenure Law even permits Boards of Education to make the charges as well as to hear them and according to 35 Cyc. 1093:

> "Where a school board constitutes the only tribunal authorized to try charges against a teacher, it is no ground of objection to a trial before them that they were accusers rather than judges, and because of their prejudice;"

and 84 N. W. 1026, White *vs.* Wohlenberg:

> "Some question is made as to the propriety of the members of the board acting as judges. It is said they are accusers rather than judges and the plaintiff could not secure a fair and impartial hearing before them. Nevertheless these defendants constitute the only tribunal before which such hearing could be originally had."

The question therefore becomes entirely one of whether the testimony justifies the conclusion reached by the local Board of Education. The State Board of Education in sustaining on February 5, 1927, the dismissal of John W. Eggers, a school janitor under tenure after charges and a hearing before the Elizabeth Board of Education, cited such cases as Martin *vs.* Smith, 125 Atl. Rep. 142, Hailes *vs.* the Mayor, 128 Atl. Rep. 150, and Hoar *vs.* Prenkel, 128 Atl. Rep. 857, in which the Courts decided that

> "where the judgment of the trial court is fairly supported by the record, its findings of fact will not be disturbed by the appellate court," and that "even if it were possible to reach a different conclusion, they will not review the testimony upon which a municipal officer was dismissed."

It is therefore the opinion of the Commissioner of Education in this case that the appellant had a fair trial before the Irvington Board of Education and that the testimony before the Board justified its conclusion. The appeal is accordingly hereby dismissed.

August 15, 1929.

Decision of State Board of Education

This is an appeal to this Board by Matthew C. Hamilton, a former principal, from a decision of the Commissioner sustaining his dismissal by the Board of Education of the Town of Irvington which after a trial found him guilty of conduct unbecoming to a principal.

The appeal was argued at some length before your Committee and full briefs by both appellant and respondent were submitted. Mr. Hamilton first as teacher and later as principal was in the service of the Irvington Board for about twenty-seven years. Charges were preferred against him by the superintendent. In brief, they were that he borrowed money from school employees, that he

neglected to pay his debts, and that he did not properly perform his duties as principal. A trial was held. Both sides were represented by counsel. The minutes of the trial comprise 614 pages. Following the trial the Board found Mr. Hamilton guilty of conduct unbecoming to a principal and dismissed him. From this decision he appealed to the Commissioner who after oral argument and the submission of briefs affirmed the dismissal. Counsel for Mr. Hamilton both in his oral argument before us and in his brief strongly urged that he was not given a fair trial and that the evidence did not justify his dismissal. We have carefully examined the record and we cannot agree with either contention. The same points were made before the Commissioner who in disposing of them filed a lengthy opinion. It would serve no useful purpose for us to file another. We recommend that the decision of the Commissioner be affirmed.

December 7, 1929.

PROOF OF CONDUCT UNBECOMING A PRINCIPAL UNDER TENURE JUST CAUSE FOR DISMISSAL

GEORGE R. GOOD,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

Respondent.

William W. Giddes, for Appellant.
Harrison Johnson, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, who was principal of the Jefferson High School in the Township of Union, Union County, and protected in his position by the Teachers' Tenure of Office Act, was dismissed by the respondent on September 7, 1934, after a hearing on charges of inefficiency, incapacity, conduct unbecoming a teacher or principal, and insubordination, which were set forth in fourteen separate specifications. Of these, appellant was found guilty of nine, which may be summarized as follows:

> Certain collections made by him for musical instruments, photographs of pupils, and graduation pins were not paid in full to creditors.
>
> No accurate record was kept of the amounts collected and disbursed, nor was an accounting made to the faculty or Board of Education, although one was requested by the latter just prior to the time of the hearing before it. Mr. Good borrowed from the janitors money with which he hoped to protect his home. These loans, not having been fully repaid, judgments have been secured for the debts. He failed to conduct fire drills as prescribed by Section 1, Chapter 54, P. L. 1919, and falsified records in relation thereto.

On February 12, 1935, Mr. Good appealed to the Commissioner of Education, and in the answer defending appellant's dismissal there was included the plea of laches and abandonment, upon which an opportunity was offered for the presentation of testimony.

It is the contention of counsel for appellant that the charges, even if true in fact, do not justify Mr. Good's dismissal, that the weight of evidence does not support the findings of the Board, that appellant did not have a fair trial, and that he was not guilty of laches.

While it is true that the Board of Education had no rule requiring principals to keep detailed records of money received and disbursed by them for various entertainments or games, efficiency and good judgment dictate that a school executive should be able to show the amount of money he receives in connection with his school work, the sources from which it was received, and a detailed statement of all expenditures of such funds. The refusal to show the Board his school accounts was not an act of insubordination but was due to the fact that he did not have records. The testimony supports the finding of the Board that moneys collected by Mr. Good, as principal, were not fully applied upon the bills for which they were received by him, and that no reasonable accounting was made of the funds.

The testimony discloses that appellant was financially embarrassed largely attributable to obligations for his home, the value of which had been greatly reduced because of the depression. Appellant claims that the loans made to him by the janitors were offered by them because they knew that he might otherwise lose his home. It is natural to assume, however, that Mr. Good's need of funds must have been conveyed to them by the appellant, but no coercion is disclosed by the evidence. In reference to borrowing from school subordinates, the Commissioner, whose opinion was affirmed by the State Board of Education and Supreme Court in the case of Hamilton *vs.* Irvington Board of Education, 1932 Compilation of School Law Decisions, 860, held:

> "It does indicate, however, that appellant had financial transactions involving the borrowing of money or sale of stocks with school janitors and with a number of the teachers under his supervision, a proceeding highly improper in the opinion of the Commissioner."

and the State Board, in dismissing the appeal, said:

> "In brief, they were that he borrowed money from school employees, that he neglected to pay his debts, and that he did not properly perform his duties as principal."

Although the instant case lacks evidence that Mr. Good was inefficient in the management of his school from an academic and disciplinary viewpoint or that he did not pay his personal debts within his ability to do so, the testimony shows that he failed to pay his school debts with funds which were available therefor, and that he borrowed money from subordinates.

While in the opinion of the Commissioner the testimony does not clearly establish the guilt of appellant in not conducting fire drills and of falsifying

records in relation thereto, it was held by the State Board of Education in the case of Fitch *vs.* Board of Education of South Amboy, 1928 Compilation of School Law Decisions at page 176:

> "The Legislature has imposed the duty of determining if the charges are true in fact upon the local board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local Board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature."

The Supreme Court has in many cases affirmed the above ruling of the State Board, notably in the ase of Reilly *vs.* Jersey City, 64 N. J. L. 510, where Justice Gummere in delivering the opinion of the Court said:

> "In reviewing the action of a board of police commissioners this Court will not weigh the evidence taken before them, for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong, this Court will not interfere."

There is nothing in the evidence before the Commissioner to indicate that appellant did not have a fair trial. The charges were definite and the trial was conducted in compliance with the Teachers' Tenure of Office Act. In the case of Hamilton *vs.* Irvington, above cited, where similar objections were raised, the Commissioner said:

> "The Commissioner cannot, moreover, conclude that appellant was in any way denied a fair trial. Some indications of hostility to the appellant on the part of the individual Board members do appear in the record, but the Commissioner is unable to conclude that appellant's rights were impaired or that he was thereby deprived of an opportunity to fully present his defense. The Teachers' Tenure Law even permits boards of education to make the charges as well as to hear them and according to 35 Cyc. 1093:
>
> "'Where a school board constitutes the only tribunal authorized to try charges against a teacher, it is no ground of objection to a trial before them that they were accusers rather than judges, and because of their prejudice;' and 84 N. W. 1026, White *vs.* Wohlenberg:
>
> "'Some question is made as to the propriety of the members of the board acting as judges. It is said they are accusers rather than judges and the plaintiff could not secure a fair and impartial hearing before them. Nevertheless these defendants constitute the only tribunal before which such hearing could be originally had.'"

Appellant was dismissed on September 7, 1934, and appealed on February 12, 1935—a lapsed period of more than five months. At the hearing before the Commissioner upon the ground of laches, no testimony was presented to show whether another principal had been appointed or another person paid all or a part of the salary heretofore allotted to Mr. Good's position and there is lacking a changed condition generally required to establish laches, as defined in the cases of Oystermans National Bank of Sayville *vs.* Edwards, 112 N. J. E. 148, and Tyman *vs.* Warren, 53 N. J. E. 313. The delayed action of the appellant constitutes, to some extent both abandonment and laches. In Gleason *vs.* Bayonne, decided February 20, 1933, affirmed by the State Board of Education May 6, 1933, the Commissioner cited with approval United States ex rel. Arant *vs.* Lane, 249 U. S. 367, in which Mr. Justice Clark, speaking for the Court, said:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service."

The Commissioner has ruled upon many cases in which he has stressed the peril to the appellants of delay in prosecuting cases. Griff *vs.* Elizabeth Board of Education, April 1, 1933; Gleason *vs.* Bayonne Board of Education, May 6, 1933; Carpenter *vs.* Hackensack Board of Education, April 14, 1934; Aeschbach *vs.* Secaucus Board of Education, May 12, 1934.

Although this appeal might be dismissed on the ground of abandonment and laches, due to the long delay in his prosecution, the action of the Board of Education of the Township of Union in dismissing George R. Good on the ground of inefficiency and conduct unbecoming a principal, is affirmed.

May 8, 1935.

Decision of the State Board of Education

Appellant had been, before June, 1934, in the employ of respondent as principal of the Jefferson High School, and had acquired tenure under Chapter 243, P. L. 1909. That act provides, as to teachers under tenure:

> "No principal or teacher shall be dismissed * * * except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, * * * and after the charge shall have been examined into and found true in fact by said board of education" * * *.

In June, 1934, appellant was charged by respondent with inefficiency, incapacity, conduct unbecoming a teacher, and insubordination, as embodied in fourteen specifications. A hearing was had at which evidence was submitted

by both parties. On September 7, 1934, respondent adjudged appellant guilty as charged in nine of the specifications. The misconduct alleged was that moneys were received by appellant in connection with several school activities and not applied for such purposes, or otherwise accounted for; that he borrowed money from employees of respondent, some of which he failed to repay, and that he failed to hold fire drills and falsified reports by stating therein that fire drills had been held, when in fact none had been held during the period charged. Thereupon a resolution was adopted to the effect that appellant be dismissed from his position.

On February 11, 1935, more than five months later, appellant served upon respondent his petition of appeal to the Commissioner of Education.

Respondent, in its answer, reserved its right to move for a dismissal of the appeal on the ground of laches, in not bringing on the appeal promptly after judgment was pronounced. Evidence was taken on the question of laches, before the Commissioner, by which it appears appellant imputes the delay to his attorney. It has been repeatedly held that an employee who desires to attack the legality of his dismissal from a public employment must act with promptness. Gleason *vs.* Board of Education of Bayonne, decided by Commissioner of Education, February 20, 1933; Bullwinkle *vs.* East Orange, 133 Atl. Rep. 774; Carpenter *vs.* Board of Education of Hackensack, decided by Commissioner of Education, July 18, 1933; Aeschbach *vs.* Secaucus Board of Education, May 12, 1934, decided by State Board of Education. It is unfair, as in this instance, for the employee to wait for a period of more than five months to prosecute his appeal, where, should he be successful, payment of his salary would be imposed upon the taxpayers for the period of delay, although payment for the service may have been made to another. The contention that the delay was due to the fault of his attorney cannot avail. He is responsible for his attorney's negligence.

It further appeared by the evidence offered before the Commissioner that on September 11, almost immediately after his dismissal, appellant withdrew all money standing to his credit in the Teachers's Pension and Annuity Fund. Inasmuch as such moneys may only be withdrawn when the teacher is no longer in service, it would seem appellant acquiesced in his dismissal. In his application for withdrawal of the money, he states he was dismissed from his position of principal and is not under contract for further service in the public schools of New Jersey, and that such service terminated in September, 1934. These facts are fatal to the appeal. However, the Commissioner of Education, although he considered appellant was in laches, preferred to base his dismissal of the appeal on other grounds. He held there was evidence before respondent to support its determination that moneys received by appellant were not fully applied for the purposes for which they were entrusted to him, and that no account of such money was made; that fire drills were not conducted and that false reports were made in relation thereto. With these conclusions we agree. The Supreme Court of this State said in the case of Reilly *vs.* Jersey City, 64 N. J. L. 510, "In reviewing the action of a board of police commissioners this Court will not weigh the evidence taken before them, for the purpose of reaching an independent conclusion on the question

of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong this Court will not interfere."

Finally, appellant argues that the subject matter of the charges against him does not constitute the violation of any law, nor the infraction of any rule of respondent, and therefore it had no jurisdiction to put him on his defense. So far as relates to fire drills, this argument is without foundation. Chapter 154, P. L. 1919, prescribes that it is the duty of every principal of a two or more room school to have at least two fire drills every month within school hours, and makes it a misdemeanor to fail to comply with the provisions of the act. The penalty provided in the act is not exclusive and the respondent is legally justified in imposing a penalty for its violation, irrespective of whether there has been a prosecution under the statute.

It is true that the other charges do not refer to any statute or rule of the Board of Education as having been violated. Respondent 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.

The subject matter of the charges against appellant is, in our opinion, clearly that "just cause" mentioned in the Tenure Law, which when it is found to exist, justifies dismissal.

We recommend that the decision of the Commissioner of Education be affirmed, and the appeal dismissed.

December 7, 1935.

INSUFFICIENCY OF CHARGES AGAINST PRINCIPAL UNDER TENURE

MARY M. LEISTNER,

Appellant,

vs.

LANDIS TOWNSHIP BOARD OF EDUCATION,

Respondent,

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is presented to contest the legality of the action of the Board of Education of Landis Township on February 8, 1926, by which after hearings before the Landis Township Board on December 19 and January 8, respectively, the appellant, who was under tenure as a principal and teacher in that district,

was dismissed by the Board of Education from its employ. The charges against appellant filed with the school Board by the supervising principal, H. L. Reber, on December 8, 1925, and upon which she was subsequently dismissed alleged "incapacity, inefficiency and conduct unbecoming a teacher."

The appellant's chief contention is that the conclusions reached by the Landis Township Board of Education as to her unfitness as a principal and teacher were not justified by the testimony before it.

The Commissioner of Education has before him the entire stenographic record of the testimony produced before the local Board of Education together with briefs of counsel and oral argument heard by the Assistant Commissioner at Trenton on May 6.

The Commissioner finds no merit in appellant's contention that through change of membership the Landis Township Board of Education, by which she was dismissed on February 8, 1926, was a different body from that by which the hearing of charges against her was conducted. Not only had there been no re-organization of the Board of Education at the time of appellant's dismissal on February 8, 1926, but the election itself for new Board members did not take place until February 9.

Upon a careful consideration however of the testimony produced before the local Board of Education and of the briefs and argument of counsel, the Commissioner is unable to sustain the Board in its conclusion as to appellant's "incapacity, inefficiency and conduct unbecoming a teacher," which if true, would under the provisions of the Teachers' Tenure Law justify her dismissal as principal and teacher in the Landis Township schools. The testimony produced before the Board in support of the charges did show some dissension between appellant and the teachers under her supervision as principal, but the testimony failed to fix the responsibility for such dissension upon appellant. There was criticism by some of the witnesses of appellant's policy, apparently inaugurated by her as a disciplinary experiment, in requiring the pupils of the different classes to play in different parts of the school grounds; but disagreement between teachers and principal as to the wisdom of a certain policy adopted by the latter does not in the Commissioner's opinion constitute in itself an offense on the part of the principal.

There was also testimony indicating a lack of harmony between the appellant and the Parent-Teacher Association. Not only, however, was the responsibility for this situation not clearly imposed upon Mrs. Leistner, but the latter was in the Commissioner's opinion under no obligation to obey the commands or suggestions of a Parent-Teacher Association, an organization which not only had no control over appellant but which indeed forms no official part of the public school system.

One of the principal grounds relied upon by the respondent to justify its dismissal of appellant was the testimony before it as to corporal punishment having been inflicted by the appellant contrary to law upon Mildred Caesare, one of the pupils in the school under her supervision. In the Commissioner's opinion the preponderance of testimony indicated that there was no act of violence on the part of appellant toward the pupil in question, but that upon the occasion described the child contrary to regulations was running through

the corridor of the school eating her lunch as she ran, and that Mrs. Leistner forcibly detained her by seizing her by the shoulder and then proceeded to compel her to gather up the crumbs of her lunch from the floor. In any event the incident was not in the Commissioner's opinion of sufficient gravity to jeopardize a teacher's tenure protection.

The testimony, it is true, did reveal a few other minor incidents during Mrs. Leistner's incumbency of the office of school principal and arising out of her conduct and supervision of the school affairs, which indicated some lack of discretion on her part. The incidents, however, were not in the Commissioner's opinion either individually or collectively of sufficient importance to seriously reflect upon appellant's conduct or upon her efficiency as principal and teacher in the Landis Township schools.

As a result of careful consideration of the entire record in the case, it is the opinion of the Commissioner of Education that the conclusion as to appellant's "incapacity, inefficiency and conduct unbecoming a teacher" reached by the Landis Township Board of Education after hearing the charges preferred against her was not justified by the testimony produced before the Board, and that appellant's dismissal was therefore in contravention of her rights under the Teachers' Tenure Law. It is therefore hereby ordered that the Landis Township Board of Education proceed at once to reinstate Mrs. Leistner in her position as principal and teacher in the schools of the district and that the Board proceed at once to pay her salary from the date of dismissal at the rate she was receiving at that time.

May 10, 1926.

Decision of the State Board of Education

The supervising principal of schools in Landis Township preferred charges against Mrs. Mary M. Leistner, a principal and teacher in that district, alleging "incapacity, inefficiency, and conduct unbecoming a teacher." After hearings by the Board of Education, in which a considerable amount of testimony was taken, the charges were sustained and Mrs. Leistner was dismissed. The Commissioner, after examination of the testimony, held that the evidence did not justify the action of the Board, that the dismissal was in contravention of Mrs. Leistner's rights under the Teachers' Tenure of Office Law, and therefore ordered the Landis Township Board to at once reinstate Mrs. Leistner in her position as principal and teacher, and pay her salary from the date of dismissal at the rate she was receiving at that time. We have examined all of the evidence before the Board and agree with the Commissioner that it does not support the charges, or justify the appellee's dismissal, and therefore recommend that the Commissioner's decision be affirmed.

ILLEGAL IMPOSITION OF LEAVE OF ABSENCE UPON SCHOOL PRINCIPAL

GEORGE G. WHITE,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The above-named appellant, who claims tenure protection as a principal of schools in the Borough of Hillsdale by virtue of three consecutive calendar year appointments, commencing September 1, 1923, brings this action to secure his re-instatement in the active service from which he claims to have been illegally removed by the Board of Education on August 16, 1926, by means of an enforced leave of absence of one year from that date.

The respondent contends in the first place that appellant was not employed during the year 1925-26 as a principal but as a teacher, that appellant had in any event waived tenure protection, that he had violated his contract by engaging in other employment during the summer months ,and finally that the leave of absence of one year granted appellant by the board was merely the legal acceptance of an offer to that effect made by him at a meeting of the Board of Education on June 21, 1926.

A hearing in this case was conducted by the Assistant Commissioner on Wednesday, October 6, 1926, at the Court House in Hackensack, at which testimony of witnesses on both sides was heard. Since that date briefs on the legal points involved have also been filed by counsel for both appellant and respondent.

The Commissioner cannot agree with respondent's contention that appellant was not a principal but a teacher during the years 1923-24 and 1925-26. While it is true that appellant's contract for the year 1923-24 and also for the year 1925-26 contained the specific designation of teacher, the duties performed by him and accepted by the Board of Education during the entire three years of employment were always those of a so-called unapproved supervising principal. The testimony also shows that the Board of Education informed appellant in 1923 by means of a letter signed by its district clerk that he had been appointed principal at a salary of $2,500, and that the Board in a letter dated May 20, 1926, and also signed by the clerk admitted appellant's true status for that year by expressing its reluctance to have him come under tenure as "principal." It was further the uncontradicted testimony of the district clerk at the hearing before the Assistant Commissioner that the omission of the word "principal" in the first and third year contracts was purely a clerical error on his part. The contracts, therefore, between appellant and the Hillsdale Board of Education as drawn for the years 1923-24 and 1925-26 in the opinion

of the Commissioner failed to accurately express what has been proved to be the intention of both parties, namely, that appellant be appointed principal of schools, and are therefore instruments which a court must necessarily interpret in accordance with such plain intention.

Neither can the Commissioner agree with the respondent's contention that appellant had in any event waived his tenure rights. That appellant gained tenure protection on September 1, 1926, as a result of the completion of three consecutive calendar years of employment in the Hillsdale Borough district is in the Commissioner's opinion unquestionable in the light of the opinion of the Supreme Court in the case of Davis *vs.* Overpeck Township (page 586, 1925 Compilation of School Law Decisions). In that case (which is later than that of E. Brandeis *vs.* Hoboken Board of Education, (page 550, 1921 Compilation of School Law Decisions) Justice Parker held that in order to prevent tenure protection from accruing, the employment of a teacher, principal or supervising principal must be terminated short of three calendar years, and that if not so terminated, tenure would inevitably accrue upon the completion of such three years. There is no evidence in the case under consideration that appellant ever waived his tenure rights as principal of schools in Hillsdale, and he could not, in the Commissioner's opinion, in any event be legally held to a waiver of the benefits of legislation which, according to an opinion of the Attorney-General, was enacted not as a matter of personal privilege but of public policy for the benefit of the school system.

As for respondent's contention that appellant's employment elsewhere during the summer months constituted a violation of his contract, it is the Commissioner's opinion that no such violation of contract is involved in the absence of express contractual provision prohibiting it, unless there is actual proof of neglect of duty as a result of such employment. No such contractual provision and no such neglect of appellant's duties as principal have been proved in the case under consideration, and moreover it appears that the Hillsdale Board of Education has been aware of appellant's occasional employment elsewhere during the summer months and has never protested against it.

There remains to be considered the question of whether the granting to appellant by the Hillsdale Board of Education on August 16, 1926, of a year's leave of absence was, as contended by respondent, merely the legal acceptance by the Board of an offer to that effect by the appellant on June 21, 1926. It appears from the testimony that the Board of Education in the spring of 1926, not realizing that appellant would inevitably come under tenure on September 1, 1926, as a result of the then existing contract, failed to re-appoint him as principal for the coming year, 1926-27, but appointed a Mr. Humber as principal instead. At a meeting of the Board on June 21, 1926, the appellant, Mr. White, called to the attention of the Board of Education the fact that he himself would be entitled to retain the office of principal by virtue of tenure protection accruing in September; but in order to save the Board embarrassment and the taxpayers money, appellant suggested that the Board grant him a year's leave of absence, at the end of which time, if he did not have another position, he could return to Hillsdale. The president of the Board of Education then stated that a communication with regard to the matter would be addressed

to Trenton, after which the Board would call a special meeting to act upon appellant's suggestion. No further word having been received from the Board of Education, appellant on August 15, 1926, notified the Board that as he would come under tenure on September 1 he desired to offer his services and to inquire when he should report for duty, open school, etc. The Board of Education thereupon after receipt of such communication on August 16 notified appellant that the Board thereby granted his request for a year's leave of absence, reserving to itself all rights under the existing contract.

It is in the Commissioner's opinion extremely doubtful whether appellant's suggestion at the June 21, 1926, meeting that a year's leave of absence be granted him could be considered an actual offer, and whether it must not on the contrary be considered merely an invitation for negotiation. According to 9 Cyc. 278, "If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance."

The proposal made by appellant at the June 21 meeting was actually more in the nature of a suggestion than an offer, since it lacked an exact designation as to the date from which the year's leave of absence was to take effect and other exact terms such as an actual offer would logically contain. If, however, appellant's suggestion is to be taken as a formal offer, the Commissioner cannot agree with respondent's contention that it was of such a nature as to require no specific acceptance by the Board. While, according to Anson on Contracts (page 28), there may sometimes be a tacit acceptance of an offer, "if the character of the contract makes it reasonable that acceptance should be signified by words or writing, then conduct alone will not suffice."

In the present case appellant could not be deemed to have received the grant of a leave of absence until he received word of the Board's action upon his suggestion, and moreover the president of the Board stated at the June 21 meeting that further action would be taken by the Board upon appellant's suggestion when word was received from Trenton.

It remains to be considered whether appellant's offer, if such it is to be called, was actually revoked by him prior to its acceptance by the Board on August 16, 1926, or, if not, whether it is to be considered as having lapsed by reason of the delay of the Board of Education in accepting it. As above stated, the appellant on August 16, 1926, before the Board accepted his offer notified the Board of Education that he was offering his services and inquiring as to when he should report for duty, open school, etc. According to 9 Cyc. 288, "formal notice (of revocation) is not always necessary. It is sufficient that the person making the offer does some act inconsistent with it, as for example, selling the property, and that the person to whom the offer was made had knowledge of it." (Coleman *vs.* Applegarth, 68 Md. 21.)

In the opinion of the Commissioner appellant's notice of August 16 to the Board that he was ready to report for duty, etc., must be considered as action inconsistent with his offer for a leave of absence and consequently a revocation of such offer prior to its acceptance. Even, however, if there were no revocation such offer must in the Commissioner's opinion be deemed to have lapsed because of the delay of the Board of Education in accepting it. Ac-

cording to 9 Cyc. 291 and Kempner *vs.* Cohn, 47 Ark. 519, and Park *vs.* Whitney, 148 Mass. 278, an offer must, if it is not to be deemed to have lapsed, be accepted "within a reasonable time"; and in order to determine what is a reasonable time there must be taken into consideration "the situation of the parties, their facilities for communication, etc." The Hillsdale Board of Education in the present instance took no action with regard to appellant's offer of June 21 at its meeting on July 19 in spite of the fact that it had received the word from Trenton which it was awaiting, and called no special meeting thereafter to act on the offer as the president had informed the appellant it would do, but on the contrary waited until its regular meeting of August 16 before taking any action. The most advantageous time for obtaining another position for a prospective leave of absence was during the summer months, but appellant, bound by a contract until September 1 and by tenure thereafter, would have endangered his certificate under Sections 166 and 179 of the School Law had he either during his contract or except upon sixty days notice after coming under tenure accepted another position without the consent of the Board. The terms of appellant's offer also make it evident that before obtaining another position he desired the assurance of the Board that it was granting him a leave of absence only so that, if he should so desire, he could return to his position at the end of such leave. Appellant, therefore, who was thus compelled to await official response from the Board, could not in the Commissioner's opinion be deemed to be still continuing on August 16, 1926, his offer regarding a leave of absence, since through the delay of the Board in accepting such offer the time had then gone by when appellant could derive any advantage from it in the way of accepting another position.

In view of all the facts it is therefore the opinion of the Commissioner that the Hillsdale Board of Education on August 16, 1926, illegally imposed upon George G. White, the principal of schools of that district, a leave of absence of one year from that date. It is, therefore, hereby ordered that the Hillsdale Board of Education proceed at once to re-instate appellant, who gained tenure as principal on September 1, 1926, in the active service of which he has been illegally deprived since August 16 and that his salary be paid from the latter date at the rate which he was receiving at that time.

November 2, 1926.

SUSPENSION OF PRINCIPAL PROTECTED BY TENURE OF OFFICE ACT INVALID PENDING A DELAYED JUDGMENT OF THE BOARD

PAUL I. REDCAY,

Appellant,

vs.

BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY,

Respondent.

For the Appellant, Quinn, Parsons & Doremus.

For the Respondent, Florence F. Forgotson.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant has been principal of the Middletown Township High School for the past thirteen years, and it is admitted that after beginning his fourth year of service he was protected in his position under the provisions of the Tenure of Office Act.

During the month of July, 1934, charges were preferred against Mr. Redcay, signed individually by the then members of the Board of Education, "alleging that he is guilty of inefficiency, incapacity, conduct unbecoming a teacher or principal and other conduct constituting just cause to disqualify him for any position as a principal or teacher in the district schools." August 6, 1934, at 8:00 P. M. was designated for the hearing of said charges in the Leonardo School. Prior thereto a request was made by appellant's counsel for a bill of particulars, which was furnished by counsel for respondent, although the former considered it unsatisfactory. The hearing began on August 6 and continued on various evenings until and including August 16. Following the meeting on the latter date, appellant was notified that the hearing would be adjourned until such time as he signified his intention to appear with counsel who would permit an orderly procedure.

At a meeting of the Board on August 22 a motion was adopted that Mr. Redcay be suspended as principal of the Middletown Township High School pending the outcome of a hearing on charges filed against him, and from this action Mr. Redcay appealed to the Commissioner for reinstatement on August 29, 1934.

On October 5, appellant, not having indicated to the Board that he would appear with other counsel, the Board on that date by a vote of 4 to 3 dismissed Mr. Redcay as principal of the Middletown Township High School because of his continued insubordination in refusing to co-operate with the Board in examining into the charges.

The action of the Board in suspending appellant is attacked on a number of grounds, but it does not seem to be necessary to review them for the reason

that Mr. Redcay was suspended on August 22, and upon the motion to dismiss him on October 5 only four members voted in the affirmative. There is, therefore, before the Commissioner of Education on December 1, 1934, no evidence that appellant has been legally dismissed in view of Section 88, Chapter 1, P. L. 1903, S. S., which reads as follows:

> "No principal or teacher shall be appointed, transferred, or dismissed * * * except by a majority vote of the whole number of members of the board of education."

Appellant's counsel contends that since there is no statute authorizing the suspension of a principal who is protected in his position by the Tenure of Office Act, it may not legally do so under any circumstances; and in support of this view he cites the case of Weinberger *vs.* Hilfman, 8 Misc. 32, where the suspension was indeterminate and, in fact, tantamount to dismissal, and in which the Court said:

> 'It seems clear that while the Director of Public Affairs says that he suspended the relator, what he did in fact and in effect, was to summarily remove him."

This case does not specifically rule upon whether a board could suspend for a brief, definite period pending prompt adjudication of charges, but simply holds the indeterminate suspension therein described to be illegal.

It has been held by the Commissioner of Education that a board of education may, upon the preferment of charges against a principal, suspend him during the process of immediate hearings and a prompt judicial decision. Conway *vs.* Edgewater, June 27, 1928; Rein *vs.* Riverside, December 1, 1928; Groome *vs.* Gloucester City, July 17, 1933. In support of this view, the Commissioner cites Campbell *vs.* Police Commissioners, et als., 16 Mo. App. 48, in which it is held:

> "The suspension from office of an officer by the tribunal before whom he is to be tried, pending his trial in due form upon the charges, a conviction of which would involve his dismissal from office, is not an arbitrary or improper exercise of authority."

It is also held in 29 Cyc. 1405:

> "Where the power of removal is limited to cause the power to suspend made out of a dismissal power on pending charges, is regarded as included within the power of removal."

While a board may suspend a principal during the immediate prosecution of charges, it has no right to continue such suspension thereafter, either by delaying a decision or by refusing to reinstate the principal, if he has not been dismissed in accordance with the provisions of Section 88, Chapter 1, P. L. 1903, S. S., above quoted. Suspension must terminate immediately after the hearing, when the judgment of the board results in either reinstatement or

dismissal. Since there is no evidence before the Commissioner to show a legal dismissal of appellant, the Board of Education of Middletown Township is directed to immediately reinstate Paul I. Redcay as principal of its high school and to pay his salary from the date of his suspension.

December 10, 1934.

TRANSFER OF PRINCIPAL UNDER TENURE TO ANOTHER PRINCIPALSHIP WITHOUT DECREASE IN SALARY IS VALID

MABEL M. CASSIDY,
Appellant,

vs.

BOARD OF EDUCATION OF JERSEY CITY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner appeals from the action of the Board of Education of Jersey City in transferring her from the principalship of School No. 36, designated the "hospital school," which is the only school for crippled children in the city enrolling in 1927 133 pupils, to the principalship of School No. 4, a typical primary school with an enrollment in 1927 of 421 pupils.

A hearing in this case was conducted by the Assistant Commissioner of Education in the Administration Building, Jersey City, on January 31, 1930, at which the testimony presented discloses the following:

At a meeting of the Jersey City Board of Education held April 20, 1921, the following resolution was passed:

> "By the Committee on School Administration, Mr. Bernstein acting chairman:
>
> 1. *Resolved,* That the following named teachers be and they hereby are transferred from school to school as indicated, these transfers to be effective as provided:
>
> Mabel M. Cassidy, No. 30 to No. 36, April 18.
>
> 2. *Resolved,* That the following named persons be and they hereby are appointed to the positions designated at the schools indicated, at annual salaries stated, these salaries to be subject to such deductions for the purpose of the Teachers' Pension Fund as may be required by law, these appointments to be effective as provided:
>
> Mabel M. Cassidy, Principal, No. 36 $2,300, April 18th, Etc."

The following day the Superintendent of Schools notified the appellant that she was appointed Principal of School No. 36 as indicated by the above resolution. Miss Cassidy regularly served as Principal of School No. 36 from April 18, 1921, to September 3, 1929.

The minutes of October 1, 1922, include the following resolution:

> *"Resolved,* That additional compensation of $200 a year be and the same is hereby fixed for teachers in the school for crippled children. This resolution to be effective from October 1, 1922."

The principal and teachers of School No. 36 have since October 1, 1922, received $200 per year in excess of salaries they would have received as principal and teachers in the primary schools of the district. Miss Cassidy, as principal, received a salary of $4,200 during the last school year.

The Board of Education on September 3, 1929, passed a resolution transferring Miss Cassidy from School No. 36 to School No. 4, of which transfer she was duly notified by the Superintendent of Schools.

It is stipulated that the salary of Miss Cassidy immediately following her transfer to School No. 4 was $4,000 and that had she continued as Principal of School No. 36, her salary would have been $200 per annum more than she received as Principal of School No. 4.

About April 20th the appellant received a mimeographed letter which reads in part as follows:

> "Office of the Superintendent of Schools, Jersey City, N. J.,
>
> September 20, 1929.
>
> To the Principals:
>
> At a meeting of the Board of Education, held Sept. 18, 1929, the following teachers were promoted in salary, as indicated, these promotions to date from Sept. 1, 1929:
>
> School No. 4—
>
> From $4,000 to $4,350—Mabel M. Cassidy
>
> Etc.
>
> Very truly yours,
>
> (Signed) James A. Nugent."

A typical distribution of pupils in the Hospital School (No. 36) is shown by the report of the Superintendent of Schools as of June 30, 1927:

> "Kindergarten, none; Grade 1-A—10; Grade 1-B—9; Grade 2-A—4; Grade 2-B—9; Grade 3-A—4; Grade 3-B—12; Grade 4-A—7; Grade 4-B—7; Grade 5-A—11; Grade 5-B—14; Grade 6-A—12; Grade 6-B—9; Grade 7-A—10; Grade 7-B—8; Grade 8-A—4; Grade 8-B—3."

These pupils were transported to school and remained at school during the lunch period and until the time to be transported to their homes in the afternoon.

The testimony of the appellant purports to show that the Hospital School is a distinct type differing from all other schools in the system because of the anxiety and concern which is felt by the faculty for the handicapped pupils, and the special care and attention which is necessary in connection with their transportation, lunch period, and comfort during the school sessions.

Appellant contends the Board of Education could not legally transfer her from the principalship of a special type of school with higher salary provisions to a school of another type having lower salary ratings for its personnel, and furthermore the reduction made in her salary was a direct violation of the tenure law.

The respondent contends: appellant was transferred to School No. 36 as a teacher and not as a principal, her certificate did not qualify her for the principalship of No. 36, in which pupils of the grammar grades are included, the $200 increase in salaries for teachers in the school was extra compensation which could be withheld from the salary when a teacher was transferred to the normal type of school, and the Board of Education had full authority to make the transfer which was from one position in the elementary schools to another position in such schools.

It is admitted that the appellant has tenure of office rights in the school district.

Section 179, p. 120, of the 1928 Compilation of the School Law provides in part as follows:

> "No principal or teacher *shall be dismissed or subjected to reduction of salary* in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her. * * *."

The Commissioner cannot agree with argument of counsel for appellant that transfers cannot be made except to positions of the same classification and that if in a district there is a special type of school and there is no other school of similar type, then it is impossible for a board to legally transfer a teacher from such special type of school, and the only method of removing a teacher from the school is upon charges as provided in the statutes.

Neither can the Commissioner agree with counsel for the respondent that appellant was not transferred to the principalship of School No. 36. The resolution from which this deduction is made does not when read in full indicate a transfer to a teaching position. Moreover, her work in the school for the eight years of her incumbency clearly identifies her as principal of the school. No certificate requirements were set up for the position in the rules of the board, and since it elected a person to the position who was the holder of an elementary principal's certificate, it must be concluded that such certificate met its requirements for the position. The Board is now estopped from setting up a lack of certificate qualification as a defense for its present transfer of appellant. The Commissioner also disagrees with counsel's contention that the higher salaries for teachers in the Hospital School were not in the general salary schedules and that the Board could, therefore, discontinue

to pay the difference in any salary between that received by a teacher in the Hospital School and what she would receive if teaching in a primary school when such teacher is transferred from the Hospital School to a primary school.

In the case of Reed and Hills *vs.* the Board of Education of the City of Trenton, Miss Reed and Miss Hills were given extra duties as head teachers and the resolution providing for the additional compensation stated that it was to be a temporary arrangement and the extra compensation would last only during the continuance of the extra duties.

The State Board of Education in holding that a Board of Education is not liable for the payment of extra compensation when the extra duties are discontinued said:

> "If the statute were so construed any and all temporary payments to teachers for temporary work could not be made without incurring the liability of a permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatever."

There is a very distinct difference between the case above quoted and the case now before the Commissioner.

The Jersey City Board of Education gave higher salaries to the teaching personnel of School No. 36, and there is nothing to indicate that these increased salaries were to be considered as temporary. The salaries were increased and appear as permanently fixed for teachers employed in that school over salaries in the primary schools as higher salaries are fixed and paid to teachers in the secondary schools over those paid to teachers in the elementary schools. If the school for crippled children should be abolished in good faith, then of course the teachers would not only lose the additional increment, but they would be without legal claim to any position in the district. As long as the school exists and the salary schedule for it continues to be above that of the regular type of school, a teacher cannot be transferred from it at a reduction in salary.

In practically all elementary schools throughout the State in which are found special classes for atypical children the salaries of teachers in such classes range at least $200 above the salary of teachers of normal pupils in similar grades. While it is possible for a Board of Education to ask a teacher to take charge of such a class temporarily and then transfer her back to a class of normal pupils at the salary applying to the latter position, a Board that makes a regular transfer to a position in charge of atypical children at a higher salary without any indication of a temporary situation cannot reduce the salary of such teacher in transferring her back to the regular type of class. The promotion in salary is at the discretion of the Board, and if made unconditionally, the teacher cannot be removed from the position except by transfer to similar work in the elementary or high school field, as the case may be, without reduction in salary, or by removal from the position upon charges as provided in the Tenure of Office Act.

In the case of Helen G. Cheesman *vs.* Board of Education of Gloucester City, in which the appellant was transferred from the position of principal

teacher of the Monmouth Street School in immediate charge of the seventh and eighth grades to the position of principal teacher of the Cumberland Street School in immediate charge of the fifth and sixth grades, the Supreme Court says:

> "Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act (C. S. Vol. 4, p. 4763, Sec. 106a) and in the manner prescribed in said act. Her salary was not reduced or she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons."

The State Board of Education and the Supreme Court clearly concur in that part of the decision of the Commissioner of Education in the same case in which he rules:

> "This department has frequently decided that teachers under tenure may be transferred from one grade to another in the elementary grades without violation of the intent of the Tenure of Service Law. That is to say, a teacher in any of the elementary grades, as for instance the eighth grade, may be transferred to any of the positions in the elementary grades without any violation of law."

The Supreme Court in the citation from its decision rules upon the two important phases of this case, namely, (1) salaries cannot be reduced except for causes mentioned in the Tenure of Office Act, (2) a transfer within the elementary field of education to a similar position at the same salary is not a dismissal and is, therefore, legal.

The primary and grammar grades belong to the elementary school, and unless a different certificate is required, transfers within the elementary school or transfers within the secondary field are legal if made in good faith by the Board of Education, provided, there is not a reduction in salary of teachers who are protected by the Tenure of Service Act.

It is the opinion of the Commissioner of Education that the Jersey City Board of Education acted within its authority in transferring appellant to the principalship of School No. 4, but that it illegally reduced her salary from $4,200 to $4,000. The board is accordingly hereby directed to make the salary of Miss Cassidy $4,200 as of September 3, 1929, the date of her transfer, and to make her salary as of September 18, 1929, such as she would have received under the schedule if her salary had not been reduced.

April 15, 1930.

Decision of the State Board of Education

Miss Cassidy was the principal for a number of years of the Jersey City "Hospital School." In the spring or summer of 1929 she was transferred to be principal of School No. 4, and her salary, which as principal of the Hospital

School had been $4,200, was by the resolution of the Board transferring her made $4,000. She appealed to the Commissioner, alleging that her transfer and alleged reduction of salary was illegal. The Commissioner has held that the Board acted within its authority in transferring Miss Cassidy to the principalship of School No. 4, but that it illegally reduced her salary. The Law Committee agrees with the Commissioner that the action of the Board was lawful as to the transfer, but that the alleged reduction of salary was contrary to the statute and in those respects recommends that his opinion be affirmed.

The Commissioner further found, however, that her salary should be made, as of September 18, 1929, what she would have received under the salary schedule of the Jersey City Board if her salary had not been reduced. We are unable to find from the record that her salary actually was reduced, it appearing that by a resolution of September 20, 1929, it was made $4,350, as of September 3, 1929.

On that account, it is recommended that the case be remanded to the Commissioner to take further evidence to determine whether her salary actually was reduced, if either party so desires.

October 4, 1930.

Supplemental Decision of the State Board of Education

In our decision of this case, on October 4, 1930, we stated we were unable to find from the record that appellant's salary actually was reduced, it appearing that by a resolution of September 20, 1929, it was made $4,350.00, as of September 1, 1929, and we recommended the case be remanded to the Commissioner to take further evidence to determine whether appellant's salary actually was reduced, if either party so desired. Appellant now asks that we modify our decision upon the ground that said record does expressly and specifically show a reduction in salary. The application is resisted by respondent.

Appellant's counsel argues, as we understand him, that inasmuch as she was entitled, on September 1, 1929, when she was transferred, to a salary of $4,200.00, the additional $350.00, granted her on September 20, 1930, as of September 1, 1930 (Exhibit A-3), should be added to $4,200.00, thus making the salary to which she is now entitled $4,550.00, and not $4,350.00.

There is nothing in the evidence to show the existence of a salary schedule in force in Jersey City whereby Miss Cassidy, by reason of length of service or rank in the teaching service, is entitled to a salary of more than $4,350.00.

The transfer of appellant became effective September 1, 1930, at which time she was entitled to a salary of $4,200.00. On September 20, 1930, her salary was fixed at $4,350.00, also effective September 1, 1930. There being no proof of any salary schedule of respondent Board, by the provisions of which appellant is entitled to any other salary, we recommend the order applied for be denied.

March 14, 1931.

LEGALITY OF TRANSFER OF PRINCIPAL UNDER TENURE

EMMA A. MACNEAL,

Appellant,

vs.

BOARD OF EDUCATION OF OCEAN CITY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

By agreement of counsel this case is submitted for decision upon a stipulation of facts together with briefs upon the legal points involved and an oral argument heard by the Assistant Commissioner of Education on August 31, 1926, at the State House at Trenton.

From the stipulation of facts it appears that Appellant was first appointed by the Respondent as a teacher in the public schools of Ocean City in 1918, that she served in such capacity up to and including the school year 1923-24, a period of six years, that for the school year 1924-25 she was designated by the Respondent as grade principal of one of the Ocean City schools and served in the latter capacity during that year and the following year, 1925-26. Appellant's salary as grade principal was fixed in 1924 at $1,800, with provision for a yearly increase of $100 until a maximum of $2,000 was reached, and she was consequently receiving for the school year 1925-26 a salary of $1,900. On June 14, 1926, the Board of Education confirmed the action of the City Superintendent in refusing to recommend Appellant's continuance as grade principal and designated her as a teacher of the sixth grade of the Wesley Avenue School for the school year 1926-27 at a salary of $1,900. Appellant accepted the transfer under protest and brought this appeal on the ground of alleged illegal demotion and reduction of salary in contravention of the Teachers' Tenure Law.

Section 176, Article VIII of the 1925 Compilation of the School Law provides in part as follows:

> "The service of all teachers, principals, supervising principals of the public schools in any school district in this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board. * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause."

The Commissioner cannot agree with Respondent's contention that in order to gain the protection of the Tenure Act as principal of the Ocean City schools Appellant must necessarily have served for three consecutive years in that

particular position. The act does not, in the Commissioner's opinion, prescribe the necessary three-year period of service for each of the groups, namely, teachers, principals and supervising principals, but makes permanent the term of an incumbent, whether he be teacher, principal or supervising principal, who has been employed for three consecutive years in the aggregate in the various designated positions or who has been promoted to the higher of such positions after three years of service in any one of them. If, therefore, a person employed in the position of teacher has been promoted by the employing Board to that of principal, her status under the Tenure Act will not, in the Commissioner's opinion, be affected by the fact that she has been employed as a teacher for all or part of the time necessary to gain the statutory protection, since both are positions specifically included in the Tenure Act. In such case the rights thus gained as teacher will attach to and continue in the position to which such person has been promoted. Should the Respondent's theory prevail, it might well be to the interest of a Board desiring to rid itself of a teacher under tenure to promote her to the office of principal or supervising principal. Since she could not hold both positions at once and would, according to Respondent's contention have lost tenure protection in the higher position, she might then at any time be dismissed by the Board of Education while in process of earning such protection anew in the office to which she was promoted. Such the Commissioner is convinced was not the intention of the Legislature in enacting the Teachers' Tenure Law.

The case of Noonan and Arnot *vs.* Board of Education of the City of Paterson is exactly parallel to the one under consideration in that both Appellants in that case had gained tenure as teachers, were promoted to the position of principal and then almost immediately were dismissed and again assigned to teaching positions. It was held by the Commissioner and by the State Board of Education on appeal that the Appellants were under tenure in the position of principal to which they had just been promoted and could not be dismissed except by the procedure provided for in the Tenure Law.

Moreover, the Commissioner does not agree with Respondent's contention that the case of Davis *vs.* Overpeck Township (p. 581, School Law) supports the latter's contention that a supervising principal must have served three consecutive years in that particular position to gain tenure as such. Nowhere in the decision of the State Board of Education (which reversed that of the Commissioner) is there anything to indicate that the Board was not taking into consideration Mr. Davis' services as a teacher as well as principal in determining that he had gained tenure protection; and in the concurring opinion of Dr. J. C. Van Dyke it was specifically stated that "the appellant herein was, with his six years of service (three years as teacher and three years as principal) well within the provisions of the act." When the Davis *vs.* Overpeck case was reviewed by the Supreme Court on a writ of certiorari, Justice Parker, it is true, utilized appellant's three years of service as a principal only as a basis in reaching the conclusion that he was under the protection of the Teachers' Tenure of Service Act. In that case, however, the Court was not compelled to consider the effect of Mr. Davis' services as a teacher in determining the question of tenure as principal, since his service

of three years in the latter position alone was sufficient to gain for him the protection of the act. Moreover, it was in the Commissioner's opinion probably the purpose of the Court in deciding the case to take as a hypothesis the state of facts least favorable to appellant, thus making the more conclusive and convincing a decision in his favor.

The written notification to Miss MacNeal of her assignment to the position of grade principal and acceptance by her for each of the school years 1924-25 and 1925-26 in the Commissioner's opinion in no way constituted, as the Respondent contends, a contract rather than a tenure employment. Even though the form had been such as is required by the School Law for teachers' and principals' contracts, the appellant could not in any event be held to any contract for a definite period of service and thus to a waiver of her tenure rights. Tenure protection for teachers, according to an opinion of the Attorney-General, is conferred by the Legislature as a matter of public policy for the benefit of the school system, and as such cannot be waived by a beneficiary.

There is, therefore, in the Commissioner's opinion, no doubt whatever of the fact that Miss MacNeal was under tenure as principal in the Ocean City schools at the time of her transfer to the position of sixth grade teacher, and that she was entitled to the continued protection of the Tenure Law in the position of principal or any position which was its equal or superior in rank.

There remains then to be considered the question of whether appellant suffered a demotion when she was transferred from the position of grade principal to that of sixth grade teacher, and if so whether such demotion is to be considered a violation of tenure rights.

The Teachers' Tenure Law definitely prohibits any reduction in salary of a teacher or principal under tenure. Had appellant been allowed to continue in her position as grade principal her salary, according to the $100 yearly increase designated for such position by the Board, would have reached for the year 1926-27 the sum of $2,000, while the salary awarded her on the transfer to a teaching position was fixed at $1,900. Appellant hence suffered an actual decrease in compensation. Moreover, the sum of $1,900 for the sixth grade teaching position is $400 more than the maximum fixed by the Ocean City Board of Education for its grade teachers. Upon this point the opinion of the State Board of Education in the case of Davis *vs.* Overpeck, above referred to, may be quoted as follows:

> "If the decision appealed from is sound, there is nothing to prevent a Board from elevating any teacher who has served more than three years to a position as principal, increasing his salary and subsequently assigning him to teach with the assurance that though but a teacher he will thenceforth receive a salary of a principal. * * * If such procedure can be adopted it would not only be unjust to the taxpayers but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teaching the same grade with no more experience, was paid the salary not of a teacher but of a principal."

Aside from the question of compensation, however, it has been held in a number of cases that the transfer of a principal under tenure to the position of teacher constitutes a demotion and hence a violation of the Tenure Law. In the Davis case above quoted the State Board held that "When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the army dismissed as such when he is reduced to the ranks and another assigned to his place or a teacher be dismissed as such if made a truant officer or a janitor;" and Justice Parker, in the same case, said that "his (Mr. Davis') attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school." Similar rulings with regard to demotion were contained in the cases of Noonan and Arnot *vs.* Paterson, above referred to, and in the case of Welch *vs.* West Orange, reported on page 591 of the School Law.

In view of all the facts, therefore, it is the opinion of the Commissioner of Education that the appellant, Emma A. MacNeal, was under tenure as a grade principal in the schools of Ocean City at the time of her transfer to the position of sixth grade teacher by action of the Board of Education on June 14, 1926; that such transfer constitutes a demotion both as to compensation and rank and hence a violation of the Teachers' Tenure Law. It is, therefore, hereby ordered that appellant be at once reinstated in the position of grade principal, or in a position its equal in rank, in the Ocean City schools and that her salary be paid from the date of such transfer at the rate she was receiving at that time.

Dated September 27, 1926.

Affirmed by State Board of Education without written opinion January 8, 1927.

Affirmed by Supreme Court without written opinion January 18, 1928.

WRITTEN CONTRACTS ESSENTIAL TO EMPLOYMENT OF TEACHERS IN ABSENCE OF BOARD RULES

ANGE LAROSE,

Appellant,

vs.

BOARD OF EDUCATION OF EGG HARBOR CITY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner was employed by the respondent Board of Education as a teacher of manual training and mechanical drawing under contracts from September 1, 1928, to June 8, 1929; September 3, 1929, to May 31, 1930; and from September 2, 1930, to May 30, 1931. On April 7, 1931, appellant

was re-elected for the 1931-32 school term at a salary of $1,800 and was notified of his election by the secretary of the Board. The letter of notification contained a request that he reply promptly as to his acceptance. Mr. LaRose immediately accepted the offer in writing. Instead of sending to Mr. LaRose a contract in the usual form of preceding years, the Board of Education at a meeting on May 5, 1931, decided not to offer Mr. LaRose a contract, and, therefore, notified him that his services would no longer be required after the end of the 1930-31 school term.

It is not contended by counsel for petitioner that Mr. LaRose is protected by the Tenure of Office Act, but he holds that the offer of the position by the Board in writing and the appellant's acceptance in like manner constituted a valid contract binding upon both parties and the Board should, therefore, be required to pay appellant the salary of $1,800 for the school year 1931-32.

If the Legislature had not made specific requirements in reference to contracts between Boards of Education and teachers, the Commissioner would be of the opinion that the contention of counsel is valid. The Legislature, however, has prescribed specific requirements for such contracts in Section 106, Chapter 1, P. L. 1903, S. S., which reads in part as follows:

> "The employment of any teacher by such Board, and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto. If a Board of Education shall not have made rules and regulations as aforesaid, then no contract between such Board of Education and a teacher shall be valid unless the same be in writing, or partly written and partly printed, in triplicate, signed by the president and district clerk or secretary of the Board of Education and by the teacher. One copy thereof shall be filed with the Board of Education, one copy with the teacher and one copy with the county or city superintendent."

It is probable that the Legislature, in making definite conditions essential to legal contracts between Boards of Education and teachers, had in mind many boards of education whose contractual experience might be limited, and it desired to protect such boards from incurring legal obligations except in formal contracts or under rules of employment which they definitely adopt. Whatever the legislative purpose may have been, the provisions in relation to such contracts are clear. Unless a Board adopts rules prescribing the method of employing teachers, a valid contract requires the signatures of the president of the Board, the district clerk or secretary, and the teacher. Each party to the contract is to retain a copy and one is to be filed with the county or city superintendent of schools. The making of a teacher's contract in the manner prescribed is a prerequisite to a valid employment in all cases where the board does not make other rules for the employment of teachers.

The Board of Education of Egg Harbor City does not have any rules relative to the employment of teachers. It executes contracts with teachers in triplicate in accordance with the above statute, and appellant was so employed during the preceding three school terms.

The offer and acceptance of a position as a teacher by correspondence where the Board has not adopted rules for such employment may be considered as acts of intention from which either side may withdraw until bound by a legal contract. Since no legal contract exists between Mr. LaRose and the Egg Harbor City Board of Education for the school year 1931-32, no salary payments are due the petitioner. The appeal is dismissed.

December 30, 1931.

DECISION OF THE STATE BOARD OF EDUCATION

The facts in this case are set forth in the first paragraph of the Commissioner's opinion, which reads:

> "The petitioner was employed by the respondent board of education as a teacher of manual training and mechanical drawing under contracts from September 1, 1928, to June 8, 1929, September 3, 1929, to May 31, 1930, and from September 2, 1930, to May 30, 1931. On April 7, 1931, appellant was re-elected for the 1931-32 school term at a salary of $1,800 and was notified of his election by the secretary of the board. The letter of notification contained a request that he reply promptly as to his acceptance. Mr. LaRose immediately accepted the offer in writing. Instead of sending to Mr. LaRose a contract in the usual form of preceding years, the board of education at a meeting on May 5, 1931, decided not to offer Mr. LaRose a contract, and, therefore, notified him that his services would no longer be required after the end of the 1930-31 school term."

There was no oral argument before the Law Committee, but the papers in the case show the positions of the parties. The appellant's first contention is that the board's offer of re-employment on or about April 7, 1931, and the defendant's acceptance in writing, constituted a valid contract for the school year 1931-32, and he would seem to be right were it not for Section 106, Chapter 1, P. L. 1903, cited by the Commissioner in his opinion. The Commissioner holds that because of this provision, no legal contract existed between Mr. LaRose and the respondent, Board of Education. The Committee agrees with this conclusion.

The second claim made by the appellant is that he was under Tenure of Office. It appears that he did not make this point before the Commissioner. The Tenure of Office statute provides that the service of teachers shall be during good behavior and efficiency "after the expiration of a period of employment of three successive years," and this has been held by the Supreme Court to require employment for three calendar years. Carroll *vs.* State Board of Education 8 N. J. Misc. 859.

Inasmuch as the appellant had no valid contract with the respondent for the prescribed period he had not, in our opinion, obtained tenure protection under the statute.

It is therefore recommended that the Commissioner's opinion be affirmed.

April 2, 1932.

LEGAL EFFECT OF PREDATED CONTRACT ON ATTAINMENT OF PROTECTION UNDER THE TEACHERS' TENURE LAW

BENTON F. ALLEN,

Appellant,

vs.

BELLEVILLE BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case, which both appellant and respondent agreed to submit to the Commissioner of Education for decision upon a stipulation of facts and briefs of counsel, reveals according to such stipulation the following facts:

Appellant was first employed as a teacher in the Belleville public schools under a contract executed August 3, 1925, but providing for a term of employment from July 1, 1925, until June 30, 1926. Appellant was again employed for the school year 1926-27 and also for the school year 1927-28, the term of employment in each of the last two instances being stipulated as from September 1, to June 30. Before the completion of the third and last contract, appellant was notified on June 14, 1928, that his services would not be required after June 30, 1928.

Appellant's first contention is that the requirements of the Teachers' Tenure Law are satisfied by the completion of whatever period of academic service or teaching is prescribed by the school board during the three consecutive years in the same district. Appellant therefore contends that, since he was under contract as a teacher in the Belleville public schools from July 1, 1925, to June 30, 1928, and taught during all of the academic sessions conducted by the Belleville Board of Education during that period, he was under tenure on June 30, 1928, and could not therefore be removed from office except upon charges and a hearing.

While the Commissioner agrees with appellant's contention that the law does not require three full consecutive years of actual teaching in order for a teacher to gain tenure protection, he is nevertheless of the opinion that the terms of employment stipulated in a teacher's contracts must aggregate three full consecutive calendar years. Section 176, page 113 of the 1925 Compilation of the School Law provides in part as follows:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board."

Section 10 of the Statutory Construction Act, New Jersey Compiled Statutes (1911), p. 4973 states

> "that the word 'month' when used in any statute shall be construed to mean a calendar month, and the words 'a year' shall be construed to mean a calendar year."

In the Commissioner's opinion the phrase "period of employment" as used in the Tenure Law means the terms of employment stipulated in the teacher's contracts and, since the term "years," as used in the tenure law, is unqualified, it must be construed in the manner indicated by the Statutory Construction Act above quoted, namely as calendar years. Counsel for appellant argues in his brief that the term "year" as used in the School Law must be considered to have a meaning distinct from the ordinary meaning since the term "month" has been defined by the School Law to mean four weeks of five days each. In the Commissioner's opinion, however, the fact that the term "month" has been especially defined by the School Law in an enactment later than the Statutory Construction Act and the term "year" has not, is an excellent argument to support the conclusion that the Legislature when it used the term "year" in the Teachers' Tenure Law without any qualification of the term intended it to have the usual meaning indicated by the Statutory Construction Act, namely, a calendar year. Moreover, it was held by the New Jersey Supreme Court in the case of Walter G. Davis *vs.* Overpeck Board of Education, reported on page 581 of the 1925 Compilation of the School Law, that

> "if the board wished to avoid the Tenure of Office Act, it could have made the term of the 1911 contract less than a year, or it could have given thirty days notice during the year, as provided in the contract, and thus cut off the employment short of three years. Not having done so, the act of 1909 applies."

It must be noted that in the above decision the Court based its ruling favorable to the appellant on the ground that his third contract term was a full calendar year and indicated that appellant would not have gained the protection of the act had such contract been "for less than a year." Even though the contract term in the Davis *vs.* Overpeck case, namely, from September, 1911, to September, 1912, included certain non-teaching intervals, the Court insisted that the stipulation in the contract of an actual calendar year of employment was essential in order to gain tenure. Even though, therefore, all necessary teaching were completed under such a contract in June leaving a non-teaching period of two months, it is very evident from the Supreme Court ruling that any provision in such contract by which it was to end in August for instance, or any time short of a calendar year, would result in a loss of tenure protection.

Although the Supreme Court case above quoted is the existing authority to the effect that the completion of three appointments of a calendar year each will place a teacher under tenure, it was the original view of the State Board of Education, reported at p. 553, 1921 Compilation of the School Law, that a teacher's services must be "continued *after* the expiration of three years" in

order to gain tenure protection. Such a view as that of the State Board was thus even less favorable to the teacher.

In the present case the Commissioner cannot conclude that the appellant upon the completion of his third contract had actually been employed as a teacher in the Belleville schools for three consecutive calendar years, namely, from July 1, 1925, to June 30, 1928. It is the Commissioner's opinion that the Teachers' Tenure Law above quoted in stipulating a period of employment required to gain protection intended, not that there should necessarily be actual teaching during all of the contract terms, but that in all cases there should be actual employment or contract relationship either during the three (calendar) years named in the act or during a shorter period which boards of education are according to the Tenure Law allowed to fix. The nature and purpose of a legislative enactment as well as its phraseology must always be taken into consideration in determining its true meaning. While, therefore, it might well be that parties could mutually agree to pre-date a surety bond or bonds issued as evidences of indebtedness without violating any statutory provision, it is apparent from the very nature of the Teachers' Tenure Law that the stipulated period of employment for a public school teacher is intended to actually continue for the full time so that the Board may determine whether it desires the teacher for a permanent position. In the present case there could not possibly have been any actual period of employment or contract relationship of any kind between the appellant and the employing Board of Education prior to the date of the execution of the contract which was August 3, 1925, since the minutes of the meeting of the Board of Education itself indicate the appointment of appellant on that date. The pre-dating of the contract to July 1, 1925, even though duly authorized by the Belleville Board of Education, could not possibly create a period of employment between July 1st and August 30th. Any such attempt is nothing but a fiction and in the Commissioner's opinion a fictitious period of employment was not what the Teacher's Tenure Law intended. If carried out to its logical conclusion, the theory of pre-dating a teacher's contract might result in the attaining of tenure immediately upon the first employment, since the contract term could be pre-dated three years and the protection of the act thus gained at once upon a period not of actual but of fictitious employment. This in the opinion of the Commissioner is entirely subversive of the real intention of the Legislature as expressed in the Teachers' Tenure Law.

It is therefore the Commissioner's opinion that the appellant at the time of the completion of his third contract on June 30, 1928, lacked the three full consecutive calendar years of employment necessary to gain protection in the School District of Belleville and that, being under no protection of any kind, the Board of Education acted entirely within its legal rights in refusing to re-employ him for the year 1928-29 and in notifying him on June 14, 1928, to that effect. The appeal is therefore hereby dismissed.

August 18, 1928.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant was employed as a teacher in the Belleville public schools by a contract dated August 3, 1925, but providing for employment from July 1, 1925, until June 30, 1926. He was again employed for the school year 1926 to 1927 and again for 1927 to 1928. On June 14, 1928, he was notified that his service would not be required after June 30, 1928. The Commissioner has held that under these circumstances he was not under Tenure of Office inasmuch as he had not been employed for three successive years as required by the statute. We agree with his conclusion and recommend that his decision be affirmed.

December 8, 1928.

EMPLOYMENT FOR A PERIOD OF LESS THAN THREE YEARS INSUFFICIENT FOR TENURE PROTECTION

ELIZABETH A. CARROLL,
Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MATAWAN,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Hearings in this appeal before the Assistant Commissioner on September 13th and 24th and October 9th, 1929, reveal the following facts:

Miss Carroll was first appointed a teacher in the Matawan Township schools under a contract executed on July 15, 1926, providing that she was thereby employed "for the term of one year" from September 7, 1926. She was again appointed in 1927 under a contract executed on May 19th with a similar provision of employment for one year from September 1, 1927. Her third contract, executed on June 13, 1928, provided for employment of one year from September 4, 1928.

In each of appellant's contracts for the years 1926-29 there was contained a mutual provision by which either party might end the agreement upon thirty days' notice to the other, and in accordance with such provision the appellant was on July 15, 1929, formally notified by the Matawan Township Board of Education that her services with the district would terminate on August 15, 1929.

It is appellant's first contention that the termination notice was illegal, and it is her further contention that even though there were no technical defects in the exercise of such termination provision, each of the three teaching con-

tracts of the appellant beginning with 1926 must inevitably be construed as constituting employment for the school year, namely, July 1st to June 30th, and that consequently the appellant had already attained tenure protection on June 30, 1929, prior to the receiving of notice of termination of services above referred to.

The Commissioner cannot agree with appellant's first contention, namely, that the mutual termination provision in her contracts was illegally exercised by the Matawan Township Board of Education. The testimony shows that the District Clerk duly notified the Board members that a meeting would be held on July 16, 1929, "for the purpose of considering contracts of certain teachers" and in the Commissioner's opinion such a notice was entirely adequate to enable the Board of Education to take action in terminating appellant's contracts. Moreover, the minutes of that meeting record the fact that the resolution in question was duly carried by the unanimous vote of the five members present, thus constituting the necessary vote of the majority of all the members of the Board, and the minutes are corroborated by the District Clerk's unrefuted stenographic notes of the proceedings indicating a roll call with the resulting unanimous vote above referred to.

Even if there had been any grounds to justify appellant's contention as to illegal termination of her services by a notice, it is the Commissioner's opinion that there was no violation of any potential tenure rights accruing upon the completion of the contracts, since the appellant would not upon such completion have actually been employed for the three consecutive calendar years required by the Teachers' Tenure Law, which provides in part as follows:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; * * * "

According to the Statutory Construction Act (N. J. Compiled Statutes, p. 4973) "the words 'a year' shall be construed to mean a calendar year." Appellant insists that if calendar years are to be required in making up the period necessary for tenure, such year would have to be considered as being from January 1st to December 31st. In the Commissioner's opinion, however, a calendar year must mean any period of 365 days, or any period including twelve calendar months. Moreover, the statute above quoted has been construed by the Supreme Court in the case of Davis *vs.* Overpeck Township reported on p. 195 of the 1928 Compilation of Decisions to require a period of employment of three consecutive calendar years in order to gain the protection conferred by the act. Decisions of the State Board of Education such as in the case of Brandes *vs.* Hoboken, p. 550, 1921 Compilation of School Law; Welch *vs.* West Orange, p. 197, 1928 Compilation of Decisions, and Shapiro *vs.* Paterson, decided September 12, 1925, and not reported, may be construed as requiring even more, namely, continued employment of a teacher beyond the completion of the third appointment, even though the total period

of employment already comprises three full consecutive calendar years. In the Supreme Court case above referred to, however, it was held that the completion of three consecutive calendar years of employment, namely, September, 1909, to September, 1912, is sufficient in itself to confer tenure protection. The Court in considering the employment period above referred to decided that the Board might have made the third contract for "less than a year, or it could have given thirty days' notice during the year * * * and thus cut off the employment short of three years. Not having done so the Act of 1909 applies." That the actual completion of the three full calendar years of employment, however, is essential to tenure is equally emphasized in the Davis *vs.* Overpeck case in the Court's very ruling above referred to as to the destructive effect upon tenure in the event that by any one of the enumerated methods the employment is made short of three calendar years. The same theory and the insufficiency of the completion of merely three academic years or teaching periods are reiterated in the case of Benton F. Allen *vs.* Belleville Board of Education in which the Commissioner's decision (sustained by the State Board of Education in December, 1928) commenting upon the Davis *vs.* Overpeck opinion held that

> "Even though, therefore, all necessary teaching were completed under such a contract in June leaving a non-teaching period of two months, it was very evident from the Supreme Court ruling that any provision in such contract by which it was to end in August, for instance, or any time short of a calendar year, would result in a loss of tenure protection."

Moreover, regardless of what additional requirements the State Board of Education may be construed to have made in the case of Brandes *vs.* Hoboken, Welch *vs.* West Orange, and Shapiro *vs.* Paterson, there is no question but that in all of them the mere completion of three academic years was held to be insufficient to confer tenure protection. In the case of Shapiro *vs.* Paterson, the State Board decision in commenting on three academic year appointments stated that

> "Where the services of a teacher are not continued after the expiration of three years, the probationary period provided by the act, there is no protection under it. * * * Inasmuch as the appellant's employment is not continued beyond three years, he was not protected by the Statute."

It is fortunate, as far as the public school system is concerned, that a less than three calendar years' period of employment will not confer tenure protection, since Boards of Education usually desire to test a teacher's efficiency by employment for three academic years without incurring tenure obligation, and if the completion of three such academic years of from September to June would confer tenure, the Board would then be compelled in order to prevent tenure to stop a teacher's employment prior to the completion of the third academic term, which would be highly deleterious to the interests of the pupils and would not afford the Board of Education the desired opportunity to view

the teacher's work for the three full teaching terms for the purpose of ascertaining her efficiency.

It is the Commissioner's opinion that, as stated in the case of Benton F. Allen *vs.* Belleville,

> "the phrase 'period of employment' as used in the tenure law means the term of employment stipulated in the teacher's contracts"

and that such employment does not begin with the execution of the agreement. A contract may be signed at one time but provide for employment at a much later date and the intervening period with possible occupation elsewhere cannot consequently, in the Commissioner's opinion, possibly be considered as one of teaching employment. Miss Carroll's first employment term stated in her contract to begin September 7, 1926, and her employment under a third contract, if allowed to continue, would have ended September 4, 1929. It is thus apparent that neither the completion of three academic years nor the three contract years specified in the agreements (which although only a few days short are nevertheless short of three calendar years) would confer tenure protection, and that therefore any illegal termination of services on August 15, 1929, prior to the completion of the contract term (even if such illegality be considered) would violate no potential tenure rights of appellant.

The Commissioner, moreover, can see no merit in appellant's contention that there can be no legal employment of a teacher from September to September since such employment would extend beyond the school fiscal year and that therefore the School Law must be construed to require three consecutive school years, namely, from July 1st to June 30th as a condition precedent to tenure protection. The Supreme Court decision in the case of Davis *vs.* Overpeck above referred to recognizes terms of employment from September to September and this fact alone would appear to be all the justification the contracts in the case under consideration would require. The contract terms do, it is true, extend into the life of the succeeding Board of Education, but they also expire during such official life and there is no usurping of the Board prerogatives which is all that is prohibited in Brown *vs.* Oakland p. 277 1928 Compilation of Decisions and Fitch *vs.* Smith, 26 Vroom 326. Such contracts do also extend beyond the conclusion of the school fiscal year of July 1st to June 30th, and consequently beyond the current appropriation for that year, but all contracts of municipal bodies must in the Commissioner's opinion be considered as conditional upon the making of whatever appropriation is necessary, and only become ultra vires with payments or disbursements under them consequently illegal when such necessary appropriation is not actually made. It is the Commissioner's opinion therefore that the term of employment named in a teaching contract may legally run from September to September, that such employment was plainly provided for in all of the contracts under consideration and that it was the intention of the tenure law to require the completion of three such calendar years of employment in order to gain tenure protection.

However, granting appellant's theory to be true that the only legal basis for tenure protection is the completion of three school years, namely, July 1, 1926,

to June 30, 1929, there is no possible way of construing the contracts under consideration so as to fulfill that requirement. The best appellant could contend for would be that the execution dates be considered as the beginning of the employment, since according to the Allen *vs.* Belleville case above quoted employment cannot possibly precede the execution of the contract, but even this date of execution in 1926 was shown to be July 26th instead of July 1st as contended by appellant to be necessary. However, as above stated, the term of employment, which in the opinion of the Commissioner must be considered to begin not with the date named in the contract, was distinctly stipulated to begin on Sepember 7, 1926, and there is no legal method of varying the terms of a written contract.

It is therefore the opinion of the Commissioner that the termination of appellant's services on August 15, 1929, by exercise of the mutual termination clause in her contracts was entirely legal, and that even if such termination had been illegal, appellant could have suffered no violation of potential tenure rights since her employment terms named in the contracts if allowed to be completed on September 4, 1929, would have been short of the three consecutive calendar years necessary under the law to gain tenure protection.

The appeal is accordingly hereby dismissed.

December 10, 1929.

Decision of the State Board of Education

This is an appeal by Elizabeth Carroll, Marguerite Tansey and Mathilda Dunham, from the decision of the Commissioner of Education, wherein he sustained the Board of Education of the Township of Matawan in terminating the contracts of the appellants and held that appellants were not entitled to tenure of office under Chapter 243 of the Laws of 1909, commonly known as the "Tenure of Office Act."

We concur in the opinion of the Commissioner of Education on the various points raised by appellants, and the opinion of the Commissioner is so comprehensive that we deem it unnecessary to say more, except that the opinion of the Commissioner appears to relate wholly to the case of Elizabeth Carroll, and we wish it understood that, in adopting it as our own, it is to be deemed a disposition of the cases of all three appellants.

The appeals are therefore dismissed.

May 10, 1930.

Decision of the Supreme Court

The prosecutrix was employed by the Board of Education of the Township of Matawan under three consecutive written contracts.

The first was dated and executed July 15, 1926 providing for her employment for the term of one year from September 7, 1926. The second was dated and

executed May 19, 1927 and provided for her employment for one year from September 1, 1927. The third was dated and executed June 13, 1928 and provided for employment for one year from September 4, 1928. In each contract there was a provision that either party might terminate the agreement upon thirty days notice to the other.

This provision was not exercised by either party under the first two contracts, but was exercised by the Board of Education of Matawan under the third contract by that Board giving notice to the prosecutrix on July 15, 1929, that her services would terminate on August 15, 1929. She appealed to the Commissioner of Education asserting that her employment could not be thus brought to an end because of the provision of Chapter 243, P. L. 1909. That officer ruled against her and her appeal was dismissed. She then appealed to the defendant, State Board of Education, and that body affirmed the finding and judgment of the Commissioner of Education.

This writ brings up for review such judgment. Chapter 243, P. L. 1909, provides:

> "The service of all teachers, principals and supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board * * * ".

It may be here stated that the case before us does not show that the Board of Education of the Township of Matawan fixed any shorter period. We are, therefore, concerned only with the provisions of the statute.

The decision of the Commissioner of Education, affirmed by the defendant was, that the term of service of the prosecutrix commenced September 7, 1926 and her three years of service would not have expired under her three contracts until September 7, 1929 and therefore, the option to terminate under the last contract exercised by notice of July 15, 1929, effective August 15, 1929 left her without a full three year period of service and therefore, she was without the benefit of Chapter 243, P. L. 1909.

This, we think, was a correct finding upon the law and facts.

Prosecutrix urges to the contrary as follows:

1. That the three years of service was completed in that under her first contract she taught from September 7, 1926, until the end of the school sessions in June, 1927; under her second contract she taught from September 1, 1927, until the end of the school sessions in June, 1928, and under her third contract she taught from September 4, 1928, to the end of the school sessions in June, 1929, and that in each instance the Board of Education waived performance and the teaching from the close of sessions in June of each year.

Be this as it may, prosecutrix under no circumstances would have performed three calendar years of service until September 7, 1929; three years from the commencement of her first contract of employment.

2. That prosecutrix completed more than three calendar years of service under her three contracts.

This is argued upon the fact that her first contract bears date July 15, 1926, and the date of discontinuance of her services under her third and last contract was August 15, 1929. Her insistence falls short, however, because, while her first contract bears date as of July 15, 1926, by its terms it did not become operative, so far as the performance of any service is concerned until September 7, 1926; consequently her "period of employment" did not commence until that date.

3. It is next contended that the contracts of the prosecutrix and the statute in question should be considered and construed in connection with the statute fixing the school year as from July first of one year, until, June thirtieth, of the year succeeding.

That statute is 4 Comp. Stat., p. 4804, Sec. 238: "The school year shall begin on the first day of July and end at the thirtieth day of June" and has been construed to be "for fiscal and administrative purposes," Wooley *vs.* Hendrickson, 73 N. J. L. 14 at p. 20.

We think the Tenure Act, Chapter 243, P. L. 1909, supra, cannot be construed in the light of the statute last referred to, but, on the contrary with the assistance of the statute, 4 Comp. Stat. 4973, Sec. 10, which is a legislative guide given for the purpose of construing the language of the law making body and which provides:

> "That the word 'month,' when used in any statute shall be construed to mean a calendar month and the words 'a year' shall be construed to mean a calendar year."

So construed the prosecutrix was not in the position of a teacher engaged to teach and teaching "after the expiration of a period of employment of three consecutive years in that district" when her employment was terminated under the terms of her third contract.

The writ will be dismissed, with costs, and the judgment under review affirmed.

November 24, 1930.

FAILURE TO PROPERLY INSTRUCT AND MAINTAIN DISCIPLINE SUFFICIENT CAUSE FOR TERMINATION OF TEACHER'S CONTRACT

J. S. WEEKLEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Testimony in this case was heard by the Assistant Commissioner of Education on June 26th and July 23, 1929, in the City of Hackensack and reveals the following facts:

Appellant was employed as physical training teacher in the public schools of Teaneck Township under three successive contracts for one year each beginning July 1, 1926, and in each of such contracts there was a provision for termination by either party upon sixty days notice to the other. On April 27, 1929, appellant received an official notice from the district clerk to the effect that his contract would not be renewed for the year 1929-30 and that "in accordance with your contract, notice is hereby given of the termination of same at the expiration of said contract". On May 31, 1929, the following resolution was adopted by the Board of Education:

> "WHEREAS, Mr. Leon C. High, principal of the Teaneck High School, has filed with the clerk of this board certain charges against Mr. J. S. Weekley and
>
> WHEREAS, This board considers that Mr. J. S. Weekly has violated his contract with it and this board deems it wise to terminate Mr. J. S. Weekley's services as a teacher, and
>
> WHEREAS, Mr. J. S. Weekley is not yet under tenure of service, now therefore be it
>
> *Resolved,* That Mr. J. S. Weekley be forthwith dismissed as a teacher."

Mr. Weekley was accordingly notified by the Board of the above action and thereupon proceeded to bring this appeal.

Even had the Teaneck Township Board of Education decided to rely upon its original action of April 27, 1929, in terminating appellant's services at the expiration of the then existing contract, namely June 30th of that year, such action would in the Commissioner's opinion have been entirely effective without the later dismissal of May 31st, since appellant could not be said to have been employed for three full consecutive calendar years and thus to have attained tenure protection on June 30, 1929, in view of the terms of his first contract of

1926. It appears that the 1926 contract while predated as to the term of employment to July 1st, was not actually executed until August 3rd of that year and there was no other evidence of contract relationship prior to that date. It was held by both the Commissioner and State Board of Education in the case of Benton F. Allen *vs.* Belleville Board of Education, in which a teacher's contract was predated to July 1, 1925, that there could not have been "any actual period of employment or contract relationship between the appellant and the employing board of education prior to the date of the execution of the contract which was August 3, 1925, since the minutes of the meeting of the Board of Education itself indicated the appointment of appellant on that date." While the Supreme Court in the case of David *vs.* Overpeck Township Board of Education (reported on p. 187 of the School Law) definitely upheld the theory that three consecutive calendar years of employment would confer tenure protection upon a teacher or principal, it was equally definite in implying that a less period of time would prevent such protection. Appellant could not, therefore, in the Commissioner's opinion have in this case been under tenure on June 30, 1929, but on the contrary could not have gained such protection until August 3, 1929.

As above stated, however, the respondent on May 31, 1929, a month before the expiration of the contract, took action to dismiss appellant at once from its service, and the legality of this latter dismissal remains for the Commissioner to decide.

Upon first impression it might seem strange that the Board of Education if dissatisfied with appellant's services, should have allowed him to continue his employment until the end of the year, and then, when tenure protection appeared inevitable, have taken the dismissal action which it did take on May 31st. The testimony shows, however, that the Teaneck Township Board of Education was actually dissatisfied with the appellant early in April after the high school principal had inspected Mr. Weekley's work and made his adverse cricitism. The Board of Education, however, evidently was under the impression that in notifying appellant on April 27th that his services would not be required after the conclusion of the existing contract, it was effectively exercising the sixty days mutual termination clause in the contract so as to prevent tenure protection from accruing. Termination of services under such a notice clause in the agreement would not be in the nature of a dismissal but merely the exercise of a mutual term in the contract and hence would permit of no contest by the teacher. Any Board of Education, therefore which is dissatisfied with a teacher would be very likely to adopt the latter method of procedure, which precludes the possibility of a successful appeal. When it appeared to the Board of Education, however, in this case that the notice procedure was likely to prove ineffective in preventing tenure, it then took the dismissal action of May 31st, above referred to.

Section 167, Article VIII of the 1928 Compilation of the School Law provides as follows:

> "In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a board of education shall, upon

> appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the board of education whether such teacher shall or shall not teach for the unexpired term."

Under the above statute the burden of proving good cause for the dismissal of appellant falls upon the Teaneck Township School Board, and it must accordingly be determined whether such dismissal is justified by a preponderance of the evidence. In the Commissioner's opinion the vital factor in determining the question of preponderance of evidence produced by the respondent is the weight to be given the testimony of the high school principal, Leon C. High, concerning appellant's methods of instruction and discipline, since these are the only important grounds of dissatisfaction with Mr. Weekley disclosed by the testimony.

H. H. Foster, Professor of Education, Beloit University, in his work on high school administration states that

> "As the responsible head of the school, the principal must see that the results for which the school exists are forthcoming. This means that he must be an organizer and supervisor of instruction as well as of management; that he must know what things should be done, how they should be done, and that they are done. . . . In fact his position is to see that things get done."

W. A. Cook, Professor of Education, University of South Dakota, in his work upon the same subject states that

> "The principal sets the standard of discipline for the school. * * * The principal must establish a general standard of discipline for corridor and study hall. * * * His form, wherever seen about the school, is the shibboleth and reminder to all of the general and specific requirements which the school lays upon conduct. * * *"

In giving to the testimony of a high school principal the weight naturally incident to the important status universally conceded his office, it is of course assumed that such particular principal is not only unprejudiced but possesses himself the training, ability and experience necessarily implied in all such characterizations of his office as those above quoted; and in the present case the value of the testimony of the principal, Mr. High, was in no way impaired by any revelation on cross examination or otherwise of any lack on his part of the usual training, ability and experience necessary to the successful conduct of his office or of any prejudice whatever against the appellant. There is no question but that the testimony of the principal was highly adverse to the appellant's methods of conducting his classes and his maintenance of order and discipline. Mr. High testified that he made five different inspection visits to Mr. Weekley's classes, namely, on March 20, 21, 25 and 27 and on April 9, 1929, of about twenty minutes each, and when asked for the details which his observation on those occasions revealed he testified in part as follows:

"His pupils were in groups talking and doing nothing constructive. The line-up at the beginning for taking the roll was disorderly. Pupils were talking to each other and in one case I saw a pupil writing with a book open. I found on the visit of March 27th, when Mr. Weekley had specifically asked me to come and was prepared, that more than half of the pupils were not participating. Pupils were standing in one corner talking. Some were seated on mats, and two boys were standing talking apart. I specifically called Mr. Weekley's attention to these boys. I spoke to them. Some of the boys listened and then went back and talked again. I saw the boys wrestling and boys were receiving no instruction and Mr. Weekley was not with them. I saw two boys boxing or rather pummeling each other and boys surrounding them calling at them. I found that when Mr. Weekley blew his whistle there was practically no attention. He had to blow several times before tney took notice, and not more than half were listening to what was being said."

Mr. High also testified that Mr. Weekley confessed to him about the second week in February

"Frankly, I can't make these boys do what I tell them to. I tell them to do another thing and they shoot for baskets."

The principal further testified to three or four instances while he was at lunch in the school cafeteria of disorder in the corridors by the boys of whom Mr. Weekley was then in charge. Mr. High stated on the witness stand that he

"frequently found pupils outside of Mr. Weekley's room; in fact almost invariably I have found it so noisy that I had to speak to Mr. Weekley about the noise. He was fully aware of it."

There were also instances of loitering in the auditorium by boys who had entered through the area of which Mr. Weekley was in charge, and various other breaches of discipline testified to by the principal. Mr. High's analysis of the situation in appellant's classes was fully set forth in his letter to appellant on March 28th, and was introduced as evidence at the hearing. The letter was as follows:

"March 28, 1929.

Mr. Weekley:

You have already indicated when you asked me to see your class on Wednesday morning, March 27, that you realize that I have not been satisfied with the work in Physical Education for boys. This is a fact, and in order that there may be no misunderstanding concerning why I am dissatisfied and what I believe should be the general outline of a more satisfactory program, I am giving you this written statement.

I have already called your attention to a number of details which seemed to me to be given inadequate attention. Even while work was being carried on in the three schools before the new building was opened, I pointed out to you frequently what seemed to me a very serious lack of organization in

the Physical Education work. Particularly in ordering equipment for the new building I emphasized the necessity for a far greater care of equipment than I had ever seen before, when soccer balls were simply given to the pupils for promiscuous use. I called your attention to the complete lack of sportsmanship, the lack of organization and the 'rough house' and rowdy tactics on the play grounds. When I did call your attention to these things you blamed these results on the grade teachers through whom it was necessary for you to work.

Since we have been in the new building, it has seemed to me that there has not been any real improvement in the work. The class that I saw on Wednesday morning did show better results than I had seen previously, but even in that class I think that I am safe in saying that fifty percent of the boys were doing practically nothing, while most of the work that was done was done in exactly the same way, without adequate direction and leadership, as a group of boys just fooling around would do it.

In general, to be perfectly frank, it has not seemed to me that there was any education to the work, and that there was positive harmful result coming from the utter lack of discipline. The boys pay comparatively little attention when you blow your whistle. When you are making announcements, with the boys supposedly in the line for attention, they are talking to each other, fooling around, or even doing work for other classes. The line that they form when told to line up is absolutely irregular and has none of the snap which should enter into Physical Education. It seemed to me a serious thing when I had to leave my lunch one day to go out and suppress the yelling and cat-calls of the group passing through the corridor, particularly when I found you in their midst doing nothing to stop it. Your classes straggle in when reporting for gymnasium work and straggle out when leaving. Nearly every time that I have come down to the gym during your class time I have found boys loitering around the corridor or in the locker rooms. Now when the classes are going down to the athletic field instead of going as an organized group they straggle down, some on the dead run, others loafing along, and all going without organization. The language of the boys on the athletic field particularly is far from elevating, and I have already called your attention to the lack of supervision in the shower room. Quite frequently, too, boys are fooling around in the gymnasium with no one in charge at all. Incidentally too, your supply room is in a very untidy state. And finally, I have seen no evidence of corrective work or of any special training, the proper adjustment of which alone justifies the physical examinations that were given.

This is a very blunt statement, and in making it I am not unmindful of some of the handicaps you have in your work. It is always a handicap not to be able to lock a portion of the gymnasium. It is very unfortunate that the locker room is so inadequate in showers and space. It is unfortunate the stage is really too small for decent Physical Education work, at least for boys and girls at once. Recognizing these things however, I know still that a much superior type of work could be done and it is these very handicaps that make a more thorough organization of the work essential.

> Constructively, there are certain things that seem to me to be basic in a real program of Physical Education. The first is absolute cooperation. This expresses itself in various forms, such as complete attention to the instructor, prompt performance of directions, fullest regard for the rights of others and giving one's best to whatever exercise is being undertaken. There is no value in a listless exercise and there is positive harm when many of the classes merely stand around without participating at all. The second fundamental is adaptation of the work to individual needs. So far as I can see, your attention is being given primarily to those boys whom you have pointed out as 'good athletes' when they are the ones who need it least. It is the listless boys, the handicapped boy, or the boy with some special defect who needs our attention much more than the boy who is constantly in need of restraint lest he give all his time to physical pursuits. A third fundamental is all-around development, including a variety of exercise which will develop all muscles and organs and which will teach co-ordination. At the same time, care must be exercised in a number of our activities, such as apparatus work, wrestling, etc., lest the unskilled attempt at these things or the undirected and unsupervised attempt results in serious harm. In this same connection, of course, is the Hygiene work, where the right sort of mental attitude toward physical education and the right sort of information regarding physical action are important. In short, there should be as carefully planned a course of study with as definite aims in Physical Education as in any other subject. In fact, health is put down under the seven cardinal principles as primary in our scheme of instruction.
>
> "When you have read this I hope that you will try to check up in your work and then give me an opportunity to discuss it with you if you care to discuss it."

Appellant stresses the fact that no fault was found by the Teaneck Township Board of Education with his work as physical instructor for two years and a half. It is apparent from the testimony, however, that appellant's difficulties in management of pupils and instruction in physical training technique began with the organization of the high school in the middle of the last year and the resulting necessity of dealing with older pupils.

Voorhees in "The Law of Public Schools" states that

> "The *teacher* is responsible for the discipline of his school and for the progress, conduct and deportment of his pupils, and it is his imperative duty to maintain good order and to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for the position."

In view, therefore, of the testimony of the high school principal alone which could be successfully rebutted only by professional testimony of equal or higher standing, which was not produced by the appellant, it is the opinion of the Commissioner that appellant's unfitness for the position of physial training instructor in the Teaneck Township schools was proved by a clear preponderance

of the evidence, and that the action of the Board of Education on May 31, 1929, in immediately terminating his services was legally justified.

The appeal is accordingly hereby dismissed.

August 26, 1929.

DECISION OF STATE BOARD OF EDUCATION

This is an appeal from the decision of the Commissioner of Education, in which he sustains the action of respondent in dismissing the appellant as a teacher.

Appellant was employed by respondent as a teacher, by a contract in writing dated August 3, 1926, "for the term of one year *from the first day of July, 1926*"; by a second contract dated June 30, 1927, "from the first day of July, 1927, to the 30th day of June, 1928"; and by a third contract dated June 30, 1928, "for the term of one year from the first day of July, 1928". From the beginning of appellant's employment to about February, 1929, his duties were teacher of physical education of the elementary schools of Teaneck Township. From February, 1929, to the time of his dismissal, he was teacher of physical education in the high school of said township, then organized.

On April 27, 1929, respondent wrote to appellant:

> "This is to advise that at a meeting of the Board of Education, held on April 17, 1929, you were not reappointed for the school year 1929-1930.
>
> "In accordance with your contract, notice is hereby given of the termination of same at the expiration of said contract."

On May 20, 1929, appellant filed a petition of appeal with the Commissioner of Education, in which he prayed that an order be issued by the Commissioner of Education to the respondent, declaring appellant to be protected by the Tenure of Service Act of 1909, and entitled to continue in the service of the respondent Board as director of physical education.

On May 31, 1929, the respondent board at a meeting held on that day unanimously adopted a resolution, which, after reciting that Mr. Leon C. High, principal of the Teaneck High School, had filed with the clerk of the Board certain charges against appellant, that the Board considered appellant had violated his contract with it, and that the Board deemed it wise to terminate appellant's services as a teacher, and reciting further that appellant being not yet under tenure of service, it was resolved that appellant be forthwith dismissed as a teacher. This action of the Board was communicated to appellant on the following day. It may be said here that no appeal from this action of the Board of Education was taken. The further proceedings in the case were based on the petition of appeal filed on May 20, 1929, and in the event it were held that appellant was not under tenure and that he was dismissed without good cause, the result would be he would be entitled to compensation for the full term for which his contract, then in force, was made. (Sec. 167, Art. VIII of the School Law, Compilation of 1928.)

An answer to the petition of appeal was filed by respondent, in which it denied appellant was employed by it for three consecutive years and that he was entitled to tenure of office, and further pleads the notice of April 27, 1929, of its intention to terminate appellant's employment, and that it had dismissed him as a teacher on May 31, 1929, before the expiration of a period of employment of three consecutive years. The case was brought on for hearing before Assistant Commissioner of Education Strahan. Voluminous testimony was submitted, briefs were filed by counsel for both parties with the Assistant Commissioner, and a decision was rendered by the Commissioner of Education in which he held that appellant was not under tenure, and that he was not dismissed from his employment without good cause, and sustaining the action of the respondent board which was complained of. Appellant thereupon appealed from the decision of the Commissioner to this Board. Upon the appeal to this Board, counsel were heard in oral argument, and they have each submitted briefs. The points raised are:

First: Whether appellant was under tenure.

Second: Whether he was dismissed as teacher without good cause.

Section 179 of the School Law Compilation of 1928, page 120, provides that:

> "This service of all teachers, principals, supervising principals of the public schools in all school districts of this State, shall be during good behavior and efficiency after the expiration of three consecutive years in that district, unless a shorter period is fixed by the employing district."

Appellant contends that, having been employed by three successive yearly contracts, he is entitled to the protection of the statutory provision above quoted. It appears, however, his first contract, whereby he was employed for one year from July 1, 1926, was made on August 3, 1926, and it does not appear there was any contractual relation between him and the respondent, or that any service was rendered by him between July 1 and August 3, 1926. We are of the opinion that a Board of Education cannot, by predating the commencement of a period of employment embodied in a contract with a teacher, confer the right of tenure upon such teacher. The statute requires three consecutive years of employment. If that period can be fixed by an arbitrary date, without reference to actual employment, then a board who desired to favor a teacher in securing tenure might make a contract with such teacher at any time during the year, and by predating the commencement of such employment, substantially reduce the required period of three years. Nor can such action by an employing Board be deemed to "fix a shorter period" of employment as entitling to tenure. Such action should be of an affirmative character by the Board in meeting assembled, and not be left to inference. In a case on all fours with the present one, in so far as the right to tenure is concerned, in an opinion of the Commissioner of Education, which was affirmed by this Board, it was said:

> "It is apparent, from the very nature of the Teachers' Tenure Law, that the stipulated period of employment for a public school teacher is intended to actually continue for the full time, so that the Board may determine

whether it desires the teacher for a permanent position. In the present case there could not possibly have been any actual period of employment or contract relationship of any kind between the appellant and the employing Board of Education, prior to the date of the execution of the contract, which was August 30, 1925, since the minutes of the meeting of the Board of Education itself indicates the appointment of appellant on that date. The predating of the contract to July 1, 1925, even though duly authorized by the Belleville Board of Education, could not possibly create a period of employment between July 1 and August 30. Any such attempt is nothing but a fiction, and in the Commissioner's opinion a fictitious period of employment was not what the Teachers' Tenure Law intended. If carried out to its logical conclusion, the theory of predating a teacher's contract might result in the attaining of tenure immediately upon the first employment, since the contract term could be predated three years and the protection of the act thus gained at once upon a period not of actual but of fictitious employment. This, in the opinion of the Commissioner, is entirely subversive of the real intention of the Legislature as expressed in the Teachers' Tenure Law."

Benton F. Allen *vs.* Belleville Board of Education, decided August 18, 1928. See also the decision in the case of Shapiro *vs.* Board of Education, 3 N. J. Misc. page 406.

We conclude appellant was not under tenure at the time of his dismissal and that tenure would not have become vested in him had he actually continued in his employment until the expiration of his contract for one year from July 1, 1928.

The second contention of appellant, that he was dismissed from his position of teacher without good cause, and in violation of his contract of employment, we also find to be without merit. The determination of this contention involved a question of fact. Much testimony was submitted by the Board of Education, tending to establish the omission of appellant to observe the rules promulgated by the principal, and his inability to maintain proper discipline in his classes, and dissatisfaction by the board with his services; this evidence was opposed by that appellant and his witnesses. Where the trial court has considered evidence offered by the parties, has had the benefit of observing the witnesses while testifying, and it has reached a conclusion of fact, an appellate body will not disturb such finding where there is any evidence to support it. Faux *vs.* Willett, 69 N. J. L., page 52.

Appellant contends the Commissioner of Education erred in considering a letter dated March 28, 1929, written by the principal to appellant, in which the principal calls attention to the deficiencies of appellant in the conduct of his classes.

We find, after examination of the record, that this letter was an exhibit in the cause, and the Commissioner was entitled to consider it in weighing the evidence of the parties.

Appellant further contends the Commissioner erred in excluding testimony of witnesses as to appellant's ability. In our opinion this ruling was correct.

It follows the decision of the Commissioner of Education must be affirmed. December 7, 1929.

BILATERAL PROVISION OF TERMINATION OF CONTRACT BINDING ON BOTH PARTIES

JESSICA B. PALMER,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Jessica B. Palmer was employed by the Board of Education of the Township of Weehawken by contract for the term of five months from the first day of February, 1927. Contracts thereafter were executed for terms as follows: Ten months from the first day of September, 1927; one year from the first day of September, 1928; and one year from the first day of September, 1929. Below the signature on the last contract there was typed the following:

> "It is hereby agreed by the parties hereto that this contract may be terminated by either party giving to the other sixty days notice."

Prior to the execution of this last contract there appears to have been a discussion among the Board members as to whether Miss Palmer should be re-engaged, and it is evident that such discussion was provoked by the thought that she would upon such employment be thereafter protected by the Tenure of Office Act. The minutes of May 9, 1929, contain the following:

> "After some discussion over the question of re-appointing Miss Jessica B. Palmer, a teacher in the high school, for the next school year, Mr. Coyle seconded by Mr. Hollander, moved that the Board of Education give a contract to Miss Palmer for the coming school year. Motion carried by the following vote: Ayes—Messrs. Coyle, Hollander and Paul; Nays—Messrs. Fetterly and President Eisinger."

and the minutes of June 13, 1929, contain the following:

> "The following resolution relative to the salaries to be paid to the various principals and teachers for the school year, 1929-1930, was presented and read:
>
> *Resolved*, That the following named principals, teachers, and special teachers, be and they are hereby appointed to teach in the Weehawken

Public Schools from the first day of September, 1929, to the 30th day of June, 1930 (with the exceptions of those marked (**) whose salaries are to be on a 12 month basis beginning July 1, 1929) at the salary opposite their respective names.

Jessica Palmer $2325.00.

Etc.

Mr. Fetterly, seconded by Mr. Hollander moved for the adoption of the foregoing resolution, which was carried by the following vote: Ayes—Messrs. Fetterly, Hollander, Paul and Pres. Eisinger. Absent—Coyle.

Resolution suggested by Mr. Diebold."

There was an executive meeting of the Board of Education prior to the meeting of June 13th at which those present evidently agreed that all contracts for that school year should bear the 60-day notice clause and in accordance with this understanding all contracts were prepared with the notice clause at the bottom, the same as the 1929 contract of Miss Palmer, but neither the records of June 13th nor the testimony at the hearing discloses any action by the Board about inserting the notice clause in the contracts.

A contract was presented to the appellant about June 25, 1929. After petitioner received the contract and before signing it Miss Palmer testified that she called the attention of some members of the Board of Education individually to the notice clause and was told by one of the members, Mr. Hollander, that it meant nothing, that it would not be acted upon, and that if it should be, he would assist her; after which she signed and returned the contract. Mr. Hollander denied that he made any such statement.

On November 14, 1929, the Board acted under the authority of the notice clause provision and terminated the contract of petitioner as of January 15, 1930.

It is the contention of the petitioner that her employment on May 9, 1929, supplemented by the resolution of June 13th constituted an irrevocable contract, that the 60-day notice clause included in the agreement was contrary to the rules and regulations of the employing Board, and that the secretary and others preparing the contract acted beyond their authority in inserting the notice provision, which is an illegal and divisible part of the contract.

The Board of Education elected Miss Palmer as shown by the resolutions of May 9th and June 13th, and the district clerk thereafter proceeded to prepare the contracts. It is evident that the inclusion of the 60-day notice clause was instigated by the conference of the members at an executive meeting of the Board at which not all members were present. When the contract was received by Miss Palmer, her attention was attracted to the notice provision because of it being typewritten, whereas, with the exception of the notice clause and spaces for the inclusion of names and dates, the contract was printed. Miss Palmer admits that she read the notice clause and called it to the attention of a member or members of the Board of Education. She did not present the matter to the Board of Education but signed the contract with the knowledge of the notice clause provision and continued to teach until she was notified on November 14th by the Board of Education that her contract was terminated as of January 15th.

It is practically the universal method of employing teachers, for the Board to elect and the district clerk to prepare the contracts. The terms of contracts should be determined by the rules of the Board. In the absence of written or printed rules, the acts of the Board may establish its rules. When a new Board is organized which does not adopt the rules of the preceding Board or does not adopt rules of its own making, the acts of the Board may be deemed to establish the rules under which it transacts business.

The Board of Education of the Township of Weehawken did not formally adopt rules in reference to the employment of teachers. In the absence of rules as to the terms of teachers' contracts, the district clerk and those acting with him in the preparation of the contracts assumed unwarranted authority in inserting the 60-day notice clause. The teacher could have refused to bind herself by such a contract or the Board could have disavowed the bilateral termination provision. It is evident that the Board acquiesced in the inclusion of the notice clause since on November 13th it acted to terminate the contract under its provisions.

The appellant signed the contract as presented to her by the district clerk. In a similar situation where the agent's authority was more questionable than that of the district clerk in this case, the Supreme Court in Marshall *et al., vs.* Hann, 17 N. J. L. 430 held:

> "Upon this point of the case, I have had some doubts, for reasons which it is not now necessary to state. But upon reflection I am prepared to reverse this judgment on the ground that this must be viewed either as a contract made by an assumed agent, and subsequently recognized by the principal, or as the evidence of an original agreement between these parties. If A contract as the agent of B, though in fact he is not so, yet if B think proper afterwards with a knowledge of the facts, to recognize such agent, and act upon it, he is undoubtedly bound. And so too, where the principal neglects to dissent within a reasonable time (some of the cases say on the very first opportunity) after being apprised of the unauthorized act, he will be presumed as assenting thereto, and bound accordingly. These principles are perfectly well settled, and will be found amply supported in their varied phases, by the following English and American cases. (Cases cited.)"

The appellant by signing the contract must be presumed to have assented to it. The binding effect of a written contract is set forth by the Supreme Court in the case of Naumberg *vs.* Young, 44 N. J. L. 431, as follows:

> "I think it may be considered as settled upon principle, as well as by the weight of authority, that where the written contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and that oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction, with respect to which the parties are contracting, as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract."

Since Miss Palmer signed the contract with knowledge of its provisions, rendered service and received salary in accordance with its terms, and was dismissed under its provisions, she has no legal claim against the Weehawken Township Board of Education.

The appeal is hereby dismissed.

April 29, 1930.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, who had not yet acquired tenure of office, signed a contract with the Weehawken Board of Education on June 25, 1929, which contained a clause providing that it might be terminated by either party upon sixty (60) days notice. Such notice was given her by the Board on or about November 14, 1929. She refused to accept it and appealed to the Commissioner on the ground that such termination of the contract was contrary to the rules and requirements of the Board, was illegal and void, and that the execution of the contract, in so far as the clause providing for termination by notice was concerned, was obtained from her by fraud. Testimony was taken and counsel were heard before the Commissioner who overruled the petition and dismissed the appeal on the ground that Miss Palmer signed the contract with knowledge of its provisions, rendered services and received salary in accordance with its terms, and that the termination of the contract was within the rights of the Board.

After careful consideration of the arguments advanced by petitioner's counsel, it is the opinion of the Committee that the Commissioner's conclusion was correct, and it is recommended that his decision be affirmed.

July 12, 1930.

RIGHT OF BOARD OF EDUCATION TO EXERCISE NOTICE CLAUSE IN TEACHER'S CONTRACT

MARY B. MANNION,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTHAMPTON, BURLINGTON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On September 18, 1919, a petition of appeal was filed in this office by the appellant, Mary B. Mannion, of Moorestown, Burlington County, setting forth the fact that she had been employed by the Northampton Township Board

of Education by written contract dated July 1, 1919, to teach in the Mount Holly public school for the term of one year from the eighth day of September, 1919; that after entering upon such agreement she was notified by the Board of Education on August 6, 1919, by letter, that a resolution had been passed by the Board demanding her resignation, and that upon her refusal to so resign, the contract between her and the Board would terminate September 6, 1919. Deponent further stated in her petition that before receiving the notification above mentioned she was asked to meet with the Board on August 5, 1919, which she did, and while there she learned of some charges that had been preferred against her, and that she was cross-examined at said meeting by several members of the Board upon said charges. Deponent also alleged that shortly after receiving the demand for her resignation mentioned above she requested from the Board of Education through her attorney a copy of the charges preferred against her, which the Board refused to furnish. Appellant concluded her petition with the request that the Commissioner of Education set aside the action of the Northampton Township Board of Education in so dismissing her from its service.

On October 14, 1919, answer was filed by the Northampton Township Board of Education with this office, alleging as its defense to the above petition the fact that the appellant was not dismissed by respondent in accordance with the provisions of the statute relating to the dismissal of teachers for cause, but that said contract was terminated by notice as authorized by its terms, namely: "It is hereby agreed that either of said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving to the other party one month's notice in writing of its election to so terminate the same," with which provision of the contract the respondent maintained it had strictly complied.

Hearing was not demanded in this case by either side, but it was decided to submit the matter to the Commissioner of Education to be decided on the pleadings and on briefs, which were filed by counsel for appellant and respondent on June 9 and June 18, 1920, respectively.

Inasmuch as the contract between the parties provided for its termination by either party at any time by the giving of one month's notice in writing, and inasmuch as respondent admits that the dismissal of appellant was not for cause but merely in the exercise by the Board of its alleged right to so terminate the agreement in conformity with the terms of the contract, the whole case clearly hinges upon the question of whether the parties to such an agreement may arbitrarily exercise the privilege given them by it of terminating said contract by giving the prescribed notice without the necessity of establishing any reason or cause for so terminating it.

Counsel for the appellant argues at some length in his brief that such a provision in a teacher's contract allowing its termination by notice is against the public policy of the State, since the statute (Sec. 149 of the School Law) provides that "in case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a board of education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract

shall have been made." Counsel for appellant cites a number of authorities, including Encyclopedias of Law and decisions from States other than New Jersey, in support of his contention that even though contracts may provide in their terms for termination by either party by notice to the other, such provision assumes by implication that the parties shall have just cause for exercising such privilege.

Counsel for respondent, on the other hand, cites in his brief authorities in the shape of decisions from still other States to the effect that provision in contracts for their termination upon notice by either party is entirely legal, inasmuch as such provision is bilateral in its effect and is a privilege that may be exercised by either party and a contingency contemplated by both parties when the agreement is made and entered into.

Counsel for the appellant further contends that the agreement made in July for services that were to commence in September could not be terminated by the Board of Education by notice before the services began, inasmuch as no cause for dissatisfaction with such teacher could have arisen before she commenced her term of service with the Board.

The above outline embraces the facts in this case and the contentions of counsel for both sides as to the application of the law to these facts.

As to the appellant's claim that she cannot legally be dismissed before the commencement of her services, it is my opinion that if the contract is to be interpreted according to its very plain language, namely, "it is hereby agreed that either of said parties to this contract may, at any time, terminate said contract, and the employment aforesaid, etc.," no other conclusion can be reached as to the intention of the parties than that the agreement might be terminated at any time after it was entered into. Terms cannot be read into a contract or others substituted for those contained in it, and nowhere does this particular contract provide that it may be terminated only after the services began, but on the contrary, provides for its termination "at any time," which must mean in the absence of any qualifying clause at any time after the agreement is entered into. It has been held furthermore in 146 Michigan, 64, that: "Where a contract between a school district and a teacher provided that she might be dismissed at any time on thirty days' notice, a notice to terminate is effectual, although given before the commencement of the services."

As to the appellant's other contention, that a notice clause in a teacher's contract is not effectual in terminating it, unless there be at the same time just cause for the Board's action in so doing, this is a matter upon which the New Jersey courts have never rendered a decision. While in some States outside of New Jersey the courts have held that teachers' contracts cannot be terminated without just cause even though the contracts contained provision for their termination at the option of the parties, it is held in an equal number of other States that such bilateral provision for termination is entirely legal.

In view, therefore, of the fact that the matter has never been judicially determined in New Jersey and that legal opinion in other States seems fairly divided on the subject, and in view of the fact that it is a well recognized principle of law that agreements may contain provision making them deter-

minable at the option of either of the parties, a principle which this Department has frequently upheld and sanctioned in matters involving teachers' contracts, it is the opinion of the Commissioner of Education that the Board of Education of Northampton Township committed no illegal act in exercising the privilege given it by contract of dismissing the said Mary B. Mannion from its service.

It is further the opinion of the Commissioner that the exercise of such privilege by the said Board of Education was justified at any time after the contract was entered into, whether before the actual services began or not.

The appeal is accordingly hereby dismissed.

July 2, 1920.

TEACHERS' TENURE OF OFFICE ACT NOT EFFECTIVE UNTIL THREE ACADEMIC YEARS OF EMPLOYMENT AND BEGINNING OF FOURTH YEAR

ROSALIE J. PALETZ,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

For the Appellant, James Mercer Davis.
For the Respondent, Lewis Liberman.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was employed by the respondent under contracts for the following terms:

September 1, 1929, to June 30, 1930
September 1, 1930, to June 30, 1931
September 1, 1931, to June 30, 1932
October 1, 1932, to June 30, 1933
September 1, 1933, to June 30, 1934

On or about May 3, 1934, the respondent Board notified Miss Paletz that her services would not be required after June 30, 1934, and from which date she has been denied employment. Appellant contends that her services were illegally terminated by the Board of Education and asks for reinstatement with compensation for the time she has not been permitted to continue her work.

The above employments show that the continuity of the appellant's employment was broken by her non-employment during the month of September, 1932. While she had been employed three consecutive academic years on June 30,

1932, the Board evidently did not employ her at the beginning of the fourth consecutive academic year for the very definite purpose of keeping her from coming under the protection of the Teachers' Tenure of Office Act, Chapter 243, P. L. 1909. Under this statute the courts have uniformly held teachers employed continuously for a period of less than three calendar years not to be qualified for its benefits.

After the break in employment of September, 1932, appellant served for less than two consecutive years. In the case of Chalmers *vs.* State Board of Education (168 At. 236), the Supreme Court, after holding that a person must be employed for a period of three consecutive calendar years to secure tenure protection, in answering counsel's contention that a break in the continuity of service resulting from a resignation and early re-employment constituted an evasion of the Tenure of Office Act and was, therefore, illegal, said:

> "It is clear that prosecutrix obtained no tenure rights until 'after the expiration of a period of employment of three consecutive years.' Therefore, having, by her own act, terminated the service before she became entitled to such rights, we are not dealing with a situation where an effort is made to avoid recognition of an existing right. *It was within the competence of either party to terminate the service before the right had been acquired,* and prosecutrix concedes that this would be lawful. This is what was done in the instant case.
>
> "This statutory right of tenure never having been acquired, the objection of the prosecutrix is without merit. Carroll *vs.* State Board of Education, 8 N. J. L. Misc. Rep. 859."

In the Chalmers case the continuity of the service was broken by the teacher, and in the instant case the break was caused by action of the Board of Education. Miss Paletz has, therefore, neither been employed for three consecutive calendar years, nor has she been employed for the fourth consecutive academic year. Counsel for appellant, however, contends that his client is protected under the provision of the amended Tenure of Office Act, Chapter 188, P. L. 1934, by the part reading as follows:

> "* * * or upon continuous employment during all the time that the schools are open in the district for a period of three calendar years from the date of original employment, provided that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect shall be counted in determining such period of employment."

It is argued by counsel that if appellant was employed at the time this act became effective, June 5, 1934, that she was protected in her employment if, at any time prior thereto, she had been employed all the time the schools were open in the district for a period of three calendar years from the date of her original employment, even though there might have elapsed a period of ten years between the present employment and the employment during such three consecutive years. It is the opinion of the Commissioner that the statute

contemplates only that service continuously in effect up to and including the date of its enactment. Appellant at the time this act went into effect, June 5, 1934, had taught continuously all the time that the schools were open for a period of less than two years.

Since Miss Paletz was not continuously employed during all the time the schools were open in the district for a period of three calendar years, including June 5, 1934, she is not protected by the provisions of the Teachers' Tenure of Office Act. The appeal is dismissed.

November 5, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

Appellant, Rosalie J. Paletz, was first employed as a teacher by the respondent board, September 1, 1929, to June 30, 1930, and thereafter from September 1, 1930, to June 30, 1931, and from September 1, 1931, to June 30, 1932. She was again employed on October 1, 1932, to June 30, 1933, and again from September 1, 1933, to June 30, 1934, when her service was terminated by respondent.

Appellant contends respondent was without legal right to terminate her service in that she was under tenure by virtue of Chapter 188, P. L. 1934, which provides:

> "The services of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board; or upon beginning service for the fourth consecutive academic year, or upon continuous employment during all the time the schools are open in the district for a period of three calendar years from the date of original employment; provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect shall be counted in determining *such* period of employment. An academic year shall be interpreted to mean the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

Respondent denies that appellant's service was of that continuous character which entitles her to tenure.

The Commissioner of Education held that appellant not having been employed after three consecutive calendar years, or for a fourth consecutive academic year, and not during all the time the schools in respondent's district were open for a period of three calendar years from the date of her original employment, she did not acquire tenure rights, and he dismissed the petition. Appellant appeals from that decision to this Board.

It is argued before us on behalf of appellant that on June 30, 1932, she had been employed for three consecutive academic years and that her re-employment

on October 1, 1932, was for the fourth academic year, and thus she came within the provisions of the amendment to the tenure act above quoted. This argument rests upon a false premise. Appellant was not employed "for the fourth consecutive academic year," as there was a hiatus of one month between the opening of school at the beginning of the fourth academic year, and the date of her employment in that year, so her employment was not "for the academic year."

Furthermore, it is contended that she was continuously employed during all the time the schools were open in the district for a period of three calendar years from the date of her original employment. That her original employment began on September 1, 1929, from which time she served until June 30, 1934, excepting the one month from September 1 to October 1, 1932, during which she was not employed. This contention assumes appellant's "original employment," for the determination of this case, was on September 1, 1929. To adopt the view of appellant, the employment of a teacher during all the time schools in a district were open during a period of three calendar years, followed by a period of years of non-employment, and the teacher then re-employed, she would immediately acquire tenure. We deem this view unsound. It has been held by this Board and affirmed by the Supreme Court on review, that a break in the continuity of a teacher's employment deprived her of the right to compute the time of employment before such break as a part of the period of employment requisite to acquire tenure rights. Chalmers *vs.* State Board of Education, 11 N. J. Misc., page 781. See also decision of State Board of Education in the case of Meech *vs.* Board of Education of the City of Wildwood, State Board Minutes, June 2, 1934.

The proviso contained in the amendment of 1934 is identical with that of the act before it was amended. It reads "that the time any teacher * * * has taught in the district at the time this act shall go into effect shall be counted in determining such period of employment." The words "such period of employment" have reference to the "continuous" character of the employment during which the schools in the district were open during a period of three calendar years immediately before the time it is claimed tenure was acquired. Upon re-employment after a break in the continuity of employment, there is a new and different employment and this then constitutes the "original employment" contemplated by the tenure statute.

We conclude that appellant was not under tenure when her service was terminated by respondent, and that the decision of the Commissioner of Education should be affirmed.

May 11, 1935.

DENIAL OF RIGHT TO PERFORM UNDER TEACHER'S CONTRACT DOES NOT RELIEVE BOARD OF RESPONSIBILITY FOR PAYMENT

ALYSS MAE HERSHAW,

Appellant,

vs.

BOARD OF EDUCATION OF ATLANTIC CITY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

After the opening of schools in Atlantic City in September, 1926, Alyss Mae Hershaw was elected as a teacher by the Board of Education for the remainder of that school term. At a meeting of the Board held March 31, 1927, she was re-appointed for the school year 1927-28 at a salary of $1,900. On March 28, 1928, Miss Hershaw was re-elected by the Board for the school year 1928-29 at a salary of $2,000. In each of the above instances she was duly notified of the Board's action and filed an acceptance of the offer. Appellant does not claim protection under the Teachers' Tenure of Office Act.

On or about April 17, 1928, the Superintendent of Schools, Charles B. Boyer, received a communication from Samuel Pries, of the Pries Company Store, which stated that the Guarantee Trust Company had received a check presented by the Pries Company bearing the names of Julia M. Collins, maker, and Alyss Mae Hershaw, payee and endorser, and that neither of these persons had an account with the bank. Mr. Boyer, who had been advised that there were questionable features about the check, sent for Miss Hershaw and asked her to bring Miss Collins to his office. Appellant stated that Miss Collins had gone to Philadelphia. Mr. Boyer then told Miss Hershaw that she was granted absence without loss of pay to April 27th to go to Philadelphia to bring Miss Collins to Atlantic City, and stated that unless she produced Miss Collins, her resignation should be sent to the secretary of the Board. On May 5th, the Superintendent wrote her stating that he had given her until April 27th to either produce Miss Collins or resign and as she had done neither, he would on May 7th turn over the check to legal authorities unless in the meantime he received her resignation. Miss Hershaw sent to Mr. Boyer, by special delivery, a money order covering the amount of the check and protest fees, but she did not resign. The testimony indicates that between the fifth and fifteenth days of May, Miss Hershaw and her counsel (p. 55) went to the office of Mr. Boyer, at which time counsel notified him that Miss Hershaw would not resign, but would report for duty the next morning. Counsel testifies that he saw to it that she did report.

On July 16, 1928, counsel for appellant, by letter to the Superintendent of Schools, demanded payment of the salary claimed to be due appellant for the months of May and June, 1928, and notified him that Miss Hershaw would report for duty in September, 1928. A similar letter was at the same time sent

to the Secretary of the Board of Education, who acknowledged the communication and promised further information within ten days, but the Board did not subsequently communicate with the attorney.

On September 8, 1928, the date set for teachers to report for assignment for the school year 1928-29, Miss Hershaw appeared at the office of the Superintendent and was notified that the Board had directed him not to assign her to a position. She thereafter left the school and did not return.

On March 4, 1929, counsel again made application for moneys claimed to be due appellant for May and June, 1928, and also her salary from September, 1928, to March, 1929. On April 10, 1930, appeal was taken to the Circuit Court, but jurisdiction was denied for the reason that petitioner had not exhausted her remedy under the School Law; and on May 20, 1931, counsel for appellant filed a formal appeal with the Commissioner of Education praying that he direct the Board of Education of Atlantic City to pay to petitioner salary for the months of May and June, 1928, and for the entire school year of 1928-29, in accordance with the contracts.

Counsel for respondent contends that a certain affidavit made by appellant in application for refund of premiums credited to her by the Trustees of the Teachers' Pension and Annuity Fund indicated that she resigned from the Atlantic City teaching staff in April, 1928.

This contention of the respondent can be readily disposed of. A resignation is not complete until it has been offered to and accepted by the proper authorities. Whether such application indicated resignation need not be considered. Appellant did not tender her resignation to the secretary of the Board of Education, which is the proper authority, and said Board, therefore, could not have accepted it.

Respondent contends further that appellant's failure to report on April 27, 1928, which was the date upon which her leave of absence terminated, amounted to a voluntary abandonment of her contract to teach.

In Oakes *vs.* Cedar County School District, 98 No. App. 163, the Court held:

> "The failure of a teacher employed for a specified number of months, to finish his term because of an attempted unauthorized dismissal, amounts to a voluntary abandonment."

The demand for a resignation was made by the Superintendent upon the recommendation of a committee of the Board, but without the official action of the Board and, therefore, was not legally authorized. Not only did the failure of appellant to return on April 27th (when her leave of absence terminated) constitute an abandonment of her position, but the fact that she did not return to her class or the Superintendent's office until about two weeks later is additional evidence of abandonment. She is not entitled to compensation for the months of May and June, 1928.

The single issue remaining to be decided is: Is appellant entitled to her salary under the contract for the school term 1928-1929? The only ground upon which appellant can justly claim said compensation is performance by her or prevention of performance by the respondent.

In Fry *vs.* Miles—71 N. J. L. 293, the Court held:

> "A person who seeks to recover the compensation provided by a contract for services rendered by him in accordance with its term must show either performance of the contract on his part or else that his performance was prevented by the willful or fraudulent act of the other party to the contract."

That appellant tendered her services and held herself ready and willing at all times to perform and that she was prevented from doing so by the respondent, is easily discerned from the testimony.

The board cannot justify its instruction to the Superintendent to refuse an assignment to the appellant on the ground that she had abandoned her previous contract. Appellant's abandonment of the contract for the school term of 1927-28 was not an abandonment of the contract for the term 1928-29. The contract for the term 1928-29 was not a renewal; the two contracts were separate and distinct, and, therefore, the evidence which supported the contention of abandonment under the 1927-28 contract, not being applicable to the 1928-29 contract, cannot be set up as a defense in relation to the latter contract. Furthermore, in line with the rulings of the Supreme Court in the cases of Gulnac *vs.* Board of Freeholders of Bergen County, 74 N. J. L. 543, and State *vs.* Rogers and Adrain, 56 N. J. L. 480, Boards of Education are not continuous bodies. Therefore, it was a differently organized Board which authorized the contract for the school year 1928-29 from that which made the contract for the year 1927-28. The Supreme Court also held in the case of Fitch *vs.* Smith, 28 Vr. 526, that a Board of Education cannot enter into a contract with a teacher for any term when said term is to begin after the Board has ceased to exist. In Ottinger *vs.* School District No. 25 of Jackson County, 247 S. W. 789, 125 Ark. 82, it was held:

> "Conduct under a previous contract is not ground for discharge of a teacher."

The abandonment by appellant of the contract for the 1927-28 term might be a good reason for not employing her in the first instance, but it would not be sufficient ground for her discharge after she had been employed for another school year.

Section 107, Chapter 1, Special Session 1903, provides:

> "In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a Board of Education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the Board of Education whether such teacher shall or shall not teach for the unexpired term."

The Board of Education of Atlantic City not having produced evidence to show good cause for denying appellant the right to render service under her contract for the school year 1928-29 nor having established abandonment of that contract, appellant is entitled to compensation for the full school term of 1928-29, and the Board of Education is hereby directed to pay to her the contractual salary for that year.

August 3, 1931.

Affirmed by the State Board of Education without written opinion March 5, 1932.

SALARY SCHEDULES TACITLY ADOPTED BECOME BINDING

LENA V. MORGENWECK, ET ALS.,
Appellants,

vs.

BOARD OF EDUCATION OF GLOUCESTER CITY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellants in this case who are married women teaching in the schools of Gloucester City and dissatisfied with their employment status and salary increments ask that the proceedings and practices of the Board of Education and the Superintendent of Schools of Gloucester City be reviewed to determine whether illegal discriminations have been made against appellants because of their sex or marital condition.

Hearings were conducted by the Assistant Commissioner in the Camden County Court House on August 30th, September 6th, and September 20, 1929.

Some testimony was presented which purported to show that Edith Cubley had been discriminated against because of marriage in that when the Cumberland Street School, of which she was principal, was demolished about three years ago, she was not given another principalship but was transferred to the position of teacher of a special class. The evidence, however, is to the effect that the principalship was clearly abolished and that Mrs. Cubley made no protest against being transferred. There appears to be no illegality in her transfer and it is the opinion of the Commissioner that she has no claim to either another principalship or higher salary based upon the transfer made at that time.

The petition in this case made no contention that Susan McInnes Norcross was illegally transferred although some evidence was offered to that effect. While the omission of such contention in the petition of appeal is sufficient to eliminate it from the hearing, it is the opinion of the Commissioner that the testimony did not disclose any illegality in the transfer of Mrs. Norcross.

All of the remaining testimony, which comprises a large majority of it, has to do with discrimination in relation to salary increments based upon sex and

marital condition with general application to all of petitioners. This testimony discloses that all of the married female teachers were given ratings by the superintendent indicating successful work would have entitled them to increases in salary under the general plan of salary increments as applied to the other teachers, but no increase in salary was given to any female married teacher. Mr. William Weiss, who according to the testimony (Vol. I, p. 48, 49) is a married man, received a salary increase over that of the last year upon a rating by the superintendent similar to that given to the married women teachers. All of the single women who received the ratings given to the married teachers were granted salary increments except two teachers, who, it appears, are now receiving salaries recognized as a present limit in that type of employment. The testimony of the members of the Board of Education as well as that of all the other witnesses permits of but one conclusion which is that the Board of Education definitely discriminated against the married female teachers, both in favor of the single women and married men teachers.

Does the discrimination in either respect above referred to violate either the general laws or the statutes applying to public schools?

The Commissioner is not called upon to decide whether a Board of Education has a moral obligation to pay married female teachers the same as single female teachers, but whether it has a legal obligation to do so. Many Boards do not pay teachers on the basis of merit, even if merit can be definitely determined, but they pay in accordance with their discretion and they have a right in contracting as public bodies to use their discretion in such matters as long as they do not commit illegal acts.

Counsel for appellants holds that such discrimination in favor of single as against married women teachers is against public policy in that it tends to restrain marriage and is, therefore, illegal.

The courts have ruled in a number of cases including Sterling *vs.* Sinkinson, 5 N. J. L. 888-959 that contracts which tend to restrain marriage are invalid, and counsel for appellant quotes from the decision of Chief Justice Kirkpatrick in the above decision as follows:

> "Marriage lies at the foundation not only of individual happiness, but also the prosperity, if not the very substance of the social state; and the law, therefore, frowns upon and removes out of the way every rash and unreasonable restraint upon it whether by way of penalty or inducement."

The Board of Education made no contracts which include any reference to the marriage state. It refused to increase the salaries of married female teachers and it is contended that the failure to increase the salaries of married female teachers tends to restrain the single female teachers from entering into matrimony.

In the citation above quoted the Court refers to "rash and unreasonable restraints in the way of penalty or inducement". Can the refusal by a Board of Education to increase in any year the salaries of married women be considered "a rash or unreasonable" restraint from marriage upon the single teachers employed in the system?

It has been the history of civilized countries that women do not marry with the expectation of becoming the sole support of the families of which they thus become a part. The United States Government in the pensioning of the widows of veterans, discontinues a pension when a widow again marries. It does not discontinue the pension of a veteran who marries. This action on the part of our government indicates that the male is recognized as the one to provide financially for the family, and that the withholding of the pension from the widow who again marries is not against public policy.

The salary of a teacher under tenure cannot be reduced. It seems improbable that the knowledge that a salary might not be increased would restrain a woman from marriage when the salary she was receiving before marriage would be continued to her and become a supplement to the salary of the husband. The Commissioner must, therefore, conclude that this discrimination so far as single and married women teachers are concerned is not against public policy.

Does the discrimination however in favor of married men teachers violate the laws applying to public schools? The only enactment with application to sex discrimination is Chapter 238, P. L. 1925, which reads as follows:

> "In the formulation of a scale of wages for the employment of teachers in any school, college, university or other educational institution in this State which is supported in whole or in part, by public funds, there shall be no discrimination based on sex, and the provisions of this act shall apply to appointment, assignment, compensation, promotion, transfer, resignation, dismissal and all other matters pertaining to the employment of teachers; provided, where any such school, college, university or other educational institution is open only to members of one sex, nothing contained herein shall be construed to prohibit the exclusive employment of teachers of that sex."

Since the evidence shows that the Board of Education increased the salary of a male married teacher and did not increase the salary of female married teachers who had similar ratings of merit, there seems to be a discrimination based on sex. The case before us, therefore, is to be determined upon whether or not the Board of Education has formulated a scale of wages.

Webster's New International Dictionary defines a scale as a gradation; succession of ascending and descending steps and degrees; scheme of a comparative rank or order as a scale of wages; a scale of taxation, etc.

The Legislature indicates what may be considered a scale of wages in par. 328 of the 1928 Edition of the New Jersey School Law which reads in part as follows:

> "Teachers hereafter employed in any graded school in this State supported in whole or in part by State moneys shall receive salaries proportioned to their experience and success. * * * Such salary * * * to be not less than the amount provided for such teachers in the following schedule: * * *"

Then follows fixed salaries through a period of years for different types of positions in the public schools based on experience which becomes effective

when adopted through a referendum. While informally adopted salary schedules in recent years in many systems of the State there are now included pre-service training of teachers, in-service training, minimum salary, and definite increases based upon successful work leading to definite maximum salaries, it must be concluded that a scale has been formulated when the method of paying salaries includes the essentials of Section 328, above referred to with or without any of the additional considerations which are included in schedules recently adopted by Boards of Education.

Does the Board of Education of Gloucester City have a plan or policy providing for initial salaries in different types of work with increases based upon successful experience as is contemplated by the law? Four of the five members of the Board of Education and the superintendent of schools of Gloucester City testified that the school district of Gloucester City does not or does not to their knowledge have a scale of wages or a salary schedule, and all testified that none has been adopted for this year. Adoption appeared to mean formal action by the Board making a scale of wages or schedule a rule of the Board or placing a resolution to that effect upon the records. It is the opinion of the Commissioner that not only may a salary schedule or scale of wages be adopted by a resolution, but such adoption may be determined by acts of the Board regardless of whether or not such action appears upon the official minutes of the Board.

Extracts from the testimony of different witnesses upon the question of a scale of wages is as follows:

President Black, Vol. III, p. 31:

"Q. But you do have an understanding between the members that a certain scholar * * * a certain teacher shall be paid $1,200 the first year, another teacher is paid $1,400? A. For Normal School and college graduates, yes, on the recommendation of Mr. Bean as vacancies occur.

* * * * * * *

Q. And the only people this year who did not get an increase in salary who had not reached the maximum as recommended by Mr. Bean were the married teachers? A. There are, I think, one or two others who were recommended by him who did not get it.

Q. Have they reached their maximum? A. I don't think so." (See also p. 25.)

p. 33:

"Q. You do not know of any time when you have not followed this policy of starting them off at $1,200 or $1,400 and increasing yearly until they reached $1,700? A. Not that I know of."

"Q. In the last two years? A. Not to the best of my knowledge."

Robert G. Goodfellow, Member of Teachers' Committee, p. 67:

"Q. This year the board had paid what to Normal School graduates without experience? A. $1,200.

Q. Did it pay that last year? A. Yes, sir.
Q. What did they pay to college graduates this year? A. $1,400.
Q. That was on the recommendation of whom? A. The superintendent."

p. 75:
"Q. Let us assume that a teacher made good, what increase would she get? A. I think that some were allowed $50.00 and some $100.00."

p. 76:
"Q. What is the largest salary that the board pays? A. I think non-teaching principals get $2,100."

p. 77:
"Q. Is the elementary grade fixed at $1,700? A. No.
Q. That is the highest you ever paid anyone? A. In the elementary grades, yes.
Q. Can you tell me the next class and the highest salary they have paid in that class? A. The next would be the next six grades. I think the highest is $2,100.
Q. In those grades the highest is $2,100. A. It is.
Q. Take the next grade, the high school. What is the highest salary according to this—we won't call it anything—that high school teachers would get? A. $2,100."

* * * * * * *

p. 80:
"Q. There is nothing that the board of education has spread on the minutes? A. They did not adopt it.
Q. But they have followed this general scheme, schedule, understanding, policy or whatever we do not want to call it? A. Yes.
Q. And last year? A. Yes." (See also Vol. III, pages 66, 75, and 97.)

Testimony similar to the above was also given by *Mr. Connelly,* Member of Board (See Vol. II, page 87) and *Mrs. Blome,* Member of Board (Vol. III, pages 54, 59, 60, and 65).

Albert N. Bean, Superintendent of Schools, Vol. II, p. 66:
"Q. That has been done by boards as they came and went? A. Yes.
Q. And have those individual boards as they came and went seen fit to adopt this recommendation of yours? A. Yes, they have.
Q. So that previous to this time and at the present time the board of education is paying what for Normal School graduates? A. $1,200 beginning.
Q. What does the board and what have previous boards paid to college graduates? A. It has varied during the five years of my incumbency, it is now $1,400 without experience."

p. 23:

"Q. Now, if I understand you clearly, the board has not agreed upon a schedule. They have made it a practice to follow your recommendation which is based upon a schedule?

Mr. Evans—I said 'this year'.

Mr. Keown—I will confine my present question to this year.

A. Yes.

Q. Was that likewise true last year? A. Yes." (See also Vol. II, pages 65, 69, 84; Vol. III, pages 16, 19, 23.)

An understanding upon the part of teachers as to salaries, ratings and increments is indicated by testimony Vol. I, pp. 22, 23, 50; Vol. II, pp. 2, 29.

Exhibits R-1 and R-2 to be found in Vol. III of the testimony reveal the employment of 77 teachers in Gloucester City and gives the salary each received for the school year 1928-29 and the salaries voted by the Board for the school year 1929-30. Of the 20 receiving no increase in salary 10 are appellants, which leaves 10 teachers who it appears were not recommended for increases either because they had reached a salary considered at the present time to be a maximum or because they did not receive efficiency ratings by the superintendent which would entitle them to increases. One teacher received an increase of $50. Nine received increases of $150 each, of whom 6 were high school teachers and 3 were in the elementary grades. Two high school teachers received increases of $200 each and 45 teachers received increases of $100 each. These increments considered with the testimony of Irene H. Hutchinson (Vol. II, p. 2), as to ratings of G, G plus, S, and F and the testimony of Mr. Bean (p. 84, Vol. III) and Mrs. Blome (p. 65, Vol. III) and Mrs. Marenzana (Vol. II, p. 22) indicate a definite increment based on specific ratings and accordingly a formulated scale.

The testimony of the members of the Board of Education and the salaries as shown by Exhibits R-1 and R-2 indicate a general understanding between the Board and the teachers in relation to minimum salaries, increments based upon ratings, and approximate maximums attainable. The scale formulated by the superintendent and tacitly adopted by the Board became the formulated scale of the Board. It is practically as definite as the scales of wages formally adopted by many different Boards in this State.

It is inferred by counsel for respondent that a schedule formally adopted by a Board becomes binding upon succeeding boards. While an adoption by the voters as contemplated by Section 326, 1928 Compilation of the School Law, might be binding upon the board in relation to teachers who were employed during the time such adoption was effective, the Commissioner does not consider that any board is bound by a salary schedule adopted by a previous Board unless such Board also adopts it by a formal vote or tacitly by acting under it. A Board of Education may, therefore, disavow a schedule made by a preceding Board and institute a new schedule provided it does not decrease the salary of any teacher under tenure or deprive her of rights which may have accrued to her up to the time of the revocation or change in the schedule.

It is true, as pointed out by respondent's counsel, that the Legislature does not require districts to formulate a scale of wages nor to change a scale in relation to sex discrimination that was adopted prior to the passage of Chapter 238, P. L. 1925; but if a board does formulate a scale or changes one which was made prior to the date when Chapter 238 became effective, such scale cannot legally discriminate between sexes.

It appears that the Board of Education of Gloucester City acted under a formulated scale of wages which may have been originally adopted prior to 1925; but the fact that since then it has from time to time changed the minimum and maximum salaries for certain types of work requires that it be considered as formulated since the 1925 Act became effective.

To take the view of the respondent that a scale is not formulated under the provisions of this act unless it is formally adopted by the Board even though the same results are obtained would be to encourage subterfuges and evasions and practically nullify the statute. In the matter of evasion and subterfuge, it was held in the case of the United States *vs.* American Tobacco Company, 221 U. S. 106, 181 as follows:

> "That is to say it was held that in view of the general language of the statute and the public policy which it manifested there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirections the prohibitions of the statute";

and in the case of Standard Sanitary Manufacturing Company *vs.* United States, 226 U. S.

> "The other it is not necessary to review or to quote from except to say that in the very latest of them the comprehension and thorough character of the law is demonstrated and it is sufficient to prevent evasions of its policy by resorting to any disguise or subterfuge of form or the escape of its prohibitions 'by any indirection'."

It is evident that the Legislature by Chapter 238, P. L. 1925, intended to set up a policy in the employment of teachers of equal pay for equal work without discrimination between sexes. It may be assumed that because of the financial burden involved the statute was not made retro-active and did not require that existing schedules be changed to eliminate discriminations in existence prior to that time, but it was the intention of the Legislature that the policy would become effective as new scales were formulated or as amendments were made in scales established prior to 1925.

Even though a Board of Education may believe a formal adoption of a scale of wages is essential to bring it under the provisions of Chapter 238, P. L. 1925, and may act in good faith to avoid being bound by its provisions, it cannot by omitting formal adoption of a scale, have such a scale in fact by which salaries are determined, and thus evade a policy of the Legislature clearly set forth in the statutes.

It is the opinion of the Commissioner of Education that the Board of Education of Gloucester City has in fact formulated a scale of wages as comprehended by Chapter 238, P. L. 1925, and in raising the salary of a married man and refusing to raise the salaries of married women with the same ratings of successful work, it has illegally discriminated between the sexes. The Board of Education is accordingly hereby directed to discontinue sex discrimination in its application of a scale of wages and to give to appellants now employed the increments for the present school year beginning September 1, 1929, to which their respective ratings of success entitle them under the scale as applied to other teachers in the schools of Gloucester City.

January 8, 1930.

DECISION OF THE STATE BOARD OF EDUCATION

Ten teachers, employed by the Board of Education of Gloucester City, namely, Lena V. Morgenweck, Alice Donaldson, Elizabeth Reddy, Dorothy G. Marenzana, Susan McInnes Norcross, Edith Cubley, Marion Ivory, Irene Hutchinson, Anna Andrews and Josephine Keller filed their petition with the Commissioner of Education, in which, in the order as hereinafter stated, they complain respectively:

(1) Edith Cubley, that she has been a teacher with proper certificate in New Jersey, and has taught for fourteen years. During a period of nine years, she was married. That she was formerly principal. That the said position of principal was abolished, and she continued as a teacher of a class of backward children, for which position she has secured a special certificate. That since the abolition of the position of principal, formerly held by her, three other teachers have been advanced to positions as principals of newly opened schools, and that the reason she was not assigned to one of such principalships was because she was married. Further, that she has received no raises in salary and because of the fact she is married, is discriminated against.

(2) Susan McInnes Norcross, that she has been a teacher with proper certificate in New Jersey, for twenty-eight years past. That she has been married twenty-one years. That she has been refused increases in salary, and is given compensation less than other teachers of less experience and qualifications, and that the reason she was not properly compensated in accordance with her experience and was not given the position of principal, was because she was married.

(3) Marion Ivory, that she is a graduate of Philadelphia School of Industrial Art, and is at present teaching and supervising art education and has taught five years in the schools of respondent, and has been refused increases in salary and has been discriminated against due to the fact she is married and because of her sex.

(4) Josephine Keller, that she has been a teacher more than ten years, is a college graduate, and has the degree of Bachelor of Arts. That although she has received proper ratings as to her skill and efficiency, she has received no increases in salary, and has been discriminated against because of her sex and that she is married.

(5) Irene Hutchinson, that she has been a teacher for fourteen years. She has not received the proper increase of salary due her because of her efficiency and ability, because of her sex and that she is married.

(6) Anna Andrews, that she has been a teacher for thirteen years and has been married ten years. That she has been informed she has received proper ratings in skill and efficiency to entitle her to increase in salary, but no increase was given her, and that she has been discriminated against because of her sex and because she is married.

(7) Lena V. Morgenweck, that she has been a teacher in the schools of respondent for fourteen years. That she has been informed she has received the proper ratings in skill and efficiency to entitle her to increase in salary. That she has received no increases in salary, and has been discriminated against because of her sex and because she is married.

(8) Alice Donaldson, that she has been a teacher for four years. That although she has been informed she has received the proper ratings in skill and efficiency to entitle her to an increase in salary, no increase has been given her because she was about to be married.

(9) Elizabeth Reddy, that she has taught in the schools of respondent for four years. That she was married in 1928, and in April of that year received a salary increase for the year 1928-1929, of $100.00, above the salary of 1927-1928. That she was informed if she married before September, 1928, she would not receive said increase. That she was married in October, 1928, and was informed in April, 1929, she would receive no further increase because she was married.

(10) Dorothy G. Marenzana, since the filing of the petition, has resigned her position as teacher and has been dropped from the proceedings.

The petitioners pray that the Commissioner review the proceedings and practices of the respondent board, and of Albert M. Bean, Superintendent of Schools, and take such proofs as in the Commissioner's opinion may be necessary to support their allegations of illegal and improper discrimination against petitioners because of their sex and marital condition.

The respondent board answered the petition, denying the discrimination alleged, and as to the complaint of Edith Cubley, that she was not appointed as principal because her said position had been abolished and her tenure rights to such position terminated with the abolition of the school where she had been principal.

The respondent further answers that it, in the employment of its teachers, in the fixing of their salaries, as well as in making promotions, exercises a judicial discretion, based upon the qualifications of the applicant for position, promotion or increase in salary, and in the exercise of that discretion, has a right to consider and determine the peculiar qualifications and fitness of the applicant for such position, promotion or increase in salary, such as the academic education; years of experience in teaching certain courses or classes; the adaptability to the work; temperament and success in teaching, at the same time having due regard to the funds available for such employment, promotion or increase in salary. And further, that respondent has never adopted a schedule of salaries.

Testimony of the parties was taken before the Commissioner after the consideration of which the Commissioner found as a fact, the respondent Board

had formulated a scale of wages as comprehended by Chapter 238, P. L. 1925, and in raising the salary of a married man and in refusing to raise the salaries of married women with the same ratings of successful work, it has illegally discriminated between the sexes. The opinion directed the respondent board to discontinue sex discrimination in its application of a scale of wages and to give appellants now employed, the increments for the present school year between September 1, 1929, to which their respective ratings of success entitle them under the scale as applied to other teachers in the schools of Gloucester City.

The respondent board has appealed to this Board from that part of the Commissioner's decision, and finds that respondent has adopted a salary schedule for teachers under its employ; and which finds that respondent did, in fact, discriminate between married men and married women teachers in fixing salaries for the school year 1929-1930, in violation of the provisions of Chapter 238, P. L. 1925, and that respondent pay to appellants the increases in salary claimed by them.

Counsel have submitted briefs and have been heard orally, in addition to which we have carefully read the evidence of the parties, which comprises over two hundred fifty typewritten pages.

The questions involved in this appeal are wholly factual. This Board has repeatedly declared that it will not disturb a finding of fact made by the Commissioner when there is evidence to support it. On the other hand, when we deem there is no evidence to support such findings of fact, we shall not hesitate to reverse.

Boards of Education have complete authority in the employment of teachers and the fixing of salaries, and the time and mode of payment, subject only to the statute prescribing a minimum and the provisions of Chapter 238, P. L. 1925, which provides that:

"1. In the formulation of a scale of wages for the employment of teachers in any school, college, university, or other educational institution in this State, which is supported, in whole or in part, by public funds, there shall be no discrimination based on sex, and the provisions of this act shall apply to appointment, assignment, compensation, promotion, transfer, resignation, dismissal and all other matters pertaining to the employment of teachers; provided, where any such school, college, university or other educational institution is open only to the members of one sex, nothing contained herein shall be construed to prohibit the exclusive employment of teachers of that sex.

"2. All acts or parts of acts inconsistent with this act are hereby repealed.

"3. This act shall take effect immediately."

When a scale or schedule of salaries is adopted by a board, as one of its rules, it becomes binding on the board until modified or repealed. Each successive Board may adopt the rules of its predecessor, either expressly or tacitly and be bound by them. In the present instance it does not appear the respondent board, or its predecessors, had ever formally adopted a rule creating a teachers' salary schedule. We gather from a reading of all the evidence, the manner of fixing salaries was: A list of teachers employed and their salaries was pre-

pared. The teachers' committee of the Board then considered what increases, if any, of salary should be recommended to the Board. The recommendations of the committee were based upon ratings given the teachers by the superintendent. One rating was recognized as justifying an increase of $50.00, per annum, another $100.00, per annum, and another $150.00, per annum. The list of teachers with the present salary and the salary recommended in each case for the ensuing school year was then submitted to the Board, which was at liberty to adopt the recommendations or to modify or reject them. In the employment of new teachers, a minimum was recognized; in the case of normal school graduates, $1,200.00, per annum, and of college graduates $1,400.00 per annum. There was no established maximum salary.

In fixing the salaries for the year 1929-1930, the foregoing described practice was followed. It appears that all teachers in the employ of respondent, except the appellants in the present case and ten other teachers, some whose salaries had reached a figure higher than which the respondent would not pay, and some who did not receive a satisfactory rating, were granted salary increments. The Commissioner considers that the method above indicated constitutes a definite increment based on specific ratings and accordingly a formulated scale. The statute (Chapter 238, P. L. 1925) prohibits: "In the formulation of a scale of wages for the employment of teachers in any school * * * there shall be no discrimination based on sex * * * etc. Is the annual adoption of a resolution employing teachers and fixing their salaries and fixing the salaries of teachers already employed and under tenure, a "formulation of a scale of wages"? We think not. In our opinion, what is contemplated by the language of the statute above quoted, is the formulation (putting into an established or permanent form), of a scale or schedule of wages which is to have prospective operation, with or without definite annual increments for certain positions or employments, the adoption of which would deprive the adopting board of discretion in fixing future salaries in conflict therewith, except by formal amendment or repeal of the action adopting the scale or schedule. If the fixing of salaries by the use of a list of teachers showing present salaries and increasing some or all according to the recommendations of the school executive based on the performance of each teacher, is adopting a schedule every Board could be held to have adopted a salary scale or schedule. In the present case it clearly appears the respondent board, in adopting the salaries for the year 1929-1930, was acting independent of any action by its predecessor boards and according to its judgment and discretion. There is no record of the Board of Education of Gloucester City showing it had adopted a salary schedule. No evidence was produced that such action had ever been taken. On the contrary, every member of the Board but one, testified positively no salary schedule had ever been adopted, and that in fixing salaries, the Board acted wholly of its own discretion.

There being no salary schedule binding the respondent to grant or entitling the appellants to have increments in salary, respondent was acting within its powers when it did not increase the salaries of appellants for the school year 1929-1930.

The complaint of the petitioners, Edith Cubley, Susan McInnes Norcross, Alice Donaldson, and Elizabeth Reddy is based on alleged discrimination be-

cause they are married. That of Marion Ivory, Josephine Keller, Irene Hutchinson, Anna Andrews, Lena V. Morgenweck, upon alleged discrimination against them because of their sex and being married.

Inasmuch as it is our opinion the respondent board was under no duty or obligation to increase the salary of any particular teacher, the motive which actuated the members of the Board in their official action in failing to grant increases to the appellants, cannot be inquired into and evidence of actual or supposed hostility to married teachers was irrelevant.

The decision of the Commissioner of Education which holds that respondent had adopted or formulated a scale of wages and had illegally discriminated between the sexes and whereby respondent is directed to discontinue sex discrimination in its application of a scale of wages and "to give to appellants now employed the increments for the present school year, beginning September 1, 1929, to which their respective ratings of success entitled them under the scale as applied to other teachers in the schools of Gloucester City," is reversed, and the appeal dismissed.

July 12, 1930.

TEACHERS ENTITLED TO MINIMUM COMPENSATION FIXED BY STATUTE

RUTH LYON, PEARL HILL, DOROTHY CANFIELD, FLORENCE DANIELSON,
Petitioners,
vs.
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,
Respondent.

For the Petitioners, Clark C. Bowers.
For the Respondent, J. W. Roseberry.

DECISION OF THE COMMISSIONER OF EDUCATION

Ruth Lyon, Pearl Hill, and Florence Danielson were employed continuously for more than three years preceding the school year 1932-1933 in the School District of Mansfield Township and received salaries of $1,100, $900, and $900, respectively. Under Chapter 243, P. L. 1909, they were protected against reduction in such salaries except as provided in that act and by Chapters 12 and 449, P. L. 1933; 6, P. L. 1935; 27, P. L. 1936. For the school year 1933-1934, the salaries of these three petitioners were reduced to $800 per year and have so remained down to and including the school year 1936-1937. No objection is made to the reductions except for the present school year when it is con-

tended by petitioners that such reductions were in violation of Chapter 27, P. L. 1936, which provides:

> "* * * that there shall be no reduction in the salary or compensation of any officer or employee whose contractual salary or compensation is $1,000 or less per annum, nor shall the salary or compensation of any officer or employee whose contractual salary or compensation is more than $1,000 be reduced below $1,000."

The right to reduce the salaries of petitioners under the provisions of Chapter 27, P. L. 1936, below those in which they were protected by the Teachers' Tenure of Office Act was illegally exceeded, and the action of the Board is accordingly void.

While the salary of Ruth Lyon could have been reduced to $1,000, the Commissioner has no authority to hold that since the Board reduced the salary to $800, it should now be $1,000. The Board of Education of Mansfield Township is, therefore, directed to pay Ruth Lyon her salary from the beginning of the year at the rate of $1,100 per year until such time as a legal reduction is made, and to pay to Pearl Hill and Florence Danielson each a salary of $900 per year.

Dorothy Canfield was first employed in 1932 at an annual salary of $900, and for each subsequent year her compensation was fixed at $800. There was nothing in the statutes which would cause her salary to revert to $900 at the end of each year, after 1932-1933, and she accordingly had no right to an amount in excess of $800 during any of the last three years regardless of the salary reduction acts. There was no discrimination against her under Chapter 27, P. L. 1936, because her salary was not reduced under it. The salary of Miss Canfield for the year 1935-1936 was not reduced below her contractual salary of $800 for the preceding year and accordingly the action of the Board in fixing her compensation at $800 is valid.

It is contended by counsel for respondent that Chapter 27, P. L. 1936, is unconstitutional. The Supreme Court and Court of Errors and Appeals have held it to be constitutional in the cases of Askam and Phelps *vs.* Board of Education of the Town of West New York, 115 N. J. L. 310.

December 23, 1936.

UNDER PROVISIONS OF STATUTE AUTHORIZING REDUCTION IN SALARIES (CHAPTER 12, P. L. 1933) GRADUATED SCALE IS VALID AND LAW OF AUTHORIZATION CONSTITUTIONAL

LUCY ASKAM, ET ALS.,
Appellants,
vs.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,
Respondent.

For the Appellant, Robert H. McCarter.
For the Respondent, Reinhold Hekeler.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent Board of Education on June 23, 1933, adopted resolutions as follows:

"*Resolved,* That between July 1, 1933, and July 1, 1934, the salaries of the Superintendent of Schools and of all principals, supervisors and teachers in the West New York school system be and they are hereby reduced as follows:

All salaries from $1,200 to $1,999 per annum reduced ten per cent.;
All salaries from $2,000 to $2,499 per annum reduced eleven per cent.;
All salaries from $2,500 to $2,999 per annum reduced twelve per cent.;
All salaries from $3,000 to $3,499 per annum reduced thirteen per cent.;
All salaries from $3,500 to $3,999 per annum reduced fourteen per cent.;
All salaries from $4,000 to $5,600 per annum reduced fifteen per cent.;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1,200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1,600 per annum."

"*Resolved,* That between July 1, 1933, and July 1, 1934, the salaries of clerks in the West New York school system be and they are hereby reduced to the amounts set opposite their respective names below:

*Pearl Rutan	$2,200	per annum
Rose Millimet	1,600	" "
Caroline Johansen	1,600	" "
Madelyn Offerman	1,200	" "
Angela Wintrich	1,200	" "
Marie Martin	1,200	" "
Sylvia Wilson	1,200	" "
Cathleen Bach	1,200	" "
Virginia Otis	1,200	" "
Helen Roth	900	" "
Marion Holm	900	" "

* Clerk assigned to superintendent and Board jointly."

The salaries of teachers protected by the Tenure of Office Act were reduced by the percentage set forth in the first resolution. The clerks, whose salaries were fixed by the second resolution at $1,600, were reduced from $2,300; those at $1,200 from $1,500; and the one at $1,000 from $1,100. The two at $900 were new employees. The percentage reductions in the three decreased salary groups were approximately 30 per cent., 20 per cent., and 9 per cent., respectively. The reduced salaries were accepted by appellants without formal complaint until the filing of the petition on December 16, 1933. The original stipulation of facts did not come to the Commissioner until May 9, 1934, and this was supplemented by others on June 4 and 13.

Counsel for appellants holds that the action of the Board is illegal under the following contentions:

(1) Chapter 12, P. L. 1933, is unconstitutional as it interferes with the contractual rights of appellants.
(2) Even if the act were constitutional, the resolutions of June 23, 1933, are discriminatory and, therefore, in violation of the act.

The State Board of Education in the case of Albertson *vs.* Glassboro, decided December 1, 1924, held:

> "Neither * * * the Commissioner nor this Board is empowered to declare any act passed by the Legislature to be contrary to the constitution * * *"

Since, in accordance with that decision, it is not the prerogative of the Commissioner to pass upon the constitutionality of the statute, there remains only to be decided whether the respondent could legally reduce salaries in any class of service on a graduated percentage basis, and whether it had a right to reduce the salaries of teacher-clerks in a greater amount than those of teachers.

Chapter 12, P. L. 1933, provides in relation to the authority of boards of education to reduce salaries of employees or persons holding positions in any school district:

> "That in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service."

This provision indicates a legislative purpose of avoiding arbitrary discrimination in any class or group of employees which would lead either to an attempt to dismiss certain individuals without resorting to the methods prescribed in the Tenure of Office Act, or to the creation of dissatisfaction among members of a group. It is the opinion of the Commissioner that the Legislature, while thus protecting individual employees, gave broad discretion as to salary reductions in relation to classes or groups. The board of education has a right to consider the living wage of employees in determining salary reductions and it is not discrimination, within the meaning of Chapter 12, P. L. 1933, to increase the reductions by 1 per cent. on each graduated amount in excess of the minimum of $1,200 fixed by the resolution. Salary reductions, therefore, may be made on a flat percentage basis applicable to all employees

of a class or in proportion to the salary of such employees. The statute recognizes different classes of service. Although they are not specifically set forth there appear to be three distinct groups of employees of a board; namely: professional (including teachers, principals, supervisors, etc.); non-professional (including clerks, secretaries, custodians, janitors etc); and employees whose work partakes of the two preceding groups (including teacher-clerks, teacher-librarians, etc.). While sub-divisions may be made by a board of education the resolutions in this case have application to these three major groups only. The first resolution applies to the professional group, the second includes clerks belonging to the second group, and by inference through the stipulations, includes teacher-clerks belonging to the third group. In the first resolution the Board established a graduated percentage reduction of salaries and in the second made a proportionate reduction in the salaries of clerical employees, some of whom are termed "teacher-clerks" because they hold teachers' certificates. Clerks without teachers' certificates have no tenure protection, and the Commissioner is unable to find any decisions defining the status of teacher-clerks in reference to the Tenure of Office Act. In the present instance, it does not appear to be necessary to decide whether teacher-clerks have tenure since, even if protected, the service rendered is different from that of regular teachers. A board of education is vested with discretion to evaluate the importance of clerical work in relation to the strictly professional work of classroom teachers, and to reduce the salaries of the former employees to a greater extent than those devoting practically their full time to teaching. The West New York Board of Education acted within its statutory authority when it adopted the above recited resolutions. The appeal is dismissed.

July 18, 1934.

UNDER PROVISIONS OF STATUTE AUTHORIZING REDUCTION IN SALARIES (CHAPTER 12, P. L. 1933) GRADUATED SCALE IS VALID AND LAW OF AUTHORIZATION CONSTITUTIONAL

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The testimony in this case is identical with that in Askam, et als., *vs.* West New York Board of Education, decided this day by the Commissioner of Education, with the exception that for the school year 1933-1934 appellant has not accepted compensation for the performance of his duties as a teacher in the public schools and has not agreed expressly or impliedly to the terms of

the first resolution set forth in the Askam case. Since it was held in that case that the respondent acted in accordance with its statutory authority, the fact that appellant did not accept compensation does not affect his status. For the reasons set forth in the Askam decision, this petition is dismissed.

July 18, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

The appellants, ninety-four in number, are all teachers, principals, supervisors, or clerks of the public schools of the Town of West New York. Each of them is alleged to have been employed for more than three consecutive years and therefore to have tenure of office. On June 23, 1933, the Board of Education of West New York adopted resolutions whereby the salaries of principals, supervisors, teachers, and clerks in the system were reduced by certain specified percentages, or, as to the clerks, to certain specified amounts. The resolutions are set forth in the Commissioner's opinion.

The Board's action was taken in pursuance of and reliance upon Chapter 12 of the Public Laws of 1933, which provided, in brief, that boards of education "shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district," notwithstanding they might "be under tenure or not."

Appellants do not deny that this statute, in terms, made lawful the reduction of salaries, notwithstanding the Tenure of Office Act, but they maintain that the statute is unconstitutional, and this presents the first question to be determined on this appeal.

This Board has heretofore taken the position that it is not empowered to declare an act of the Legislature to be unconstitutional. It was so held by this Board on December 1, 1924, in the case of Albertson *vs.* Glassboro, which is cited by the Commissioner in his opinion. Counsel for the appellants in their brief urge that our position in this respect was mistaken; that the Commissioner, in exercising his judicial functions in determining controversies arising under the School Laws, and this Board, in exercising the appellate jurisdiction conferred upon it by law with respect to such controversies, are tribunals which outrank other inferior courts of the State which, in their decisions, have declared acts of the Legislature to be contrary to the constitution.

This question has therefore been carefully investigated and studied with the result that we believe that the position heretofore taken by the Board was possibly unduly modest and that the Board may have the right to declare the statute in question to be a violation of the constitution of the State. But even if this Board has such power, this is not a case, in the opinion of the Law Committee, where it should be exercised.

It is true that in some courts and by some writers on the subject, it has been said that where a judge of an inferior court believes that a statute is without doubt contrary to the constitution, he should so hold, and act accordingly.

However, even the highest courts are always hesitant to declare legislative acts unconstitutional. The foremost textbook on this subject, possibly, contains the following:

> "The fundamental law of the State is in question, as well as the correctness of legislative action; and considerations of courtesy, as well as the importance of the question involved, should lead the court to decline to act at all"

except after the most careful and deliberate consideration, thus indicating the constraint with which even the highest courts of the land approach questions of constitutionality.

It is true, as stated by the same authority, that "this is a rule of propriety, not of constitutional obligation;" but even Chief Justice Marshall himself declined to pass upon the constitutionality of an important act of Congress until a full bench of the Supreme Court was available. (See 1 Cooley's Constitutional Limitations, (8th Ed.) 335 et seq.; citing 8 Pet. 118).

One of the most eminent and scholarly judges who ever sat in the Surrogate's Courts of New York State, and whose opinions commanded the highest respect, once declared himself as follows:

> "The transcendant power of declaring an act of the Legislature unconstitutional should never in my opinion be assumed by a court of first instance, except possibly in rare cases involving life or liberty, and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the Legislature void should, I think, be reserved to the graver courts of the State in solemn session *in banc,* or held for the final review of such great questions."

In re Thornburgh, 72 Misc. Rep. 619.

It has also been said that

> "Undoubtedly when the highest courts in the land hesitate to declare a law unconstitutional, and allow much weight to the legislative judgment, the inferior courts should be still more reluctant to exercise this power, and a becoming modesty would at least be expected of those judicial officers who have not been trained to the investigation of legal and constitutional questions."
>
> (1 Cooley's Constitutional Limitations, (8th Ed.) p. 337, note).

We are convinced that even should the high courts of the State instruct this Board that it has the power, in the exercise of its judicial functions, to pass on the constitutionality of acts of the Legislature, that power should never be exercised unless the violation of the constitution is clear and beyond question. In our opinion, this is not such a case and we therefore believe that this Board should decline to pass on the constitutional question raised by the appellants.

One further question remains to be decided. The act of the Legislature in question (Chapter 12, P. L. 1933) provides "that in fixing salaries or com-

pensation (pursuant to the act) there shall be no discrimination among or between individuals in the same class of service."

The appellants contend that the action of the Board of Education in this case violated the provision above quoted. The Commissioner, after careful discussion, holds that the Board did not discriminate among individuals in the same class of service and that the statute was not violated in that respect. With this conclusion we agree.

It is therefore recommended that the opinion of the Commission be affirmed.

February 9, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

The testimony of this situation was identical with that in the Askam case, just decided, with the exception that for the school year 1933-1934 the appellant, Jay B. Phelps, has not accepted compensation for the performance of his duties as a teacher in the public schools, and he has not agreed, expressly or impliedly, to the terms of the first resolution set forth in the Askam case. The Commission dismissed Mr. Phelps' petition on the ground stated in his opinion in the Askam case and held that the fact that Mr. Phelps did not accept compensation does not affect his status. With this we agree, and recommend that the Commissioner's decision be affirmed.

February 9, 1935.

DECISION OF THE SUPREME COURT

Nos. 248, 249, May Term, 1935

Argued May 10, 1935; decided , 1935.

1. Chapter 12 of the Laws of 1933 (P. L. p. 24) is not unconstitutional as impairing the obligation of contracts, or as depriving a citizen of the equal protection of the laws, as applied to the prosecutors in this case.
2. The proviso in Chapter 12 of the Laws of 1933 (P. L. p. 24) forbidding discrimination among or between individuals in the same class of service is not violated by classifying teachers for purposes of salary reduction according to their former salaries.
3. The Legislature by said act having declared the existence of an economic emergency requiring that certain powers be given to every board of education, it was not necessary for an individual board so to adjudge before exercising the powers.

On Certiorari.

Before Justices Parker, Case and Bodine.

For the Prosecutors, Robert H. McCarter (Ward J. Herbert, on brief).

For the Defendants, Raymond J. Otis.

The opinion of the Court was delivered by PARKER, J.

These two writs of certiorari bring up decisions of the State Board of Education, affirming on appeal decisions of the State Commissioner of Education which dismissed appeals of the several prosecutors challenging a resolution of the Board of Education of West New York in Hudson County, dated June 23, 1933, which provided for certain deductions beginning July 1, 1933, in salaries of the superintendent of schools, principals, supervisors and teachers, by percentages varying according to amount of salary; also a resolution readjusting the salaries of certain named clerks at certain stated figures. The Commissioner of Education dismissed the appeals before him on July 18, 1934; the State Board affirmed on February 9, 1935.

The resolution first mentioned, relating to those having the status of teachers, is founded on Chapter 12 of the Laws of 1933 (P. L. p. 24) entitled "An act respecting the salaries or compensation of officers and employees, and persons holding positions in the several school districts of this State." This act contains the following preamble:

> "WHEREAS, Due to present economic conditions, an emergency exists which requires that the Board of Education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employees of and persons holding positions in any such school district;" and proceeds to enact that
>
> "The Board of Education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district between the first day of July, 1933, and the first day of July, 1934, notwithstanding any such person be under tenure or not."

There are certain provisos not here material, viz., that there shall be no increase of pay during the year: that rights in the pension fund remain unaffected: that the existing minimum salary of teachers of $70 per month remain unchanged and a further proviso, relied on by prosecutors as part of their case, "that in fixing salaries or compensation, there shall be no discrimination among or between individuals in the same class of service." Section 2 provides that nothing in the act "shall be construed to affect or impair the continuity of position or employment under any tenure of office statute."

The resolution of June 23, 1933, relating to teachers reads as follows:

> "*Resolved,* That between July 1, 1933, and July 1, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York school system be and they are hereby reduced as follows:
>
> All salaries from $1,200 to $1,999 per annum reduced ten per cent.;
> All salaries from $2,000 to $2,499 per annum reduced eleven per cent.;
> All salaries from $2,500 to $2,999 per annum reduced twelve per cent.;
> All salaries from $3,000 to $3,499 per annum reduced thirteen per cent.;

All salaries from $3,500 to $3,999 per annum reduced fourteen per cent.;
All salaries from $4,000 to $5,600 per annum reduced fifteen per cent.;
all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1,200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1,600 per annum."

The other resolution of like date relates to "clerks" and is as follows:

"*Resolved,* That between July 1, 1933, and July 1, 1934, the salaries of clerks in the West New York school system be and they are hereby reduced to the amounts set opposite their respective names below:

Pearl Rutan	$2,200	per annum
Rose Millmet	1,600	" "
Caroline Johansen	1,600	" "
Madelyn Offerman	1,200	" "
Angela Wintrich	1,200	" "
Marie Martin	1,200	" "
Sylvia Wilson	1,200	" "
Cathleen Bach	1,200	" "
Virginia Otis	1,000	" "
Helen Roth	900	" "
Marion Holm	900	" " "

We take up first the resolution affecting the teacher group. As to this, the two main propositions are that the act of 1933 is unconstitutional as impairing the obligation of contracts; and secondly, that the scheme of salary reductions violates the proviso in that act forbidding "discrimination among or between individuals in the same class of service."

The argument for unconstitutionality proceeds on these lines: after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, Chapter 243, P. L. page 398): that tenure is contractual: and the Legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.

The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the Legislature may not modify. If the argument now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the Legislature, with certain powers conferred by statute. It is a municipal corporation, or at least a quasi municipal corporation, and, as such, subject to supervision and control by the Legislature. The act of 1933 is in purport and effect, though not so entitled, an implied partial repealer or amendment of the tenure act of 1909, and we are clear that it was well within the power of the Legislature.

The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change. See Vroom *vs.* Board of Education, 79 N. J. Law, 46. We are clear that the Legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933. It is suggested in the brief that the teachers have rights of the same standing as those of bondholders but we can see no merit in this suggestion and hardly think it is made seriously.

Secondly, with regard to the claim that there is in the resolution discrimination between individuals in the same class of service because of the varying percentages of reduction based on salary limits. We are unable to perceive any such discrimination. The resolution relating to teachers divides them into six classes according to salary, the first class including those drawing salaries from $1,200 to $1,999 per annum, and so upward by steps of $500 each except the last, where the limits are from $4,000 to $5,600. The higher the salary, the greater the percentage of reduction. But every one in the same class suffers the same per cent reduction. It is true that in some cases where one salary is just over the minimum of the class, and another just under the maximum of the next class below, the first is cut to below the second: but that does not create a discrimination between individuals in the same class of service: It is simply an arithmetical result of applying a general formula. Counsel point out what is probably a clerical error touching two individuals who are apparently not parties to this proceeding. The complaint here is that the board did not follow its own resolution: but that vagary is not the object of attack by these writs. Again, it is said that the Board paid no attention to individual merit or demerit. Naturally, it did not, as that is expressly forbidden by the statute of 1933.

As to the resolution bearing on the clerks, counsel for respondent argues that they are not entitled under the tenure act, and claims they are not protected by the proviso in the act of 1933. But be this as it may, we concur in the view of the Commissioner of Education that the reductions are likewise by classes according to salary, the two $1,600 clerks being reduced from $2,300: the four $1,200 clerks from $1,500: the one $1,000 clerk from $1,100: the two $900 clerks being new employees. As to the two so-called teacher-clerks, we think that one holding a teacher's certificate but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do.

Much of the voluminous brief for the prosecutors is devoted to the proposition that "There is no justification for the assumption that there was in West New York at the time of the adoption of the salary resolutions, such a financial debacle as justified the passage of the resolutions". The brief treats this matter as though the Board, without so alleging in its resolutions, assumed the existence of an emergency in West New York, and as though this court must, if it can, assume such existence in order to support the resolution. But the preamble of the statute, fully quoted above, expressly recites that "due to present economic conditions an emergency exists which requires that Boards of Education be enabled to fix and determine," etc. The argument apparently

ignores this fact, viz., that the Legislature itself in its preamble not only assumed, but declared, the existence of an emergency "which requires that the Board of Education of *every* school district in this State be enabled," etc. Language could not be broader or more definite, as a preface to the enacting clause.

The judgments and decisions of the State Board under review will be affirmed, with costs.

DECISION OF THE COURT OF ERRORS AND APPEALS
No. 35 (with 36) February Term, 1936

Appeal from Supreme Court.

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Parker, in the Supreme Court, reported in 115 N. J. Law 310.

Filed May 14, 1936.

DECISION OF THE COURT OF ERRORS AND APPEALS
No. 36 (with 35) February Term, 1936

Appeal from Supreme Court.

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Parker, in the Supreme Court, reported in 115 N. J. Law 310.

Filed May 14, 1936.

DECISION OF THE SUPREME COURT OF THE UNITED STATES
Nos. 454, 455.—October Term, 1936

Appeals from the Court of Errors and Appeals of the State of New Jersey.

March 1, 1937.

Mr. Justice Roberts delivered the opinion of the Court.

The people of New Jersey have ordained by their constitution that the Legislature "shall provide for the maintenance and support of a thorough and efficient system of free public schools" * * * (Article IV, Section VII, Paragraph 6, 1 N. J. Comp. St., page lxxv). In fulfillment ofthis command a comprehensive school law was adopted in 1903 by which boards of education were set up for cities, towns, and school districts throughout the State (Act of October 19, 1903; Laws of N. J. 1904, 5; 4 N. J. Comp. St. 4724). Section 106 empowered these boards to make rules and regulations governing engagement and employment of teachers and principals, terms and tenure of such employment, promotion, and dismissal, salaries and their time and mode of payment, and to change and repeal such rules and regulations from time to time (4 N. J. Comp. St. 4762). This general school law was amended by

the act of April 21, 1909 (Chapter 243, N. J. L. 1909; P. L., page 398; 4 N. J. Comp. St. 4763, 4764), Section 1 of which provides:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; * * * No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, * * * and after the charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. * * *"

An act of February 4, 1933, (chapter 12, New Jersey Laws 1933, pamphlet laws page 24), premising that existing economic conditions require that boards of education be enabled to fix and determine the amount of salary to be paid to persons holding positions in the respective school districts, authorizes each board to fix and determine salaries to be paid officers and employees for the period July 1, 1933, to July 1, 1934, "notwithstanding any such persons be under tenure;" prohibits increase of salaries within the period named; forbids discrimination between individuals in the same class of service in the fixing of salaries or compensation; and sets a minimum beyond which boards may not go in the reduction of salaries. June 23, 1933, the board adopted a resolution reducing salaries for the school year July 1, 1933, to July 1, 1934, by a percentage of the existing salaries graded upward in steps as the salaries increased in amount, except with respect to clerks, the compensation of each of whom was reduced to a named amount.

Appellants, who were principals, teachers, and clerks employed by the appellee, petitioned the Department of Public Instruction, in accordance with the school law, praying that the action of the board be set aside. The Commissioner of Education dismissed the petition and, upon appeal from his action, the State Board of Education affirmed the decision. The appellants applied for certiorari from the Supreme Court, assigning among other reasons that the decision violated Art. I, Sec. 10, and Sec. 1 of the Fourteenth Amendment, of the Federal Constitution. The writs (Two writs were issued. The only difference between the two cases, which were heard as one, is that in the *Phelps* case the employee refused to accept the reduced salary. In the case of *Askam, et al.*, the employees took the reduced salary under protest.) issued and, after hearing, the court affirmed the action of the administrative tribunal. (115 N. J. Law 310.) The Court of Errors and Appeals affirmed the judgment upon the opinion of the Supreme Court. (116 N. J. Law 412, 416.)

The position of the appellants is that by virtue of the Act of 1909 three years of service under contract confer upon an employe of a school district a contractual status indefinite in duration which the Legislature is powerless to alter or to authorize the board of education to alter. The Supreme Court

holds that the Act of 1909 "established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. . . . The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change."

This court is not bound by the decision of a State court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of this State. (*Freeport Water Co.* vs. *Freeport,* 180 U. S. 587, 595; *Tampa Water Works* vs. *Tampa,* 199 U. S. 241, 243; *Milwaukee Elec. Ry Co.* vs. *Railroad Comm.,* 238 U. S. 174, 184; *Seton Hall College* vs. *South Orange,* 242 U. S. 100, 103; *Coombes* vs. *Getz,* 285 U. S. 434, 441.) Here those courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the State and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them.

It appears from a stipulation of facts submitted in lieu of evidence that after a teacher has served in a school district under yearly contracts for three years it has not been customary to enter into further formal contracts with such teacher. From time to time, however, promotions were granted and salary raised for the ensuing year by action of the board. In the case of many of the appellants there have been several such increases in salary.

Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year. The employe assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the board, a creature of the State, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher.

The resolution of June 23, 1933, grouped the existing salaries paid by the board into six classes the lowest of which comprised salaries between twelve hundred dollars and nineteen hundred and ninety-nine dollars; and the highest included salaries ranging between four thousand dollars and fifty-six hundred dollars. The reduction in the lowest class for the coming year was ten per cent; that in the highest class fifteen per cent. Salaries in the intermediate classes were reduced eleven, twelve, thirteen and fourteen per cent. It resulted that in some instances a teacher receiving the lowest salary in a given bracket would have his compensation reduced to a figure lower than the reduced compensation of one receiving the highest salary in the next lower bracket. From this circumstance it is argued that the board's action arbitrarily discriminated between the employes and so denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.

We think it was reasonable and proper that the teachers employed by the board should be divided into classes for the application of the percentage reduction. All in a given class were treated alike. Incidental individual inequality resulting in some instances from the operation of the plan does not condemn it as an unreasonable or arbirtrary method of dealing with the problem of general salary reductions or deny the equality guaranteed by the Fourteenth Amendment.

Judgments affirmed.

REDUCTION OF SALARY OF TEACHER UNDER TENURE

LILIAN M. REED AND E. MAY HILLS,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Linton Satterthwaite, for the Appellants.

Malcolm C. Buchanan, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The following state of facts is admitted by both parties in this case:

Miss Lilian M. Reed was principal of the Lutheran School in the City of Trenton up to March 11, 1912, and Miss E. May Hills was head teacher in the Parker School. After the death of the principal of the Parker School both schools were organized as one and Miss Reed was made principal of the combined schools on March 11, 1912, and Miss Hills remained as head teacher of the Parker School with the additional responsibility of the Lutheran School.

Both Miss Reed and Miss Hills were at the time of assuming the new responsibilities protected by the tenure of service act and were receiving salaries in accordance with the schedule of salaries arranged for the schools of the City of Trenton. Miss Hills had reached the maximum salary of $850 under the schedule. Miss Reed was receiving a salary of $1,050 at the time of her appointment as principal of the Parker School.

The schedule for principals provided for an increase of $50 a year in salary, with a maximum varying according to the number of teachers supervised. Because of the combination of these two schools the Board of Education agreed to pay Miss Reed $200 a year in addition to the salary provided in the schedule and also agreed to pay Miss Hills $50 a year in addition to the schedule salary, the maximum of which she was receiving.

The resolution providing for the combining of the two schools and the appointment of Miss Reed as principal and Miss Hills as head teacher distinctly stated that this combination of schools was to be a temporary arrangement

and that these salaries could last only while the temporary combination of schools lasted. The teachers were so informed.

This temporary combination of schools ordered on March 7, 1912, by the Board of Education, and the appointment of principal and teacher made on March 11, 1912, lasted until July 6, 1916, a period of over four years. On January 6, 1916, the Board of Education granted an additional increase of salary to Miss Reed of $100 per year and to Miss Hills an increase of $50 per year. This increase was to date from September, 1915. This last increase of salary continued a full school year. It will thus appear that the increase of $200 per year to Miss Reed as principal lasted through more than three years, as also did the increase to Miss Hills. The additional increase of $100 and of $50 respectively lasted through a period of one year.

On July 6, 1916, the Board of Education discontinued what it regarded as a temporary organization of the Lutheran School as an annex to the Parker School and annulled the temporary assignment of Miss Reed as principal of the Lutheran School and discontinued all increases of salary given for what it regarded as extra work resulting from the combination.

This appeal to the Commissioner of Education is taken under what is known as the tenure of service act which in part is as follows:

The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing.

It is admitted that these teachers were serving under tenure at the time the increases of salary were made. The question involved in the controversy is, "Can there be any such thing as a temporary increase of salary in case of a teacher who is under the tenure of service act?"

If these Appellants were new in the school district of the City of Trenton and were employed in these positions by resolution of the Board of Education making their salaries temporary, and such temporary employment continued from the 11th day of March, 1912, until July 6, 1916, a period of more than three years, it would be very clear that they would come under the tenure of service act and could not be dismissed or subjected to reduction of salary in the school district of the City of Trenton except in the way that the statute provides. This would be true notwithstanding that the teachers were informed that they were employed temporarily. If the employment lasted for more than three consecutive years it was not temporary after the third year had expired. It then became permanent by operation of law.

In this analogous case the question of time regardless of the question of salary enters. The salary that would become permanent would be the salary that was received during the third year of employment. It cannot be soundly argued that teachers who are already under the tenure of service act would be less protected than would new teachers in the district. The Appellants were already under the tenure of service act and were safely protected in their employment. In addition to the element of time, three years, that the statute gives, it also further renders protection by saying that the salary of a teacher who has served the requisite length of time to make her position permanent cannot be reduced.

Much stress was laid by counsel on the question of a temporary assignment to these positions by the Board of Education. This undoubtedly can be done. A Board of Education may assign a teacher to any school within the district, even though she is under tenure of service in that district. A principal may be assigned to the principalship of another school in the district. The Board of Education had a perfect right to assign the Appellants to these new positions in the schools of the City of Trenton. The tenure of service act does not require in these assignments that the salary shall be increased even when there are increased burdens placed upon the teacher or principal. The only command of the statute is that the salaries be not reduced. The statute does not command that the salaries be increased. Neither does it prohibit the increase of salaries. The thing it clearly states, and which proposition is in strict conformity to the permanency of the teachers' positions, is that the salary shall not be reduced.

We next have only to inquire, was the amount paid a salary? Was it paid in such a manner as to indicate that it was a salary? The appellants received this increase not separately, but in the regular way in monthly installments. The schedule salary and the increased amount were added together and paid in regular monthly installments as an annual salary.

A board of education cannot make a temporary increase of salary to a teacher under tenure even though such teacher may agree to have her salary reduced when certain conditions entirely under the control of the board of education shall be changed. This would be making a contract in conflict with the statute law which says that no teacher under the tenure of service act shall be dismissed or subjected to reduction of salary when once under the tenure of service act.

It is my opinion that there being no charges made against these Appellants for "inefficiency, incapacity, conduct unbecoming a teacher or other just cause," the salaries paid to them for the school year ending June 30, 1916, cannot be reduced even though the work and the responsibility have been lessened.

July 26, 1917.

Decision of the State Board of Education

The Appellees in this case are teachers in the Trenton schools, and are teaching under tenure of service. No complaint against them has been made. The Trenton Board of Education has not dismissed them, nor taken any action

toward dismissing them. They are still on scheduled salaries, and apparently the Trenton Board of Education wishes to keep them in its employ. This action was started by them that they might have certain temporary salaries (paid to them for extra work) declared permanent salaries, even though the temporary service had been abandoned as no longer needed.

In March, 1912, Miss Reed was principal of the Lutheran School in Trenton, and Miss Hills was a head teacher in the Parker School. The principal of the Parker School died, and the Trenton Board of Education thought best to continue the two schools under one head. Miss Reed was appointed principal over both schools, and Miss Hills remained as head teacher in the Parker School. This was a temporary arrangement, but it entailed some extra work for both teachers. In addition to their regular salaries, fixed in accordance with the schedule of salaries arranged for the Trenton schools, they were paid extra sums for the extra work put upon them.

The minutes of the Trenton School Board, under date of March 7, 1912, read "that the Lutheran School be organized temporarily as an annex to the Parker School and that Miss Lilian Reed be appointed principal, the appointment to take effect from March 11, 1912, and that her salary be increased temporarily $200 a year."

Under date of April 12, 1912, there is the minute that "Miss May Hills, senior assistant of the Parker School, be granted an increase of $50 a year in salary during the temporary arrangement of one principal being assigned to two schools."

Further increases were granted in 1916. Under date of January 6, 1916, there is a minute of the Trenton School Board that "Miss Lilian M. Reed, principal of the Lutheran Parker Schools, be given an increase in salary of $100, and Miss May E. Hills * * * assistant in the Parker School, be given an increase in salary of $50; these increases to date from September 1, 1915, and be regarded as temporary and subject to such change as may be required to conform to any salary schedule that may be subsequently adopted."

Under date of July 6, 1916, this minute appears: "that the temporary organization of the Lutheran as an annex to the Parker School be dissolved, that the temporary assignment of Miss Reed as principal of that school be annulled, that the temporary special increment of salary granted to Miss Reed as principal of the two schools and Miss Hills as senior assistant of the Parker School be withdrawn."

It is very clear from these entries that only a temporary arrangement regarding the schools and the salaries was contemplated. It seems to have been so understood by all parties concerned. The arrangement lasted some four years and the Appellees now claim that the salary has become automatically permanent because the Tenure of Service Act declares that "no principal or teacher shall be dismissed or *subjected to reduction of salary* in said school district, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause," etc.

There is chance here for pretty argument on either side, as the briefs of counsel disclose, but we do not think that either arguments or technicalities should turn us from a common sense view of the case before us. The Tenure

of Service Act was not passed to fit such a case as this. The prohibition against reduction of salary applies to a permanent scheduled salary and not to a temporary increase given for extra work done. The prohibition of the statute was meant to prevent school boards from reducing a teacher's salary to a nominal sum and thus forcing a resignation that could not be gotten otherwise. There is no attempt in this case to force a resignation nor is there any reduction in the regular scheduled salary. The extra work given the teachers was withdrawn and the Trenton Board of Education thought the extra salary should be withdrawn also.

The question of how long the payments of the temporary salaries ran on should not enter into this case. Tenure of service is not arrived at by salaries but by time service. The Appellees were already under tenure by three years or more of service under regular scheduled salaries. Their status there is not questioned. But they now seek to invoke an extra tenure of service because of three years or more of extra work for which they received extra compensation. We do not believe that the law contemplated any such double protection. If the statute were so construed any and all temporary payments to teachers for temporary work could not be made without incurring the liability of a permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatever.

We think no injustice has been done the Appellees by the action of the Trenton Board of Education. They do not receive further payment of temporary salary, but neither have they the temporary work to do. Their regular scheduled salaries and their position under the Tenure of Service Act are in no way imperiled.

The decision of the Commissioner of Education is reversed.

January 19, 1918.

TEACHER CANNOT CONTEST IN SUCCEEDING YEAR RIGHT TO COMPENSATION IN EXCESS OF AMOUNT ACCEPTED WITHOUT PROTEST DURING A PRECEDING YEAR

HAZEL W. HOWELL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF ROCKAWAY, MORRIS COUNTY,

Respondent.

For the Petitioner, King & Vogt (Robert H. Schenck, of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Hazel W. Howell, was first employed in the Borough of Rockaway for the school year 1930-1931 at a salary of $1,450, and for the three next succeeding years she was re-engaged at a contractual salary of

$1,500, which constituted her compensation at the time she acquired the protection of the Tenure of Office Act. Teachers in Rockaway Borough have not only been denied increments since the year 1931-1932, but during the school year 1933 and thereafter, either by consent of the teachers or under the provisions of Chapter 12, P. L. 1933 and similar statutes enacted during ensuing years, the salaries of all teachers have been reduced at the rate of 5% on the first $1,000 and 10% on the remainder so that Mrs. Howell has reseived $1,400 for each of these years, including the present.

The petitioner and a Mr. William Phillips, who was elected at the same time and received the same salary as Mrs. Howell until 1935-1936, joined in writing a letter to the Board of Education in January, 1935, asking for an increase in salary and setting forth that while their salaries were in the same amount, they were not comparable with those of other teachers rendering the same type of service in the high school. The board took no definite action upon the letter during the remainder of the school year.

In June, 1935, soon after the close of the schools, the petitioner married. Upon the opening of schools in September, 1935, individual members of the Board of Education indicated an intention of increasing the salaries of both Mr. Phillips and the petitioner, but no action was taken by the board until September 17, 1935, when Mr. Phillips's salary was increased to $1,750, but no increase was given to the petitioner.

On May 19, 1936, the Board of Education voted to increase the salary of Mr. Phillips to $1,900 for the year 1936-1937, but this amount was never paid to him as a teacher for the reason that during the latter part of that year he was elected to fill at that time a vacancy in the principalship of one of the schools, and on June 23 his salary in the new position was fixed at $2,200 for the ensuing year.

On September 24, 1936, Mrs. Howell sent an informal petition to the Commissioner of Education asking for a determination of her rights to salary equal to that being paid to Mr. Phillips. On September 26 the Commissioner advised the petitioner that she must serve a copy of her appeal upon the Board of Education and reminded her on October 6 that no proof of service had been received. On October 12, Mrs. Howell made further written inquiries of the Commissioner about the petition, and on November 6, 1936, she served a copy upon the respondent Board of Education.

The testimony taken in this case at the Court House in Morristown on January 29, 1937, discloses that the Board of Education of Rockaway formulated a salary schedule in 1927, and on January 17, 1928, adopted a resolution providing that the marriage of tenure teachers automatically deprived them of further increases in salary. Petitioner contends that the refusal of the board to increase her salary in September, 1935, to the same amount as that of Mr. Phillips was not only a violation of the provisions of Chapter 238, P. L. 1925, which prohibits in any salary salary discrimination based on sex, but is also a violation of Chapter 6, P. L. 1935, which, while permitting reductions in teachers' salaries, provides that there shall be no discrimination among individuals in the same class of service. There was no evidence to show that for the present school year, 1936-1937, there is discrimination as between petitioner

and any other teachers in relation to salary based either on sex or on type of service.

In September, 1935, the increasing of the salary of Mr. Phillips, who was performing the same class of service as that of the petitioner, without increasing the latter's salary in like amount was a violation of the 1925 and 1935 acts, above mentioned. If in September, 1935, or shortly thereafter, petitioner had instituted proceedings to establish her rights to such salary, it appears that she would have been entitled to the same salary as that received by Mr. Phillips as a teacher, but instead of contesting the action immediately, she accepted her vouchers not only from September to the time of making the budget for the schools for the succeeding year in February, but continuously throughout that school year ending June 30, 1936, at which time the testimony shows no discriminatory salaries existed between her and any other employee.

While the testimony discloses an illegal discrimination against the petitioner during the school year 1935-1936, it shows no such discrimination during the current year. The school fiscal year is from July first of any year to June thirtieth of the next year, and the appropriations available for any ensuing school year are determined by the voters at an annual election held in February. Under ordinary circumstances, an action involving school funds should not only be brought within the fiscal year in which the alleged illegality occurred, but promptly upon knowledge thereof. In the instant case, the petitioner believed her salary rights had been illegally affected by the action of the board during the latter part of September, 1935, and her alleged claim to compensation is, therefore, based upon a condition which existed during the year 1935-1936; yet she waited until November 6, 1936, a lapse of fourteen months after the original action, to formally protest the discrimination.

A board of education is a public body which conducts business for the taxpayers. If a board acts illegally, public policy demands that prompt action should be taken by aggrieved parties so that the obligation of the district may be determined as early as possible.

In U. S. ex rel. Arant *vs.* Lane, 249 U. S. 367, the Court in ruling upon a delay in prosecuting a removal from office held:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service."

In the case of Good *vs.* Union Township Board of Education, decided by the State Board of Education December 7, 1935, in relation to the delay in protesting a dismissal, the State Board held as follows:

> "It is unfair, as in this instance, for the employee to wait for a period of more than five months to prosecute his appeal, which, should he be successful, payment of his salary would be imposed upon the taxpayers for the period of delay, although payment for the service may have been made to another.

In Smith *vs.* Spencer, 81 N. J. E. 389, where action was delayed in contesting the right to erect a building until its construction was in process, the court held:

> "The complainants cannot in a situation like this protect their rights by claiming such right, however persistently, by mere correspondence. Legal proceedings must be taken before there has been a serious expenditure of money. . . . On this branch of the case I must hold that the complainants are guilty of laches."

The delay of Mrs. Howell in presenting her petition against the Rockaway Board of Education, as set forth in this case, constitutes laches, and the appeal is accordingly dismissed.

March 15, 1937.

NON-DISCRIMINATORY AMENDMENTS TO A SALARY SCHEDULE ADOPTED PRIOR TO THE ENACTMENT OF CHAPTER 238, P. L. 1925, NOT AFFECTED BY PROVISIONS OF THE ACT

C. HELEN REGAN, et al.,
Appellants,
vs.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

C. Helen Regan, Lora Hurd, Sara Bartow, Elizabeth Ayer, Martha Elting, Marguerite Houlihan, Emma Isett, Elsie Yarnold, Theresa Featherston, Kathryn Bownton, Elizabeth Newell, Catherine Close, Irene Kerstetter, Mary Fisher, Amanda Loughren, Agnes Gardell, Alfhild Peterson and Mary McCready, all of the foregoing being teachers employed in the secondary schools of the City of Elizabeth, New Jersey, contend that the Board of Education of that city is illegally discriminating between the sexes in the payment of salaries of teachers in the school district, and petition the Commissioner of Education to require the Board of Education to reframe its schedule and salary list so there shall be no discrimination in the wages and salaries paid to the men and women teachers doing equal or similar work and having equal training and experience and to require that such reframed schedule shall be retroactive to such time as shall be determined by the Commissioner of Education and to grant such further relief as shall seem fit and proper.

Chapter 238, P. L. 1928, provides:

> "In the formulation of a scale of wages for the employment of teachers in any school, college, university or other educational institution in this

State, which is supported, in whole or in part, by public funds, there shall be no discrimination based on sex, and the provisions of this act shall apply to appointment, assignment, compensation, promotion, transfer, resignation, dismissal and all other matters pertaining to the employment of teachers; provided, where any such school, college, university or other educational institution is open only to members of one sex, nothing contained herein shall be construed to prohibit the exclusive employment of teachers of that sex."

The testimony taken at a hearing held in the Court House at Elizabeth on Friday, June 20, 1930, shows: The Board of Education of the City of Elizabeth formulated and adopted on April 13, 1922, a salary schedule for the employment of teachers in that school district and modified the schedule January 31, 1924. The minutes of a meeting of the Board held January 28, 1927, include the following:

"Report of Special Committee, Elizabeth, N. J., January 28, 1927.

The Special Committee of the Board of Education appointed to confer with representatives of the Elizabeth Teachers' Association relative to the proposed salary schedule, after two joint conferences, recommends that a supplementary increment for all teachers on the maximum be granted by the Board. This increment would be as follows:

Principals of Grammar and Elementary Schools	$125
High School Teachers (including Special Teachers)	125
Heads of Departments	125
Teacher-Clerks assigned to High Schools	100
Teachers of Kindergarten and Grades 1 to 6	100
Teachers of Grades 7 and 8	100
Teachers of special subjects in Elementary Schools	100
Teacher-Clerks	100
Teachers of Parental, Ungraded, and Subnormal Classes	100
Supervisors	125
Assistant Supervisors	125
Vocational and Continuation School Teachers	125

Your Special Committee further recommends that a special committee of three be appointed to continue the study of teachers' salaries for the Public Schools of Elizabeth.

Respectfully submitted,

Herman Hersh, Walter H. Cole, W. J. Kenealy.

Commissioner Braun moved that the report be received and the recommendations of the committee adopted.

Which was carried by the following vote:

Affirmative—Commissioner Railey, Banker, Braun, Cole, Hersh, Kenealy. Sauer and Sefton—8.

Negative—None."

The salary schedule as adopted on April 13, 1922, was followed in determining the salaries of teachers until January 31, 1924, and the schedule as modified at that time was followed until the modification of January 28, 1927, which has been in effect since that date.

In the employment of teachers for the school year 1925-26 under the salary schedule then in effect the resolution of the Board of Education reads as follows:

> "April 30, 1925. Your committee on educational management recommends subject to correction of errors salaries for teachers listed on the following sheet for the year ending June 30, 1926."

With the salary of each teacher immediately following the same. Practically the same wording appears in the employment for each succeeding year.

There was also offered in evidence the form upon which teachers were notified of their respective salaries as determined by the foregoing resolutions.

Counsel for appellant holds (1) the Board of Education has violated the provisions of the above statute in its continuance to pay salaries under a schedule which was changed after the Act became effective and (2) the annual appointment of teachers with salaries fixed by resolution of the Board of Education together with the contract or notice of appointment constitutes an annual formulation of a scale of wages.

The Commissioner cannot agree with the second contention that the annual resolution fixing salaries which are in accordance with the schedule in effect constitutes the formulation of a scale of wages, but is of the opinion that only a definite change in an existing schedule or the formulation of a new schedule subsequent to March 21, 1925, will bring it under the provisions of the 1925 Act.

Counsel for respondents contends that the appearance of representatives of the Secondary Teachers Club before the Board of Education instead of the teachers as individuals making application to the Board for equal pay for women with that of men having equal work, training and experience does not constitute a controversy between the teachers and the Board.

Upon motion at the hearing the petition was amended to exclude the Secondary Teachers Club leaving the above named teachers as appellants.

It is not necessary that teachers appear before the Board of Education as members of an organization or as individuals to effect a controversy under the School Law. These appellants believe that the Board of Education is not complying with the statutes relating to public schools of this State and through counsel served upon the Board of Education a petition appealing to the Commissioner of Education for redress in accordance with such statutory provisions. The respondent Board through counsel answered the petition of appeal and both petition and answer were filed with the Commissioner of Education. A controversy exists. It was brought under an Act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof." The authority of the Commissioner to hear such controversies has been determined by the Supreme Court of this State in many cases with which counsel on both sides are familiar.

It is admitted by counsel for respondent that a salary schedule was adopted by the Board of Education of the City of Elizabeth in 1922 and revised in 1924, but counsel holds that the adoption of the resolution of 1927 providing for supplementary increments does not constitute the formulation of a scale of wages as contemplated by the act above referred to; while counsel for appellants as previously stated holds the opposite view.

It appears that the determination in this controversy rests entirely upon the resolution of January 28, 1927. If that resolution which changed the maximum salaries of teachers constitutes the formulation of a scale of wages, this schedule which discriminates between the sexes is illegal. If this change in the schedule does not constitute the formulation of a scale of wages the schedule is legal and the appeal must be dismissed.

According to the schedule in use when the 1925 Act became effective, the maximum salaries of teachers in the high school were as follows: Men, $3,050, and women, $2,750. After the adoption of the resolution of January 28, 1927, the maximum salary for men has been $3,175 and for women $2,875.

Counsel for respondent in his brief states

> "This resolution or report speaks as of the time of its adoption, January 28, 1927. It does not provide that all teachers on the maximum and those hereafter to arrive on maximum shall be granted a supplementary increment."

This argument by counsel infers that the resolution has applied to only those receiving in 1927 the maximum provided in the schedule adopted in 1924. The testimony discloses that the resolution has not been so interpreted by the Board of Education. The new maximums of $2,875 for women in the high school and $3,175 for men in the high school have been given to all who have likewise reached the old maximum since 1927. The record conclusively shows that the new maximum salaries established by the resolution of 1927 have been paid to all teachers since 1927, in the same manner as the maximums of 1924 were previously paid.

It does not appear to be true, as argued by counsel, that the basic schedule with the maximum remains. The old maximum of 1924 is no longer the maximum, but the new amount $125 in excess of the 1924 maximum is used as the upper limit of the salary schedule for high school teachers.

When a law of this State is amended it becomes a new chapter and should be considered as a new law composed to a greater or lesser extent of the original act. Even an act supplemented must be considered with the supplement, but a supplement is defined as "a part which sets forth new facts which cannot be added by amendment." It may be possible to supplement a schedule by adding new facts which cannot be added by amendment without formulating a schedule. A new position not before included in the schedule might be added in a supplement without legal effect upon the schedule. In this case the maximum salaries, major provisions, were changed. A subject different from the original was not introduced, and the schedule was therefore amended.

Various types of salary schedules are adopted by Boards of Education, but there is common to all of them a minimum salary for the different types of position with corresponding maximum salaries and a provision for increments by which the maximum salaries are attained.

To hold that a Board of Education can through what should be an amendment and happens to be termed a supplement change one of the three major provisions of a salary schedule, must lead to the conclusion that all of the provisions can be amended or changed. If it is legal to change one at any meeting, it must be legal to amend all at a meeting. If any or all of the provisions of a schedule may be changed by calling the changes amendments or supplements without such changes being considered the formulation of schedule, the Legislative intent can be evaded and the statute made ineffective. We do not think that the Legislative will can thus be thwarted.

It was evidently the intent of the Legislature to provide that when subsequent to March 21, 1925, schedules are changed, men and women will receive the same salary for like work, training and experience. If salary schedules can be thus amended without application of the 1925 Act, then all of the large districts which had salary schedules prior to the date of the passage of this act, could change the schedules from time to time and continue a discrimination which the Legislature intended to abolish. It is reasonable to believe that the Legislature did not desire to compel any district to immediately revise its salary schedule, but it did expect that when a salary schedule needed revision to meet economic changes, discrimination in the salary schedule would then be eliminated.

The amendment of the salary schedule by the Board of Education of the City of Elizabeth by its resolution of January 29, 1927, constitutes the formulation of a scale of wages and since the resolution was passed subsequent to March 21, 1925, the salary schedule containing discrimination based on sex in that school district is hereby declared to be illegal.

In 1924 the New York State Legislature passed an act to take effect September 1, 1924, with provisions similar to the New Jersey Act of 1925. The Supreme Court of the State of New York in the case of Rockwell *vs.* Board of Education of the City of Elmira, 214 App. Div. 431, held the act did not apply to salaries fixed prior to the passage of the act. The Supreme Court of New York in the case of Moses *vs.* Board of Education of the City of Syracuse, 217, N. Y. Supp. 265, speaking of the effect of the adoption of a new schedule, says:

> "Moreover, a clear mandatory duty rested upon the respondent if it adopted *any* new schedule after September 1, 1924, to make the salary of the women teachers equal to that of the men where the two were performing the same or similar work."

It may be pointed out that the Court of Errors and Appeals reversed the final determination of the Supreme Court in the latter case, but the reversal was in relation to certain salaries protected by the Tenure of Office Act and did not affect the ruling above cited.

It, therefore, appears from the rulings by the Supreme Court and the Court of Errors and Appeals of New York State in relation to a law similar to the New Jersey statute that when *any* new salary schedule is adopted there cannot thereafter be discrimination based on sex.

Under the plan of school financing in this State, teachers cannot after having accepted a salary without protest during a school year bring legal action in a subsequent year to claim the insufficiency of the salary so accepted. This appeal was filed with the Commissioner of Education during the school year 1929-1930 and while it may not affect the legality of salary payments of preceding years it does affect the salaries for the year current with the institution of the appeal and the year subsequent thereto.

The Board of Education of the City of Elizabeth is hereby directed to proceed at once to formulate a salary schedule without sex discriminations and to pay to appellants the difference between the salaries which they have received and that to which they are entitled under the new schedule from the date of the filing of the appeal in this case.

October 4, 1930.

DECISION OF STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education, dated October 4, 1930, in which the Commissioner held that the adoption of a resolution by the Board of Education of the City of Elizabeth, on January 29, 1927, granting a supplemental increment to all teachers in its employ who were then in receipt of the maximum salary fixed by its scale of salaries or wages, adopted in 1922 and modified in 1924, constituted the formulation of a scale of wages, and that such scale of wages contained discriminations based on sex, and by force of Chapter 238, P. L. 1925, was and is illegal, and directed the Board of Education of the City of Elizabeth to proceed at once to formulate a salary schedule without sex discriminations, and to pay to appellants the difference between the salaries which they have received and those to which they are entitled under the new schedule from the date of the filing of the appeal in this case.

The Board of Education of the City of Elizabeth appeals from the whole of the judgment and decision of the Commissioner, and the petitioners, the teachers, appeal from so much and such parts of the decision as adjudges that petitioners are not entitled to an award of salary retroactively as of the adoption and effective date of Chapter 238 of the Laws of 1925, based upon unlawful discrimination in salaries paid to men and women teachers performing equal or similar work in the schools of the City of Elizabeth.

It appears that on April 13, 1922, the Board of Education of the City of Elizabeth adopted a salary schedule, or, as is designated in the statute hereinafter referred to, a scale of wages for teachers in its employ. On May 27, 1924, the scale was modified in certain parts. The scale of wages so adopted and modified contained discriminations in the payment of salaries to men and women teachers, men teachers receiving $300.00 per annum, in excess of the amount paid to women teachers performing similar work, and having like training and

experience. On or about January 29, 1927, the Board of Education adopted a recommendation of a special committee which had theretofore been appointed by it to consider the question of teachers' salaries, in the following language:

> "The Special Committee of the Board of Education appointed to confer with representatives of the Elizabeth Teachers' Association relative to the proposed salary schedule, after two joint conferences, recommends that a supplementary increment for all teachers on the maximum be granted by the Board. This increment would be as follows:
>
> | | |
> |---|---|
> | Principals of Grammer and Elementary Schools | $125.00 |
> | High School Teachers (including Special Teachers) | 125.00 |
> | Heads of Departments | 125.00 |
> | Teacher-Clerks assigned to High Schools | 100.00 |
> | Teachers of Kindergarten and Grades one to six | 100.00 |
> | Teachers of Grades 7 and 8 | 100.00 |
> | Teachers of special subjects in Elementary Schools | 100.00 |
> | Teacher-Clerks | 100.00 |
> | Teachers of Parental, Ungraded and Subnormal Classes | 100.00 |
> | Supervisors | 125.00 |
> | Assistant Supervisors | 125.00 |
> | Vocational and Continuation School Teachers | 125.00 |
>
> Your Special Committee further recommends that a special committee of three be appointed to continue the study of teachers' salaries for the public schools of Elizabeth.
>
> Respectfully submitted,
>
> Herman Hersh,
> Walter H. Cole,
> W. J. Keanealy."

Since the adoption of the foregoing recommendation, the Board has continued to pay the supplemental increment to teachers as they became entitled to the maximum salary under the scale.

It further appears, that it was a practice of the Board of Education of Elizabeth to adopt annually a recommendation of its Teachers Committee of the salaries to be paid teachers during the ensuing year.

That the schedule or scale of wages adopted in 1922 and modified in 1924, was incorporated in the rules of government of the Board of Education, adopted on June 31, 1924, and that said rules have been readopted annually as the rules and regulations by each succeeding Board.

It is contended by the petitioners that upon the enactment of Chapter 238, P. L. 1925, it was mandatory upon the Board of Education to revise its salary schedule or scale of wages in such manner that discrimination between men and women teachers, based solely on sex, should cease.

That the granting of the supplemental increment to teachers on the maximum grade on January 28, 1927, constituted a formulation of a scale or schedule of

wages or salaries, and that the continuation of the discrimination in the salaries paid men and women teachers was in violation of Chapter 238, P. L. 1925.

That the annual adoption by the Board of the recommendations of its Teachers Committee of salaries to be paid to teachers during the ensuing year, constituted the formulation of a scale of wages in which there was discrimination in favor of men as against women teachers, based solely on sex, and that the annual adoption of the rules of government by each succeeding Board since the year 1925, constituted the adoption or formulation of a scale of wages which contained discriminations in favor of men as against women teachers, based solely on sex.

That the petitioners are entitled to be paid by the Board of Education salaries equal to those of men teachers performing equal or similar work, retroactively as of the adoption and effective date of Chapter 238 of the Laws of 1925.

These contentions are met by the Board of Education, first, by a challenge to the jurisdiction of the Commissioner to entertain the complaint or appeal; further it is contended by the Board that the scale of wages adopted in 1922 and modified in 1924, was legal at the time of its adoption, and that the granting of the supplemental increment in 1927 is not the formulation of a scale of wages within the purview of Chapter 238, of the Laws of 1925, nor is the action of the Board annually in adopting the report of its teachers committee with reference to the teachers employed and their salaries for the ensuing year, and the annual adoption by the Board upon organization of the rules of government of the preceding Board, and that the decision of the Commissioner to the extent that it directs the Board to formulate a new salary schedule and pay the difference between the salaries which they have received and those which they claim under the new schedule from the date of the filing of the appeal in this cause, should be reversed and the petition dismissed.

The proceeding on behalf of the teachers was inaugurated in May, 1930, by the filing of a petition with the Commissioner of Education, signed by a number of teachers of the City of Elizabeth, and an organization known as Secondary School Women's Club of the City of Elizabeth. Before the filing of the petition with the Commissioner of Education, and sometime in February, 1930, a petition had been filed with the Board of Education by the Secondary School Women's Club of the City of Elizabeth, directed to the Board, requesting it to immediately comply with and enforce the provisions of the act of the Legislature known as Chapter No. 238 of the Pamphlet Laws of New Jersey of 1925, adopted March 21, 1925, by forthwith adopting resolutions fixing the salary of women teachers on the same scale as is and has been paid to men teachers, so that there should henceforth be no discrimination based on sex, and making demand that the Board pass proper resolutions for the raising of funds to pay to the women teachers sums of money equal to the difference between salaries paid to men teachers since March 21, 1925, in that they have been advised by counsel that the Board had continuously since 1925, violated the mandatory provisions of said statute by withholding from women teachers the same salary as paid to men teachers occupying similar positions. The Board referred this petition to its counsel, who advised it that it was under no legal obligation to comply with the said petition. No demand upon the Board of

Education was made by any of the petitioners in this case directly, their first action being the filing of their petition, together with the Secondary School Women's Club of the City of Elizabeth, with the Commissioner. The Board of Education answered the petition and therein objected that no controversy or dispute existed under the school laws or under the rules and regulations of the State Board of Education, between it and the Secondary School Women's Club of the City of Elizabeth, and at the hearing before the Commissioner, upon the same objection being pressed, petitioner's counsel withdrew the Secondary School Women's Club as a party to the proceeding, and consented that its name be stricken out, thus leaving only the individual teachers as petitioners. The School Law provides:

> "The Commissioner of Education shall decide * * * all controversies and disputes that shall arise under the school laws or under the rules and regulations of the State Board of Education. The facts involved in any controversy or dispute shall, if he shall so require, be made known to him by written statements by the parties thereto, verified by oath or affirmation, and accompanied by certified copies of all documents necessary to a full understanding of the question in dispute * * *." [4 Com. St. 4727, Sec. 10; P. L. 1911, p. 510, Sec. 8.]

The subject matter of this proceeding is one clearly within the jurisdiction of the Commissioner, and by answering and proceeding to a hearing respondent submitted to the jurisdiction and it cannot now be heard to complain. We think the Commissioner decided correctly in holding there was a dispute or controversy.

We agree with the Commissioner that the annual resolution designating the teachers employed and the salaries which they should respectively receive during the ensuing year does not constitute the formulation of a scale of wages. This is a purely administrative proceeding by which the Board of Education is informed of the individual teachers who are to be in service and the amount of their salaries. The salaries are in accordance with the schedule or scale of wages in force, as nearly "as it is humanly possible," to quote the evidence of the Superintendent of Schools, who was sworn as a witness.

Neither are we impressed by the argument that the annual adoption by the Board of Education, since the year 1924, of the Rules of Government of the preceding Board, one of which rules is the scale of wages adopted in 1922 and modified in 1924, constitutes the formulation, annually of a scale of wages. Certainly there is nothing in the evidence to show the Board so regarded it. It is, at most, an affirmation that the pre-existing rules shall continue operative, and is not the formulation of a scale of wages consciously entered upon. We cannot impute to the Board such an intention or purpose from the adoption of a routine parliamentary motion.

Petitioners further argue that Chapter 238, P. L. 1925, is mandatory in its terms. That it became the duty of the Board of Education, when said act became effective, to revise the scale of wages for payment of its teachers so as to equalize the pay of men and women performing similar work, and that not-

withstanding the failure of the Board to comply with the law in that regard, they are entitled to the difference from that date between the wages they have received and those which they would have received had the law been observed. In our opinion the language of the act does not sustain this contention. The words "In the formulation of a scale of wages for the employment of teachers * * * there shall be no discrimination based on sex * * *," imports, not a command to formulate a scale of wages, a command that in the event of the formulation of a scale of wages, in such scale there shall be no discrimination, etc. Had the Legislature intended that all scales of wages of teachers, then in effect, which contained discrimination between men and women based on sex, should be immediately revised and the pay of men and women equalized, it would have used language which would have clearly expressed that purpose. It is elementary that statutes are to be prospective in operation unless it clearly appears they were intended to be retrospective. Applying this rule of construction to the act under consideration, its title and text are tantamount to a declaration that in the future, in the formulation of a scale of wages, etc., there shall be no discrimination based on sex. We conclude there was no duty upon the Board of Education to revise its salary or wage scale by reason of the enactment of Chapter 238, P. L. 1925, and, therefore, the petitioners are not entitled to receive back pay from the effective date of that act.

There remains for consideration the effect of the resolution of the Board of Education adopted January 29, 1927. The Commissioner has construed this resolution as an amendment to the existing salary schedule and as the formulation of a scale of wages within the purview of Chapter 238, P. L. 1925, and, as the scale contained discriminations based on sex, he declares it to be illegal. It seems obvious from the language of the resolution, that the Board did not deem its adoption an amendment of the salary scale, or the formulation of a scale of wages; that it regarded the action as a concession to the demand of the teachers' organization for an increase of salaries pending a further study of the question of teachers' salaries generally. The resolution refers to conferences with reference to a proposed salary schedule. An amendment is defined, as applied to statutes as an alteration in the draft of a bill proposed or in a law already passed. 36 Cyc. page 1053. No expressions in the resolution contain reference to the existing schedule. The resolution grants to all teachers receiving maximum salary, a "supplemental increment" of certain amounts based on the position held, making no discrimination between men and women, all who occupy positions within the same classification being treated alike.

To impute to the Board an intention, by reason of the adoption of the resolution, to formulate a scale of wages, is to do violence to its language.

The resolution of January 29, 1927, was not an amendment of the teachers' salary schedule then in force in the City of Elizabeth, and said schedule continued in operation unchanged by said resolution. It was an independent legislative act of the Board and operates in addition to the salary schedule adopted in 1922 and modified in 1924. It applies without discrimination based on sex to men and women alike.

In so far as the decision of the Commissioner holds the resolution of January 29, 1927, to constitute the formulation of a scale of wages and directs the

Board of Education of the City of Elizabeth to proceed at once to formulate a salary schedule without sex discrimination and to pay to petitioners the difference between the salaries which they have received and those to which they are entitled under the new schedule from the date of the filing of the appeal in this case, said decision should be reversed and the petition dismissed.

February 7, 1931.

DECISION OF THE SUPREME COURT

1. The adoption by the Board of Education annually of reports, purely as an administrative proceeding, which were merely declaratory of the basic general salary schedule or "scale of wages" of teachers which was formulated and adopted in 1924 for a period of ten years, and which reports were annually adopted subsequent to 1924, merely for the guidance of principals, secretaries and others in the preparation of pay rolls and to facilitate generally the business of the Board, does not constitute the "formulation of a scale of wages for the employment of teachers" within the meaning of Chapter 238 of the Laws of 1925.

2. The mere adoption annually by a Board of Education of a parliamentary motion that "the rules and regulations of the preceding year be adopted as the rules and regulations for the government of the Board for the ensuing year" is not a "formulation of a scale of wages for the employment of teachers" within the meaning of Chapter 238 of Laws of 1925.

3. A statute will be given prospective effect unless there are words contained therein expressing a contrary intention. Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot otherwise be satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms and the manifest intention of the Legislature.

4. Chapter 238 of Laws of 1925, declaring that "in the formulation of a scale of wages for the employment of teachers * * * there shall be no discrimination based on sex" was not retrospective in its operation, and did not abrogate the scale of wages adopted and in force prior to the passage of the Act.

5. The adoption by a Board of Education in 1927 of a resolution, providing for a stated "supplementary increment" to both men and women teachers alike doing similar work and who reached the maximum salary under the basic schedule, was not "the formulation of a scale of wages" within the purview of Chapter 238 of Laws of 1925, prohibiting discrimination based on sex, and the mere adoption of the resolution did not impose upon the Board any duty to recast its entire basic scale of wages which, though discriminatory, was lawful when made in 1924.

6. A notice of appointment which the City Superintendent of Schools annually sent to teachers engaged by the Board of Education, with a statement

of the amount of salary based on the basic scale of wages formulated in 1924, being merely a routine administractive act, did not have the effect of a formulation of a scale of wages for the employment of teachers within the meaning of Chapter 238 of Laws of 1925.

On Certiorari, etc.

Before Justices Trenchard, Daly and Donges.

For the prosecutors—Samuel Koestler.

For the defendants—Martin P. O'Connor.

The opinion of the Court was delivered by

TRENCHARD, J.

This writ of certiorari brings up for review the judgment of the State Board of Education, rendered February 7, 1931, reversing the judgment of the State Commissioner of Education in a proceeding instituted by C. Helen Regan and others before him.

The situation was this:

On February 13, 1930, there was presented to the Elizabeth Board of Education a petition, by the "Secondary School Women's Club," alleging that it represented the women teachers employed in certain of the public schools of the City of Elizabeth, and requesting that the local board "immediately comply with and enforce the provisions of an act of the Legislature of the State of New Jersey entitled 'An act prohibiting discrimination on account of sex in the employment of teachers' and known as Chapter 238 of P. L. 1925 and passed on March 21, 1925, by forthwith adopting resolutions fixing the salary of women teachers on the same scale as is and has been paid to men teachers, so that henceforth there shall be no discrimination based on sex," and demanding that the Board "pass proper resolutions for the raising of funds to pay to the women teachers sums of money equal to the difference between salaries paid men teachers since March 21, 1925, to the present time." The Board refused to comply with the petition, and denied that it was violating the statute referred to. Subsequently, and on May 2, 1930, a petition of appeal was filed with the State Commissioner of Education by certain individual teachers. On October 4, 1930, the Commissioner rendered his decision in which he held (a) that the claim for salary for years prior to the appeal was without merit and that item was denied; (b) that the Board proceed at once to formulate a salary schedule without sex discrimination and pay to the petitioners the difference between the salaries which they had received and that to which they claimed to be entitled under an alleged new schedule from the date of the filing of the appeal. The local Board thereupon appealed from that judgment to the State Board of Education, which, after hearing, reversed the State Commissioner of Education and sustained the local Board. It is this latter judgment which is now before the Court on certiorari.

In the view we take of the case it is unnecessary to consider the contention of the defendants in certiorari that the State Commissioner had no jurisdiction; and we now proceed to examine the merits of the decision.

Chapter 238 of Laws of 1925, invoked by the prosecutors declares that "In the formulation of a scale of wages for the employment of teachers * * * there shall be no discrimination based on sex." Throughout the entire controversy the Elizabeth Board of Education maintained that, *since the passage of the Act of 1925,* it had not "formulated a scale of wages for the employment of teachers."

But the prosecutors contend that the Board, in adopting annually reports setting forth the names of the teachers and the salaries they were to receive for the following school year, and containing general information, has the effect of establishing a new salary schedule each year and as such it is a violation of the statute.

The record does not support that contention. On the contrary it is plain that these reports, annually adopted subsequent to 1925, were adopted purely as an administrative proceeding. They were merely declaratory of the basic general salary schedule, or "scale of wages" formulated and adopted in 1922 (modified in 1924) for a period of ten years. They were merely for the guidance of principals, secretaries and others in the preparation of payrolls and to facilitate generally the business of the Board, and they have not the character or the effect of a "formulation of a scale of wages for the employment of teachers," within the meaning of that language in Chapter 238 of Laws of 1925.

The prosecutors next contend that the Board has violated Chapter 238 of Laws of 1925 by thereafter adopting annually a resolution that "the rules and regulations of the preceding year be adopted as the rules and regulations for the government of the Board for the ensuing year," and argue that thereby it adopted a new scale of wages which must be recast in the light of the statute. But this is not so. The mere adoption of such a parliamentary motion was not intended to be, and was not, the "formulation of a scale of wages for the employment of teachers" within the meaning of that language in the Act of 1925.

It is further urged by the prosecutors that Chapter 238, P. L. 1925, is mandatory in its terms, and that, therefore, it was the duty of the local Board of Education upon this act taking effect to reframe its salary schedule and place men and women teachers on the same salary level; in other words, to equalize the pay of men and women performing similar work, and that by reason of its failure to do so, the teachers are entitled to the difference from that date (March 21, 1925) between the wages they have received and those which they would have received had the law been complied with.

The statute is entitled "An act prohibiting discrimination on account of sex in the employment of teachers," passed March 21, 1925, the material parts of which provide:

> "In the formulation of a scale of wages for the employment of teachers * * * there shall be no discrimination based on sex * * *."

The language of the act does not support the contention of the prosecutors. The act does not abrogate the salary schedule or scale of wages adopted and in force prior to the passage of the act. It is the "formulation

of a scale of wages" after the passage of the act (March 21, 1925) with which the statute deals. There is no direction by the statute to local Board of Education to formulate a scale of wages placing men and women on the same wage level, but rather a command that "in the formulation" that is to say, when in the future the Board shall undertake the "formulation of a scale of wages," there shall be no discrimination based on sex.

A statute will be given a prospective effect, unless there are words contained therein expressing a contrary intention. Monahan *vs.* Matthews, 91 N. J. L. 123; Citizens Gas Light Co. *vs.* Alden, 44 N. J. L. 648. Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot otherwise be satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature, Erie Railroad Co. *vs.* Callaway, 91 N. J. L. 34; Baur *vs.* Common Pleas of Essex, 88 N. J. L. 128; Williamson *vs.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

The State of New York has a similar statute became effective September 1, 1924. That statute was construed by the Court of Appeals of the State of New York in the case of Moses et als. *vs.* Board of Education of the City of Syracuse, 245 N. Y. 106, 156 N. E. Rep. 631, reversing the Supreme Court, Appellate Division. That statute had for its purpose the same object as our statute. The Court held that the Act was "designed * * * to prohibit future schedules or contracts where the inequality was based on the ground of sex"; that by the language "or the payments to be made" the Legislature did not intend to interfere with the existing schedules or contracts, and that "only when a change came, the *new schedule* must contain no discrimination as to salaries based on sex."

The prosecutors also urge that the adoption by the local Board of a report on January 28, 1927, providing for a stated "supplementary increment" to teachers who reach the maximum salary under the basic schedule (which supplementary increment was accepted by all such without complaint), was the "formulation of a scale of wages" within the purview of the statute of 1925, prohibiting discrimination based on sex, and consequently the Board's legal duty was to recast its entire salary schedule and to make provision for the payment to women teachers of the same salary as is paid to men where they are performing similar work, to run from January 28, 1927, the date of the adoption of the report.

We do not think that the adoption of such report had that effect. It is obvious from the language of the resolution that the local board did not deem its adoption as a formulation of a scale of wages. The obvious purpose and effect of the report was that pending a study of the salary question (by the report continued for such purpose) a stated supplementary increment, treating alike men and women doing similar work, should be

given teachers who reached the maximum salary under the basic schedule. At the time of the adoption of the report, eleven women and five men received the supplementary increment, having reached the maximum salary provided for in the basic schedule. The act of granting the "supplementary increment" was not an act formulating a scale of wages, but was rather the "formulation" of a "supplementary increment." On the contrary, it grants an "increment" only, quite separate and distinct from all other considerations. The basic salary schedule remains. Both basic salary schedule and the "supplementary increment" rest upon distinct foundations, yet consistently legal. The general basic schedule of 1922, modified in 1924, is the authority and warrant, good under the statute for the compensation therein provided for; and the report is the authority and warrant for the "supplementary increment" also consistent with the statute because it treats both *men and women alike*, thus being free from the vice of discrimination prohibited by the statute. The discrimination which exists grows out of the basic schedule (not unlawful under the statute) and not out of the act creating the "supplementary increment" adopted since the passage of the law, consequently the discrimination based on sex was not brought about by an act of the Board after the adoption of the statute. The Legislature evidently did not intend by the statute to deprive the Board of the power, in the exercise of its sound discretion, to grant teachers reaching a maximum, such a "supplementary increment" so long as it treated both men and women alike. Such in effect was the decision of the Court of Appeals in Moses et al. *vs.* Board of Education of the City of Syracuse, 245 N. Y. 106, 156 N. E. Rep. 631.

Lastly, the prosecutors contend that the notice of appointment which the city superintendent sent annually to each of the teachers engaged, with a statement of the amount of the salary, based on the basic scale of wages, had the effect of formulating a "scale of wages" in violation of the statute. Both the State Commissioner and the State Board in their decisions disagreed with the prosecutors, and we think rightly. The notices were nothing more than routine administrative acts on the part of the Superintendent of Schools.

We believe that the foregoing in effect disposes of every question raised and argued.

The judgment of the State Board of Education will be affirmed, with costs. 109 N. J. L. 1.

Affirmed by Court of Errors and Appeals, 112 N. J. L. 196, January 12, 1934.

NECESSITY OF MAJORITY AFFIRMATIVE ACTION BY BOARD OF EDUCATION IN INCREASING TEACHERS' SALARIES

MARY I. MINIHAN,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Mary I. Minihan, a teacher in the public schools of the City of Bayonne, appeals to the Commissioner of Education because of the refusal of the Board of Education to act in accordance with a resolution offered by Lavey Levine at a meeting of the Board of Education in the City of Bayonne held on January 5, 1928, as follows:

"22 By Trustee Levine.

WHEREAS, Sufficient money was included in the school budget for the current year to adjust the salaries of all teachers who have taught in the schools of Bayonne 13½ years or more, but who have not reached the elementary schedule maximum of $2,800.00 according to the schedule of salaries adopted by this Board and now in force; therefore

Be It Resolved, That the salaries of all teachers who have taught in these schools of Bayonne 13½ years or more, but who have not reached the elementary schedule maximum of $2,800.00 be placed at the maximum elementary schedule of $2,800.00 effective as of September 1, 1927.

Trustee Levine moved the adoption of the resolution.

Lost.

Ayes: Trustees Levine and President Chamberlin.
Nays: Trustees O'Leary, Loye and Nealon.
Excused: Vice-President Lee.
Not Voting: Trustees Wauters and Hayes.
Absent: Trustee Tokarski."

The foregoing resolution, vote and ruling were submitted in evidence at a hearing held in Bayonne, February 5, 1929.

Section 132 of the 1928 Compilation of the School Law (Sec. 88, S. S. P. L. 1903) provides as follows:

"No principal or teacher shall be appointed, transferred or dismissed, nor the amount of his salary fixed; no school term shall be determined, nor shall any course of study be adopted or altered nor textbooks selected, except by a majority vote of the whole number of members of the Board of Education."

It is agreed by counsel that the Board of Education consists of nine members and in accordance with the above provision of law five votes are necessary to fix the salary of petitioner.

It is contended by counsel for appellant that instead of the motion being lost as declared by the president, the ruling was improperly made, as Vice-President Lee, who asked to be excused, but who was not excused by the Board and the non-voting members, Wauters and Hayes should be considered as having voted in the affirmative which would make five for and three against the resolution thus adopting it.

In support of this contention counsel cites the manual of the Board of Education, page 5, paragraph 16, as follows:

> "Each member who is present when a question is put, shall vote for or against the same unless excused by the Board of Education, provided the president shall not vote when appeals are taken from his decisions."

and submits supporting evidence to show that Vice-President Lee was not excused by resolution of the Board of Education. He quotes Ruling Case Law, Volume 19, page 890, section 190:

> "If members present desire to defeat a measure they must vote against it for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition."

Counsel also attempted to show a special appropriation submitted to the Board of School Estimate providing funds for the increase in salaries required by the resolution. While the testimony did not disclose the inclusion of such an item in the informational budget submitted to the Board of School Estimate, such inclusion would not in the opinion of the Commissioner have any effect upon the case. The motion was made on January 5, 1928, and at such time there was money available in the current expense account to make the payments incurred by the proposed increase provided the motion was carried according to the statute above quoted. It, therefore, appears that the sole question involved in this case is whether the resolution was lost as declared by the chair or whether it was carried as contended by appellant's counsel.

In the case of Thorpe *vs.* Board of Education of the City of Bayonne, decided by the Commissioner, June 7, 1928, and affirmed by the State Board of Education, the Commissioner said:

> "It is, however, the general consensus of judicial opinion in various States as well as that of Cushing's Manual and of textbook writers upon the subject of the procedure of public boards or bodies that where a majority vote of those present and constituting a quorum is required for the passage of a resolution, those who do not vote will be considered as acquiescing in the passage of the resolution before the board and to have accordingly voted in the affirmative."

Such was also the opinion of the New Jersey Supreme Court in the case of Mount *vs.* Parker, 32 N. J. L. 341, which held as follows:

> "It being the well established law, that *where no specified number of votes is required,* but a majority of a board, regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do."

In this case, however, a specified number of votes is required, and since the Board consists of nine members an affirmative vote of five is necessary for the passage of the resolution above cited.

In the case of McCurdy *vs.* Matawan Board of Education, decided by the Commissioner of Education, October 19, 1926, and affirmed by the State Board of Education, it appears that in the vote for the election of a supervising principal there were four affirmative votes and three in the negative and that upon such vote the president announced that the motion was carried. It was held in this case that the announcement by the president, who was not recorded as voting, was equivalent to his casting a vote. In support of this ruling the case of Roberts *vs.* Dancer, 93 S. E. 297, decided by the Court of Errors and Appeals of Georgia, was given which holds as follows:

> "In the present instance we think concurrence must have been evidenced in some more active and positive manner than by acquiescence, which is altogether implied, and that in some way actual and positive manifestation of such intent must have been given. It is our opinion that the statement of the chairman, in declaring the resolution carried, when the circumstances were such that his vote became necessary to its adoption, was equivalent to the express and formal casting of his vote therefor."

It is to be noted that in this case the Court of Errors and Appeals did not accept silence as acquiescence but considered only that the chairman in his ruling showed positive manifestation of his intention to vote affirmatively.

The case of Schermerhorn *vs.* Mayor and Aldermen of Jersey City, 53 N. J. L. 112, appears to be directly in point. In that case the Board of Aldermen consisted of twelve members and a president who also had the right to vote and therefore constituted a voting board of thirteen members. In voting for an ordinance requiring that three-fourths of all the members * * * shall agree to the passage, there were nine votes in favor of the ordinance, including the president's, two against and two members not voting. The court held that ten votes were necessary to meet the specific requirement of three-fourths of all the members and decided accordingly that the resolution having received but nine affirmative votes failed of passage. If the Court had held that the two members not voting were to be considered as favoring the resolution, then there would have been eleven votes in favor and two against which would have made the resolution effective. In this same case the Court refers to the Constitution of our State giving the authority by which statutes are passed:

> "That no bill or joint resolution shall pass unless there shall be a majority of all the members of each body personally present and agreeing thereto."

The requirement of eleven affirmative votes in the Senate and thirty-one affirmative votes in the House is necessary to the passage of a bill or joint resolution, and the failure of any member to vote, in no case gives the authority to record such member in the affirmative.

In accordance with the authorities above cited in the cases where a specific number of votes is required, it is the opinion of the Commissioner that the resolution in this case presented to the Board of Education of the City of Bayonne on January 5, 1928, was not passed by the statutory number of votes and therefore is void and of no effect. The appeal is hereby dismissed.

March 25, 1929.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant petitioned the Commissioner of Education to rescind the action of the Board of Education of Bayonne refusing to act in accordance with a resolution offered at a meeting of the Board held on January 5, 1928, providing that the salaries of all teachers in the Bayonne schools who had taught thirteen and a half years or more, but had not reached the elementary schedule maximum of $2,800.00, be placed at that maximum as of September 1, 1927. The Board consists of nine members; two voted for the resolution, three against it, three did not vote and one was absent.

The parties did not desire a hearing before this Committee and no brief has been filed for the appellant, but the record shows that it is her counsel's contention that the members not voting should be recorded as having voted in the affirmative. Testimony was taken before the Commissioner who delivered a written opinion in which he overruled the appellant's contention and dismissed the petition for reasons fully stated in the opinion. We agree with his conclusions, and recommend that the decision be affirmed.

July 13, 1929.

DISMISSAL OF TEACHER UNDER TENURE

ELLA CONROW,

Appellant,

vs.

BOARD OF EDUCATION OF LUMBERTON TOWNSHIP

Respondent.

Richard B. Eckman, for the Appellant.
Davis & Davis, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted that the appellant was employed as a teacher in the schools under the control of the respondent continuously for eight years at the close of the school year ending June 30, 1912, and that the respondent did not assign her to any school at the opening of the fall term in September last.

, written charges that she was inc

On Jan[illegible] as a teacher by reason of deafn[illegible]pacitated from performing he[illegible] ion of Lumberton Township; on J[illegible]ss were filed with the Board of Ed[illegible] nesses, declared the charges susta[illegible]nuary 13 said Board, after examining wit[illegible] is exceedingly deaf, and, wi[illegible]ained and dismissed her.

Miss Conrow [illegible]ly incapacitated from [illegible]thout the aid of some mechanical device is undoubted[illegible] of long sta[illegible] performing the duties of a teacher. Her deafness has been [illegible]hanged ver[illegible]uding, and it is evident from the testimony that the condition has c[illegible]ars ago[illegible]y little, if any, since she was first employed by the respondent eight y[illegible]mec[illegible]. Miss Conrow, since the close of school in June, 1912, has procured a [illegible]hanical device known as the "acousticon" and with this she is able to hear distinctly. If the respondent was of the opinion, as is shown by retaining her in its employ, that the services of Miss Conrow were satisfactory and efficient for eight years while her difficulty in hearing was about the same, there appears to be no good reason for dismissing her on account of her deafness, after she had secured an appliance which enables her to hear almost, if not quite, as well as a person with normal hearing.

The action of the respondent in dismissing the appellant was in violation of the provisions of Chapter 243, P. L. 1909, commonly known as the "Teachers Tenure of Service" law, and is, therefore, null and void.

April 18, 1913.

Decision of the State Board of Education

Miss Conrow was a teacher in the employ of the Board of Education of Lumberton Township. In January, 1913, a charge was preferred that because of deafness she was incapacitated to serve as a teacher. Evidence was taken at a hearing of which she had notice. The charge was found to be true in fact and she was dismissed. She appealed to the Commissioner of Education, and he ruled that her dismissal was contrary to the Tenure of Service Act, and, therefore, null and void.

That act provides that a teacher who has been charged with incapacity may be dismissed if she has been given a trial after reasonable notice, and if the charge has been found true in fact by the Board of Education having charge of the school in which she was engaged.

In this case we have not been furnished with transcript of the proceedings of the trial before the local board, but, from the argument, we infer that the evidence adduced before it was substantially the same as that before the Commissioner. As the procedure prescribed by the statute was followed, but two questions arise: first, was the charge such as, if found true in fact, would justify dismissal; and, second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice. The charge against Miss Conrow was that she was so deaf that she was incapacitated to properly perform the duties of a teacher. Hearing is so essential to a teacher that we cannot say that its substantial impairment is not just cause for dismissal. That Miss Conrow is quite deaf is admitted. She contends, however, that between the time when she last taught and the time of

her trial she had purchased an acousticon with the aid of which she could hear as well as the average person. At the time of the trial, she could not wear glasses to improve their vision. It was argued that as teachers are permitted to otherwise be allowed to wear acousticons, those with defective hearing should likewise be allowed to wear acousticons. It is not necessary however for us to decide to what extent local boards must submit to the use of instruments by teachers to overcome defects. On the trial evidence was submitted tending to show that the acousticon is not the equal of the normal ear. In fact, it was admitted that hearing with it is, to some extent, dependent on the direction from which sound comes.

There is a suggestion that the Board of Education of Lumberton Township is estopped to claim that Miss Conrow is incapacitated because she had been in its employ for many years during most, if not all, of which time her hearing was defective. We cannot subscribe to a doctrine that a board which, because of sympathy or other reason, tolerates an inefficient teacher, thereby estops itself and the public which it represents from dismissing her. If such were the law, a sympathetic, or an incompetent, or a dishonest board might confer a life tenure on an absolutely incompetent teacher.

The decision of the Commissioner of Education is reversed, and the determination of the Board of Education of Lumberton Township affirmed.

January 3, 1914.

DISMISSAL OF TEACHER UNDER TENURE

WALTER G. DAVIS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,

Respondent.

John Scott Davison, for the Appellant,
William J. Morrison, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

From the "Agreed State of Facts" it appears that the appellant was continuously in the employ of the respondent from 1906 to the end of the school year in 1912; that from September, 1906, to June, 1909, he was a teacher in the high school, and from September, 1909, to June, 1912, was principal of the high school, and that his salary for the school year of 1911-1912 was $1,200. It also appears that in August, 1912, the respondent forwarded to the appellant for his signature a contract for the school year of 1912-13 at a salary of $1,200. Said contract does not specify the position to which the appellant had been assigned, and it appears that when he reported for duty on the opening of the schools in September, 1912, the person who had been

appointed to succeed him as principal assigned him to teach the eighth grade in School No. 1, which assignment the appellant declined.

Chapter 243, P. L. 1909, provides that "the service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in the district. * * * No principal or teacher shall be dismissed or subjected to a reduction of salary in said district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause."

It is claimed by the appellant that the recommendation of the committee adopted by the respondent at the meeting held May 17, 1912, was a dismissal, and therefore in violation of the Teachers' Tenure of Service Act, above quoted, no charges having been preferred against him as required by said act.

This recommendation reads as follows:

"The Committee on School Government recommends that Walter G. Davis be not re-employed as principal of and instructor in the High School of Overpeck Township for the coming year, it being our conviction that the best interests of the schools would be served by dispensing with his services."

Taken alone, this action, in the absence of any charges or hearing, would undoubtedly be a violation of the Tenure of Service Act, but taken in connection with the fact that the respondent tendered him a contract for the ensuing year is evidence that all that was intended was to relieve him of his duties as principal of the high school, and that the "dispensing with his services" applied only to his position as principal, and that it was not the intention of the respondent to dismiss the appellant from its employ.

The Tenure of Service Act prohibits a board of education from dismissing a teacher, except in the manner provided in the act, but makes no reference to the transfer of a principal or teacher to another position.

The counsel for the appellant admits that a person protected by the Tenure of Service Act may be transferred from one position to another, provided such transfer is made by a vote of a majority of all the members of the Board of Education. In the absence of proof to the contrary, it must be assumed that the transfer of the appellant to the eighth grade in School No. 1 was legally made.

The counsel for the respondent argued that the positions of principal and teacher are separate and distinct, and therefore the appellant was not protected by the Tenure of Service Act for the reason that he had held the position of principal only for three years, and that he would not be protected by said act until he had entered upon his fourth year of service as principal.

I am clearly of the opinion that the Legislature did not intend to divest a board of education of its power to transfer a teacher or principal from one point to another as the best interests of the schools demanded, and that a board of education may make such transfer, provided there is no reduction in salary.

A contract between a board of education and a teacher protected by the Tenure of Service Act is unnecessary for the reason that the terms of the contract are fixed by said act. The appellant has not lost any of his rights

by failing to sign the contract forwarded to him, neither would his rights have been impaired had he signed it.

The appeal is dismissed.

November 7, 1912.

DECISION OF THE STATE BOARD OF EDUCATION

On May 17, 1912, the respondent's Committee on School Government recommended that the appellant should not be re-employed as principal in its high school. The recommendation apparently was adopted and the appellant appealed to the Commissioner of Education. His appeal was dismissed on the ground that he had been assigned to teach in an elementary school at the salary received by him as a principal and that such a transfer was within the power of the Board. From the decision of the Commissioner he has appealed to this Board.

In 1906 Mr. Davis was employed as a teacher in the High School of the Township of Overpeck. He was re-employed in 1907 and 1908. In 1909 he was appointed principal of the high school, and served as such until June, 1912. In May, 1912, a committee of the Board recommended that he should not be re-employed as principal and that the best interests of the schools would be served by dispensing with his services. Thereafter another principal was appointed in his place, and when he reported for duty in September, 1912, he was assigned to teach the eighth grade in an elementary school.

In Chapter 243 of the Laws of 1909, known as the Tenure of Service Act, it is provided that:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency after the expiration of a period of employment of three consecutive years in that district."

It is further provided that:

> "No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

Mr. Davis comes within the terms of the Act and is entitled to its protection. The question to be decided is the measure of such protection. It is claimed by the respondent and has been held by the Commissioner that the protection merely covers service, and that Mr. Davis not only could be

changed about as a principal but could also be assigned to teach, provided that his salary was not reduced. He was so assigned, and, as stated in the argument, is now serving under protest as a teacher at the salary received by him as a principal. The township is now paying the salary allotted to the principal of the high school to two persons, though one is a teacher in an elementary school. If the decision appealed from is sound, there is nothing to prevent a board from elevating any teacher who has served more than three years to a position as principal, increasing his salary and subsequently assigning him to teach with the assurance that though but a teacher he will thenceforth receive the salary of a principal. By such procedure a school district might be called upon to pay the salary of a principal not to one teacher, as in Overpeck, but to many. If the respondent's construction of the law is correct, it is within the power of any board to transfer a man who is a principal to a position as teacher in the lowest grade. In other words, it would be within the power of a board to assign a man who is receiving a salary of $3,000 or more to teach in a grade where the usual salary paid in the district for such grade is only one-fifth or one-sixth of that amount. If such procedure can be adopted, it would not only be unjust to the taxpayers, but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teaching the same grade, with no more experience, was paid the salary not of a teacher but of a principal?

We cannot believe that the Legislature by the enactment of the Tenure of Service Act intended to place it within the power of a board of education to pay for a $500 position a salary of $3,000 or more merely because in its opinion the person receiving such large salary is not competent to fill the position for which that sum has been allotted. Such a construction of the Act is not in accord with reason, and should not be adopted unless the language admits of no other. If a man who is principal is not competent, he should be removed, rather than given less responsible work at the same compensation. If he is fit only to teach, he should receive only the salary of a teacher.

The language of the statute is not such as to compel a district to retain an incompetent principal. It is provided that a principal may be removed for any just cause, and incompetency is certainly a just cause. The record is silent as to whether the appellant in this case is competent or incompetent to act as principal of a high school. Does the statute, fairly construed and with due regard to consequences prescribe that a principal may, without cause be reduced to the rank of a teacher?

It reads: "No principal or teacher shall be dismissed" except for just cause after a trial. This language, in our opinion, is the equivalent of (1) no principal shall be dismissed and (2) no teacher shall be dismissed except for just cause after a trial. When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor.

No trial was given the appellant, so that as we construe the statute its provisions were disregarded by the respondent.

The case of McManus *vs.* Newark, 20 Vroom 175, has been cited in support of the contention of the respondent. In that case a transfer from detective to patrol duty was held not to contravene the Police Tenure of Service Act. In that act, however, it is provided that "no person shall be removed from office or employment in the police department of any city." If in the Tenure of Service Act under consideration it had been provided that no person engaged in the public schools shall be removed from office or employment, the case would be analogous. The Legislature, however, instead of saying that "no person" shall be dismissed has enacted that "no principal or teacher shall be dismissed."

The record shows that the original intention of the respondent was to entirely dispense with the services of the appellant. When it was found that he was protected by the Tenure of Service Act, it transferred him from the position of principal in the high school to that of teacher in an elementary school.

Instead of complying with the statute and preferring charges against the appellant, it endeavored to evade the statute, and if its act is sustained it will be within the power of boards, if so disposed, not only to pay the salary of principals to favorite teachers, but also to so degrade and humiliate worthy principals that the protection which the statute is supposed to afford them would really become a myth. We do not believe that we should place a construction on the statute which will so readily enable boards to evade its provisions.

In a very recent case, Standard Sanitary Mfg. Co. *vs.* United States, 226 U. S., the Supreme Court of the United States, in construing the Sherman Law, wrote:

> "This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.'"

The decision of the Commissioner is reversed and the reduction of the appellant from the rank of a principal to that of a teacher is adjudged contrary to law.

March 1, 1913.

CONCURRING OPINION BY DR. JOHN C. VAN DYKE

(1) It seems from the agreed state of facts in this case that the appellant, Prof. Davis, was the first employed by the respondent, the Board of Education of the Township of Overpeck, in 1906, as a teacher in its High School; that he continued in that capacity until 1909, and after that, to wit, May 7, 1909, he was employed as a principal. He continued to hold the position of principal until May 17, 1912, when he was notified, by recommendation of

the respondent, that "the best interests of the school would be served by dispensing with his services." No charges were preferred against him. Three months later the respondent offered the appellant a second contract, for a service unspecified, at the same salary he had been receiving as principal. When the appellant reported for work he was assigned, not to principal's work, but to teaching in the eighth grade. He protested and claimed protection under the Tenure of Service Act.

(2) All told, the appellant served six years in the respondent's schools, three years as teacher and three years as principal. Counsel for the respondent contends that there should be three consecutive years as a principal for the appellant to come under the Tenure of Service Act. Even admitting for the moment that this is necessary, and that his three previous years as a teacher are not to count, he was still under contract with the respondent from May 7, 1909, to May 17, 1912, a matter of three years and over. The twisting of the dates to read from school year to school year, beginning in September and ending in September is ingenious, but does not alter the facts that the appellant served as a principal for three years and ten days under contract with the respondent, and for three years before that had been a teacher under the respondent. Commissioner Betts in his decision recognizes that the appellant is within the Tenure of Service Act, saying that the recommendation of the respondent dispensing with the appellant's services "taken alone in absence of any charges or hearing was undoubtedly a violation of the Tenure of Service Act." It must be assumed that the Tenure of Service Act was designed to meet just such cases as this, and that the appellant herein was, with his six years of service, well within the provisions of the act.

(3) When the respondent on May 17, 1912, passed its recommendations that the appellant's services should then and thereafter be dispensed with, there was no mention of service in any other capacity than as principal. There was evidently an attempt made to dispense with Prof. Davis's services in any and every capacity. It can be construed in on other way than as a dismissal, and the contention of the appellant that it was a dismissal, that it was a dismissal without charges, and that it was in violation of the Tenure of Service Act must be upheld.

(4) On August 12, 1912, three months after this dismissal, the respondent offered the appellant another contract for an indefinite service, at the same salary he had been receiving as principal. This cannot be considered as a renewal of the old contract as principal, but an entirely new undertaking, a new contract which the appellant could accept or reject as he thought best. He accepted it under protest, still insisting that he was a Principal, not a teacher, and protected by the Tenure of Service Act. The second contract may perhaps be pleaded in explanation of the respondent's intentions and good will, but it does not alter the essential fact that the appellant was dismissed without formal charges, after he had served six years as teacher and principal in the respondent's schools and was within the Tenure of Service Act which forbids this very thing.

(5) The question of the respondent's right to promote or demote the appellant, to place him in one position or another, is dealt with in another

opinion in this case, filed herewith, in which concurrence is herewith expressed. The main contention of the appellant that the Tenure of Service Act has been violated, that the second contract is inoperative, and that he is still a principal in the respondent's employ should be sustained.

Decision of the STATE BOARD OF EDUCATION affirmed by SUPREME COURT, May 21, 1913.

NEW JERSEY SUPREME COURT.

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,

Prosecutor,

vs.

STATE BOARD OF EDUCATION, ET AL.,

Defendants.

Submitted May 10, 1913—Decided May 21, 1913.

Certiorari to a decision of the State Board of Education reversing on appeal a ruling of the Commissioner of Education which dismissed the appeal of Walter G. Davis from the action of the Overpeck Board in superseding him as principal of the high school.

Argued before Parker J. at Chambers.
For the Prosecutor, William J. Morrison, Jr.
For the Defendants, John S. Davidson.

Memorandum by Parker, J., May 21, 1913.

This case was presented to me sitting as a single Justice with a view of an early decision, and as counsel join in requesting a speedy termination of the matter and no questions of particular difficulty seems to be involved, I will state my conclusion somewhat informally.

The case arises under what is called the Teachers' Tenure of Office Act C. S. Compiled Statutes 4763. That act provides *inter alia* that "The service of all teachers, principals . . . in any school district . . . shall be during good behavior and efficiency after the expiration of the period of employment of three consecutive years in that district. . . . No principal or teacher shall be dismissed or subjected to a reduction of salary in said school district except for inefficiency," etc., and after charges and trial.

Mr. Davis served several years in the Overpeck district as a teacher and for three years as principal of the high school, the latter under written contracts pursuant to Section 106 of the School Act and which show that his three years of service expired early in September, 1912. In May, 1912, his discharge was recommended by a committee of the board; in August the employment of another as principal was recommended by the same committee;

soon after the board tendered him a written contract for service as teacher in the public school at the same salary he had had as principal of the high school but he did not execute it. He reported as principal of the high school at the beginning of the year and was debarred from serving as such.

I agree entirely with the State Board that Mr. Davis was protected by the act; that his three years of service beginning with September, 1909, entitled him to the benefit of its provisions; that the fact of his service under contracts for a definite term did not prejudice his rights of that service was continuous and for the statutory period; and that his attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school.

The technical objection that the appeal was taken on August 28, 1912, before the expiration of a calendar year, and was taken from a resolution of May 27, and the appointment of another on August 27, would have no weight. The case has been successively heard by the Commissioner of Education and by the State Board on its merit and the point is too late now.

The decision or judgment of the State Board of Education is affirmed with costs.

NEW JERSEY SUPREME COURT.

BOARD OF EDUCATION OF THE TOWNSHIP OF OVERPECK,

Prosecutor,

vs.

STATE BOARD OF EDUCATION, WALTER G. DAVIS, ET AL.,

Defendants.

ON CERTIORARI

Additional memorandum May 28, 1913.

Counsel for prosecutor calls my attention to the fact that in the original memorandum no notice is taken of the point made by him that as Mr. Davis was serving under a written contract for a definite term of one year from September 5, 1911, the decision of the Court of Errors and Appeals in Hardy *vs.* Orange, 32 Vroom 620, controls this case. The point was not overlooked, but was considered and deemed to be without merit. The Tenure of Office Act of 1909 must be read in view of the law in force when it was passed. The School Act of 1903, which the Act of 1909 was intended to modify, provides in Section 106 that the boards of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, etc., that the employment of any teacher shall be dependent upon and shall be governed by the rules and regulations in reference thereto. In the absence of such rules and regulations, it requires the contract of employment to be written and in triplicate; and provides that the State Superintendent of Public Instruction shall prepare and

distribute blanks for contracts between boards of education and teachers. The approved form of such a contract will be found annexed to the compilation of the School Law prepared by the State Superintendent of Public Instruction and printed in pamphlet form, and the several contracts under which Davis served from year to year follow that form and are evidently drawn on printed blanks. It does not appear in either the return or the additional proofs submitted to me that the Overpeck board made any rules or regulations. What does appear is that Davis was employed as principal under three successive annual contracts drawn in strict compliance with the Act of 1903 and in the official form promulgated by State authorities.

Now it seems to me perfectly plain that the Act of 1909 was intended to apply to "employment" under the Act of 1903, i. e., of either employment under rules and regulations or one under contract; and that it is this application that distinguishes the case from Hardy *vs.* Orange.

If the Act of 1909 does not affect "employment" under contract, we must read into its language that it applies only to employment under "rules and regulations." And, if such rules and regulations provided for example that the employment of teachers should be for a fixed period no longer than two years (or indeed for any such term) at the end of which time there must be a re-employment, a term would be effectively fixed by a contract recognized by the statute as arising out of the rules and regulations, and the object of the Act of 1909 would again be as effectually defeated as if there were a written contract. The result would be that the Act of 1909 would apply only to cases where there had been a three years' service under an employment for an indefinite term. I do not see how the plain intent of the Act of 1909 could be more completely nullified; for the number of teachers who were not serving for fixed terms at and after the passage of the Act of 1909 must be comparatively small. Manifestly the Tenure of Office Act was intended to apply to all forms of "employment" contemplated by Section 106 of the School Act. If the board wished to avoid the Tenure of Office Act, it could have made the term of the 1911 contract less than a year, or it could have given thirty days' notice during the year, as provided in the contract, and thus cut off the employment short of three years. Not having done so, the Act of 1909 applies.

The counsel for defendant Davis, asks that certain depositions and evidence outside of the return be struck out and not considered, because not before the Commissioner or the State Board of Education. Section 2 of the Certiorari Act permits the consideration of such evidence, and I have considered it in disposing of the case, and see no good reason why it should be struck out or disregarded. It contains among other things the contract of 1911 which does not appear in the return proper, although its existence and contents were doubtless known to both the Commissioner and the State Board.

DISMISSAL OF TEACHER UNDER TENURE

LAURA C. WELCH,

Appellant,

vs.

THE BOARD OF EDUCATION OF WEST ORANGE,

Respondent.

Laura C. Welch, pro se.

Simeon H. Rollinson, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, prior to April, 1913, had taught continuously in the schools under the control of the respondent for more than three years, and was, therefore, protected by the provisions of Chapter 243 of the Laws of 1909, commonly known as the "Teachers' Tenure of Service Act." She claims that she was principal of the St. Cloud School and that the action of the respondent, on June 9, 1913, transferring her to a position as teacher in the St. Mark's School was in violation of the provisions of said act, as interpreted by the Court in the case of Davis *vs.* Board of Education of the Township of Overpeck.

She also claims that the action of the respondent, on September 18, 1913, in discharging her from its service, was contrary to law, and she further claims that she has not been paid the full amount of salary due her for the school year of 1912-13.

If the appellant was employed as a principal, the action of the respondent transferring her to a grade position in the St. Mark's School was illegal.

Section 182 of the School Law provides that the County Superintendent of Schools shall apportion to a district the sum of $400.00 for each principal employed, and the sum of $200.00 for each teacher, except certain high school teachers. The evidence shows that $200.00 was apportioned to the district of West Orange for Miss Welch. The Supervising Principal and the District Clerk both testified that Miss Welch was a teacher and not a principal, and Miss Welch testified that all the time the school was in session she was occupied in teaching.

A principal of a school is a person who devotes all or nearly all his time to supervising the work of the classes in his building, and very little, if any, time to class teaching. Miss Welch was a teacher and not a principal, and, therefore, could legally be transferred to another position.

Was her transfer from the St. Cloud School to the St. Mark's School made in the manner prescribed by the Statute?

Section 88 of the School Law prescribes that "no teacher shall be appointed, transferred or dismissed except by a majority vote of the whole number of the members of the Board of Education."

The Board of Education of West Orange is composed of five members, and the minutes of the meeting of the Board of June 9, 1913, at which meeting the resolution transferring Miss Welch was adopted, show that four members were present. The minutes do not show how each member voted on this resolution, but the District Clerk testified that the vote in favor of the adoption of the resolution was unanimous. I am of the opinion that the transfer of Miss Welch was legally made.

The Supervising Principal, under date of September 8, 1913, preferred charges of insubordination against the appellant, and she was notified to appear before the respondent on September 18, 1913, to answer said charges. The notice served upon the appellant did not state on what ground the charge of insubordination was based. The appellant, however, waived any rights she may have had by reason of any defect in the notice served upon her, by appearing at the hearing on September 18, and failing to enter any protest. The failure of the appellant to take charge of the class in the St. Mark's School, to which she had been assigned, and her action at the opening of the St. Cloud School sustain the charge of insubordination preferred against her, and justified the action of the respondent in dismissing her.

The claim of the appellant that she has not received the full amount of salary due her is not properly before me. Having taken the case to the District Court, and the case having been tried in said court on its merits, she is bound by its decision until said decision is reversed by a court having jurisdiction in appeals from district courts.

The appeal is dismissed.

February 13, 1914.

Decision of the State Board of Education

This is an appeal by Miss Laura C. Welch from a decision of the Commissioner of Education to the effect that her transfer from the St. Cloud to another school in West Orange was legal and that her subsequent dismissal for insubordination was justified and in accordance with law.

The charge of insubordination was predicated upon the fact that Miss Welch refused to obey the order transferring her, and endeavored, in defiance of the school authorities, to keep her position in the St. Cloud school so that it became necessary for them to appeal to the police authorities for assistance.

Her reason for such action was and is that she was principal of the St. Cloud School, a two-room building, and that the attempt to assign her to teach a class in another school was a demotion equivalent to a dismissal from the position of principal, and contrary to the provisions of the Teachers' Tenure of Service Act.

That Miss Welch was guilty of insubordination if her transfer was legal is conceded. In fact, it admits of no question. She maintains that when she came within the provisions of the Tenure of Service Act, she was a principal and that her transfer to teach in another school was a reduction in rank and unlawful.

The act provides that—

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency after the expiration of a period of employment of three consecutive years in that district."

Miss Welch's third year of service in the West Orange Schools terminated with the school year 1909-1910. If she was employed after the expiration of such school year, she came automatically under the protection of the Tenure of Service Act. She was thereafter employed, and it is, therefore, important to ascertain in what capacity she was engaged to serve. That fact is clear.

On the 4th of May, 1910, a written contract was entered into between the Board of Education of the Town of West Orange and Miss Welch, wherein and whereby the Board employed "Laura C. Welch *to teach* in the West Orange Public Schools" for one year from the 6th day of September, 1910, at a salary of $775.00, and wherein and whereby Miss Welch accepted "the employment aforesaid, and undertakes that she will faithfully do and perform her duty under the employment aforesaid."

Miss Welch was then serving in the St. Cloud School, and continued in it without change in her duties down to the time of her transfer. She insists that notwithstanding her contract she was held forth to the public as a principal. In a suit between an employer and a third party, the apparent as well as the real scope of the authority of the employee may be important, and to ascertain it, representations of the employer to the public are considered. In a suit, however, between an employer and an employee, their respective rights and liabilities are governed by the contract between them. The contract between the Board of Education of the Town of West Orange and Miss Welch is clear. She was engaged to teach and she undertook to teach during the year which brought her within the protection of the Tenure of Service Act, and there is no evidence to show that any change has taken place in her relations to the Board since then.

It is not, therefore, necessary for us to consider on the one hand that in notices and reports she was described as a principal nor on the other that to the State authorities she was defined as a teacher, and that the County Superintendent apportioned to the district, because of her services, the sum of $200.00, whereas if she was a principal, the sum of $400.00 would have been allotted. Neither is it necessary for us to consider the definition of a principal propounded by her learned counsel, further than to point out that if it is sound, consolidation of rural schools would become practically impossible, for every teacher of a one-room school would insist that she was a principal and the staff of the consolidated school would consist of all principals and no teachers—all generals and no privates.

The decision of the Commissioner is affirmed.

April 4, 1914.

DISMISSAL OF TENURE TEACHER BECAUSE OF TEMPORARY MENTAL ILL HEALTH, INVALID

SARA P. EASTBURN,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST WINDSOR, MERCER COUNTY,

Respondent.

For Appellant, William C. Gotshalk.

For Respondent, Scammell, Knight & Reese.

DECISION OF THE COMMISSIONER OF EDUCATION

The testimony in this case discloses that the appellant, Sara P. Eastburn, who had been employed in the schools of East Windsor Township for approximately six years and accordingly protected in her position by the Teachers' Tenure of Office Act, became mentally and physically ill during the early part of the school year 1934-1935 and made certain irrational statements to the Rev. Dr. Powell H. Norton, pastor of the Baptist Church in Hightstown, and to a few other people in the community evincing a belief that certain persons had done unkind acts to her and made derogatory statements about her. Dr. Norton, believing from appellant's statements to him that she should not be in the schools, repeated them to Miss Jane B. Donnell, Supervising Principal of Schools, and to some members of the Board of Education. Later, the other persons to whom Miss Eastburn had spoken irrationally repeated her remarks to the school officials. The supervising principal and members of the Board of Education then consulted Dr. William L. Wilbur, the medical inspector of the schools, and he discussed Miss Eastburn's mental condition with members of her family. Following these consultations Dr. Wilbur advised the Board to give Miss Eastburn a vacation or to have her cease work at least temporarily. Acting upon this advice, Mr. Walter C. Black, a member of the Board of Education, went to Miss Eastburn's home and told her she must remain away from the school property and that she could do so for two months, and if at the end of that period she could produce a doctor's certificate, the Board would see what could be done. This action of Mr. Black was confirmed by the Board of Education.

The respondent, apparently believing that the abnormal mental condition of the appellant would continue indefinitely and also that statements made by her during the early part of October terminated her usefulness in the schools of the township, attempted to secure her resignation. Counsel for the Board of Education wrote to Miss Eastburn on November 20, 1934, stating that the Board had given her a leave of absence with pay until the Christmas holidays, and that the Board felt it should insist upon her resignation to be effective

at the end of the school year. Counsel expressed a hope that an amicable solution of the situation might be reached, but if that were impossible he would be forced to advise the Board to have charges preferred against her for the purpose of effecting a dismissal under the Tenure of Office Act. Thereafter, negotiations in reference to a settlement appear to have been continued between the attorneys for the Board and for Miss Eastburn. During January the Board was notified that a plan of settlement proposed by her attorney was not acceptable to her. Soon thereafter she employed new counsel, with whom negotiations were conducted until early in April, when he was replaced by another, who, after interviewing counsel for the Board, appeared before the Board in Miss Eastburn's behalf on May 13, 1935, demanding her reinstatement. The Board refused to comply, and about May 17, a petition was filed with the Commissioner of Education asking him to determine Miss Eastburn's rights under the Tenure of Office Act. The petition was dismissed upon technical grounds without prejudice to the appellant, and charges were then preferred against her by Miss Jane B. Donnell, Supervising Principal of Schools, alleging that Miss Eastburn had not been a fit and proper person to be employed by the East Windsor Township Board of Education for the following reasons:

> "(1) Her mental health has not been normal during the school year 1934-1935, and it would be unfair and unsafe to allow her to continue as a teacher;
>
> (2) Her capacity and qualifications as a teacher have been impaired by her mental health;
>
> (3) Her conduct has been that unbecoming a teacher in that she has related distorted, suspicious and harmful stories concerning individuals in and about the school district and county and in other ways her conduct has been unbecoming a teacher;
>
> (4) Her retention as a teacher would impair the efficiency of the other teachers and pupils at the school, and prevent the work at the school from being carried on harmoniously and efficiently."

On July 10 and 15 the Board of Education heard witnesses on both sides and at the conclusion thereof found the evidence supported of all the charges. The report concludes as follows:

> "And further finds that the proof of any one of the four specifications sufficient to sustain its findings that in September and October, 1934, and subsequent thereof, Sara P. Eastburn, has not been a fit and proper person to be employed by this Board as a teacher in the High School of the Borough of Hightstown or any other school in the District of East Windsor Township, and her dismissal as of October 8, 1934, is hereby ordered and confirmed."

On November 29, December 1 and 2, Miss Eastburn consulted Dr. Raymond B. Wallace of New Hope and, upon finding her in a highly nervous condition and desiring another physician's opinion prior to prescribing treatment

he referred her to Dr. Johannes F. Pessel, a practitioner of internal medicine in the city of Trenton. It was Dr. Pessel's opinion that on December 4 when he gave her a careful examination, she was suffering from toxic psychosis (a disease of the mind without structural change in the brain), and that it was not wise at that time for her to be in charge of pupils. Dr. Pessel did not further examine appellant after December 5. On November 26 Miss Eastburn visited Dr. Thomas Klein, of Philadelphia, who is also a practitioner of internal medicine, whom she had consulted professionally at various intervals since 1930. He testified that when she came to him on November 26, 1934, she had high blood pressure which he diagnosed as being aggravated by excessive activity of the thyroid gland. She returned to Dr. Klein on December 18, 1934, and during January, February, March, April, and May, 1935. It was his opinion that Miss Eastburn could have resumed teaching on December 18, 1934. Upon receiving a letter from her attorney about December 27, in which it was indicated that a legal contest was involved, he referred her to Dr. George Wilson, Professor of Clinical Neurology of the University of Pennsylvania, who is connected with clinics in a number of hospitals in Philadelphia and its suburbs, consultant at the State Hospital for the Insane in Norristown, and United States Veterans' District No. 3, and was formerly psychiatrist of the 78th Division during the World War. Dr. Wilson saw Miss Eastburn on February 15, 16, 18, 25, and 27, March 2 and 22, April 4 and May 13, 1935. He testified that during these visits he found no evidence of disease except high blood pressure, that the nervous system had not been structurally affected although it may have been functionally affected by her high blood pressure and too much thyroid secretion prior to her visits to him. From the description of her condition he agreed with Dr. Pessel that earlier in the year Miss Eastburn had a toxic psychosis. Dr. Wilson described Miss Eastburn at the time of the hearing as being in good condition, sane, and able to teach, and stated that while in his opinion she was able to resume work when he first saw her on February 15, 1935, he believed it was advisable then for her to take a little longer rest. He admitted a possibility of a recurrence of toxic phychosis, but held it to be improbable.

There is no evidence to show that appellant ever refused to submit to an examination by any experts suggested by the board, although it is indicated that her attorney offered to have her submit to such an examination by an impartial psychiatrist. The testimony of Miss Eastburn's expert (psychiatric) witness, Dr. Wilson, stands uncontradicted by other experts and, therefore, must be accepted against lay opinions as to her mental competency in February, 1935; and the testimony of Dr. Klein shows that she was able to resume teaching about December 18, 1934.

Chapter 243, P. L. 1909, provides in part as follows:

> "No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for *inefficiency, incapacity, conduct unbecoming a teacher* or *other just cause,* and after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charge shall have been examined into and been found true in fact by said Board of Education. * * *"

The above cited statute sets forth the grounds for the dismissal of a tenure teacher. It, therefore, remains to be determined whether the findings of the Board are supported by the testimony and, if so, whether they constitute inefficiency, incapacity, conduct unbecoming a teacher, or other just cause for dismissal.

The findings of the Board of Education upon the charges may be summarized as follows: Miss Eastburn's mental health was not normal during the school year 1934-1935, it was unsafe and unfair for her to continue as a teacher, her capacity and qualifications as a teacher were impaired by her mental health, her retention as a teacher would impair the efficiency of the work of the other teachers and pupils, and the relating of her delusions was conduct unbecoming a teacher. For these reasons the Board adjudged Miss Eastburn an unfit and improper person to be employed in the school district.

It is true that during the early part of the year Miss Eastburn's physical and mental health was such as to incapacitate her for teaching during that time, but there is no evidence to support the view that the condition continued beyond the latter part of December, or that her capacity and qualifications were impaired thereafter. The irrational statements made by appellant when she was mentally irresponsible do not constitute conduct unbecoming a teacher.

The Commissioner knows of no case in this State in which a teacher has been denied a leave of absence or her dismissal attempted because of a brief physical illness. In Prince *vs.* Board of Education of the Borough of Kenilworth, the State Board affirmed the Commissioner of Education in holding that absence because of physical incapacity due to expected motherhood was not good cause for dismissal. This ruling of the State Board is supported by a decision of the Commissioner of Education of the State of New York In the Matter of the Appeal of Bridget C. Peixotto, reported as Case No. 216, State Department Reports.

The good faith of all connected with the prosecution of this case is established by the testimony. The Rev. Powell H. Norton's report of this interview with Miss Eastburn to the school authorities was the performance of a civic duty. Regardless of whether the statements were made to him in confidence, they were irrational and it was imperative that the school authorities know of her condition. Dr. Wilbur's recommendation early in October that appellant's services be temporarily discontinued appears to be clearly justified by the testimony. Miss Donnell's belief that the efficiency of the schools would be impaired by Miss Eastburn's return, and the Board's subsequent action is unquestionably sincere. The question before the Court is not the determination of the good faith or sincerity of any of the parties involved, but the legality of the dismissal based upon the charges and testimony.

The testimony neither establishes appellant's mental incapacity in excess of approximately two months, nor does it show violent tendencies at any time. It is to be noted in this case that the dismissal was as of October 8, 1934, when the mental illness had been apparent for not more than one or two weeks. Mental illness which is recurrent, prolonged, or of a nature dangerous to others may constitute "just cause" for dismissal as may similar conditions of physical illness, but the brief duration of Miss Eastburn's mental and physical

illness under the conditions in this case does not constitute inefficiency, incapacity, conduct unbecoming a teacher or other just cause for her dismissal. The Board of Education of East Windsor Township is accordingly directed to immediately reinstate appellant to a high school position.

The Board paid Miss Eastburn's salary to approximately January 1, 1935, and could not therefore have legally dismissed her as of October 8, 1934, but since she did not offer her services either personally or through counsel until May 13, 1935, she is not entitled to compensation from January 1 to May 13. From the latter date the Board is hereby directed to pay to Miss Eastburn the same salary she would have received if she had been then reinstated.

December 11, 1935.

Decision of the State Board of Education

This is an appeal by the Board of Education from a decision of the Commissioner of Education and order made thereon, directing the reinstatement of Sara P. Eastburn in her position of teacher in the high school at Hightstown, and that salary be paid her from May 13, 1935, to the date of her reinstatement.

Sara P. Eastburn appeals from so much of the decision and order as concerns salary, contending she is entitled to salary from January 1, 1935.

Charges were preferred against Miss Eastburn in June, 1935, that in the months of September and October, 1934, and subsequent thereto, her mental health was not normal and thereby her capacity and qualifications as a teacher were impaired; of conduct unbecoming a teacher, in that she related distorted, suspicious and harmful stories concerning various individuals, and otherwise, and that her retention in the school system would impair the efficiency of the other teachers and the pupils in the school.

Hearing was had after due notice before the Board on July 10 and 15, 1935, at the conclusion of which the Board found the charges were sustained by the testimony and Miss Eastburn's dismissal, as of October 8, 1934, was ordered and confirmed.

Miss Eastburn promptly appealed to the Commissioner of Education, with the result before mentioned. The evidence taken before the Board was voluminous and has been brought before us on this appeal. It appears therefrom that Miss Eastburn had been employed in the district upwards of three years and was under tenure. In the latter part of September and the early part of October, 1934, she manifested signs of mental aberration. She entertained delusious of persecution and related to various persons stories of fancied injuries. This was communicated to members of the Board of Education and to its medical inspector, who deemed her in no condition to teach, and on October 8 following, a Mr. Black, who was chairman of the Teachers Committee, directed her to take an indefinite leave of absence. This action was ratified by the Board on October 23. Other than its final action dismissing Miss Eastburn in July, 1935, there was no revocation of the leave of absence. The medical inspector, on the basis of the reports that had been made to him concerning her, diagnosed Miss Eastburn's case as one of paranoia, which is said to be degenerative, progressive and incurable, and he so reported to the

Board. Acting upon this belief, the Board engaged counsel and instructed him to take such action as seemed necessary to dispense with Miss Eastburn's services as soon as possible.

On November 20, 1934, counsel for the Board wrote to Miss Eastburn, stating the Board had granted her leave of absence until the Christmas holidays, and that due to her mental condition they now insisted upon her resignation, effective at the end of the school year, and that unless the matter was amicably arranged, by her resignation or otherwise, he would advise the Board to prefer charges against her. After the receipt of this letter, Miss Eastburn engaged counsel who replied to the demand for her resignation by stating she was, according to her physician, in good physical condition and would present herself on December 10, 1934, to resume her duties. There was some correspondence thereafter between counsel for the board and for Miss Eastburn, the former insisting upon her resignation and the latter maintaining she was competent to resume her position. She changed her counsel about the middle of January, and against some time later. On May 13, 1935, her counsel made a vigorous demand for her reinstatement or other definite action by the Board. On or about June 28 following, the charges against her were filed and served.

A number of physicians were sworn as witnesses. Dr. Klein testified he saw Miss Eastburn on November 26, 1934, and six times after that date, to May 13, 1935, that she had suffered from high blood pressure but had steadily improved in health and that she was competent to resume her duties on December 18, 1934; that on May 13, 1935, she was free from symptoms of hyper-tension and there was no likelihood of a recurrence. He sent her to Dr. Wilson, an eminent psychiatrist, on February 14, 1935, whom she visited eight times from then to May 18. Dr. Wilson describes her ailment as a toxic psychosis resulting from high blood pressure and excessive thyroid secretion. He says her condition was temporary and that she was able to teach on February 15, 1935, although he advised a little longer rest. Dr. Wallace, of New Hope, Pa., whom Miss Eastburn consulted on November 29, and December 1 and 2, 1934, testified that he found her in a very nervous state, bordering on a psychosis, that her condition was temporary, and he was sure she would recover. He, however, sent her to Dr. Pessel, of Trenton, for an independent diagnosis. The latter saw her on December 1 and 3, 1934; his diagnosis as to her ailment agrees with that of the other doctors but he expressed the opinion that Miss Eastburn was not in a condition to teach and he advised a long rest. He did not think her condition would clear up within six months. He did not see her after December 3. Evidence of other witnesses is to the effect that Miss Eastburn manifested no indications of aberration in the classroom, and that in conversation and dealing with her she was rational. Thus it appears that whatever basis Dr. Pessell had for his opinion on December 3 or 4, that Miss Eastburn's condition might not clear up in six months, we have the positive evidence of the other physicians, whose qualifications are not questioned, that on December 18, 1934, and thereafter, she was competent to resume her duties, although Dr. Klein felt on February 15, 1935, that a little longer rest was advisable.

It is apparent from a reading of the record that the Board believed Miss Eastburn was suffering from paranoia. This belief was created by the expressed opinion of the medical inspector, Dr. Wilbur, who based his diagnosis wholly upon the reports to him of the actions and irrational statements of Miss Eastburn in October, when her condition first manifested itself. He did not see her at any time. His opinion is contradicted by all the medical testimony. That it created a bias in the minds of the Board members cannot be doubted. Their attitude was that Miss Eastburn was mentally incapacitated, and they persisted in this attitude until the end.

It has been held by this Board it will not disturb a finding of fact made by the tribunal where there is evidence to support it. (Morganweck *vs.* Gloucester City, Supplement to School Decisions, 1932, page 909.) And that it will not interfere with the determination of the local Board where the evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, or unless the finding that the charge was true in fact was clearly against the weight of evidence. (Wallace *vs.* Board of Education of the Township of Greenwich, Idem., page 857.) This is not the situation here.

The evidence in this case indicates that on and after December 18, 1934, Miss Eastburn was physically and mentally able to resume her duties as a teacher, and there is no evidence to the contrary. The finding of the Board that the charges against her had been sustained is not supported by the evidence, nor does the fact that Miss Eastburn was incapacitated by illness, mental and physical, from September or October, to some time before December 18, 1934, justify the verdict of the Board of Education. During that time she was under leave of absence, and in fact her salary was paid to her to December 31.

The Commissioner of Education in his opinion says, "Mental illness which is recurrent, prolonged or of a dangerous nature to others may constitute 'just cause' for dismissal, as may similar conditions of physical illness, but the brief duration of Miss Eastburn's mental and physical illness under the conditions in this case do not constitute inefficiency, incapacity, conduct unbecoming a teacher or other just cause for his dismissal." We agree with this conclusion.

As before mentioned, the Board of Education on October 23, on the recommendation of its medical inspector, gave Miss Eastburn an indefinite leave of absence. On or about December 10 her counsel communicated to the Board that she was then in good physical condition and able to teach. She did not, however, actually present herself at the school to resume her work. Thereafter there was correspondence between counsel for the Board and counsel for Miss Eastburn, in which the former endeavored to procure her resignation, while her counsel insisted that she was capable of resuming her duties. Evidently some arrangement for a settlement of the controversy had been tentatively agreed upon by Miss Eastburn's counsel, but she refused to accept it and her then counsel withdrew. New counsel was engaged by her, but it does not appear in the case that she or her representative actually demanded that she be permitted to resume her duties until May 13. While the attitude of the Board was that Miss Eastburn was not physically or mentally competent to teach, there was some discussion as to having her examined by a physician to determine whether that was the fact but no action was taken. Neither does

it appear that Miss Eastburn at any time presented to the Board convincing evidence of her recovery. She did not communicate to it the opinions of her physicians above referred to. Statements were made by her counsel from time to time that she was able to teach, but nothing more. We cannot say from the record that if Miss Eastburn had produced to the Board the certificate of a physician that she had physically and mentally recovered and was able to resume her work, the Board would have refused to reinstate her. Under all the circumstances of the case, we are of opinion that she is not entitled to salary from January 1 to May 13. It is recommended that the appeals of both the appellant and respondent be dismissed, and that the decision of the Commissioner of Education be affirmed.

April 4, 1936.

DISMISSAL OF TEACHER ON CHARGES

L. W. SMITH,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PHILLIPSBURG,

Respondent.

S. C. Smith and Marshall Miller, for the Appellant.

Blair Reiley, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant in this case was a teacher in the schools of Phillipsburg and had served in such capacity for more than three consecutive years. He was, therefore, under the provisions of the tenure of service act.

In April, 1917, written charges were made by Valette V. Secor, the father of Ambrose Secor, a boy attending the Phillipsburg High School. These charges were to the effect that Ambrose Secor was forcibly ejected from the school room by Mr. Smith on March 28, 1917. The particular charge was that the boy was kicked three times by the appellant while obeying his order to leave the studyroom and report to the principal of the school.

A hearing was held by the Board of Education at which witnesses were examined and counsel on both sides were heard. The Board of Education found the appellant guilty of the charge and forthwith dismissed him from service as a teacher in the high school.

Mr. Smith appealed from that decision to the Commissioner of Education. A hearing lasting two days was held by the Commissioner at Phillipsburg, at which witnesses on both sides were examined by counsel.

The facts brought out in the case were that on March 28, 1917, while Mr. Smith, who had charge of the studyroom at the time, was about to dismiss the school, a piece of chalk was thrown by someone. Mr. Smith supposed that

Ambrose Secor, who was sitting near the place from which the chalk was thrown, was the person who threw it. He went to the desk where Secor was sitting and said to him, "Get out." The boy made no answer but proceeded to gather up his books and, according to his own testimony and that of four or five witnesses, to obey the order of Mr. Smith.

Mr. Smith, in his statement, says the boy did not immediately obey the order, and looked at him in a defiant manner, whereupon he put his hand on his shoulder, turned him around and gave him, according to his testimony, a shove with his foot. The boy, according to Mr. Smith's testimony, slowly proceeded down the aisle and stopped at the door and looked over his shoulder in a defiant manner, whereupon Mr. Smith again gave him a shove with his foot. Another shove with the foot was given him in the hall. The boy's books fell out of his hand. The boy claims that the shove given him caused the books to be thrown out of his hand, but Mr. Smith claims that the books simply dropped down on the floor. Secor admits that the so-called kicks did not hurt.

It is not denied by the appellant in this case that he did use his foot to propel the boy toward the office of the principal, where he was ordered to go. There is conflict of testimony as to whether the action by Mr. Smith in using his foot would be called a kick or a shove. The boy himself calls it a kick. A few other boys in giving their testimony also called it a kick. Several witnesses, together with Mr. Smith, himself, say it was a shove with the foot.

There is conflict of testimony also as to whether the obedience to the order of the teacher was prompt. Mr. Smith and several witnesses say that it was not prompt, while the boy and a few witnesses on the other hand say that he moved promptly when he was ordered to do so.

The testimony also showed that Ambrose Secor did not throw the chalk. That was admitted as being done by another boy.

The question in the case is, was this action of Mr. Smith in using his foot to compel the boy's obedience to the order given by him conduct unbecoming a teacher. Mr. Smith's explanation or excuse for using his foot was, first, that the boy assumed a threatening attitude and a defiant look and hence that force was necessary to have his order carried out; and, secondly, that he used his foot because a physical infirmity on that day prevented him from using his hands.

The testimony shows that there was no word of defiance uttered by Secor. It also shows that Secor was not informed by Mr. Smith why he was ordered to the office.

The Board of Education, with all the facts before it, found Mr. Smith guilty of conduct unbecoming a teacher and dismissed him from its service. The question before the Commissioner, therefore, is not a question of facts. The facts as stated above, are admitted. The question for decision on this appeal is, was the conduct of the appellant unbecoming a teacher in a high school.

The teacher is clothed with authority to maintain discipline in school. In schools of more than one teacher the principal alone can inflict the only punishment allowed under the law—suspension or expulsion from school. Corporal punishment is prohibited by law.

In this case the appellant was within his right in ordering the boy to the principal for investigation of the alleged offense. If the boy resisted the appellant or used defiant language or refused to obey the order to "get out" there might have been justification in using reasonable physical force to get him to the principal's office.

I do not find that there was any resistance nor any defiance of the authority of the teacher and hence no excuse for using force and much less was there necessity for using the foot to hasten the movement of the boy. The boy was not injured, but the insult, the humiliation, quite as much as the injury, must be considered.

I therefore agree with the action of the Board in finding the appellant guilty of conduct unbecoming a teacher and dismissing him from service.

The appeal is hereby dismissed.

August 23, 1917.

Affirmed by State Board of Education, January 19, 1918.

TENURE TEACHER MAY BE DISMISSED UPON CHARGES FILED BY NON-RESIDENTS OF STATE

CLARA L. SMITH,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Appellant, Louis Dweretz.
For the Respondent, Harold D. Green.

On May 10, 1934, the appellant was dismissed as a school teacher by the Board of Education of the city of Paterson following a hearing on charges of conduct unbecoming a teacher preferred by the Guiana Realty Corporation. Miss Smith appealed for reinstatement to the Commissioner of Education, who, without considering the merits of the case, decided that her dismissal was illegal for the reason that she did not have a fair trial because one of the Board members, who was absent on certain evenings during the trial, participated in adjudicating her case. In support thereof, the Commissioner cited Kelly *vs.* Bishop, et al., 119 Atlantic 6, and Eisberg *vs.* Cliffside Park, 92 N. J. L. 321.

On October 11, 1934, the date of appellant's reinstatement, new charges against her were received by the Paterson Board of Education, who forthwith suspended her pending a hearing, which was conducted on October 18 and 24. Again, Miss Smith was found guilty of conduct unbecoming a teacher and dismissed.

Counsel alleges that appellant's dismissal was invalid for the following reasons:

(1) The ruling of the Commissioner of Education dated September 5, 1934, was final disposition of the charges and complaint of October 11, 1934.
(2) The Guiana Realty Corporation is not a competent complainant.
(3) The matters set forth in the charges are cognizable, if at all, in a court of civil jurisdiction.
(4) The charges made by the complainant were not verified and represented a mere statement of facts without being sworn to.
(5) The Board of Education erred in rejecting very material and pertinent evidence.
(6) The complainant, the Guiana Realty Corporation, was guilty of laches.
(7) There was no creditable evidence adduced to support the dismissal of the appellant.
(8) The charges preferred by the complainant were plainly a subterfuge and calculated solely to harass and persecute the appellant.

(1) Since in the former case the Commissioner did not render a decision based upon its merits, the legality of a retrial is supported by the following:

Corpus Juris, Vol. 34, par. 1210, p. 703, reads in part as follows:

"A judgment dismissing a suit on account of any technical defect, irregularity or informality, is not on the merits and is therefore, no bar to subsequent action."

Par. 1501, p. 1063, reads:

"Since a former judgment between the same parties does not bar a second suit upon the same cause of action *unless it was rendered on the merits,* a plea of former adjudication must distinctly show that such former judgment was on the merits."

In Hughes *vs.* United States, 4 Wall, 232, the Court held:

"In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

The Commissioner cannot agree with appellant's counsel that the failure of the Commissioner's former decision to include a remanding order bars the bringing of a new suit under the conditions in this case. As pointed out by attorney for respondent, to have remanded the case would require the Board to continue it, when such action might not be desired. Failure to remand the case left to the discretion of the Board the discontinuance of the prosecution or the conduct of a hearing on the same or new charges.

(2) Charges, reflecting upon the honesty and integrity of Miss Smith, were submitted by the Guiana Realty Corporation. Regardless of whether they were signed by the representatives, or agents, of a corporation, or whether the signers were residents of this State or elsewhere, the Board acted within its rights in conducting a hearing to determine to what extent, if any, the teacher was guilty of the charges and whether, if guilty, her dismissal should follow.

(3) While charges of fraud and forgery are, or course, cognizable in the civil courts, certainly such cognizance does not bar a board of education from hearing charges involving the penalty of dismissal under the provisions of the Teachers' Tenure of Office Act; namely, inefficiency, incapacity, conduct unbecoming a teacher, or other just cause.

(4) While the Janitors' Tenure Act, Chapter 44, P. L. 1911, requires a sworn complaint, the Teachers' Tenure of Office Act, Chapter 243, P. L. 1909, contains no similar provision. The latter act simply requires the signing of the charges by the person or persons making them and the filing thereof with the secretary of the board of education. Since the charges against Miss Smith were filed by the persons constituting the Guiana Realty Corporation, through their officers, they are legal.

(5) There is nothing in the testimony to indicate that the board of education rejected any evidence which affected her right to a fair trial.

(6) A delay by the Guiana Realty Corporation in presenting the charges in nowise constitutes laches by the board of education. When the conduct of the teacher was brought formally to the attention of the board of education, it proceeded with the trial; and since there was no delay by the board, there is no justification of a charge of laches against it.

(7) The board of education heard sworn testimony as to the acts of the appellant. There was no testimony to attack the credibility of the witnesses, the principal claim being that the testimony was incompetent because some witnesses came from outside the State. The charges appear to be reasonably supported by the evidence.

(8) There is no testimony to justify the allegation of counsel for appellant that these charges were brought to persecute and harass Miss Smith.

The Commissioner and State Board of Education have held in a number of cases that they will not disturb the findings of a local board of education in the dismissal of a teacher on charges, provided the board reached its decision after giving a fair hearing and there was no showing of passion or prejudice on its part. Wallace *vs.* Greenwich Township Board of Education, 1932 Compilation of School Law Decisions, 859; Fitch *vs.* South Amboy, 1928 Compilation of School Law Decisions, 176; Cheeseman *vs.* Gloucester City, 1928 Compilation of School Law Decisions, 159. In Martin *vs.* Smith, 100 N. J. L. 50, Justice Minturn in delivering the opinion of the Supreme Court in a similar situation said:

> "But the settled rule of law is that if there be evidence upon which the trial tribunal may reasonably found its conclusion of guilt or innocence, this court will not reverse the judgment by weighing the testimony for the purpose of forming an independent judgment. If the judgment of the trial court can be fairly supported by the record, the duty of this court is at an end so far as further investigation is concerned."

Since written charges were preferred against Miss Smith and served upon her, and a fair hearing was conducted by the board of education, at which she was represented by counsel, and the testimony supported the charges, the appellant was legally dismissed by the Paterson Board of Education.

February 8, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, a school teacher in Paterson, was dismissed by the board of education of that city on May 10, 1934, following a hearing on charges of conduct unbecoming a teacher. She appealed to the Commissioner who held that her dismissal was illegal because she did not have a fair trial, on the ground that one of the board members, who participated in the decision of her case, was absent during part of the trial. The Commissioner directed that she be reinstated, but did not remand the case for further proceedings, leaving it to the board to determine its future course of action.

Miss Smith was promptly reinstated by the board, but on the day of her reinstatement new charges, in substance the same as the former charges, were received by the board of education, being preferred by the same complainant, namely, the Guiana Realty Corporation. She was forthwith suspended pending a hearing on the new charges, was given notice thereof and appeared at the hearing, which was conducted on October 18 and 24, 1934. At the close of the hearing, she was again found guilty of conduct unbecoming a teacher and dismissed, the decision of the eight members of the board who were present being unanimous.

She appealed to the Commissioner of Education who, after considering all the grounds urged by her counsel in support of her appeal, found that "written charges were preferred against Miss Smith and served upon her, and a fair hearing was conducted by the board of education, at which she was represented by counsel, and the testimony supported the charges." He therefore decided that she was legally dismissed by the Paterson Board.

1. The principal ground of appeal from his decision to this Board is that the ruling of the Commissioner on the first appeal was a final disposition of the charges, and that therefore she could not be tried on new charges; in other words, that the board of education was estopped to renew the charges under the legal principle of *res adjudicata*. It is fundamental that this principle applies only to judgments on the merits and that decrees based on such technical reasons as that upon which the Commissioner's former decision was based do not stand in the way of the prosecution of a new suit or proceeding on the same cause of action. The Commissioner so held and, in our opinion, correctly.

2. Another ground of appellant's appeal is that the tenure of office statute does not contemplate the preferring of charges against teachers by persons outside the State, and that since the Guiana Realty Corporation was not a corporation of New Jersey, or authorized to do business in this State, it "was not a competent party complainant." Section 106-A of the School Law provides that "charges may be filed by any person whether a member of said

School Board or not." Appellant insists that this language refers to a natural person having some interest in the public instruction, either as parent, citizen, taxpayer, etc. We cannot agree, and think the Commissioner was right in overruling this ground of appeal. The purpose of the section of the Tenure of Office Act which authorizes the trial and dismissal of teachers and principals after preferring charges and giving them a fair hearing is to provide means by which boards of education may displace those whom they find to be incompetent or unworthy after they have served more than three years. It is clearly to the benefit of the public schools that where, at a fair hearing evidence is presented to a board of education which proves that an accused person has been guilty of "conduct unbecoming a teacher," to use the language of the statute, such teacher should not be retained in the school system. To do otherwise would be unfair to the pupils and injurious to the school system in general. If the charge of unbecoming conduct is proved to be true, the interest of the schools demand that the teacher should be dismissed, no matter by whom the charges are preferred. There is no limitation in the statute as to the source of the charges provided for therein, and we see no reason to read any such limitations into it.

Several other grounds of appeal are presented on behalf of the appellant, but we think the Commissioner has properly disposed of all of them, and further discussion seems unnecessary.

Examination of the record shows that the appellant received due notice of the charges, was given a fair hearing at which she was represented by counsel who received an opportunity to fully present her case, and that there was evidence to support the Board's decision. Indeed the chief grounds of attack on this appeal are directed more to what seem to us technical points than to the substance of the proofs.

The appellant, having received a fair trial and it not appearing that the decision of the Board was contrary to the evidence, we find, in accordance with the rule several times announced by this Board under similar circumstances, that the Commissioner's decision was right, and recommend that it be affirmed.

July 20, 1935.

DECISION OF THE SUPREME COURT

No. 222 and 240 May Term, 1936

Argued May 5, 1936; decided 1936.
On *Certiorari.*
For the Prosecutor, Louis Dwortez.
For the Respondents, Harold D. Green.
Before Justices Lloyd and Donges.

Per Curiam:

The prosecutor, a former teacher in the schools of Paterson was tried and convicted by the school board on charges justifying her dismissal. Appeal being taken the case was reversed on the ground that a member of the school board hearing the case was not present during the taking of all of the proofs,

and the prosecutor was ordered reinstated in her position. This order was complied with by the Board. On the same day the charges were renewed in a new proceeding, a new trial had, a second dismissal and affirmance by the Commissioner of Education, and also by the State Board. To review this action the *certiorari* presented in No. 222 was allowed.

The respondents have moved to dismiss the writ for reasons subsequently appearing by affidavit and now before us on stipulation of facts. From this stipulation it appears that the prosecutor before the allowance of the present writ applied for and received the full proceeds of her portion available in the teachers' retirement fund, setting forth as a ground of the application for such fund that she was dismissed and that she was not under contract to teach.

Respondents for the motion presented in No. 240 of the present term urge that by so doing she accepted the action of the School Board in dismissing her and hence is not entitled to a review of the action taken.

The basis of this contention is that under the School Board Law, sections 249 and 251, by withdrawing from the retirement fund she automatically ceased to be a teacher in the public schools or entitled to consideration as such.

Our reading of the sections relied upon leads us to the conclusion that the contention of the respondent is well founded. These sections are as follows:

> Section 249. "All persons who become teachers after the first day of September, 1919, and whose appointment is made subsequent to the passage of this act, shall become members of the retirement system by virtue of their appointments as teachers."
>
> Section 251. "A contributor who withdraws from the service or ceases to be a teacher for any cause other than death or retirement, shall be paid on demand the accumulated deductions standing to the credit of his individual account in the annuity savings fund."

If the prosecutor were not a teacher she would not be entitled to participate in the funds. As one interested in the fund she was obliged to make regular systematic contributions which inured not only to her own benefit but to the benefit of all fellow teachers in the school system.

The result we reach is that by drawing her proportion of the fund and failing to contribute to it for the period intervening between her dismissal and the application for the writ of *certiorari,* she automatically ceased to be a teacher in the public schools of the city. That she consequently is without standing as a teacher by virtue of her own act and this makes it unnecessary to consider the sufficiency of the action taken leading to her dismissal.

The motion to dismiss the writ is granted with costs.

Filed December 15, 1936.

TESTIMONY BEFORE LOCAL BOARD MUST SHOW GOOD CAUSE FOR DISMISSAL OF TEACHER UNDER TENURE

GEORGIA B. WALLACE,
Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, CUMBERLAND COUNTY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, a married teacher of the Negro race and a graduate of the State Normal School at Trenton, who taught for more than three years in a one-room school for colored pupils from grades one to five inclusive maintained by the Greenwich Township Board of Education at Springtown, Cumberland County, was dismissed by the Board of Education after written charges had been preferred against her and a hearing conducted by the Board at which appellant was present and offered testimony in her own behalf. The petition asking for her removal was presented by Anna W. Price, Francis Price, John Brown, Annie G. Brown, Alma Bryant, Maurice Williams, Clara Kemp, Verna Williams, and Laura V. Williams, and sets forth that:

> "Georgia Wallace has lost all interest in the educational qualifications of our children * * * is inefficient so much that she is incapable of keeping the pupils of said school up to standard, * * * is untidy in her personal appearance, and unclean in her wearing apparel. * * * has been rated by the County Superintendent and Miss Cole in Class D."

Appellant claims that she was improperly and illegally dismissed and appeals to the Commissioner for a re-hearing of her case and an order for her reinstatement.

At a hearing conducted by the Assistant Commissioner of Education in the Court House at Bridgeton on September 18, 1930, it was admitted that the stenographic record taken before the Board of Education is incomplete and it was agreed by counsel for both appellant and respondent that because of the incomplete record the case should be presented de novo to the Commissioner of Education. The case is, therefore, with the consent of counsel, to be determined by the evidence before the Commissioner of Education which may differ from that which was presented before the Greenwich Township Board of Education.

It is admitted that Mrs. Wallace has a right to the protection in her position which is provided by Chapter 243, P. L. 1909.

The principal testimony was given by County Superintendent of Schools, J. J. Unger, and one of the Helping Teachers of the county, Miss Nella H. Cole.

Mr. Unger testified that he considers the teacher incompetent and inefficient and that he bases his judgment upon the school records which discloses that only nine of the eighteen pupils in the fifth grade were definitely promoted and two others placed in the sixth grade on trial, which he states is a very low percentage of promotions. He also found the teacher's desk cluttered on one of three visits made last year. He never found the school disorderly.

Miss Cole testified that she criticized the teacher several times because of the room being untidy, the last criticism being made during December, 1929. She spoke at least twice during the last school year to appellant about adjusting the windows for proper ventilation and is of the impression that the windows were neglected thereafter until she arrived at the school, and further states that there were frequent cases of repetition of grade work by the pupils. She admits that the housekeeping problem improved after her criticism of December and the teacher's testimony, which is unrefuted, shows that after a thermometer was furnished by the Board of Education so that the correct temperature could be known, she assigned pupils to adjust the windows in relation to the temperature and thereafter proper ventilation was maintained. Miss Cole further admits that the classroom work in this school as shown by examinations compares favorably with the same tests in other schools which she supervised, and she does not deny the testimony of the teacher that two children in the fifth grade received 100 per cent in a county reading test given by the helping teachers.

In considering the repetition of grade work by pupils and the low percentage of promotions as pointed out by the County Superintendent of Schools, it is necessary to consider the evidence relative to the general intelligence of the pupils. Tests to determine the learning ability of pupils were conducted by the Helping Teacher and the result of these tests which were presented by the Helping Teacher to the appellant indicates that only six of the pupils are of normal mentality, five rank as feeble-minded and the remainder of the fifth grade class varies in mental ability between these two groups. While it is admitted by school authorities that intelligence tests are not always accurate in determining definitely the mental ability of individuals or classes, it is generally conceded that they furnish a very fair indication of relative ability. These intelligence or mental ability tests indicate that the mentality of the pupils of this fifth grade class is very much below the average mentality of pupils in other fifth grade classes of the county and State. The rating of these pupils would indicate that it would be very difficult for some of them to ever do fifth grade work satisfactorily. Mr. Unger upon cross examination agreed that the mentality of a number of the pupils in this school would interfere with their ability to learn.

A careful testing of the pupils in this school and a comparison of the results with those of tests given to pupils of the same grades in several other schools might result in conclusive evidence of the teacher's inefficiency, but the tests given by the Helping Teacher which include standard accomplishment tests as well as intelligence tests do not disclose inferior instruction.

After a careful consideration of this teacher's work at the close of the last school year by the County Superintendent and Helping Teacher, they gave her

a "D" rating. If she was incompetent she should have been rated "E" or marked "failure" in accordance with the county rating plan.

The only evidence in relation to personal untidiness was given by Mrs. Anna Price, but this was refuted by a preponderance of testimony. Neither the County Superintendent nor the Helping Teacher had any fault to find with the teacher's personal appearance. It appears that the original petition was prepared by Mrs. Price, and of the eight other signatures to the petition six are those of her relatives. Mrs. Price is mother of one of the children whom the tests classified in the lower mental group. Appellant testifies that Mrs. Price has acted unfriendly toward her since she refused to lend her automobile to Mrs. Price.

The Tenure of Office Law was enacted to protect efficient teachers. It should not protect the inefficient. The welfare of the pupils is the first consideration in cases of this kind. If inefficiency, conduct unbecoming a teacher or other just cause for removal is shown, the dismissal of a teacher by a Board of Education should be affirmed. If the evidence fails to support the charges, the teacher has a right to the protection of the Act.

In this case the testimony does not support the charges. It is true a number of pupils did not receive ratings which qualified them for promotion, but with the range of mental ability shown by the tests, a high percentage of promotions should not have been expected. The class to which special reference is made did work equal to other classes in the county and it is possible that the other classes had a higher average of native ability. Some of the pupils did exceptionally well in their work. There was a preponderance of testimony to the effect that the teacher dressed reasonably well. She appears to have profited by the suggestions of the Helping Teacher in improving her housekeeping and the ventilation of the room. She prepared for her work by graduation from the State Normal School at Trenton and showed an interest in improving the school environment with a library, pictures, a victrola and records, flower beds, and a graveled path. Her work probably does not compare with the best teachers. She may be below the average but she is not proven incompetent or inefficient nor is other conduct unbecoming a teacher shown by the evidence.

The Board of Education of Greenwich Township is hereby directed to reinstate appellant as a teacher in the Springtown School and to pay to her the salary which she would have received if she had not been dismissed.

October 9, 1930.

Decision of the State Board of Education

The facts are set forth in the Commissioner's opinion and need not be repeated here. It appears from his statement, and is not disputed, that because of the incompleteness of the minutes of the proceedings at the hearing by the Board of Education of the charges preferred against Mrs. Wallace, it was agreed at the outset of the hearing before the Commissioner that the testimony be taken "de novo". On this account, the witnesses, some or all of whom had testified at the hearing before the Board of Education, were examined and

cross-examined before the Commissioner and, probably on that account, he seems to have felt that he should determine according to his judgment on the evidence before him whether or not the charges were sustained by the evidence.

In this we think he was mistaken. The issue presented to him for determination by the Petition of Appeal was whether or not Mrs. Wallace had been "improperly and illegally dismissed" by the Board of Education of Grenwich Township. In other words, the question was not whether, according to *his* judgment, the charges preferred against Mrs. Wallace had been sustained, but whether her dismissal by the Board was without justification and unlawful.

The statute pursuant to which the proceedings here involved were taken is as follows:

> "No principal or teacher shall be dismissed * * * except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact *by said Board of Education,* upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not." (School Laws, 1928 Ed., pp. 120, 121.)

The record shows that written charges preferred against the Respondent, signed by the persons making them and filed with the clerk of the Board of Education, were examined into by that Board upon reasonable notice to her at a hearing attended by her and were found true in fact. The circumstance that the record of the proceedings before the Board was incomplete and inadequate, and that it was necessary to make a new record before the Commissioner could pass on the question before him, did not change the nature of the issue presented to him for determination, which was whether the action of the Board was justified, it appearing that the statute in all procedural respects had been complied with.

In the determination of that issue, two questions are presented. The *first* one is: Was the fault charged against the teacher sufficient to support the dismissal if found to be true? The principal charge was the inefficiency and poor quality of her work. There can be no doubt that such a charge stated sufficient grounds for dismissal.

The *second* question is: Was the charge properly and fairly found true in fact? In the determination of this question this Board has always taken the position that the finding of a Board of Education, after a hearing on the merits, will not be disturbed unless it is so clearly against the weight of the evidence that it appears to be the result of bias or prejudice.

In an earlier case before the Board the same situation existed, generally speaking, as exists in the present case. The Law Committee was not furnished with a transcript of the proceedings of the trial before the local Board, but

inferred that the evidence adduced before that Board was substantially the same as that before the Commissioner. In reversing the decision of the Commissioner, this Board said:

> "As the procedure prescribed by the statute was followed, but two questions arise: first, was the charge such as, if found true in fact, would justify dismissal; and, second, was the finding that the charge was true in fact so clearly against the weight of evidence as to lead to the conclusion that it was the result, not of honest judgment, but of passion or prejudice." (Conrow *vs.* Lumberton Township, New Jersey Law Decisions, 1928 Ed., p. 186.)

In Fitch *vs.* The Board of Education of South Amboy, decided on the same day (January 3, 1914) as the Conrow case, this Board laid down the rule which has ever since been followed and which is directly applicable to the present case, saying:

> "As we have today indicated in another case, it is our opinion that we should not interfere with the determination of a local Board of Education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice. The Tenure of Service Act provides that all charges shall be examined into by the local Board of Education, and that if such Board finds they are true in fact, the teacher may be dismissed. The Legislature has imposed the duty of determining if the charges are true in fact upon the local Board. Where evidence against a teacher is clear, or where, if not entirely clear, there is room for an honest difference of opinion, we should not interfere with the determination of the local Board. To do so would mean that we could substitute our judgment in place of its judgment, a substitution which, in our opinion, would be unauthorized and contrary to the intention of the Legislature." (Fitch *vs.* South Amboy, New Jersey School Law Decisions, 1928 Ed., p. 176.)

In Cheesman *vs.* Gloucester City (1928 School Law Decisions, p. 159) it was said:

> "This Board will not disturb the findings of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part." Affirmed by Supreme Court, Id., 159.

In the present case, the county superintendent of education and the county helping teacher who had observed Mrs. Wallace's work, both appeared before the Board of education and testified in support of the charges. It is true that, as pointed out in the Commissioner's opinion, their testimony does not establish an absolute failure on the part of the teacher, but we cannot say that it is not sufficient, in connection with the other testimony which was before the Board, to warrant it in holding that there was sufficient evidence to justify them in sustaining the charges of inefficiency and dismissing the teacher. Nor, judging

of their conduct by the record made before the Commissioner, can we say that they did not act in good faith, or that they were swayed by bias or prejudice. It might be that if the case were presented to us for our opinion on the evidence alone, we might disagree with their conclusion, but the power and duty of passing upon the charges was theirs under the law and we cannot say that there was no justification for the finding which they made. For this reason, we are compelled to disagree with the Commissioner and recommend that his opinion be reversed and the case remanded to him with instructions to dismiss the petition.

February 7, 1931.

SALARY OF TEACHER UNDER TENURE OF SERVICE ACT

ARTHUR WAKEFIELD,
Appellant,
vs.
THE BOARD OF EDUCATION OF HOBOKEN,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was employed as a teacher in the schools under the control of the Respondent from June 1, 1907, to January 30, 1914, but his salary did not begin until September 1, 1907, from which date said salary was paid to him each year in twelve equal monthly installments, except the July and August installments, which were both paid in July. He ceased to be a teacher in the schools of Hoboken, by virtue of his resignation, dated January 1, 1914, to take effect on January 30, 1914, which resignation was accepted by the respondent on January 19, 1914.

The appellant has received five-twelfths of his salary for the year beginning September 1, 1913, but claims that he should have received six-twelfths, for the reason that he taught in the schools of Hoboken for one-half of the time the schools were actually in session during said year.

The appellant further claims that the refusal of the respondent to pay him the full one-half of his annual salary is a violation of that provision of Chapter 243, of the laws of 1909, which prohibits a board of education from reducing the salary of a teacher "after the expiration of a period of employment of three consecutive years in the district."

In the case of Gowdy *vs.* the Board of Education of Paterson, 84 N. J. L. 231, the Supreme Court held that the resolution of the Board of Education providing that the salaries of teachers should thereafter be paid in twelve monthly installments, instead of ten, as therefore, resulted in a reduction in Miss Gowdy's salary, and was, therefore, prohibited by the act of 1909.

Prior to the passage of said resolution, Miss Gowdy's salary had, for a number of years, been paid in ten monthly installments, and had been so paid prior to the passage of the act of 1909, and for some months subsequent to its passage. It was, for this reason, and not merely because Miss Gowdy had performed all the duties required of her at the end of ten months, that the court decided that the action of the Board of Education was illegal.

The appellant in this case has always received his salary in twelve monthly installments, except for July and August. There is nothing in the rules of the respondent which requires the payment of the August salary in July, but such payment is, by virtue of a special resolution, adopted each year.

The conditions are so dissimilar that I am of the opinion that the decision of the court in Miss Gowdy's case cannot be construed as applying to the case under consideration.

Section 106 of the School Law provides that "a Board of Education may make rules and regulations governing the engagement and employment of teachers, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations. The employment of any teacher by such board and the rights and duties of such teacher with respect to such employment, shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto."

The section, except as modified by the act of 1909, is still in force.

Rule XI of the Board of Education of Hoboken reads as follows:

"Salaries shall be paid by the secretary as nearly as possible on the last Friday of the month."

This rule was in force at the time the Appellant was employed by the respondent and is still in force.

The appellant has not suffered a reduction of salary, but has been paid the full amount due him.

The appeal is dismissed.

July 6, 1914.

Decision of the State Board of Education

The facts in this case are clearly stated in the decision of the Commissioner of Education and need not be repeated here. The contract of the Board of Education of Hoboken with Arthur Wakefield, as a teacher, ceased and determined with the resignation of the said Arthur Wakefield, which, being duly accepted, took effect on January 30, 1914. His claim for vacation money payable during the months of the following July and August, when his contract had been terminated by his own act on the previous January, can hardly be upheld. The contention of the respondent that Mr. Wakefield's successor-teacher at Hoboken would claim the monthly payments of July and August, and that payment to Mr. Wakefield in whole or in part would require from the School Board double payment for those months, is certainly entitled to

consideration. If the respondent's argument here is sound, and we think it is, it may not be impertinent to enquire if Mr. Wakefield has not a claim against his new employers for the vacation months of July and August. Does Mr. Wakefield think to forego such a claim with his new employers, or does he think to collect for those months from both old and new employers? We do not think his claim against the respondent in this case is well based?

The law in the case and the non-application of the Gowdy case herein are very well summarized in the Commissioner's opinion. We uphold that opinion and dismiss the appeal.

November 7, 1914.

LEGALITY OF TRANSFER OF TEACHER UNDER TENURE

HELEN G. CHEESMAN,

Appellant,

vs.

THE BOARD OF EDUCATION OF GLOUCESTER CITY,

Respondent.

Bleakley & Stockwell, for appellant.

Henry M. Evans, for respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is admitted that the appellant in this case, Helen G. Cheesman, is by virtue of approximately nineteen years of service as a teacher in the public schools of Gloucester City protected by the provisions of the Tenure of Service Act.

It appears from the pleadings on file in this office that appellant was up to September, 1921, the principal teacher of the seventh and eighth grades in the Monmouth Street School in Gloucester City; that on September 16, 1921, the Board of Education assigned appellant to the position of principal teacher of the fifth and sixth grades of the Cumberland Street School in the same district. Appellant protested against this change and refused to take the position to which she had been assigned pending an appeal to the Commissioner of Education. Appellant claims that the transfer from the position of principal teacher in the seventh and eighth grades of the Monmouth Street School to that of principal teacher of the fifth and sixth grades in the Cumberland Street School is an illegal one and virtually a dismissal. Appellant's grounds for so claiming are that the facilities in the Cumberland Street School are not equal to those in the school from which she was transferred, and that being made principal teacher of the fifth and sixth grades in the one school is a demotion from the position of principal teacher of the seventh and eighth grades in the other school.

The main question to be considered therefore is a simple one: Has a board of education a legal right to transfer a teacher or a principal teacher in the grades from one grade to another or from one school to another, provided the transfer has not been from a regular high school to an elementary school? This department has frequently decided that teachers under tenure may be transferred from one grade to another in the elementary grades without violation of the intent of the Tenure of Service Law. That is to say, a teacher in any of the elementary grades, as for instance the eighth grade, may be transferred to any of the positions in the elementary grades without any violation of law.

In view of the fact that in the case in question the appellant's contract was general in its terms and not limited as to any particular school in which appellant was to teach, and in view of the fact that her transfer was made within the elementary grades and from one position as principal teacher to another, it is the opinion of the Commissioner of Education that the Gloucester City Board of Education had a legal right to make the transfer in question, and that such action on the part of the Board of Education did not amount to a dismissal of appellant from her position and was consequently not a violation of the Tenure of Service Act.

If further appears that there was held on September 30, 1921, a special meeting of the Gloucester City Board of Education; that appellant was duly notified of such meeting and to the effect that she would be given a hearing upon the charges of insubordination which had been made against her because of her refusal to comply with the order of the Board of Education transferring her to the position of principal teacher of the fifth and sixth grades in the Cumberland Street School.

Appellant appeared through her counsel at such special meeting of the Board of Education and protested that the Board of Education had no legal right to dismiss her because of her refusal to comply with an order of the board, the legality of which order was in process of adjudication by the Commissioner of Education. Appellant's contention, in other words, was that refusal to obey an order could not be considered insubordination until the legality of that order had been sustained. Appellant was, however, found guilty of insubordination and by a majority vote of the Gloucester City Board of Education ordered dismissed from the service of such board of education.

While there may be technically some grounds for the action of the Board of Education in dismissing on the charge of insubordination a teacher who has refused to obey an order, the legality of which was being adjudicated, it is nevertheless the opinion of the Commissioner that an unfair advantage would be taken by such precipitous action. There is no evidence in the case at hand of willful insubordination on the part of the appellant but apparently only a desire to await the adjudication of this department before complying with the order of the board.

While sustaining, therefore, the Board of Education in its action transferring appellant to the position of principal teacher of the fifth and sixth grades of the Cumberland Street School, the Commissioner of Education does not sustain the respondent in its dismissal of the appellant on the charge of insubordination.

It is therefore hereby ordered that the appellant, Helen G. Cheesman, be renstated in the service of the Board of Education of Gloucester City and that such reinstatement take effect immediately.

Dated October 28, 1921.

DECISION OF THE STATE BOARD OF EDUCATION

Miss Helen G. Cheesman was employed by the Board of Education of Gloucester City, Camden County, by a written contract dated May 18, 1921, "to teach in the Gloucester City Public Schools" at a salary of $1,350 a year. The contract recites that she had an elementary grade teachers' certificate, but assigns her to no particular school or duties.

Her petition alleges that before the contract was signed she was told in answer to her inquiry that she would be principal of what the petition terms the "Junior High School" located in the Monmouth Street School, Gloucester City. She reported at the school at its opening in September, but on the fifth of September, after a meeting of the Board of Education at which a resolution was passed that she be transferred to the principalship of the Cumberland Street School, which is a fifth and sixth grade school, the superintendent of schools notified her that she was so transferred, and directed her to report at that school.

She refused to accept the transfer on the ground that it was a demotion and violated her tenure of office and consulted counsel, who appealed on her behalf to the Commissioner and advised her that she should not teach pending that appeal. She therefore refused to report to the Cumberland Street School.

Her appeal came before the Commissioner simply on the pleadings. No testimony was taken, but the contract was included in the petition. The Commissioner decided that her transfer was not a demotion but simply a transfer from one grade school to another grade school and did not affect her tenure of office.

It appears both from the pleadings and from the records of this Board and the Commissioner's Office, that the school, which in the petition is termed a "Junior High School" was merely a seventh and eighth grade school and not a "Junior High" or "Intermediate School," as defined by law or in the accepted sense of that title. The Commissioner was therefore right in holding that the Board had the right to transfer Miss Cheesman to the Cumberland Street School without preferring charges against her. (See Welch *vs.* West Orange Board of Education, N. J. School Laws, 1921, pp. 557, 558.)

Counsel for Miss Cheesman raised the point that the assurance above referred to, which is alleged to have been given her by authority of the Board of Education, can be read into the contract and that therefore proof should be taken on that issue. In our opinion the written contract must be presumed to express the entire agreement and this contention therefore is overruled.

One other question remains to be decided. It appears that Miss Cheesman, after she had refused to report at the Cumberland Street School, was charged by the Board of Education with insubordination on account of that refusal. It

is alleged by the Board that she was notified in writing of the charge, the notice fixing a time and place at which she should appear before the Board to make answer. She did not appear in person in response to said notice, but was represented by counsel, who stated formally that she had been advised not to appear on account of her appeal to the Commissioner from the Board's order of transfer. The Board of Education proceeded to take testimony on the charges, found that her refusal to report at the Cumberland Street School was insubordination and dismissed her on that ground. There was no other complaint againse her.

Appeal from the Board's decision was taken to the Commissioner, who held, without receiving the record of the trial, that she should be reinstated because she was acting under advice of counsel and that while she was perhaps technically guilty of the charge of insubordination, nevertheless she should not be punished for following her counsel's advice.

To this we cannot agree, first, because she should have complied with the order of the Board pending her appeal and would not have waived her rights by so doing; second, because the Board of Education of Gloucester City ought not to be compelled to pay Miss Cheesman for work she did not perform as well as for a substitute to take her place, and third, because this Board will not disturb the finding of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part. (Fitch *vs.* Board of Education of South Amboy, N. J. School Laws 1921, pp. 533 to 535.)

In order to determine whether or not her trail and dismissal were fairly and properly conducted by the Board the transcript of its proceedings and such evidence as may be pertinent thereto should be before the Commissioner.

It is very unfortunate that Miss Cheesman, who is a teacher with a good record, should be dismissed under charges merely because she followed the advice of her counsel and therefore, though the Board of Education may be justified in its ruling, it is hoped that some less harsh action may be taken.

The case is therefore remanded to the Commissioner with instructions that Miss Cheesman was not demoted, but transferred and that therefore she should have obeyed the order of the Board; and that the Commissioner take up the matter with the Board and Miss Cheesman and endeavor to effect a reinstatement without salary from the time of her refusal to report at the Cumberland Street School to the date of reinstatement; and should he be unable to effect a reinstatement, that he receive the transcript of the proceedings of the trial before the Board and such pertinent testimony as the parties desire to offer and render a decision anew in the case.

Decision of the Supreme Court

The writ of certiorari in this case is prosecuted for the purpose of reviewing the legality of the action of the Gloucester City Board of Education in transferring the prosecutrix, Miss Helen G. Cheesman, from a principal teacher of the seventh and eighth grades at the Monmouth Street School in Gloucester City, to be principal teacher of the fifth and sixth grades in the Cumberland

Street School in said city, and the action of that Board in dismissing Miss Cheesman for insubordination in refusing to obey the order of transfer.

Miss Cheesman had been for some 19 years a teacher in the public schools of Gloucester City. On May 18, 1921, she executed a contract in the statutory form with the Board of Education to teach in that city from September 1, 1921, to June 30, 1922. Miss Cheesman had been instructing the seventh and eighth grades at the Monmouth Street School. In September, 1921, the Board of Education transferred her to the Cumberland Street School where she was to teach scholars of the fifth and sixth grades. Miss Cheesman contended that the Monmouth Street School was a junior high school; that the transfer demoted her and was contrary to the contract. She refused to obey the order and appealed the order of transfer to the State Commissioner of Education. The Gloucester City Board of Education then charged Miss Cheesman with insubordination. She was served with notice of this charge. She did not attend the meeting at which the charge was to be heard, but employed counsel to appear specially to protest against the proceeding. The Board held her guilty of insubordination and dismissed her. From this dismissal Miss Cheesman appealed to the State Commissioner of Education. The Commissioner of Education considered these appeals upon the record and held that the transfer was legal but that Miss Cheesman was not guilty of insubordination. An appeal was then taken by Miss Cheesman to the State Board of Education. The State Board of Education held that the transfer was legal and that Miss Cheesman was guilty of insubordination and properly dismissed. It is these determinations of the State Board of Education which Miss Cheesman seeks to set aside.

The contract was in the usual form prepared by the Commissioner of Education under Section 106 of the School Law (C. S., Vol. 4, p. 4762). It did not mention the principalship of the Monmouth Street School. The Gloucester City Board of Education had the power of transfer. (Sec. 68, School Law, C. S., Vol. 4, p. 4744.) Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act (C. S., Vol. 4, p. 4763, Section 106a) and in the manner prescribed in said act. Her salary was not reduced or she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons.

It is contended in behalf of the prosecutor that when Miss Cheesman signed the contract the secretary of the local Board told her that in signing the contract she was made the principal of the Junior Department of the Gloucester City High School. Assuming the statement was made by the secretary, he was not in the making of such a statement acting within the scope of his authority. The contract spoke for itself and could not be changed or altered by parol testimony.

It is further contended that Miss Cheesman could not be guilty of insubordination and dismissed pending her appeal of the order of transfer to the State Commissioner of Education. We do not think this point well taken. Miss Cheesman could have taken up the work in the Cumberland Street School, to which she was transferred, under protest pending her appeal. Such a

course would not have prejudiced her appeal. She chose to assume in her actions that the transfer was illegal. In this Miss Cheesman acted at her peril. If the transfer was legal it necessarily follows that she was guilty of insubordination in refusing to obey the order and that the Board was justified after charges had been preferred and notice given to hear the case and order a dismissal, if it chose so to act.

TRANSFER OF TEACHER UNDER TENURE

ANNA B. MORRISON,
Appellant,
vs.
THE BOARD OF EDUCATION OF DELAWARE TOWNSHIP, CAMDEN COUNTY,
Respondent.

For the Appellant, Scovel & Harding.
For the Respondent, Lawrence B. Reader and Howard L. Miller.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by Anna B. Morrison, under the Teachers' Tenure of Service Act. Two questions are involved. First, was the Appellant principal of the school at Ellisburg? Second, if the appellant was principal, did her transfer to the single-room school at Horner Hill constitute a dismissal?

The facts in the case, as developed at the hearing held in the Court House at Camden on the 8th day of September, 1915, are as follows:

The appellant, Anna B. Morrison, began teaching at Ellisburg, in Delaware Township, Camden County, in 1903. A letter was produced in evidence, addressed to Anna B. Morrison, dated April, 1903, and written by Amos G. Haines, District Clerk of the Board of Education, in which appeared these words, "I beg to inform you that at a meeting of the school board last evening you were elected principal of the Ellisburg school." On the basis of this letter the appellant began her work as teacher and principal in the Ellisburg school. The minutes of the meeting of the Board of Education of April 17, 1905, contain this, "The following were nominated and elected: Ellisburg, No. 1, Anna B. Morrison, principal, salary $50 per month for ten months; Anna E. Fields, primary room, salary $40 per month for nine months." On April 9, 1906, the minute is as follows: "Election of teachers, school No. 1, Anna B. Morrison, principal, salary $50 per month; Clara L. Munson, primary, salary $40 per month." On April 6, 1908, the minute is as follows: "On motion, the following teachers were elected: Anna B. Morrison, principal." Other evidence was introduced to verify the fact that Miss Morrison was regarded as the teaching principal of this school. The County Superintendent

testified that he regarded the appellant as principal. It is in evidence that the appellant prepared examination questions, not only for her own grades, but for the primary grades as well. It is also in evidence that the appellant always received a larger salary than any other teacher in the school district. On the other hand, it is denied by individual members of the Board of Education that the appellant was principal.

Counsel for the respondent claims because there was no written contract as required by the statute that the appellant had no way of defining the position which she occupied. That there was no written contract is true. This was because the Board of Education failed to perform its duty. To be sure, the appellant could compel the granting of a contract. It has, however, been held in a similar case that a teacher having rendered service which was accepted and paid for constitutes an admission of a contractual relation. It is, therefore, not a valid answer to the question at issue.

By order of the Board of Education the appellant has been transferred, at the same salary, $80 per month, to the Horner Hill school, a single room school in the district of Delaware Township. She is now teaching in this school. The position as teacher at Horner Hill is a subordinate position, it being a single room school, which involves the teaching of all the grades. Moreover, that the position is a subordinate one is manifest by the fact that never before was so large a salary paid in this district as is paid now to the appellant.

In the case of Davis *vs.* the Board of Education of Overpeck Township, the State Board of Education used this language. "It would be within the power of a board to assign a man who is receiving a salary of $3,000 or more to teach in a grade where the usual salary paid in the district for such grade is only one-fifth or one-sixth of that amount. If such procedure can be adopted it would not only be unjust to the taxpayers, but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teacher in the same grade, with no more experience, was paid the salary, not of a teacher, but of a principal?" The Davis case is similar to the case under present discussion. There has been a transfer of the appellant to a subordinate place, and by reason of this transfer the subordinate position has been elevated to a salary larger than is paid in any other school in Delware Township. Surely this, too, is not fair to the taxpayers.

The law provides that no principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing.

In this case there has been no charge of inefficiency, incapacity, or conduct unbecoming a teacher. The lawful remedy, therefore, of dismissing the ap-

pellant from her position as head teacher at Ellisburg has not been pursued.

I have reached the following judgment in this case:

First. The appellant, being in the continuous service of the respondent since 1903, is under the Teachers' Tenure of Service Act.

Second. The preponderance of evidence shows that the appellant was the principal teacher in the Ellisburg school, and I so find.

Third. Under the law, as interpreted by the State Board of Education and affirmed by the Supreme Court in the Davis case, I find the transfer from the position of principal teacher to a subordinate position in a single room school, thus raising the salary of this school far above the salary paid hitherto, was tantamount to a dismissal as principal teacher in the Ellisburg school.

The appeal is sustained, and it is ordered that the appellant be replaced in her former position as principal of the Ellisburg school.

October 14, 1915.

TRANSFER FROM A JUNIOR HIGH SCHOOL TO A GRADE POSITION IS LEGAL

RUTH M. TINSLEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant began teaching in the public schools of the Borough of Lodi in September, 1921. For a period of seven years she taught in either the fifth or sixth grade. On September 1, 1928, she was assigned to departmental work in the seventh and eighth grades. The State Board of Education at a meeting held October 6, 1928, approved as a junior high school the organization and curriculum of the seventh, eighth and ninth grades of the school in which appellant was teaching. Mrs. Tinsley continued full time employment in the junior high school until October 22, 1931, when in accordance with a resolution of the Board of Education adopted October 19, 1931, she was transferred to a fifth grade position at the same salary, which transfer she accepted under protest on the grounds that it constituted a demotion and was in violation of the Teachers' Tenure of Office Act. She subsequently brought this appeal for reinstatement in her former position.

Chapter 69, P. L. 1923 provides:

> "Hereafter any school district in this State having a school enrollment of at least one hundred pupils in the seventh, eighth and ninth grades may,

with the consent of the State Board of Education, establish and organize such grades into an intermediate school.

Such intermediate school to be subject to the rules and regulations which shall be prescribed by the State Board of Education."

Chapter 1, P. L. 1903, S. S., Section 181, sub-sections (e), (m), and (n), provide for the apportionment of school moneys by the County Superintendent, as follows:

"(e) The sum of two hundred dollars ($200) for each permanent teacher employed in an ungraded school or in a kindergarten, primary or grammar department. * * *"

"(m) The sum of three hundred fifteen dollars ($315) for each permanent teacher employed in a high school or high school department or in an intermediate school associated therewith; provided, that such schools shall together have a full six years' course following a full six years' primary and grammar school course, and that such high school and intermediate school shall have been approved by the State Board of Education."

"(n) The sum of two hundred fifty dollars ($250) for each permanent teacher employed in an intermediate school approved by the State Board of Education in districts not maintaining senior high schools."

Many school systems in New Jersey have organized as indicated in sub-section (m). The first six grades constitute the elementary school, the seventh, eighth and ninth grades constitute the intermediate or junior high school, and the tenth, eleventh and twelfth grades are designated as the senior high school. This organization is termed the 6-3-3 plan. Some school districts, including Lodi, have organized as indicated in sub-section (n). The seventh, eighth and ninth grades, referred to in the statute as the intermediate grades, are commonly called the "junior high school". The State Board of Education uses that title in its approval of courses of study and curriculum of such schools and also in its provision for the certification of teachers.

Higher salaries and qualifications for teachers in the junior high school than those in the elementary school associated therewith are indicated in the apportionment set forth in sub-sections (e), (m), and (n) above quoted.

The professional rank of these various schools is shown by the requirements for the certification of teachers. The minimum training provided by our normal schools and teachers' colleges to qualify graduates for teaching in school systems organized under the 6-3-3 plan is:

Elementary school	Three-year course
Junior high school	Four-year course
Senior high school	Four-year course

After July 1, 1932, the minimum qualifications under the certification rules are as follows:

Elementary school.....Three years of training
Junior high school.....Three years of training plus thirty-two additional college credits
Senior high school.....Three years of training plus sixty-four additional college credits

It has been held in decisions by the Commissioner and State Board of Education that a teacher may be transferred from one grade to another in the elementary school. Therefore, when any system is organized with eight elementary and four high school grades, teachers may be transferred from the upper to the lower grades within each division. This authority is clearly set forth in the case of Cheesman *vs.* Board of Education of Gloucester City where the principal teacher of the seventh and eighth grades of one school was transferred to the position of principal teacher of the fifth and sixth grades of another school, when the State Board held:

> "It appears both from the pleadings and from the records of this Board and the Commissioner's office, that the school, which in the petition is termed a 'junior high school' was merely a seventh and eighth grade school and not a 'junior high' or 'intermediate school', as defined by law or in the accepted sense of that title. The Commissioner was therefore right in holding that the Board had the right to transfer Miss Cheesman to the Cumberland Street School without preferring charges against her."

This ruling was affirmed by the Supreme Court. There is, however, implied that if the grades taught by Miss Cheesman had been in an approved Junior High School, the transfer would have been illegal.

Mrs. Tinsley's salary was not reduced when she was transferred from the approved junior high school in Lodi to the fifth grade position. The testimony does not show a salary schedule which provides for a higher salary in the junior high school than that in the elementry grades.

In the case of Davis *vs.* Overpeck Township, where the appellant was transferred from a principalship to a teaching position without a reduction in salary, the State Board of Education held in part as follows:

> "When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the Army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor."
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> "Instead of complying with the statute and preferring charges against the appellant, it endeavored to evade the statute, and if its act is sustained it will be within the power of boards, if so disposed, not only to pay the salary of principals to favorite teachers, but also to degrade and humiliate worthy principals that the protection which the statute is supposed to afford them would really become a myth. We do not believe that we should place

a construction on the statute which will so readily enable boards to evade its provisions."

The Supreme Court in affirming the decision of the State Board of Education said:

"* * * his attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school."

In accordance with the law and decisions, a transfer from an approved Junior High School to an elementary school constitutes a demotion and is, therefore, a violation of the Teachers' Tenure of Office Act.

The Board of Education of the Borough of Lodi is directed to immediately reinstate Mrs. Tinsley in her position as teacher in the junior high school.

February 17, 1932.

DECISION OF THE STATE BOARD OF EDUCATION

Appellant has been employed by the respondent Board of Education, as a teacher, since September, 1921. She holds an elementary certificate and is receiving the maximum salary paid by respondent to the holder of such a certificate. The minimum salary for elementary teachers is $1,200.00, and the maximum $2,000.00. For teachers holding secondary certificates, the minimum is $1,500.00, and the maximum $2,500.00.

Appellant taught in the fifth and sixth grades from September, 1921, to June, 1928. In September, 1928, she was transferred or assigned to departmental work in the eighth grade of the Columbus School of respondent. On January 21, 1929, the Board adopted a resolution granting her an increase of salary of $50.00, per half year for that service. She was subsequently granted other increases of salary until she reached the maximum salary of $2,000.00, which she now receives.

On October 6, 1928, the State Board of Education approved a junior high school in Lodi. The eighth grade class or department of which appellant was teacher was incorporated in the junior high school, and she taught it until October, 1931, when the Board of Education, by resolution, adopted by a majority of its members, transferred her to a fifth grade class in the Wilson School. Appellant accepted the transfer under protest. She claims that such transfer from the junior high school to the fifth grade of the elementary school, is a demotion, and tantamount to a dismissal from a position of higher rank and an appointment to a position of lower rank. That such transfer is in violation of her rights under the Teachers' Tenure of Office Act.

The Commissioner of Education has sustained this contention, and in his opinion he cites the provisions of the law referring to the establishment of junior high schools and the allowances made by the State to school districts for teachers employed in such schools and their method of organization, which includes the seventh and eighth elementary grades, and deduces therefrom that a junior high school is of higher rank than the elementary school and therefore a teacher in such school ranks higher than a teacher in an elementary school.

The Commissioner cites the case of Cheesman *vs.* The Board of Education of Gloucester City, reported in the 1928 Compilation of School Law Decisions, on page 156. In our view that case does not uphold the Commissioner's conclusion. Miss Cheesman was a principal-teacher of seventh and eighth grades, and was transferred as principal-teacher of fifth and sixth grades. She maintained that seventh and eighth grades were a junior high school, and such transfer constituted dismissal. This Board held that the seventh and eighth grades were not in a junior high school or in an intermediate school, and that the transfer of Miss Cheesman was lawful, it being from one elementary grade to another. The Commissioner holds that, inferentially, had Miss Cheesman taught in a junior high school, the decision would have been otherwise. This is conjecture. That situation was not before the Board or the Court.

When this Board approved the junior high school in Lodi, the status of appellant as an elementary teacher was not changed. We know of no provision in the law which gives teachers rank other than the certificate which they hold. Teachers in New Jersey are holders either of elementary certificates, entitling them to teach the first eight grades, holders of secondary school certificates, entitling them to teach in high schools, or teachers holding special certificates. The statute, Section 68 of the School Law, gives Boards of Education the right to transfer a teacher by a majoriy vote of the Board. Appellant was receiving the maximum salary of an elementary teacher in the Borough of Lodi, and it appears that such maximum is the same whether one teaches the first grade or the eighth grade, and whether the class is part of the junior high school or not. She suffered no reduction of salary on account of the transfer, either immediate or prospective.

In our opinion the fact that appellant taught in the junior high school did not affect her status as the holder of an elementary certificate. We recommend that the Commissioner's decision should be reversed and the appeal of appellant dismissed.

June 4, 1932.

GOOD FAITH REQUIRED FOR THE ABOLITION OF POSITIONS

VIOLA MISCHKE BARTLETT, ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioner, McCarter & English.

For the Respondent, Nicholas S. Schloeder.

Appellants, qualified by certification to teach in the elementary schools of the State and protected in their positions in the school district of the township of

North Bergen under the provisions of the Teachers' Tenure of Office Act, were on June 14, 1934, effective June 25, transferred by the respondent to School No. 6. Each of the appellants received notice of the transfer and, accordingly, reported for duty. The schools closed for the academic year on Friday, June 29, 1934, and on that evening, the respondent adopted a resolution closing School No. 6 and dismissing all teachers in that school as of June 30, 1934, of which action the appellants were also duly notified.

On August 9 the Superintendent of Schools wrote to the Board of Education stating that unless there was a further merging of classes, four additional elementary teachers and five teachers of ninth grade classes would be required for the opening of school on September 5, 1934. The Board met in executive session during the latter part of August and made suggestions as to the filling of the vacancies reported by the Superintendent, but took no official action in the matter at a regular or special meeting. There were, however, employed as substitutes in the elementary grades Elizabeth Jansson, Lottie Ritter, Doris Atherton, and Ralph Massey (testimony p. 15), and five other teachers for the ninth grade vacancies, all of whom are not under tenure and most of whom were employed for the same grades or classes they had taught during the preceding year. On October 15, George Kenyon was employed to teach in the grades.

The testimony shows that several elementary teachers were on leave of absence at the opening of the school year, which leaves were continuing indeterminately at the time of the hearing in this case, November 14, and that Edna Brenfleck was employed November 1, as a substitute for a Mrs. Stenfield, who took a leave of absence as of that date. The position held by Miss Brenfleck was filled by a tenure teacher at the opening of school and is not, therefore, a position to which any of the appellants is legally entitled, but the record as to George Kenyon is not so clear. On October 15 he was appointed as a substitute. The superintendent testified that he claimed protection in his position under the Veterans' Tenure Act, but no proof was submitted to establish such tenure rights. The testimony does not show whether the position he filled as of October 15 constituted a vacancy as of September 5 or was at that time filled by a non-tenure teacher.

According to the testimony 5,810 pupils were enrolled in September, 1933, and 5,844 in September, 1934. Counsel for respondent, however, sets forth in his brief that there is an error in the latter and that it should be 5,736. Granting this to be correct, there was a decrease of 74 pupils in the school system in the month of September, 1934, in comparison with the same month of the preceding year.

The finances of the township of North Bergen are controlled by the Municipal Finance Commission created under the provisions of chapter 340, P. L. 1931, as amended, and it is accordingly admitted that economy is necessary in the conduct of the schools. The Finance Commission recommended a $90,000.00 decrease in the school budget, of which approximately $40,000.00 was in teachers' salaries. The total appropriation for school purposes, as recommended by the Commission, was adopted and the amount to be raised by taxation was duly certified. The Municipal Finance Commission is without authority to

require a reduction in the teaching staff, but the appropriation compelled the Board of Education to either decrease the number of teachers or to make a greater reduction in salaries. The testimony shows that some of the teachers in the elementary grades holding secondary certificates are qualified to teach in the ninth grade.

Under the foregoing conditions, the appellants claim to have been illegally dismissed and ask for reinstatement with salary from June 30, 1934.

The Supreme Court in the case of Downs, et al. *vs.* Hoboken, 12 Misc. Rep. 345, affirmed by the Court of Errors and Appeals September 27, 1934, upheld the right of a board of education to transfer teachers to a school building and immediately thereafter in good faith to close it, when such transfer does not remove a tenure teacher while there exists a vacancy, or while a non-tenure teacher is employed in a position for which a tenure teacher is qualified. The transfer action of the Board is, therefore, legal.

The diminution of 74 pupils in the enrollment in September, 1934, from that of September, 1933, is not such as in itself would constitute valid grounds for the dismissal of approximately 17 teachers and 13 janitorial employees; but the necessary curtailment of educational costs due to the financial condition of the district places this case practically on all fours with that of Cooke, Horan, et al. *vs.* Kearny, 11 Misc. Rep. 751, in which such action by a board of education was held to be valid.

While a board of education may decrease educational costs by extreme reductions in teachers' salaries, it has a discretionary right to affect economies through the abolition of positions when it deems that procedure to be more advantageous to the schools.

Although it is shown that there are teachers in the elementary school who have secondary certificates, the Board of Education cannot be required to transfer these teachers to a high school grade in order to create vacancies for tenure teachers holding only elementary certificates.

There remains, therefore, to be decided the right of a board of education to deprive tenure teachers of positions while non-tenure teachers are retained even though the latter are substitutes for tenure teachers who are on leaves of absence. The tenure teachers, who were granted leaves of absence, were not present at the opening of school in September and several vacancies were caused thereby. If a tenure teacher is on leave of absence, neither such teacher nor her substitute can be considered as filling a position to the exclusion of a tenure teacher qualified for it. A tenure teacher may not be dismissed while a vacancy exists in the school system or while a position is held by a non-tenure teacher, if the tenure teacher is qualified for such vacancy or position.

The testimony in this case clearly establishes the right of four of the appellants to positions in the school system of North Bergen township, with salary from the date of their dismissal; and if George Kenyon is not protected by the Veterans' Tenure Act and his position was not held by a tenure teacher prior to October 15, then all appellants are legally entitled to reinstatement as of the date of their dismissal.

January 17, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

It appears by the evidence in this case, taken before the Assistant Commissioner of Education, that on June 14, 1934, appellant board adopted a resolution transferring respondents (among others) from the schools where they were then employed to School No. 6. Two weeks later, on June 29, appellant adopted a resolution reciting the financial exigencies of the township of North Bergen, the reduction of the budget for the operation of the public schools by $166,-966.14; that Public School No. 6 was attended by pupils in number not more than 60 per cent of its capacity and there was sufficient accommodation for the pupils of School No. 6 in schools of adjacent territory; that in the interest of economy and for the maintenance of an efficient system of public instruction, and to conform to budgetary limitations, it was deemed advisable to close School No. 6. The resolution further recited that by virtue of the closing of Public School No. 6, the positions held by present personnel are no longer required, ample personnel existing in the public school system elsewhere in the township, and resolved, that said Public School No. 6 be closed on June 30, 1934, "and that the pupils heretofore attending this school be transferred to Public Schools Nos. 8 and 10, and George Kenyon, Gladys Cornetta, Helen Thompson, Julia Taylor, Margare Cox, Viola Bartlett, Myrtle De Masse, John Itin and Charles E. Smith, the personnel of said Public School No. 6, be dismissed as of June 30, 1934, and their employment cease and determine as of that date."

The teachers involved in this proceeding had served in North Bergen district for periods varying from 11 to 28 years and were therefore all under tenure.

At the same time respondents were dismissed, other resolutions were adopted by appellant board, terminating the services of ten teachers who were not under tenure, as well as the service of other teachers and employees.

On or about August 9, 1934, while the schools were closed for the summer vacation, the superintendent of schools of appellant, wrote to it advising that

> "Unless there is a further merging of classes, there will be four teacher vacancies in the elementary grades upon the opening of schools, September 5, 1934.
>
> The vacancies are as follows:
> School No. 2 Grade 5AI 42 pupils
> School No. 3 Grade 4AI 30 pupils
> School No. 7 Grade 3BI 31 pupils
> School No. 8 Grade 3AI 45 pupils
>
> By increasing the size of the classes, through an increased teaching load, I estimate there will still be at least four vacancies in the ninth grade classes, because of the recent curtailment of the teaching personnel in this department. In order to fill these vacancies on September 5, 1934, I recommend the appointment of eight regular substitute teachers."

Upon the opening of school on September 5, appellant employed four teachers in the elementary grades, i. e., Lottie Ritter, Doris Atherton, Elizabeth Jenssen and Ralph Massey, and on October 15, 1934, it employed one George Kenyon, as an additional elementary grade teacher. Of these, Lottie Ritter, Doris Atherton, Elizabeth Jenssen, and George Kenyon were among the non-tenure teachers included in the resolution of dismissal adopted June 29. Ralph Massey was a new appointee. At least three teachers who were also among the non-tenure teachers dismissed on June 29, 1934, were installed in the same positions in the ninth grade junior high school they had held before their dismissal. The teachers mentioned were all employed by the designation of "substitutes" at a per diem compensation of $4.00 for elementary and $5.00 for the junior high school grade.

The respondents filed their appeal from the action of appellant terminating their employment, contending their dismissal and the dispensing of their services was not done in good faith nor for the reasons assigned and was and is illegal, improper and in violation of the provisions of Chapter 243 of the Laws of 1909, the co-called "Teachers' Tenure Act," and they prayed the action of the Board of Education of North Bergen in transferring the dismissing them be set aside; that appellant be directed to restore them to their employment and to pay them their full salary for the year 1934-1935, and for such other relief as may be proper. Appellant answers that the action complained of was done in good faith in the interest of economy, to reduce expenditures of the public school system as a result of the grave financial condition of the Township of North Bergen, and to conform to the budgetary limitations fixed by the Municipal Finance Commission. The Commissioner of Education sustained the appeal of the respondents, and it was ordered that at least four of the appellants were entitled to reinstatement and that if George Kenyon is not protected by tenure and his position was not held by a tenure teacher before October 15, all are entitled to reinstatement, with salary from the date of their dismissal.

The Board of Education of North Bergen appeals from that decision and order.

The sole question which is presented by this appeal appears to be that of the bona fides of the appellant in adopting the resolution of June 29, 1934. The desperate financial condition of appellant is not disputed and its duty to effect economies in the school system wherever legally possible cannot be denied. It is the undoubted right of a local board of education to adjust, within the limitations prescribed by law, the compensation of its employees to its ability to pay, and, where such action is taken in good faith for the purpose of economy, to reduce the number of its employees by abolishing positions. However, the employing board is also bound to maintain public education in its district and to that end engage a sufficient staff of teachers and furnish the necessary facilities and that duty cannot be evaded or its non-performance excused on the plea of economy. In attempting to effect economy there must be no transgression of the school law, which would make such attempt illegal and nugatory.

By the adoption of the resolution of June 29, appellant purported to abolish the teaching positions therefore occupied by respondents. To accomplish that purpose, the abolition must be actual, that is, the teaching positions must therefore be non-existent. Had the purpose of appellant been accomplished, the work which had before been performed by respondents would have been abserbed by the remaining teachers in the system. Several weeks after the adoption of the resolution it became apparent that the service of four or five teachers in the elementary grades would be required upon the opening of school in September, and to meet the situation, appellant authorized the employment of "regular substitutes" to fill the positions so required. There was no diminution effect in the number of teachers, and the economy effected is only the difference in the salary of the teacher and the pay of the substitute. It is manifest from this that the statement of the resolution that "ample personnel existed in the school system elsewhere" was untrue. In a court of conscience, a false statement which induces another to act thereon to his prejudice, is deemed fraudulent, even though the person making it believed it to be true. The resolution, insofar as it relates to the dismissal of respondents, being based on a recital of alleged facts, which are found to be untrue, cannot be said to have been adopted in good faith, and the dismissal of respondents, being based thereon, in violation of the "teachers' tenure Act," was illegal. Obviously the teaching positions were not abolished but remained in existence, and the attempted dismissal of respondents was ineffective.

In our opinion it was the duty of appellant, when it appeared the service of four, or five, as it later transpired, elementary teachers would be required, upon the opening of school in September, to appoint respondents to such positions. That the positions were not identical ones formerly held by respondents is immaterial. They were entitled to fill any place in the elementary grades in perference to a teacher not under tenure. Seidel *vs.* Ventnor City, 10 N. J. L. 31, Aff. 111 N. J. L., 240; Downs *vs.* Hoboken, 12 Misc. 345, Aff. 113 N. J. L. 401; Kearney *vs.* Horan, 11 Misc. 751. To permit a board of education to effect economy by the pretended abolition of teaching positions and then to fill the vacancies so created by "substitutes" at a lower compensation, would make the tenure law wholly nugatory.

We concur in the conclusions of the Commissioner of Education, and the appeal should be dismissed.

May 11, 1935.

TEACHER UNDER TENURE MAY NOT BE REMOVED BECAUSE OF ABOLITION OF POSITION IF TEACHERS NOT PROTECTED ARE AT THE SAME TIME EMPLOYED. BOARD MAY DISCRIMINATE BETWEEN MARRIED AND UNMARRIED TEACHERS IN DECIDING THOSE TO BE DISPLACED

ANGELINA KOCH DOWNS, ET ALS.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE DISTRICT OF HOBOKEN,
Respondent.

For the Appellant, Arthur T. Vanderbilt.
For the Respondent, Joseph Greenburg.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners had been employed for more than three years prior to June 30, 1932, as teachers in the public schools of Hoboken, and it is admitted that they were protected by the provisions of Chapter 243, P. L. 1909, the Teachers' Tenure of Office Act.

During the latter half of the school year 1931-32 Mr. James P. Laverty, president of the Board of Education, wrote several letters to the married and the non-resident teachers in which he censured them for continuing to teach in the Hoboken schools because of what he contended to be a divided attention between home and school on the part of the married teachers, and a lack of loyalty to the community on the part of those who were non-residents. These letters were signed by Mr. Laverty in his official capacity and his report to the board on this subject is contained in the minutes of the Board meeting of April 18, 1932. In the final letter to this group of teachers, under date of June 23, the last two sentences read:

> "The recalcitrant 'group' must fully meet the April letter requirements. Evasion will not be countenanced."

Within a week after this letter was sent to the teachers, events occurred as follows: Twenty-six of the petitioners, who were married or non-residents and had received the above mentioned letters, were transferred from other buildings to Schools Nos. 4 and 7; the resident unmarried teachers in those schools were transferred to other buildings; the board of education abandoned Schools Nos. 4 and 7 and abolished the positions of all teachers then assigned to those buildings; and the appellants were notified that their positions were abolished and they were subsequently denied compensation for the months of

July and August which they contend is a part of their salary for the school year 1931-32.

The records for the school year 1928-29 shows 6,704 pupils enrolled in the first six grades with a teaching staff of 205; whereas, in the school year 1931-32 there were 5,936 pupils so enrolled with 196 teachers. During these years there was a gradual diminution of 768 pupils with a decrease in the teaching staff of only nine teachers. The testimony discloses an impaired financial condition of the city and consequently a need for the reduction of municipal and educational expenditures.

The points to be decided in this case are:

(1) Did the Board of Education act within its authority in abandoning Schools Nos. 4 and 7, and in abolishing a number of teaching positions?

(2) Were transfers of the teachers to Schools No. 4 and 7 legal when made immediately prior to the abandonment of these buildings?

(3) Did the Board legally abolish the positions of those married teachers, who had been previously assigned to these buildings, where there is no evidence to indicate that their assignment was for the purpose of terminating their services?

(4) When the positions of teachers protected by the Tenure of Office Act are abolished, are those teachers entitled to fill existing vacancies in the schools, or to displace others not protected by the Tenure Act?

(5) Are all teachers in this case entitled to salary for July and August, 1932, because of having completed the work for the school year 1931-32?

(1) The Teachers' Tenure of Office Act (Chapter 243, P. L. 1909) provides:

> "Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said district."

There is no evidence of bad faith in the Board's decision to abandon buildings Nos. 4 and 7 and in selecting these rather than other buildings. The natural diminution of approximately 750 pupils within the last three years, and the present financial condition of the district justify the reduction in the teaching corps. It was within the discretion of the Board whether, in reorganization, it should discontinue teaching positions in various buildings or abandon entire buildings. In cases where tenure protection has been provided for employees and in which the law has no provisions relating to a decrease in the number of positions the courts have consistently held that tenure does not survive a good faith abolition of a position for purposes of economy. (Wismer *vs.* Neptune Township Board of Education, p. 873, 1932 compilation New Jersey School Law Decisions.) Justice Dixon, in writing the opinion of the Supreme Court in the case of Sutherland *vs.* Jersey City, 60 N. J. L. 436, said:

> "But it is settled that statutes of this nature are not designed to prevent the abolition of an office and the transfer of its duties to another

official, when such course is taken bona fide for economical reasons or for the promotion of greater efficiency in the public service."

The Supreme Court in the case of Boylan *vs.* Newark, 53 N. J. L. 133 held that the Act of March 25, 1885 (P. L. 163) regulating the tenure of office in police departments does not forbid the abolition of an office or rank in the department for the purpose of reducing public expenses. It therefore appears that the Board was within its legal rights in abandoning Schools Nos. 4 and 7 and abolishing the teaching positions therein.

(2) Chapter 1, P. L. 1903, S. S., Section 68, reads:

"No principal or teacher shall be appointed, transferred, or dismissed * * * except by a majority vote of the whole number of members of the board of education."

The testimony of the secretary shows the transfers of teachers to Schools Nos. 4 and 7 were made by the superintendent and ratified by a majority vote of the whole number of members of the Board of Education. Only married or non-resident teachers were transferred to Schools Nos. 4 and 7, and these transfers were made by the Board at the meeting of June 29 at which it voted to abandon the buildings. All of the teachers affected had received letters from the president of the Board indicating that the continuation of the services of married or non-resident teachers was objectionable and virtually demanding the relinquishment of their positions. The transfer of teachers under tenure from positions in which they had completed the work of the school year, and in many cases where they had been employed for a number of years, to other buildings, the abandonment of which at that time was unofficially determined, shows very clearly that the transfer of teachers was for the purpose of placing them in a situation which would appear to legalize the termination of their services. Since it is evident that these teachers were transferred with the purpose of terminating their services, they were, therefore illegally transferrd and accordingly their positions were not abolished.

(3) Upon the abandonment of Schools Nos. 4 and 7 the Board of Education transferred the pupils not as class groups, but distributed them among the grades in other buildings and consequently abolished the positions of all teachers assigned to Schools Nos. 4 and 7. The unmarried, resident teachers, formerly employed in the above mentioned schools were transferred to other positions a few minutes before the positions they held in Schools Nos. 4 and 7 were abolished, but this was not done in the cases of married and non-resident teachers. When it is determined that positions are to be abolished a board of education may retain the services of any teachers occupying such positions, but it is not required to do so. The board may select within its discretion those employees to be retained provided there is no sex discrimination as prohibited by Chapter 238, P. L. 1925. Discrimination may be evident in a board's retention of teachers as in original appointments. Where teachers do not have a legal right to positions, a board may select all married or all single teachers. It may be unfortunate for those teachers who held

positions in the abandoned schools, but when these buildings were closed and pupils distributed among other existing classes, those teaching positions ceased to exist. The fact that the Board retained by transfer some teachers whose former positions were later abolished does not give the others any rights. The positions of these teachers, who had been employed in Schools Nos. 4 and 7, were legally abolished.

(4) The Commissioner cannot agree with the contention of counsel for petitioners that upon the good faith abolition of positions of teachers protected by the Tenure of Office Act, such employees have a legal right to fill vacancies or to displace teachers not protected by the act when their certificates qualify them for such positions. If the contention is sound that teachers are elected and serve as "teachers" only, and that they do not hold definite positions, then a board, in reducing the number of teachers for reasons of diminution of pupils, may dismiss within its discretion a reasonable number of such employees without consideration of apparent rights of individuals; under this contention and in the absence of proof of sex discrimination prohibited by statute, the service of all appellants could have been legally terminated. However, it is a recognized practice that in the contract of employment between a board of education and a teacher, the term "teacher" is used in the agreement without reference to the specific work for which she is engaged. Under the broad term "teacher" parol evidence would be admissable to establish that the major work of the employee was clearly understood by both parties at the time of signing the contract. Even if the employee's principal duties were not so established, her first assignment would determine her position in the elementary school or her major field of work in the secondary school. When the position is established, such an employee may not be transferred to another position except by a majority vote of the entire membership of the board of education. If the law required that a transfer be made at the option of the teacher, then pupils might be handicapped with poor instruction until the board of education could secure sufficient evidence to prove the inefficiency of the teacher and dismiss her for that cause. That a teacher under tenure, whose position is abolished is not legally entitled to another position is clearly established by the decision of the Commissioner which was affirmed by the State Board of Education in the case of Seidel *vs.* Ventnor City Board of Education (now on certiorari to the Supreme Court and printed in State of Case). Teachers are assigned, transferred or engaged by boards of education to fill definite positions and are known as teachers of specified high school subjects, teachers of fifth grade, teachers of kindergarten, etc. They are not engaged as general practitioners for any work for which a certificate might qualify them. The purpose of the act is to protect from dismissal for reasons of prejudice, passion, politics, or unjust motives those teachers who have served a district during a probationary term. The act is not intended to guarantee perpetuity of employment regardless of existing conditions in the school. Justice Scudder in delivering the opinion of the court in the case of Fire Commissioners of the City of Newark *vs.* Lyon, 53 N. J. L. 632, in speaking of tenure acts said:

"These statutes are not intended to give perpetuity to officers in this department, but for the protection of the incumbents while the offices continue.

"* * * the tenure of office is qualified by the continuance of the office."

A teacher whose position is abolished cannot demand a transfer to another position. The right of transfer lies solely within the discretion of the board of education.

(5) All of the appellants in this case were, prior to June 30, 1932, protected by the provisions of the Teachers' Tenure of Office Act. Each was entitled to a definite annual salary. The records of their employment indicate that payment for July and August constitutes a part of the annual salary for the preceding fiscal year. Under this plan the teachers had not received at the close of any school year on June 30 the full amount of their annual salaries. At the close of the school year, the teachers had performed the services which entitled them to the full amount of their respective annual salaries. Each appellant, who has not received her full annual salary since September 1, 1931, is entitled to the balance, less deduction due to the Teachers' Pension and Annuity Fund.

The Board of Education of the City of Hoboken legally abolished the positions in Schools Nos. 4 and 7. The teachers who had been assigned to these buildings prior to June 29, 1932, are not entitled to displace other teachers not protected by the Tenure of Office Act; but the Board is hereby directed to reinstate in positions from which they were transferred all appellants who were assigned to Schools Nos. 4 and 7 at the meeting of June 29, 1932, with salary from September 1, 1932, and to pay to all appellants salary installments for July and August, 1932.

December 15, 1932.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of Hoboken from a decision of the Commissioner of Education, wherein he orders:

(1) The reinstatement of 26 teachers whose services had been terminated by the Board of Education on June 30, 1932, by reason of the natural diminution of the number of pupils in the schools of Hoboken, and to effect economy in the cost of operating its schools, and

(2) The payment of salary to said 26 teachers, and to 8 other teachers in another group, for the months of July and August, 1932.

The teachers whose services were terminated are divided into two groups, one of 26 teachers who, on June 29, 1932, had been transferred from various schools in Hoboken to Schools Nos. 4 and 7; and the other consisting of 8 teachers, including a principal, who had, before that date, served as teachers in the two schools named.

The Commissioner of Education held that the services of the second group, the eight teachers who had served in Schools Nos. 4 and 7, prior to June 29,

1932, were lawfully terminated. They appeal from that part of the decision which so holds.

By stipulation of counsel, it was agreed that the evidence taken should apply and be considered in connection with both groups.

The evidence taken before the Commissioner discloses that in the years 1928 and 1929, there were nine elementary schools in Hoboken, with 6,704 pupils. In the year 1929-1930, there was a decrease of 219 pupils; in the year 1930-1931, a decrease of 270 pupils; in the year 1931-1932, a decrease of 271 pupils under the previous year, so that to the end of the school year of 1932, there were 760 pupils less in the school district than in the year 1928-1929

In the school year 1928-1929, there were 205 teachers in the elementary schools. In the school year 1929-1930, although there was a decrease of 219 pupils under the previous year, there were 204 teachers. In the year 1930-1931, although there were 270 pupils less than the previous year, the number of teachers was the same, viz.: 204. In the year 1931-1932, although there was a decrease of 271 pupils under the previous year, the number of teachers was 196. The decrease from 1928 to 1932, inclusive, was 9, although the decrease in the number of pupils was 760. That the per capita cost in Hoboken for teachers' salaries for April, 1932, was $112.36; which was the highest per capita cost in Hudson County, and second highest in the State of New Jersey, in cities comparable with Hoboken. That the relative positions and per capita cost had existed for at least five years past. That the diminution in the number of pupils was a natural diminution, due entirely to a loss of population. That the population of Hoboken ten years ago was near 75,000, and at the present time is approximately 56,000, a loss, in round numbers, of about 19,000. It further appears that on June 30, 1931, the City of Hoboken, which also comprises the school district of Hoboken, had on deposit with the Steneck Trust Company of Hoboken, in various accounts, the sum of $1,259,713.00, which represented all the moneys of the city available for municipal and educational purposes. On that date, the Steneck Trust Company was closed by the Commissioner of Banking and Insurance of New Jersey, and still remains closed, and neither the city nor the Board of Education have been able to obtain any of said moneys up to the present time. That the closing of the said bank had entailed great difficulties upon the city, and it was difficult to raise money wherewith to pay the current expenses of the city and to provide means for the operation of its schoools. At the time of the closing of the bank, checks and salary warrants for the teachers and municipal employees had been drawn and issued and were not honored or paid, due to the closing of the bank, and it became necessary for the city, at once, to borrow money to meet these outstanding debts and salary warrants. That from that time on the city has been obliged to borrow the necessary moneys for the payment of the teachers and other municipal employees. These borrowings were made from several banks in the city of Hoboken, at the highest interest rate allowed by law. The city also induced some of its taxpayers to pay their taxes in advance, allowing them discounts. These borrowings, for which tax anticipation notes and bonds had been issued, amounted to $1,752,000.00. In December, 1931, the city advertised tax revenue bonds for sale in the amount of

$1,975,000.00, but failed to receive any bid therefor. At that time the city had outstanding, in tax revenue and tax anticipation notes and bonds, $2,749,000.00. On January 6, 1932, the Board of Education received from the State, $266,-766.07, school moneys, which enabled the Board of Education to pay salaries for January, February, and March, 1932. On and before April 7, 1932, the city was able to sell emergency bonds in the sum of $590,000.00, and tax revenue bonds in the sum of $460,000.00, which moneys were used to reduce outstanding obligations. In June, 1932, the city was able to procure $175,000.00 by the sale of tax anticipation bonds, and this money, together with tax collections and the prepayment of 1932 taxes, enabled the city to meet the requirements of the schools and the city. That during the last few months of the school year 1931-1932, the bankers who held the notes and bonds of the city, were much concerned about the city's financial situation, and had declined to make any additional loans. On June 27, 1932, a conference was held between the bankers and their representatives, and the city, in an effort to obtain a renewal of outstanding bonds and notes that were due on June 30, default in the payment of which would seriously impair the city's credit. At this conference the holders of the city, obligations insisted that reduction be made in the cost of operating the schools and otherwise effecting economy in public expenditures. As a result of this conference, the city commissioners met with the president and secretary of the Board of Education and related to them the demands of the bankers and other holders of the city's obligations, that the cost of operating the schools be reduced. The result of this last conference was that it was decided to close two schools which it was estimated would effect a yearly saving of about $200,000.00, and a saving, during the remainder of the year 1932, of $100,000.00. To carry out this decision of the city commissioners and the representatives of the Board of Education, the Board of Education met on June 29, 1932. At this meeting the superintendent of schools submitted a communication to the Board, dated June 28, 1932, in which he set forth that he had made transfers, as of that date, of principal, vice-principal, clerks, teacher-clerks and teachers from and to various schools, subject to the approval of the Board of Education, which action of the superintendent was thereupon ratified and approved by unanimous vote. The 26 teachers transferred to Schools Nos. 4 and 7 were included in the foregoing action. Furthermore, a resolution was unanimously adopted, reciting that whereas the number of pupils attending the public schools of Hoboken had been materially decreased and diminished, and the per capita cost per pupil exceeds the per capita cost per pupil of other municipalities in the State, and the city being confronted with the necessity of economizing, and the services of so large a force of teachers and principals being no longer required, etc., it was resolved that Public School No. 4 and Public School No. 7, be closed, and the classes therein discontinued and abolished on June 30, at the close of the daily session of said schools. Another resolution was adopted, providing that the pupils theretofore attending classes in Public Schools Nos. 4 and 7, should be transferred and allocated to such schools as would be most available; and another resolution which recited that whereas, Public Schools Nos. 4 and 7 had been ordered permanently closed,

and the classes therein discontinued and abolished as of June 30, 1932, and the pupils therefrom ordered transferred to adjacent school buildings, and whereas, the positions or offices of principals and teachers of Public Schools Nos. 4 and 7, held by the following named persons, (naming them), (including the 34 involved in this appeal) be and the same are hereby permanently abolished, and the duties thereof dispensed with and discontinued and terminated on June 30, 1932, and the services of the aforementioned persons are hereby terminated and dispensed with on June 30, 1932. At the same meeting, another resolution was adopted, that to economize, the positions or offices of three medical inspectors, an optician and a school nurse be abolished, and the duties thereof dispensed with. Another resolution that for the purposes of economy, the school custodian should thereafter receive no salary for his services, and another dispensing with the services and terminating the positions of three supervisors. Salaries of various other incumberts of positions were changed, and the position of a teacher doing "Prang Work" was also abolished.

It further appears that the president of the Hoboken Board of Education is one James P. Laverty. Mr. Laverty has been president for the past 20 years. He was reelected in February, 1932, and in addressing the Board upon his election at that time, he referred to the economic problems facing the Board, and, among other things, said:

> "A disturbing factor in school affairs is the 39 married women teachers. There are 123 unmarried young women on the certified monitress list who seek teacher placement. I contend that proper mental and home responsibility impairs the teaching ability of the mercenary wife who persists in pursuing a pedagogical occupation.
>
> "Most disloyal among those in our educational field is the man or woman born in Hoboken, educated in its schools with public funds, entrenched in a permanent teacher position, who deserts the city and removes to a suburban town. Such an individual existing on the wage provided by merchants and other taxpayers, fail to contribute to maintain either business or property in this municipality."

On April 12, 1932, Mr. Laverty, on stationery of the Board of Education, and signed by him above the designation, "President, Board of Education," wrote letters addressed, "Dear Teacher," which he caused to be manually delivered to married teachers, resident and non-resident of the City of Hoboken, and to unmarried non-resident teachers of the city, in one of which he said, to the non-resident teachers:

> "Ethically and legally you owe a debt of habitation in the place where your official duty lies. Practically one-third of the pedagogic staff reside beyond the limits of Hoboken—you among the number—who in one year remove out of the city, a wage total of $389,000.
>
> "A pretense of taking up abode in Hoboken will not suffice the purpose. An established genuine home is the objective of the authorities. May retrospection persuade you to pay this city the habitation obligation you owe it."

In another, among other things, he stated:

> "Competing as a married woman, you—and husband—mercenarily deprive a monitress, teacher appointment. In addition thereto you use in another municipality the money earned here. Desertion of the city which fostered and progressed your affairs is despicable; your continuing to function as a married woman teacher, especially in this season of dire distress consequent to widespread business depression merits censure. You practically usurp a place which should be occupied by an unmarried woman teacher eligible. Moral sensibility of the injustice done should motivate your suspension of school activities."

On June 23, 1932, Mr. Laverty again issued a letter on Board of Education stationery, addressed, "Dear Teacher," and signed by him above the designation, "President, Board of Education," which states, among other things:

> "Reiterated is criticism contained in a letter mailed last April to a "Group" of teachers. From a number of them came written or spoken acknowledgment. Some ignored the letter. Others exasperated, whispered words of derision.* * * The 'mercenary'-minded sustain defiance—the married woman teacher incubus shall be lifted from the monitress body force. Indefensible is refusal to help Hoboken extricate itself from difficulties incident to protracted business recession which has made for untenanted premises, shattered commercial trade, and restricted municipal financing."
>
> "The teacher constant in devotion to Hoboken should urge associates recreant in their duty, to give complete allegiance to this school district. The recalcitrant "group" must fully meet the April letter requirements. Evasion will not be countenanced."

The minutes of a meeting of the Board of Education, held on April 18, 1932, contain the following excerpt:

> "President Laverty informed the Board of the result of a recent survey made in the supervisory and teaching forces of the schools. In this connection he submitted the following data:
>
> "A number of the public school supervisory and teaching staff do not live here.
>
> "The Board two months ago directed attention to this truth.
>
> "Each of the educator force was provided with a 'Query card.' Order was given to disclose certain facts of school life.
>
> "The factual data furnished has been analyzed and tabulated; 394 individuals are on the qualified supervisory teacher roster; 373 of them in youth were mentally trained in Hoboken schools; 95% of our educators are 'home talent'—a proportion unequaled elsewhere in New Jersey; (Hoboken school children have a high rating in efficiency—it shall be maintained); 139 of the pedagogic force reside beyond the limits of Hoboken; 127 of these 139 total—former residents—with few exceptions

were born here; 18 married women teachers are numbered among the 'non-residents;' 12 of the non-residents never lived here—(5 appointed before 1914, 7 named in 1916-1921) (The periods of activity; pre-war duration, post-war—created a teacher supply scarcity.) Every educator appointed since 1925 was—in youth—a pupil in Hoboken schools; $389,000.00 of wage is annually removed from Hoboken by the 139 non-resident teachers. Communications mailed to the alleged 'ethical' transgressors comprehend 'four' groupings: Non-residents—'those who deserted the city of their birth—'those who never lived in Hoboken,' married women teachers—'non-residents'—also 'resident.' The State Public Instruction Law gives 'tenure' to an established qualified teacher; 255 of the educational force are true loyal citizens; honest with their conscience; with deliberate intent participate in whatsoever confronts them in home life; take interest in civic affairs; complacently meet care, anxiety or prosperity which emergency may create; find happiness here; thrive in health, and are faithful to their cause—the child in the classroom.

"Consequent to the comments of this Board concerning the forsaking of the city of Hoboken by public school teachers, report is made of the return of eight teachers who have once again taken up genuine permanent home in this community."

All the teachers involved in both appeals had served in the Hoboken district more than three years, and were therefore under the protection of the Tenure of Office Act.

The Commissioner concluded that the transfer of the 26 teachers from various schools to Schools Nos. 4 and 7 was illegal, in that it was for the purpose of placing them in a situation which would appear to legalize the termination of their service, and since it was evident that the teachers were transferred for such purpose they were therefore illegally transferred, and their positions not abolished.

With reference to the eight teachers who had served in Schools Nos. 4 and 7, prior to June 29, 1932, and who were not transferred, the Commissioner held that their services were legally terminated. This conclusion rests upon the reasoning that only the positions of teachers in Schools Nos. 4 and 7 were legally abolished. In his view, the teachers who were transferred to Schools Nos. 4 and 7, on June 29, 1932, did not hold such positions, their transfer having been illegal.

The powers of a board of education in the management and control of a school district are very broad. It is invested with the supervision, control and management of the public schools and public school property in its district. It may make, amend and repeal rules, regulations and by-laws, not inconsistent with the school law, or with the rules and regulations of the State Board of Education, among other things, for the employment and discharge of principals and teachers. By section 68 of the School Law, it is authorized by a majority vote of the whole number of its members, to appoint, transfer or dismiss principals and teachers. These powers are limited, as to the employment and discharge of teachers, only to the extent therein provided, by the

Teachers' Tenure Law, Chapter 243, P. L. 1909. The right to transfer a teacher seems to rest, therefore, wholly in the discretion of the board of education. Conceding that when the 26 teachers in question were transferred from their various schools to Schools Nos. 4 and 7, the Board of Education had already determined to close those schools, did that purpose make the transfers illegal? We think not. The Board had unlimited right to transfer; it also had the right, as we shall hereafter declare, to dispense with the services of such number of teachers in the district as it should, in good faith, deem necessary to effect the economies which its financial situation demanded, and whose services were no longer necessary because of the diminution in the number of pupils. It could have selected the teachers whose services were to be terminated from the school district at large. It chose to so select such teachers, and, before terminating their employment, transfer them to Schools Nos. 4 and 7, to fill the places of teachers transferred from those schools. It is argued, in behalf of the teachers, that such transfer is permeated with bad faith. That although the Board had the right to terminate their service, by reason of the diminution of pupils, and in order to effect economy in the operation of the school system, the fact that only married and non-resident teachers were so selected is an abuse of the powers and discretion of the Board of Education, and gross discrimination. As evidence of such unlawful discrimination and abuse of its power by the Board, counsel for the teachers refers to the letters written to married and non-resident teachers by Mr. Laverty, the president of the Board. Mr. Laverty was evidently a man who entertained positive views. Upon assuming the office of president of the Board, to which he was elected in February, 1932, he addressed the Board and stated his views with reference to teachers who did not reside in the school district, and teachers who were married. The Board, however, took no action. Mr. Laverty evidently also subsequently took it upon himself to make a survey of the conditions in the school district with reference to the number of non-resident and married teachers employed. He wrote the letters from which we have quoted and personally had them delivered to married or non-resident teachers, and, in June, 1932, he reported to the Board the results of such survey. The Board took no action on such report, although the secretary included it, or the substance thereof, in its minutes. The secretary of the Board testified before the Commissioner that the Board at no time took any action with regard to non-resident and married teachers; did not authorize Mr. Laverty to make a survey; to send communications to teachers, or to do anything in that regard. We are satisfied that what Mr. Laverty did was of his own motion and was not authorized by the Board. It does appear, however, that the Board was influenced by his views. It is improbable that the Board was ignorant that the superintendent had selected for transfer only non-resident and married teachers, nor is it likely the superintendent made such selection without instructions. The question arises, whether, notwithstanding the members of the Board may has acquiesced in the views of Mr. Laverty, and the action of the superintendent in accordance therewith in selecting teachers to be separated from the service, that affects the legality of the transfers. We are satisfied that controlling purpose of

the Board was to effect economy and to terminate the service of the number of teachers no longer necessary because of the diminution of pupils. The Board had unlimited discretion in the selection of the teachers to be dropped. They chose to select such as were married and/or non-resident, giving preference in continued employment to residents of the school district and to those who would normally be dependent upon themselves for a livelihood. We cannot say to do so was an abuse of discretion or evidence of bad faith. (State *vs.* Kennelly. (Conn.) 55 Atl. Rep. 555.)

Can we go behind the record of the proceeding and the action of the Board to question the motives which actuated its members? The general principle appears to be against such proposition.

> "So long as a * * * board of education * * * acts within the authority conferred upon * * * it by law, the courts are without power to interfere with, control or review * * * its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof * * * , 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." 56 C. J., page 342. Citing numerous authorities.
>
> "Even though motive was corrupt or the act was done for the purpose of spite or revenge, an action of a board is immune from judicial interference if it is within the range of the board's legal discretion. (Iverson *vs.* Springfield, etc., Union Free High School Dist. 186 Wis., 342; 202 N. W. 788."

The right of the Board to transfer teachers being absolute, the fact the Board had in view the closing of the school to which the teacher was transferred, and to terminate her employment does not affect the legality of such transfer, and we conclude that the transfers of the 26 teachers to Schools Nos. 4 and 7, were lawful.

The Teachers' Tenure Law (Chapter 243, P. L. 1909), provides:

> "The service of all teachers, principals, supervising principals of the public schools in any school district of this State, shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; * * * no principal or teacher shall be dismissed or subjected to reduction of salary in the said school district, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, etc."
>
> "Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district, when such reduction shall be due to a natural diminution of the number of pupils in said school district."

It cannot be disputed that the school district of Hoboken had suffered a natural diminution in the number of pupils, it appearing conclusively that in the past five years the number of pupils in the elementary schools had decreased by 760, while the number of teachers during the same period had decreased only 9. Neither can it be disputed that the school district was in a position where every effort to economize was necessary. The termination of the services of the 34 teachers involved in this appeal was based on said considerations, and they are appropriately recited in the preambles of the resolutions of the Board. It is unnecessary to quote authorities for the proposition that where reductions in personnel are made and positions abolished in good faith, for reasons of economy, such measures are lawful. Irrespective of considerations of economy, however, in the present case the diminution in the number of pupils was ample reason for reducing the number of teachers. Section 3 of the Tenure of Office Act, above quoted, effectively left in boards of education, when the conditions therein mentioned exist, the unlimited authority they had before the enactment of the Tenure Law. Before the enactment of the Tenure of Office Law, boards of education could discharge from its employ, principals and teachers at will, except in so far as it was bound by rights of contract. Counsel for the teacher-appellants maintains that the abolition of their positions was not in good faith because respondent wished to eliminate non-resident and married teachers. We have dealt with this argument in our consideration of the legality of the transfers of the teachers made in contemplation of discontinuing their services. We are satisfied that the respondent Board acted in good faith in terminating the positions of teacher-appellants for the purpose of effecting economy and to diminish the teacher force to a number commensurate with the number of pupils then in the elementary schools. It appears, however, that at the time of the termination of appellant's services, there were in the employ by respondent, seven teachers who had not acquired tenure. The Supreme Court of New Jersey, in the recent case of Seidel *vs.* The Board of Education of Ventnor City, (110 N. J. L., 31), has held that:

> "Granting that apart from the statute, the school board may, in the interest of economy, reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge, teachers exempt by law therefrom, and retaining the non-exempt. If such reduction is to be made at all and the place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute."

Counsel for the respondent Board contends the foregoing is not applicable to the present case. He directs our attention to a remark made by Justice Parker in the decision wherein the Justice observes that the case (Seidel) is not within Section 3 of the Act of 1909, relating to reductions in the teaching staff due to diminution in the number of pupils, for there was no diminution. It seems to us the Seidel case states the principle that whenever the service of a teacher under tenure is to be discontinued by reason of economy or

diminution in number of pupils, and there are teachers in the employ of the board not under tenure whose position a tenure teacher is competent to fill, the non-tenure teacher must first be selected for discharge. As to the seven positions held by teachers not under tenure, we feel bound to follow our interpretation of the Seidel case and to hold that the positions held by these teachers should be assigned to seven of the thirty-four teachers involved in this appeal. It should be referred to the Board of Education to determine which of the seven teachers involved in this appeal shall be assigned to the positions held by the seven non-tenure teachers.

The remaining question relates to the claim by the teachers that they are entitled to the balance of salary for the year 1931-1932. The Commissioner of Education decided that all the teachers who had not received full salary since September 1, 1931, were entitled to the balance, less deduction due to the Teachers' Pension and Annuity Fund. We agree with this conclusion. The result is, we consider that the termination of the service of the thirty-four teachers by respondent Board was legal, subject to the Board assigning seven of such teachers to the positions held by teachers not protected by tenure, and that teachers who were not paid the balance of their salaries for the school year, are entitled to such payment, and we recommend therefore, that the decision of the Commissioner, so far as it related to the reinstatement of 26 of the appellants, be reversed, and that as to the termination of the services of the remaining 8 teachers, and the payment of the balance of the salaries of all teachers, his decision be affirmed.

April 1, 1933.

DECISION OF THE SUPREME COURT

Argued October 3, 1933; Decided March 23, 1934.

On Certiorari, etc.

Before Brogan, Chief Justice, and Justices Trenchard and Heher.

For Angelina Koch Downs and Rai Driesen Flechtner, Arthur T. Vanderbilt (Nathan L. Jacobs, on the Brief).

For the Board of Education of Hoboken, Joseph Greenberg.

Per Curiam:

These writs taken together bring up for review the action of the State Board of Education in affirming the dismissal by the school board of Hoboken of certain school teachers, the action of the State Board in ordering payment of certain unpaid salary to them, and the action of the State Board in ordering the school board of Hoboken to dismiss certain non-tenure teachers and to replace them with tenure teachers.

It appears that there were 9 elementary schools in the school district of Hoboken with 6,704 pupils in attendance in 1928. From that time forward until 1932 there was a marked decrease in attendance from year to year so that in 1932 there were only 5,431 pupils. During the latter part of this period there were 5 vacant classrooms and 943 vacant seats. This diminution in the number of pupils was a natural one, due to the loss of population. During

this period the decrease in the number of teachers was only 9. In 1931, due to a bank failure, inability to collect taxes and other causes, the City of Hoboken which comprises the school district of Hoboken, found it difficult to finance its schools, difficult at first and almost if not impossible thereafter to borrow money by the use of all available credit of the city. From time to time the president of the board of education made public reference to economic problems facing the board. He referred to the fact that many of the teachers were married women, some of whom did not live in the city, and that condition he vigorously criticized. On June 27, 1932, a second conference was held between the bankers and the city officials in an effort to raise money, but that effort was futile in view of the position taken by the bankers that the cost of operating the schools must be reduced. As a result of this conference the city commissioners met with the board of education and laid before them the situation. The result was that it was decided to close two schools. To carry out this decision the board met on June 29, 1932. At that meeting a report was made by the superintendent of schools that he had made certain transfers of teachers and other employees from and to various schools, subject to the approval of the board. That approval was unanimously given. By that transfer 26 teachers represented by the prosecutrix Angelina Kock Downs were transferred to schools Nos. 4 and 7. Later at the same meeting the board by resolution reciting in effect the decreased attendance, the excessive per capita cost of pupils, the necessity of economizing, and that the services of so large a number of teachers were no longer required, unanimously resolved that schools Nos. 4 and 7 be closed on June 30th at the close of the school session, and that the pupils theretofore attending those schools be transferred to other schools, and that 34 named teachers (including the 26 heretofore referred to and 8 others represented by prosecutrix Rai Driesen Flechtner) be dismissed as of June 30, 1932, and abolished the offices of certain other employees.

All of the dismissed teachers were involved (namely, the 26 transferred to schools Nos. 4 and 7, and the 8 who had long served in Nos. 4 and 7) have served for more than 3 years, and are therefore under the protection of the Tenure of Office Act.

An appeal was taken by the named teachers to the Commissioner of Education. That official concluded that the transfer of the 26 teachers from various schools to Nos. 4 and 7 was illegal in that it had for its purpose the placing them in a situation which would appear to legalize the termination of their services. As to the 8 teachers who had served in schools Nos. 4 and 7 prior to June 29, 1932, the Commissioner held that their services were legally terminated.

An appeal was then taken to the State Board of Education and that board held that the termination of the services of the 34 teachers was legal, subject to the board assigning 7 of the teachers to positions held by teachers not protected by tenure, and that the teachers who had not been paid the balance of their salaries for the school year were entitled to such payment; in other words, the decision of the Commissioner, so far as it related to the reinstatement of the 26 teachers, was reversed, and the termination of the services

of the 8 teachers and the payment of the balance of salary for the year of all the teachers, was affirmed.

We think that the decision of the State Board of Education should not be disturbed.

The powers of boards of education in the management and control of the school districts are broad. They are invested with the supervision, control and management of the public schools. They may make, amend and repeal rules, regulations, and by-laws not inconsistent with the school law or with the rules and regulations of the State Board of Education, and, among other things, may employ and discharge teachers. By section 68 of the School Law (C. S., p. 4744) they are authorized by a majority vote of the whole number of its members to appoint, transfer or dismiss teachers. These powers are limited as to the employment and discharge of teachers only to the extent provided by the Teachers' Tenure Law, Chap. 243, P. L. 1909. And it will be noticed that that act declares, among other things, that "nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district."

In general the right to transfer a teacher seems to rest, therefore, in the sound discretion of the board of education, and it seems to us that the mere fact that the 26 teachers were transferred from their various schools to schools Nos. 4 and 7, which at the same meeting the board of education determined to close, did not render the transfers illegal. In general the board had a right to dispense with the services of such number of teachers selected from the entire school district as it in good faith deemed necessary to effect the economy which its financial condition demanded, and whose services were no longer necessary because of the diminution of the number of pupils.

It is further contended that what was done was in abuse of the powers and discretion of the board of education and was a gross discrimination, and this contention seems to rest upon the fact that the teachers dismissed were either married women or non-resident women, or both, and much is made of the expressed feelings of the president of the board with respect to this situation.

It is true that he expressed himself forcibly. It is true that he wrote letters to the teachers in which he expressed his views. It is also true that he made a survey and reported the result of his survey to the board. But it is also true that the board did not authorize such survey and took no action on such report with regard to non-resident and married women teachers, and that it did not authorize the president to communicate with the teachers nor to do anything in that regard. The board may or may not not have been influenced by his views. Upon that we will not speculate. The question is does this action of the president affect the legality of the transfers. We think not. We are satisfied from this record that the purpose of the board was to effect economy and to determine the services of a number of teachers no longer necessary because of the diminution of pupils, and we cannot say, even though they dismissed married or non-resident women teachers, giving preference in continued employment to residents of the school district and to those who

would normally be dependent upon themselves for livelihood, that such action was an abuse of discretion or evidence of bad faith. The board appears to us to have acted within the authority conferred upon it by law, and its action involved the exercise of discretion, and in the absence of clear abuse, its action ought not to be disturbed; so we conclude that the transfer of the 26 teachers to schools Nos. 4 and 7 was lawful and that the board was justified in dismissing the teachers as it did, subject to the reservation imposed by the State Board.

It appears, however, that at the time of the termination of the teachers' services there were in the employ of the school board 7 teachers who had not acquired tenure. Now in the recent case of Seidel *vs.* Board of Education of Ventnor City, 110 N. J. L. 31, it was held that "granting that apart from the statute, a school board may, in the interest of economy, reduce the number of teachers, the protection afforded by the statute (Teachers' Tenure Act, P. L. 1909, Chap. 243) would be little more than a gesture if such board would be held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute."

That decision seems to apply to this case and to justify the action of the State Board of Education in requiring the Hoboken board to assign seven of such discharged teachers to the positions held by teachers not protected by tenure.

The remaining question relates to the claim by the teachers that they are entitled to the balance of their salary for the year 1931-1932. Both the Commissioner of Education and the State Board of Education concurred in the view that all of the teachers who had not received full salary since September 1, 1931, were entitled to the balance, less deductions due to the Teachers' Pension and Annuity Fund.

We think that was right. The teachers were under contract for a year's services and those services ran from September 1st to the following June 30th. They had performed their work and we see no reason why they are not entitled to their compensation.

The result is that the judgment of the State Board will be affirmed. No costs will be allowed any party hereto as against any other party.

DECISION OF THE COURT OF ERRORS AND APPEALS

May Term, 1934

PER CURIAM.

The judgments under review herein should be affirmed for the reasons expressed in the opinion delivered by the Supreme Court, reported in 12 N. J. Misc. R. 345.

Filed September 27, 1934.

BOARDS MAY REDUCE NUMBER OF TEACHERS THROUGH REORGANIZATION REGARDLESS OF TENURE RIGHTS

VINCENT P. HORAN, ET AL., VIOLA COOKE, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF KEARNY,

Respondent.

For the appellant, Merritt Lane.

For the respondent, Charles M. Myers.

DECISION OF THE COMMISSIONER OF EDUCATION

The Superintendent of Schools of Kearny, who had served that district for a number of years, retired June 30, 1932. The board of education interviewed a number of applicants for the superintendency and since it had received notice from the municipal authorities that financial conditions necessitated a reduction of school costs it discussed with the applicants the economical operation of the schools. As a result of the interviews, Dr. Edmund Tink was elected Superintendent of Schools with the understanding that his employment comprehended the immediate institution of a program of economy.

Dr. Tink, with the assistance of Frances M. MacGuire, elementary supervisor and assistant to the superintendent, began an intensive study of the school system. Promotion lists and school registers were examined and questionable enrollments were checked with actual residence. The board raised the initial entrance age of pupils from four and one-half to five years, thereby reducing the kindergarten enrollment in the September classes. The decreased employment of children in factories indicated an overstaffing of the continuation school classes. The final checking of the lists showed a number of classes with enrollments of from twenty to twenty-five pupils. The survey showed a large number of seats in excess of the number of pupils enrolled.

In reorganizing the schools the superintendent set up a standard class size of approximately thirty-five pupils. The pupils from a number of the smaller classes were distributed among other classes with the result that it was estimated the work could be efficiently performed with approximately thirty-five fewer teachers. Under this arrangement it appeared to be financially advisable to close one building rather than have a number of vacant rooms in each building. In studying the transfer of pupils in relation to building facilities, the closing of the Clara Barton School, which was the oldest and poorest building in the system, was recommended. The proposal of abandoning the Clara Barton School and the elimination of small classes included the abolition of all such positions and the termination of the services of the teachers

then assigned to them. Under the entire reorganization, the services of fourteen non-tenure teachers with salaries of $20,450.00 and twenty-two tenure teachers with salaries amounting to $52,700.00 were to be terminated and the Clara Barton School, with a maintenance cost of $8,660.98 was to be closed, effecting an estimated total economy of $81,810.98.

On August 3, 1932, the Superintendent submitted to the board his recommendations as to the abolition of positions which recommendations were adopted as of that date. The teachers affected were given written notice of the board's action by letters dated August 4th. On August 18th the board by resolution closed the Clara Barton School. A number of positions remaining after the adoption of these resolutions were filled by non-tenure teachers.

The estimate of the superintendent as to the vacant seats was verified by the actual enrollment in September and showed that exclusive of closing the entire Clara Barton building, there were still nine unoccupied classrooms and three hundred and thirty-four vacant seats in other buildings. The result of reorganization throughout September and until the hearing shows an average elementary pupil enrollment of thirty-five and a fraction with no class in excess of forty and only thirteen classes containing that number.

Considerable testimony was submitted to show that some of the rooms now have a slightly greater enrollment than would be allowed by the strict enforcement of the rule of the State Board of Education requiring 18 square feet of floor space per pupil. The small number of classrooms in which there were two or three more pupils than would be permitted by this rule is of minor importance to the issues involved in this case, and has no effect upon its determination. Evidence was also submitted to show that the high school was under-staffed. Even if this had been proven by the testimony submitted, the high school is not involved since it is separate from the elementary school and no high-school teacher was dismissed.

Testimony was submitted by respondents to show that there was a natural diminution of pupils as comprehended by the Teachers' Tenure of Office Act (Chapter 243, P. L. 1909). With the exception of a decrease in the continuation school enrollment which reduced the number below that for which classes are mandatory, the evidence does not disclose a sufficient diminution in pupils to justify the abolition of positions under the resolution of August 3rd.

Counsel for appellants contends: The Clara Barton School was not actually abandoned, no economic need existed for abolishing positions, the resolutions of the board were not *bona fide* but for political and personal reasons and, therefore, the positions of petitioners were not legally abolished. Appellants, all of whom have been employed for more than three years in the district, and thereby protected by the provisions of the Teachers' Tenure of Office Act, petition the Commissioner to require the board to rescind its resolutions of August 3rd and 18th, and to reinstate them in the positions from which they were dismissed.

Whether the board of education has definitely abandoned the Clara Barton School is not an issue in this case. By its resolutions of August 3rd and 18th the positions in that school were abolished and the building closed. There is nothing that would prohibit a future board from re-opening it, if in its judg-

ment that is advisable. The Clara Barton School was erected more than forty years ago and the latest addition to it was built in 1909. The State Department of Public Instruction in a recent survey which enumerated the numerous defects in this building, classified it as the poorest school building in the town. In closing the poorest building and one from which pupils could be assigned to other buildings convenient of access, there is no indication of improper motives. Moreover, the board of education decides where facilities shall be provided within the appropriations legally authorized. The respondent in this case acted within its authority in closing the Clara Barton School.

While Chapter 243, P. L. 1909, specifically authorizes a board of education to discontinue the services of a teacher protected by the Tenure of Office Act where there has been a natural diminution in the number of pupils enrolled, the Supreme Court has in many cases held that positions may be abolished for reasons of economy if *mala fides* is not evident. The conditions involved in this case are not controlled by Carroll *vs.* Bayonne, 3 N. J. Misc. 308, cited by appellant, but by Southerland *vs.* Jersey City, 81 N. J. L. 436, in which the court said:

> "But it is settled that statutes of this nature are not designed to prevent the abolition of an office and the transfer of its duties to another official, when such a course is taken *bona fide* for economical reasons or for the promotion of greater efficiency in school service."

It is a legitimate function of a school system to effect economies which are made necessary by the financial conditions of the community. The financial condition of the Town of Kearny justified some retrenchments by the board of education. The testimony indicates an unprejudiced reorganization of the schools by the superintendent with the purpose of effecting economies in accordance with the desire of the board expressed at the time of his employment, and no evidence was presented which implies personal or political motives on the part of the board. The positions were legally abolished.

The Kearny Board of Education can neither be required to rescind its resolutions of August 3rd and 18th nor to reinstate petitioners in the positions which they previously held. The board can by a majority vote of the entire membership assign or transfer any teacher to a position of the type in which she has been employed. (Chap. 1, P. L. 1903, S. S., Sec. 68.) Since appellants were protected in their employment by the Teachers' Tenure of Office Act and teachers not under tenure were retained, there remains only to be decided whether the services of petitioners were legally terminated and, if not, their redress under the statute.

While the board in terminating the services of appellants, who were holding positions abolished by the resolution of August 3, 1932, was acting within its rights as determined by the then existing court decisions, the Supreme Court in the case of Seidel *vs.* Ventnor City Board of Education decided January, 1933, ruled that a tenure teacher is protected in her employment in a school district even if her position is abolished if at that time there is a vacancy, or a position filled by a non-tenure teacher in the type of work for which she was

originally employed or to which she was subsequently transferred. In accordance with this ruling, the Board of Education of the Town of Kearny is directed to reinstate as teachers as many of appellants as there were positions in its school system resulting from the reorganization of August 3, 1932, which have been filled by teachers who were not on that date protected by the Tenure of Office Act, if appellants were at that time or had previously been employed in such type of work. In reinstatement, the appellants are to be assigned as nearly as may be to positions of similar rank to those which they held during the school year 1931-1932 and to be paid their salaries from August 3rd in the amount to which they would be entitled under the salary schedule for such position.

March 13, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

On August 3, 1932, the Board of Education of the town of Kearny resolved that the services of thirty-six teachers, fourteen of whom were described as under contract, and twenty-two as under tenure, were no longer required because of the elimination of their classes. The secretary of the Board so notified all thirty-six including the appellants who commenced this proceeding for their reinstatement. The Commissioner held hearings at which 811 pages of testimony were taken and numerous exhibits were marked in evidence. Voluminous briefs were later submitted to him in which was discussed the determination of the Supreme Court in the case of Seidel *vs.* The Board of Education of Ventnor City which determination was rendered after the close of the hearings herein. The Commissioner decided that the Kearny board in good faith and in the interests of economy had effected an unprejudiced reorganization of its elementary schools and that the positions which appellants held had been legally abolished. As some non-tenure teachers had been retained, he, in accordance with the ruling of the Supreme Court in the Seidel case, directed the Kearny board "to reinstate as teachers as many of the appellants as there were positions in its school system resulting from the reorganization of August 3, 1932, which have been filled by teachers who were not on that date protected by the Tenure of Office Act, if appellants were at that time or had previously been employed in such type of work."

From the Commissioner's decision, the teachers and the Board appealed to this Board. All requested an early hearing and decision if possible. Your committee heard both sides at length in Jersey City on March 29, *i. e.* Wednesday last. In behalf of the teachers it was urged that the Kearny Board did not act in good faith and that their acts should be set aside and the appellants reinstated. In behalf of the Board if we correctly understand its counsel it was argued that it reorganized the elementary schools in good faith, that such reorganization was actuated solely by reasons of economy, that the economy resulting would be largely dissipated if it be required to substitute tenure for non-tenure teachers and that, therefore, the ruling in the Seidel case should not under the circumstances be held to apply. While the record is voluminous the facts are fairly simple and are set forth in the decision of the Commissioner.

In brief they are: That in accordance with the wishes of his Board, Dr. Edmund Tink, the new Superintendent of Schools, undertook as his first work a study of the schools to see if they could be more economically administered. On July 6 he informed the Board that he had visited the school buildings, that he was working on the problem of increasing classes and that with the help of an assistant he was preparing reorganization sheets on the basis of the enrollment during the year 1931-32. The Board assured him that his program met with its approval. He and his assistant devoted the month of July to their study. They found that many classrooms were not used and that in many classes there were fewer than 25 pupils. Assuming that kindergarten classes should be restricted to 25, the first grade to 35, the advanced eighth grade to 35 and the intermediate grades from 36 to 38 and that no class should have more than 40 pupils, Dr. Tink evolved a plan of reorganization and submitted the same to his Board. On August 3 last the Board, first reciting the necessity for care in the expenditure of public funds and that the schools should be operated at as low a cost as is practical with their efficiency, resolved to terminate the employment of 36 teachers, the majority of whom were under tenure. On August 18, it resolved to close one of its schools, the Clara Barton which was the oldest. The conclusion of the Commissioner, that the Board acted in good faith and effected an unprejudiced reorganization, in our opinion is sustained by the evidence. That the reorganization was carefully planned is evident from two facts, one that provision was made for 5,413 pupils, and in September 5,371, 42 less, entered and the other fact that while a few classes had 40 pupils none exceeded that number. At the time of the reorganization, the determination of the Supreme Court reversing that of this Board and of the Commissioner in Seidel *vs.* Board of Education of Ventnor City had not been announced. As part of the reorganization, the Kearny Board retained some non-tenure teachers, 16 we infer from the record. In the Seidel case, Mr. Justice Parker writing for the Court said a reduction in the number of teachers that if "a place remains which the exempt (tenure) teacher is qualified to fill such teacher is entitled to that place as against the retention of a teacher not protected by the statute."

Counsel for the Kearny Board argues that to apply such rule would substantially reduce the economy effected by its action. Such rule he argues should not apply in a reorganization such as the Kearny Board tried to effect. If we understand him it is difficult to see why, if his contention be sound, a board striving to effect a reorganization would not be free to ignore the tenure act and to employ at a great saving teachers out of employment, some of whom doubtless during the depression would be willing to work for barely more than living wages. We do not think the contention is sound. The language of Mr. Justice Parker in the Seidel case is most opposite. "Granting that apart from the statute a school board may in the interest of economy reduce the number of teachers the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom and retaining the non-exempt."

On the argument we were asked to rule on the status of several of the appellants. The Commissioner did not. He simply remitted the case back to the Kearny Board to act in harmony with the ruling of the Supreme Court in the Seidel case doubtless feeling that thereafter it might not be necessary to determine the status of such appellants. With that view in mind, we concur in his non-ruling. The conclusion of the Commissioner on the entire case as above pointed out reads:

> "In accordance with this (the courts in the Seidel case) ruling the Board of Education of the town of Kearny is directed to reinstate as teachers as many of the appellants as there were positions in its school system resulting from the reorganization of August 3, 1932, which have been filled by teachers who were not on that date protected by the Tenure of Office Act if appellants were at that time or had previously been employed in such type of work."

We have been interrogated as to just what is meant by the phrase "type of work." We do not believe that the Commissioner tried or intended in any way to limit the ruling in the Seidel case. With such understanding we believe his decision should be affirmed and we so recommend.

April 1, 1933.

Decision of the Supreme Court

Per Curiam.

Decision of Supreme Court filed September 7, 1933, in the case of Viola L. Cooke, et als. *vs.* Kearny Board of Education.

The Board of Education of the town of Kearny challenges the legality of an order of the Commissioner of Education, made March 13, 1933, directing the prosecutor to reinstate as many of the defendant teachers as there were positions in its school system on the reorganization of August 3, 1932, which had been filled by teachers who were not on that date protected by the Tenure of Office Act, if the defendant teachers were at the time or had previously been employed in such type of work, and assigning the defendant teachers as nearly as might be to positions of similar rank to those which they held during the school year 1931-1932 and directing the payment of their salaries in the amount to which they would be entitled under the salary schedule for such position. The prosecutor further challenges the legality of an order of the State Board of Education, made on April 1, 1933, affirming the order of the Commissioner.

In the town of Kearny, on June 30, 1932, there were ten elementary schools with an enrollment of 5,428 pupils. There were seven vacant rooms and 1,059 additional vacant seats distributed in the various buildings. At that time there were in the employ of the prosecutor 10 principals and 182 elementary teachers. Because of economic conditions the prosecutor deemed it advisable to reorganize the school system and provide a standard class size of 35 pupils. In order to accomplish this, pupils from a number of smaller classes were distributed among other classes so as to equalize the pupil load. The result of the transfers showed that the pupils could be as efficiently taught with approximately 36 less

teachers. The preceding portion of this paragraph is stated in the prosecutor's brief as a correct summary of the proofs, and we accept it as such. In the reorganization 36 teachers were eliminated. Of that number 14 were non-tenure teachers and 22 were tenure teachers. After the abolition of the positions of 36 teachers there remained in the school 146 teachers, of whom 16 had served less than three years and 130 of whom had served more than three years. Stated otherwise, 14 non-tenure teachers were retained at the same time that 22 tenure teachers were discharged, and the question is whether that status was lawfully created.

It is conceded that the decrease in the number of pupils in the Kearny school district was not sufficient to justify the abolition of the positions of 36 teachers; but it is claimed that section 3 of the Tenure of Office Act, chapter 243, P. L. 1909, 4 C. S. page 4764, in providing that "nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district" contained the authority for the action taken by the Kearny Board of Education, for the reason, as it is said, that the facts above set forth create a "natural diminution" of the number of pupils and therefore justified the action. The opinion rendered by this court in Seidel *vs.* Board of Education of Ventnor City, 110 N. J. L. 31, 164 Atl. 901, seems dispositive of the question. It was there held, as summarized in the syllabus, that a teacher in a public school, employed by general contract as such, who, by service for three years or more, has come under the protection of the statute providing for an indefinite period thereafter may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such teacher is competent to fill, are retained under employment. It may be granted that the abolition of 36 classes and 36 teachers was in the interest of economy, but the Seidel case is authority for the proposition that that movement for economy is not to be accomplished by dismissing teachers who are under the protection of the statute providing for indefinite tenure while other teachers not so protected are retained. The competency of the defendant teachers is not challenged. Prosecutor's brief contains the suggestion that "a tenure teacher may not be competent to teach the class or the subject of a non-tenure teacher," but the argument of incompetency, to be effective, must be based upon proof and not upon more possibility.

It is also argued that the compensation paid the non-tenure teachers who were retained is less than the compensation paid, up to the time of dismissal, the tenure teachers who were dismissed. This suggestion carries little weight because the right of the prosecutor to reduce salaries of the tenure teachers to a level commensurate with the grade taught is not at issue. As was said in the Seidel case:

> "Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom and retaining the non-exempt. If such reduction is to

be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute."

The writ will be dismissed, with costs.

TEACHERS UNDER TENURE DISPLACE NON-TENURE TEACHERS IN ABOLITION OF POSITIONS

RUTH BILLINGS HILBERT,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS,

Respondent.

For the Appellant, Besson & Pellet.
For For the Respondent, I. George Koven.

DECISION OF THE COMMISSIONER OF EDUCATION

Apparently at the request of the Board of Education of Secaucus, the Supervising Principal presented to it a report on the means of reducing the cost of operating the schools. The report recommended the consolidation of certain elementary grade groups whereby four classroom positions could be abolished. On August 2, 1932, the board of education, by resolution, adopted the recommendations of the Supervising Principal and terminated the services of the teachers who were in those positions, including the appellant, who had been employed in the schools for a number of years and was accordingly protected by the Teachers' Tenure of Office Act. There were at this time several teachers employed by the board who were not so protected. Appellant claims to have been illegally dismissed and asks for reinstatement as of August 2, 1932.

Testimony was presented on behalf of appellant purporting to show that the board discriminated against her because she is married. Counsel for respondent maintains that there was no discrimination because of marriage, and holds that the board was justified in reducing the number of teachers not only on the ground of economy, but under the provisions of section 3, chapter 243, P. L. 1909, which authorizes a decrease in the teaching staff when there is a natural diminution of pupils in the school system. It is not necessary to consider these contentions in reaching a determination in this case. However, it may be stated that while positions may be abolished for purposes of economy, the testimony does not show a natural diminution under section 3 which would justify the dismissal of tenure teachers.

In the recent case of Seidel *vs.* Board of Education of Ventnor City, the Supreme Court held:

"A teacher in a public school, employed by general contract as such, who by service for three years or more has come under the protection of the statute providing for indefinite tenure thereafter (C. A. 4763 pl. 106a: P. L. 1909, p. 308) may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such teacher is competent to fill, are retained under employment."

The respondent illegally terminated the services of appellant when it retained non-tenure teachers in positions she was qualified to fill. The Board of Education of Secaucus is accordingly hereby directed to reinstate Mrs. Hilbert as a teacher in its schools and to pay her salary from August 2nd, at the rate she received for the school year 1931-1932.

March 14, 1933.

Affirmed by State Board of Education without written opinion, July 8, 1933.

TENURE TEACHER HAS RIGHT TO DISPLACE NON-TENURE TEACHER WHEN POSITIONS ARE REDUCED

WALTER B. HOWELL,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD IN THE COUNTY OF CAMDEN,

Respondent.

For the appellant, Walter G. Carson.
For the respondent, Edward T. Curry.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, Walter B. Howell, was employed by the Haddonfield Board of Education "to teach in the public schools" under consecutive annual contracts from July 1, 1927, to June 30, 1932. During this time he taught Plane Geometry, Algebra I, Algebra II, Commercial Arithmetic, and General Mathematics. For the year ending June 30, 1932, he was assigned two classes in General Mathematics and three classes in Commercial Arithmetic.

At a meeting held June 30, 1932, the board adopted the following resolution:

"WHEREAS, There appears to be marked decrease in the number of pupils scheduled to study Commercial Arithmetic in the High School, making unnecessary the employment of a special instructor for this course; and

"WHEREAS, There exists a present necessity for the practice of most rigid economy in the administration of school finances; therefore, be it

"Resolved, That the position of teacher of Commercial Arithmetic and General Mathematics now held by Walter B. Howell, be and the same is hereby abolished, and that the District Clerk be instructed to notify Mr. Howell of this action of this Board."

Mr. Howell was notified by letter under date of July 22, 1932, that his position of teacher of "Commercial Arithmetic and General Mathematics" had been abolished. Nevertheless, on the opening day of school he presented himself for duty but was denied a teaching position. Appellant then interviewed various members of the board for the purpose of securing a teaching assignment and after failing to secure favorable action through such intercession filed a formal appeal with the Commissioner of Education asking that he be reinstated in the public schools of the district, with salary from June 30, 1932.

There are indications of bad faith in the abolition of appellant's position in that: several high-school teachers who were not protected by the Tenure of Office Act were retained to teach subjects formerly taught by Mr. Howell; the course of study approved by the State Board of Education was changed so the subjects taught by appellant during the preceding year and scheduled for the year 1932-33 were deferred to a succeeding year; his election was postponed after most of the teachers were employed in the spring of both 1931 and 1932; and the testimony indicates little effort to otherwise economize in the high school.

Counsel for respondent contends that the work performed by Mr. Howell during the school year 1931-32 constituted a definite position which was abolished in good faith by the board of education; whereas, opposing counsel holds that such assignment is not a position and that bad faith is evident in the action of the board in adopting its resolution of June 30th.

It is not necessary to determine these points as the decision in this case is controlled by the ruling of the Supreme Court in Seidel *vs.* Ventnor City Board of Education in which the court said in part:

> ". . . Granting that apart from the statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute.
>
> "The Commissioner, also the Board, propound certain questions by way of showing the impossibility of giving due regard to the teacher under tenure. We find they are based on the false premise that prosecutrix held a special position, out of the ordinary and not that of a "teacher" at large; and starting with that premise they conclude that a teacher employed under special and restricted contract, entitled to tenure, should not, on abolition of the special employment, displace those in the general employment. But we have said that the employment of prosecutrix was general and not special, and if we are correct in this, the argument has no minor premise to support it."

The employment of petitioner was general and not special, and since non-tenure teachers filled positions for which he was qualified, appellant was illegally denied a position in the Haddonfield High School. The board of

education is accordingly hereby directed to reinstate Mr. Howell with salary from the date of his dismissal at the rate he received during the school year 1931-1932.

March 13, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

In this case the Commissioner ordered Mr. Howell reinstated on the ground that the case is controlled by the ruling of the Supreme Court in Seidel *vs.* Ventnor City Board of Education, there being non-tenure teachers in the Haddonfield High School filling positions for which he was qualified. In the opinion of the law committee the Commissioner's holding is correct and it is accordingly recommended that his decision be affirmed subject to reopening in case the decision in the Seidel case should be reversed on the appeal now pending in that case in the Court of Errors and Appeals.

September 9, 1933.

IN THE CASE OF ABOLITION OF POSITIONS A TEACHER UNDER TENURE MAY NOT BE REMOVED IF OTHER TEACHERS IN THE SYSTEM ARE NOT SO PROTECTED

DEBORAH SHANER,

Appellant,

vs.

BOARD OF EDUCATION OF GLOUCESTER CITY,

Respondent.

For the Appellant, Walter S. Keown.
For the Respondent, Henry M. Evans.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, Deborah Shaner, was employed by the Board of Education of Gloucester City to teach in its public schools beginning September, 1922. She taught various subjects from that time until September 1, 1929, when she was assigned to the position of assistant principal and relieved of teaching duties.

When, during the school year 1929-30, the superintendent of schools resigned, the high school principal was made acting superintendent, and Miss Shaner was appointed acting principal of the high school and served in that capacity until the close of the school year 1930-31. From February 1 to June 30, 1930, Mr. Weiss devoted his full time assisting Miss Shaner in the supervisory

and administrative duties of the high school; and commencing in September, 1930, and continuing throughout that school year, Mr. Powell and Mr. Sooy, who were teachers in the high school, each devoted about one-half time in rendering such assistance.

On the list of teachers recommended by the teachers' committee for re-election for the school year 1931-32, adopted by the Board of Education, Miss Shaner was classified as "High school administrative assistant, salary $2,600." She received the same annual salary the preceding year and a half.

The position of superintendent was filled by the Board of Education in August, 1931, and the high school principal, who had been acting as superintendent, thereafter resumed his regular position. On September 1, 1931, the Board adopted a resolution abolishing the position of assistant principal of the high school, and on September 3rd so notified the appellant through its solicitor. The same evening that the dismissal action was taken, Mr. Sooy, who had formerly taught in the school, but was not expected to return, was re-elected as teacher by the Board without any vacancy existing. During the school year practically one-half of his time was devoted to the administrative duties formerly performed by Miss Shaner as assistant principal, and the remainder to the teaching of various assigned subjects. Mr. Coursen, who was a high school teacher, devoted approximately one-half of his time to supervision or administration.

After receiving the notice that her position as assistant principal in the high school had been abolished, Miss Shaner applied to the Superintendent of Schools and members of the Board of Education for a teaching assignment and upon their refusal to consider her application she secured a teaching position in Moorestown Township, Burlington County, under contract from the twenty-fifth day of September, 1931, to the end of that school year at the rate of $1,800 per year. She received $1,656 for the nine and one-fifth months of employment in that district.

Appellant brings this petition for reinstatement with payment of salary from the time of her dismissal on the grounds that her position was not abolished in fact, and the actions of the Board pertaining thereto were not in good faith.

It is entirely within the discretion of a board of education whether a high school principal should have any administrative assistants. The efficiency of the high school without an assistant principal is not an issue in this case. Less efficiency at reduced cost is permissible in situations of this kind. It may be necessary to reduce the cost of school government in many districts and boards of education should be permitted to reorganize their school systems to secure more economical administration; but good faith should be evident in all such instances.

The superintendent and high school principal received salaries of $4,000 and $3,300 respectively. It therefore appears that the only saving effected by the Board in the discontinuance of appellant's position is the difference between the $2,000 salary of Mr. Sooy and the $2,600 salary designated for Miss Shaner, since throughout the testimony there is every indication that Mr. Sooy supplanted the petitioner and no saving would have been made if Miss Shaner instead of Mr. Sooy had been appointed as a teacher at a salary of $2,000.

Naturally, Mr. Sooy was not elected to the position of assistant principal, but his duties were similar to those of an assistant principal in a school with the enrollment of the Gloucester City High School. He was not assigned, as Miss Shaner had been, to perform full time duties of supervision and administration, but the equivalent of full time service of one person was effected by half time of Mr. Sooy and Mr. Coursen, the same as the half time service of Mr. Sooy and Mr. Powell was utilized in such work when Miss Shaner was acting principal. It is not necessary for a board of education to employ an assistant principal. This extra administrative and supervisory work could have been discontinued, or could have been assigned to different members of the faculty. If Mr. Sooy had not been re-employed in the manner shown by the testimony, but some supervision and administration had been assigned to several teachers who held positions or were elected to fill vacancies, the bad faith of the Board's action from this viewpoint would not be apparent.

The Board of Education of Gloucester City appears to be divided into factions, and some employees friendly to one faction meet with the disfavor of the other. All members of the Board who testified admitted that Miss Shaner was a teacher of exceptional ability, and this is further evidenced by her promotion to the position of assistant principal and later to that of acting principal. However, due to some feeling on the part of members of the Board because the high school principal did not accept the superintendency when it was offered to him, and appellant's loyalty to him as her superior, a plan was apparently instigated for the discontinuance of her services which resulted in the abolition of her position. When the assistant principalship was abolished and petitioner asked for a teaching position, the testimony discloses an understanding between the new superintendent and the majority faction of the Board that Miss Shaner was not to continue in the schools. Appellant was apparently removed under the pretense of economy in the Board's attempt to evade the Tenure of Office Act, and the majority faction proceeded to replace her by the election of a person to do similar work under the broad classification "teacher."

It is true, as pointed out by counsel, that the Board of Education has attempted to reduce expenses. Mr. Stetser made an unsuccessful motion to abolish the assistant principalship of the high school in September, 1929. During the past year the supervisory positions of art and music have been discontinued, and other minor changes appear to have slightly reduced the school budget. These acts do not affect the circumstances surrounding the abolition of the position of administrative assistant in the high school at the beginning of the term in September, 1931.

Counsel for respondent contends that petitioner entered into a contract with the Board of Education of Moorestown beginning September 25, 1931; and even if *mala fides* should be shown in the acts of the Board, it could not be held responsible for her salary after that date. While appellant accepted this employment and may have been bound in the contract by a sixty days' termination clause, this action on her part works to the benefit of the respondent, and she accordingly cannot be penalized for receiving compensation which would reduce the Board's obligation to her.

The Supreme Court of Maryland held in the case of Underwood, et al. *vs. School Commissioners,* 103 Md. 181, that when a teacher has been wrongfully dismissed, she is entitled to recover the damages she has sustained by reason of the breach of her contract, and it makes no difference that another was employed in her place. The Supreme Court of Iowa in the case of Worthington *vs.* Park Improvement Company, 100 Iowa 39, held that a teacher wrongfully discharged before the expiration of the school year for which she is employed may recover the entire contract price where after reasonable effort she was unable to secure another position.

The bad faith of the Board in abolishing the position of assistant principal in the high school is evident in the following: An apparent understanding among the members of the majority faction of the Board that Miss Shaner's services were to be terminated for reasons not related to efficiency or economy; Mr. Sooy was elected on the same evening that Miss Shaner was dismissed without evident need of his services and with his almost immediate assignment to many of appellant's previous duties; an uneconomical assignment of high school administrative duties was made to the superintendent rather than the high school principal or an assistant principal; and the half time service of two teachers in the administration and supervision was continued the same as during the preceding year and a half when appellant was acting principal.

Since the position of administrative assistant in the Gloucester City High School was not abolished by the Board of Education in good faith, appellant is hereby ordered reinstated as of the beginning of the school year 1931-32; and in line with the decisions above cited, she is entitled to the difference between her salary of $2,600 in the Gloucester City High School and that which she received under her contract with the Moorestown Board of Education. Furthermore, until such time as she is reinstated or her position is legally abolished, the Board is directed to pay her the difference between her salary of $2,600 and that which she may now be receiving for other employment.

October 5, 1932.

Decision of State Board of Education

The appellee, a teacher in the schools of Gloucester City, who had acquired tenure of office was in September, 1929, made assistant to the principal of the high school at a salary of twenty-five hundred dollars per year. During the school year 1930-31, the high school principal was made acting superintendent of schools and appellee acted as principal. Her salary at that time was $2,600. She served as acting principal until September 1, 1931, when the Board of Education, which had appointed a new high school principal, abolished the position of assistant principal. The duties which Miss Shaner had theretofore performed as assistant principal were divided between two other high school teachers. She then applied to the Superintendent of Schools and members of the Board of Education for a teaching assignment, and upon their refusal to consider her application secured a teaching position in Moorestown Township, Burlington County, at the rate of eighteen hundred dollars per year, and brought this proceeding for reinstatement. The Commissioner, after a lengthy

hearing of many witnesses, held that the action of the Board was not in good faith and directed that she be reinstated as of the beginning of the school year 1931-1932.

Miss Shaner's qualifications as a teacher are admitted and it is undisputed that she had tenure of office. The Commissioner's finding that she was employed as a teacher and assigned to duty as assistant principal is supported by the record, which also contains evidence that at least one teacher who was employed at the time Miss Shaner was discharged, namely, Mr. Sooy, did not have tenure of office. Therefore the case in our opinion is directly subject to the decision of the Supreme Court in the recent case of Seidel *vs.* Board of Education of Ventnor City, decided in January of this year, since the present case was argued before us. The Court there said:

> "The board having assigned her under the written contract to the special class, cannot deprive her of her tenure as a teacher, by abolishing that class. * * * If such reduction is to be made at all and a place remains which the exempted teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute."

In the present case, the contract which had been made out in the usual form for Miss Shaner's employment as a teacher had not been signed by the Board of Education, but the evidence is that she was employed as a teacher. She was classed as such and there is no evidence that she at any time waived her tenure rights. We think therefore that the rule announced by the Supreme Court in the Seidel case requires that the appellee be reinstated as a teacher in the Gloucester City Schools.

The Commissioner held that the appellee is entitled to the difference between her salary of twenty-six hundred dollars when she was acting as assistant principal in the Gloucester City High School and the amount she may have received for the other employment or employments which she obtained after her discharge. In this we think he was mistaken. It appears that the Board was trying to reduce expenses and that some saving was effected by abolishing the particular position she had held, even though it was thought necessary to employ another teacher who performed a considerable part of Miss Shaner's duties in that position. Also her application for assignment to a teaching position seems to indicate that she recognized that the abolishment of her former position was not without reason. We think her reinstatement should be at the rate of salary she was receiving when she was assigned to the abolished position, namely, twenty-one hundred dollars.

It is recommended that the Commissioner's decision be modified to the extent that the Board be directed to pay the appellee the difference between her salary of twenty-one hundred dollars and the salary which she has received for other employment, and that as so modified it be affirmed.

April 1, 1933.

UPON ABOLITION OF POSITION TEACHER UNDER TENURE EMPLOYED TO TEACH SPECIAL SUBJECTS NOT ENTITLED TO A POSITION FOR WHICH SHE IS NOT CERTIFIED

ALICE D. WEIDER,

Appellant,

vs.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE BOROUGH OF HIGH BRIDGE, HUNTERDON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Appellant, Michael Shershin.
For the Respondent, Mahlon Pitney.

The appellant, Alice D. Weider, was employed by the Board of Education of the borough of High Bridge from September, 1925, until June, 1932, when she received notice by registered mail that her services would terminate at the expiration of sixty days. It is admitted that she was protected in her position by the Tenure of Office Act and that during the school year 1931-1932 she received a salary of $1,900.

The testimony discloses that during the school year 1931-1932 there was much discussion by the Board of Education in reference to decreasing the cost of education, and in order to secure the sentiment of the voters of the district an opportunity was given to them at the annual school election in February to express their views as to whether certain supervisory positions should be continued among which was that of supervisor of physical training. The vote on the question showed that a large majority favored the discontinuance of this position.

Minutes of meetings of the Board of Education held on April 27 and May 24 show the adoption of resolutions discontinuing the position of supervisor of physical training and her prompt notification of each of these formal acts. Appellant contends that her position was not actually abolished and asks for reinstatement with pay from the opening of school in September, 1932.

During the school year 1931-1932 Mrs. Weider taught or supervised physical training every period of the school day. She devoted approximately 55 per cent of the day to the high school, 45 per cent to the elementary school, and outside of school hours participated in the extra curricular physical training activities of the high school pupils.

It appears that the Board of Education was under the impression that appellant was a supervisor of physical education; whereas, all of her time in the high school was devoted to teaching. In the elementary school most of

her time was devoted to instruction rather than to supervision. The Board evidently considered that it could save the amount of Mrs. Weider's salary by assigning to the teachers of the high and elementary schools the teaching of physical training. While the elementary teachers were qualified by certificates to give physical training instruction, those in the high school did not hold certificates which made them eligible to teach that subject. Therefore, the work previously performed by the appellant in the high school could not be distributed among those teachers. It became necessary to employ a person qualified to teach this subject, but instead of reinstating Mrs. Weider the Board apparently concluded that it would be more economical to secure at a lower salary another physical training instructor who could also teach other subjects. It, therefore, employed a Miss Helen Blake, who was to devote five of the eight daily periods to the instruction of physical education, two periods to English classes, and one to library work. Not only was the new incumbent immediately assigned to devote five-eighths of her time to the work previously performed by Mrs. Weider, but she was also given library duties which could have likewise been undertaken by the appellant. With the assignment of study hall supervision added to these duties, the entire time of the appellant could have been utilized with profit to the school system. Moreover, five or six periods of actual teaching each day is generally held to be a full teaching load.

The reorganization of a school with the work of one teacher divided among several may be necessary in some instances in order to reduce the cost of education, but the termination of the services of a teacher under tenure on the pretext that her position is abolished, when, in fact, a major portion of her work continues to exist, and the subsequent employment of another person to perform her duties, cannot be considered a good faith abolition of the position. Had the high school teachers been qualified to teach the subject of physical education, then the plan of eliminating a special teacher of that subject in the high and elementary school would have been within the discretion of the Board; but when the Board found it was necessary to continue the position, it should have reinstated the appellant.

Mrs. Weider's time was devoted almost exclusively to teaching and since the major portion was spent in the high school, she should have been classified as a high school teacher of physical training and not as a supervisor of that subject. Of the new employee's time, five of the eight periods are devoted to the teaching of physical training, and therefore at least five-eighths of that position continues to exist. The Board did not decrease the number of employees, but immediately elected another person whose principal duties were those formerly performed by the appellant. The position was not abolished in fact, but continues to exist with a new incumbent. The Board of Education of the borough of High Bridge is hereby directed to reinstate Mrs. Weider as high school teacher of physical training with salary from September 1, 1932.

November 30, 1932.

DECISION OF THE STATE BOARD OF EDUCATION

This proceeding was instituted by Alice D. Weider for her reinstatement as a teacher in the public schools of the Borough of High Bridge.

In her petition she alleged that since December, 1925, she was employed as a physical training teacher, that on June 30, 1932, she received a letter from the clerk of the Board of Education of High Bridge that her services would terminate 60 days from its date, that though protected by tenure of service she was never served with written charges nor was she granted any hearing. The Board answered, admitting that she was a teacher entitled to the protection of tenure of service, but alleged that her position was abolished in good faith and as part of a general program of economy in the public interest. A trial ensued before the Commissioner, who rendered a decision, the conclusion of which reads: "The position was not abolished in fact, but continues with a new incumbent. The Board of Education of the Borough of High Bridge is hereby directed to reinstate Mrs. Weider as high school teacher of physical training with salary from September 1, 1932." From such decision the Board appealed to this Board.

The facts are simple. Mrs. Weider was a teacher of physical training. Her certificate was limited to that subject. In December, Mr. White, the Assistant Commissioner of Education in Charge of High Schools, visited that of High Bridge and gave some advice about the English load, the exact nature of which was not disclosed on the objection of Mrs. Weider's counsel, who claimed Mr. White should have been called. The principal of the school continued after the objection.

> "I advised the Board we needed additional teachers in English.
> Q. To what extent? A. A part-time teacher's assistance."

During the winter the subjects of finances and economy were frequently discussed by the Board. At the annual school meeting, held in February, 1932, the following question was submitted to the voters:

> "Shall the employment of a special physical instructor be continued?"

Eighty-two voted in favor of continuance and 292 against. Nowhere in the record do we find any suggestion that the question referred to any one other than Mrs. Weider, whose teacher's certificate as stated above covered only physical training. The financial condition of the Board, and also of the borough, was rendered more acute by the closing on March 28 of the National Bank of High Bridge, in which both had a balance, that of the Board $4,999.30 and that of the borough much more.

On April 27 the Board resolved:

> "That the action of the voters at the election in the interests of economy be upheld and the position of special supervising instructor in physical education be discontinued."

On May 24 the Board confirmed its action of April 27.

On June 30, as above stated, Mrs. Weider received notice of the termination of her employment. During the preceding year she had devoted about 55 per cent of the day to physical training in the high school and about 45 per cent in the elementary school. Her work in the elementary school was continued by the elementary teachers, whose teaching certificates qualified them for the subject. For the high school it became necessary to employ a teacher. As the principal had urged the necessity of an additional teacher of English a Miss Blake was employed who was qualified to teach both English and physical training. Miss Blake devoted five-eighths of her time to physical training, two-eighths to English, and the balance to library work.

As we view this case, the question at issue is as simple as the facts. Had the High Bridge Board the right to abolish the position of a full-time teacher of physical training and to have the subject cared for in the elementary school by the teachers therein and in the high school by employing a teacher who would devote part of her time to the subject and part to English for which the services of a new part-time teacher had been recommended by the principal?

That Mrs. Weider and her counsel understood the question is evident from the following extract from the record:

On cross-examination, Mrs. Weider was asked:

> "Q. When the abolition of the position you held in the school last year was under consideration, did any members of the Board of Education approach you on the subject of whether or not you would be interested in teaching part-time physical training? The point is this. Did any members of the Board come to you and ask you whether you would be interested in taking a part-time position as teacher of physical training?"

Mr. Shershin, her counsel, interrupted:

> "I again object. She does not have to get a contract after the third-year period. She was entitled to a full-time teaching position."

Counsel also objected on the ground that the question was not proper cross-examination, which objection was sustained.

Regardless of the facts conceded by all that Mrs. Weider's services were not needed in the elementary school and that only five per cent more than one-half her time was devoted to the high school, her counsel insisted that the Board *could* have employed her full time therein. With that contention the Commissioner agreed and he directed that Mrs. Weider be reinstated "as high school teacher of physical training with salary from September 1, 1932."

By the law, it was and is the Board of Education of the Borough of High Bridge that is charged with the management of its schools. In our opinion the question before that Board was not whether Mrs. Weider's full time *could* have been utilized in the high school, but whether it *should* have been. In view of the fact that more than 75 per cent of the voters wished her position discontinued, had the Board attempted to continue her full time to do what

had required only 55 per cent thereof, we think it would have exposed itself to a charge of lavishness in a time which calls for economy. We believe the position held by Mrs. Weider was abolished, and that the Board's action was in good faith and not the result of prejudice or discrimination. It is our opinion that the Commissioner erred when he did not deny her application for reinstatement.

We recommend that his decision be reversed.

March 4, 1933.

DECISION OF THE SUPREME COURT

No. 238, October Term, 1933

Submitted October Term, 1933. Decided, 1933.

On *certiorari*.

Before Justices Case, Bodine and Donges.

For Prosecutrix, Nicholas O. Beery.

For Defendants, Pitney, Hardin & Skinner; Mahlon Pitney, of counsel.

The opinion of the Court was delivered by

CASE, J. Mrs. Alice D. Weider, prosecutrix, was and had been for more than three years employed by the Board of Education of the Borough of High Bridge in the capacity of teacher of physical training. She was qualified to teach that, and no other, subject. The position taken in her behalf is that, notwithstanding the circumstances hereinafter stated, she was entitled by reason of tenure, to be retained as a full-time teacher of physical training exclusively. Her employment was terminated by reason of the decision of the Board of Education, supported by a popular vote, to abolish the position of "Special Supervising Instructor of Physical Training." Prosecutrix protests that she was not employed by that title. It is unimportant. The phrase is at least descriptive of her work and undoubtedly had direct and specific reference to it. Her services were ended by Board action, and this action in turn set aside by the State Commissioner of Education and re-established by the State Board of Education, is now before us on writ of *certiorari*, as is also the action in that respect of the State Board.

It is admitted by the defendants that Mrs. Weider was protected by the tenure of office provisions of the New Jersey school law, ch. 243, P. L. 1909, 4 C. S. p. 4763, pl. 106a, and by the prosecutrix that an abolishment of her position would be sufficient reason for her dismissal. The State Board found that the position was, in fact, abolished and that the action of the local board was in good faith and not the result of prejudice or discrimination. We find likewise.

Mrs. Weider served both the grades and the high school, devoting 45 per cent of her time to the former and 55 per cent to the latter, and received an annual salary of $1,900.00. Meanwhile, there was pressure for additional teaching hours in the high school English course. The borough board, in

terminating Mrs. Weider's employment, spread the physical training instruction in the grades among the several teachers of other subjects, and employed a new teacher, at an annual salary of $1,400.00, partly to teach physical training in the high school and partly to teach English. The new teacher actually devoted five-eighths of her time to the teaching of physical instruction and the balance to teaching two classes in English and to supervision over the library. Mrs. Weider's sole qualification was in her specialty, the supervision and teaching of physical education.

The action of the Board was an abolishment of the position of, exclusively, physical instructor, and the creation, at reduced expense, of a new position involving the teaching of another subject which Mrs. Weider could not teach and the performance of other duties. The evidence discloses a public economy, Reck *vs.* Board of Commissioners of North Bergen, 110 N. J. L. 173, 177; Rath *vs. Bayonne,* 10 Misc. 997, but not a discrimination against the prosecutrix.

The writ of *certiorari* will be dismissed, with costs.

DEMOTION OF TEACHER PROTECTED BY TENURE OF OFFICE ACT IS ILLEGAL

ABIGAIL J. WILLIAMS,
Appellant,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF MADISON,
Respondent.

For the Appellant, Harold A. Price.
For the Respondent, Howard W. Barrett.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant has been continuously employed by the respondent Board of Education since May 19, 1915, at which time she was engaged by a resolution which reads as follows:

> "Chairman of the Teachers' Committee then gave its report, which was accepted. The chairman then offered the following resolution:
>
> "*Resolved,* That Mrs. Abbey J. Williams be engaged under our rules governing the employment of teachers at a salary of $80.00 a month of four weeks while the school is in session, her services to begin September 7, 1915; and that a copy of the rules governing the employment of teachers accompany the notice to her of her engagement."

Neither side was able to present a copy of the contract entered into as a result of the foregoing resolution, nor was any other resolution or contract presented purporting to show a change in appellant's employment.

Mrs. Williams came to Madison from Belding, Michigan, where she had been supervisor of music and drawing, and upon employment in New Jersey was granted a limited certificate to teach these subjects, but not to supervise instruction. After three years she received a permanent certificate, which conferred supervisory powers. During this entire period of appellant's employment, she taught all the vocal music in the high school, prepared and demonstrated lessons for the guidance of grade teachers during the intervening periods between her visits, instructed pupils in chorus singing, coached and conducted all musical festivals and public singing activities of pupils, and had charge of orchestra rehearsals and performances. Appellant was assisted by a Mr. Wetterstrand, who instructed pupils on band instruments and conducted a school band; by the elementary teachers, who taught the lessons which she outlined; and by teachers in some minor musical activities in relation to club work.

During the school year ending June 30, 1933, the Board of Education established what is known as the "platoon school," the purpose of which, as defined by Mr. Wann, the Supervising Principal, is to instruct children assigned to it on at least three bases: low intelligence quotient, retardation in school, and variation from the normal in school work. Between seventy-five and eighty pupils were enrolled in this building and were divided into classes of approximately fifteen pupils each.

Under a plan purported to be introduced for reasons of economy and efficiency, the Board consulted with the supervising principal regarding a reorganization of music instruction and appears to have decided to employ one person who could take charge of the work performed by both Mrs. Williams and Mr. Wetterstrand. Accordingly, at the time of the hearing in this case, Mr. Wetterstrand was not re-employed for the school year beginning July 1, 1933. The supervising principal, evidently with the advice and consent of the Board of Education, explained to Mrs. Williams the plan of having one person to do the work as above indicated and requested her resignation, which she refused to give. Upon receiving a report of such refusal from the supervising principal, the Board of Education, by resolution on April 12, 1933, assigned the appellant to the platoon school for the ensuing year to have charge of auditorium work including the teaching of music and dramatics at the same salary she was then receiving. This action appellant claims is a demotion for the purpose of forcing a resignation and as such is tantamount to a dismissal. She accordingly asks the Commissioner for reinstatement in her former position.

Mrs. Williams received last year a salary of $2,000, less the voluntary contribution made by all teachers, and Mr. Wetterstrand, who was employed on a daily basis, received during that period $465. It was proposed to employ a well trained but less experienced person to do the combined work of the two teachers at a salary of $1,800, thereby saving in music instruction approximately $665. However, when appellant was retained at her former salary of

$2,000 and transferred to the platoon school to occupy the position formerly held by a Miss Garrison, who received $1,575, the element of economy was practically eliminated and the only reason thereafter set forth by the Board for the reorganization of the music department was the promotion of greater efficiency in instruction.

A board of education has a legal right to use its discretion in determining which of several methods shall be adopted to attain a desired educational result; provided, such action is not in violation of statutory provisions. It is, therefore, unnecessary to compare the relative merits of the music program of the school year ending June 30, 1933, with that proposed for the year beginning July 1, 1933. The only issue remaining is whether the transfer of the appellant under the conditions set forth in this case was in violation of her rights as contemplated by Chapter 243, P. L. 1909.

In the opinion of the Commissioner the work performed by Mrs. Williams clearly and definitely establishes her as a music teacher in the high school and supervisor of music in the grades. While it may be argued that the Board of Education has not by official action designated appellant as a supervisor, the fact remains that in all her relationships with the Board and supervising principal she was considered supervisor of music in the Madison public schools.

Even granting that petitioner was not elected or transferred to a supervisory position, either through direct instruction in the high school or work commonly classified as supervision in the grades, she came into frequent contact with the more than eleven hundred pupils in the schools. From this position of high rank in the system she was transferred to teach music and dramatics in a small building where the pupils were classified as backward or maladjusted, where the total enrollment did not exceed eighty pupils, and where her salary under the transfer was considerably in excess of that naturally attached to that position. It is significant that this transfer was made after appellant refused to resign from the position she had held for approximately eighteen years, and the testimony further indicates that other motives in addition to economy and better teaching prompted the request for her resignation.

In the case of Helen G. Cheesman *vs.* Board of Education of Gloucester City, in which the appellant was transferred from the position of principal teacher of the Monmouth Street School in immediate charge of the seventh and eighth grades to the position of principal teacher of the Cumberland Street School in immediate charge of the fifth and sixth grades, the Supreme Court says:

> "Miss Cheesman could not be dismissed or her salary reduced except for causes mentioned in the Tenure of Office Act (C. S. Vol. 4, p. 4763, Sec. 106a) and in the manner prescribed in said act. Her salary was not reduced or she was not dismissed. A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons."

The State Board of Education and the Supreme Court clearly concur in that part of the decision of the Commissioner of Education in the same case in which he rules:

> "This department has frequently decided that teachers under tenure may be transferred from one grade to another in the elementary grades without violation of the intent of the Tenure of Service Law. That is to say, a teacher in any of the elementary grades, as for instance the eighth grade, may be transferred to any of the positions in the elementary grades without any violation of law."

In connection with the decision of the Supreme Court in the case of Cheesman *vs.* Gloucester City Board of Education, cited above, in which it was held that transfers are legal, there must be read the decision of the Supreme Court in the case of Davis *vs.* Overpeck, where Davis, as principal of the school, was transferred to a teaching position. In that case Justice Parker said:

> "I agree entirely with the State Board that Mr. Davis was protected by the act; that his three years of service beginning with September, 1909, entitled him to the benefit of its provisions; that the fact of his service under contracts for a definite term did not prejudice his rights if that service was continuous and for the statutory period; and *that his attempted assignment as teacher in a lower grade was legally tantamount to and in fact operated as an attempted dismissal as principal of the high school.*"

In the same case the State Board of Education held:

> "'No principal or teacher shall be dismissed' except for just cause after a trial. This language, in our opinion, is the equivalent of (1) no principal shall be dismissed and (2) no teacher shall be dismissed except for just cause after a trial. When a principal is reduced to the rank of a teacher he is dismissed as a principal just as surely as is an officer in the army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor * * *
>
> "No trial was given the appellant, so that as we construe the statute its provisions were disregarded by the respondent. * * *
>
> *"Instead of complying with the statute and preferring charges against the appellant, it endeavored to evade the statute, and if its act is sustained it will be within the power of boards, if so disposed, not only to pay the salary of principals to favorite teachers, but also to so degrade and humiliate worthy principals that the protection which the statute is supposed to afford them would really become a myth. We do not believe that we should place a construction on the statute which will so readily enable boards to evade its provisions."*

The Legislature in Chapter 243, P. L. 1909, established a procedure whereby teachers protected by that act may be removed for inefficiency or other just cause. The courts, as above cited, hold that a teacher after three years of

service is protected in her position or in one of equal rank, that removal through a subterfuge is prohibited, and that demotion in rank, even though the salary of the person is not reduced, is tantamount to and in fact acts as a dismissal.

While the Board of Education in its initial action evidently intended to evolve a more co-ordinated plan of music instruction, the procedure whereby it finally attempted to accomplish it is not in accordance with the law. The transfer of Mrs. Williams to the platoon school was clearly a demotion for it was from a position of high rank in the system to one considerably lower, in which latter position she naturally would be humiliated and embarrassed. The attempt to dismiss is more evident since the demotion came as the result of her refusal to resign from the position then held.

The transfer of appellant was in contravention of the protection of the Teachers' Tenure of Office Act and as such was illegal. The Board of Education of the Borough of Madison is accordingly hereby directed to reinstate Mrs. Williams in the position which she held prior to her transfer to the platoon school.

September 19, 1933.

RESIGNATION WITHDRAWN BEFORE ACCEPTANCE IS NOT LEGALLY BEFORE THE BOARD

F. RUPERT BELLES,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

For the Appellant, Besson & Pellet.

For the Respondent, D. W. & E. A. De Yoe.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was first employed by the Board of Education of the Township of Wayne, Passaic County, in September, 1923, as principal of the Mountain View School and has served continuously since that date. On October 24, 1932, after the adjournment of a special meeting of the Board, there was a conference of the members relative to the efficiency of appellant, following which he was called before the members and his resignation requested. After a further discussion of the conditions of the school and the finances of appellant, it was agreed that no charges would be presented and he would be allowed to continue until June 30th if he would at once present his resigna-

tion. With the further understanding that the resignation would not be made public, appellant handed to Mr. Winters, a members of the Teachers' Committee, the following letter:

"Mountain View, N. J.
October 24, 1932.

Wayne Township Board of Education,
Mountain View, New Jersey.
Dear Sir:

I hereby resign as Principal of the Mountain View School.

(Signed) F. RUPERT BELLES."

Thereafter appellant continued in his employment and Mr. Winters placed the resignation in a safe deposit box. The educational committee requested Mr. Belles to attend a meeting of that committee on the evening of February 24, 1933, at which time it was suggested that he substitute another resignation to be acted upon by the then functioning Board. Appellant asked for time to consider the proposition and on February 27th wrote to the Board in part as follows:

"I hereby notify the Board of Education that I withdraw my resignation of October, 1932, which was forced upon me by your committee and do not see why I should write a resignation to take effect in June, 1933."

At a special meeting of the Board held on March 31st, Mr. Winters presented the resignation which he had kept at the bank and upon motion the Board accepted. it. Subsequently, at the same meeting the letter of February 27th, withdrawing the resignation, was read and upon motion, laid upon the table. Since the filing of petitioner's appeal, and on May 6th, the present Board by resolution ratified the action of the preceding Board in accepting appellant's resignation.

The sole question to be decided is whether the letter of February 27th, notifying the Board of the withdrawal of the resignation prior to its acceptance, precluded legal action upon it.

It is the opinion of the Commissioner that a resignation, the same as an offer of sale, or a contract, may be withdrawn prior to its acceptance. As to withdrawal of an offer, Anson in "Principles of the Law of Contract," 4th American Edition, says on page 34:

"Acceptance is to offer what a lighted match is to a train of gun powder. It produces something which cannot be recalled or undone. But the powder may have laid until it has become damp, or the man may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance."

The Supreme Court in the case of Hallock *vs.* Insurance Company, 26 N. J. L. 280, in reference to acceptance says:

> "First comes the mental resolve to accept the proposition; but the law can only recognize an overt act." And again, page 281: "The meeting of two minds *appregatio mentium,* necessary to the constitution of every contract, must take place *co instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition."

The decision of the Commissioner of Education in the case of Meerbott *vs.* Board of Education of the Town of Secaucus, 1928 N. J. School Report, p. 97, reads in part:

> "Mr. Koenemund unquestionably withdrew his resignation in April, 1927, and such withdrawal was communicated to the mayor even though the latter did refuse to accept the letter of withdrawal. Assuming the resignation to be an immediate and unconditional one, appellant insists that Mr. Koenemund, the respondent, was legally unable to withdraw such resignation prior to its acceptance. The cases which appellant cites, however, in support of the contention that an unconditional resignation cannot be withdrawn are all from States other than New Jersey, namely, Illinois, Indiana, Iowa and Virginia, in which cases either the courts have held that an unconditional resignation is complete in itself as soon as transmitted and consequently needs no acceptance or in which it appeared that the resignation had actually been accepted by the proper authority prior to its attempted withdrawal. In New Jersey, however, it has been held in many cases in which the resignations have appeared to be immediate and unconditional that such resignations were not complete until accepted by the proper authority. (Townsend *vs.* Trustees of School District No. 12 in Essex County, 41 N. J. L. 312; State *vs.* Board of Freeholders, 44 N. J. L. 390; Love *vs.* Mayor, etc., of Jersey City, 40 N. J. L. 459; State *vs.* Ferguson, 31 N. J. L. 107.) In Fryer *vs.* Norton, 67 N. J. L. 23, it was also specifically held by the Supreme Court that
>
> > 'The general rule is that the resignation of a municipal office, to become complete, must be accepted by the authority having power to fill the vacancy thereby created.'
>
> The resignation in that case also was immediate and unconditional. In the Commissioner's opinion it therefore follows that since a resignation of a public office whether prospective or unconditional must in New Jersey be accepted by the proper authority before it can be considered complete, such resignation is capable of being withdrawn at any time before actual acceptance."

Since Mr. Belles in a letter addressed to the Board of Education of the Township of Wayne formally withdrew his resignation before its acceptance, such resignation was not legally before the Board and could not have been legally accepted by it. Petitioner, therefore, has the same status in the employ of the Board of Education as if the resignation had not been presented.

July 19, 1933.

RESIGNATION BY TEACHER BEFORE COMPLETION OF THREE YEARS OF SERVICE UPON RE-EMPLOYMENT CANCELS SERVICE ACCUMULATION TO HIS CREDIT AT THAT TIME.

HELEN W. CHALMERS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF RARITAN, MIDDLESEX COUNTY,

Respondent.

For the Appellant, Kass and Kass.

For the Respondent, Herman Sorg.

DECISION OF THE COMMISSIONER OF EDUCATION

Helen W. Chalmers was employed by the Board of Education of Raritan Township for four consecutive school years under contracts for the following terms: September 1, 1928, for a period of ten months; September 1, 1929, to June 30, 1930; September 1, 1930, to June 30, 1931; September 1, 1931, to June 30, 1932.

On April 29, 1931, the following resolution was passed by the Raritan Township Board of Education:

> "On motion the recommendation of the Employees' Committee relative to employees was adopted:
>
> " 'Recommendation of Employees Committee relative to married women, as teachers was approved by vote of the Board and provided that no married teacher be hereafter allowed to come under protection of the Tenure Law except those who prove to the Board of Education that they are self-supporting.' "

Under date of April 30, the District Clerk sent the following letter to Mrs. Chalmers:

> "At its meeting held last night the Board of Education of this district adopted the enclosed resolution which explains itself. Since you are completing your third consecutive years of teaching in this district, to re-employ you for the next school year (1931-32) would place you under the protection of the tenure law. You are, therefore, hereby notified that your services will not be needed in this district after the expiration of your present contract which is June 30, 1931."

On May 1, appellant acknowledged receipt of the letter above quoted, and inquired as to whether waiving her tenure rights would make it possible for

her to receive consideration for the coming school year. On May 18, the following resolution was adopted by the Board:

> "WHEREAS, Mrs. Helen W. Chalmers, a teacher in our system has made it appear to this committee the necessity for her continuance in service in order to properly support her aged parents, this committee recommends the employment of Mrs. Chalmers as a teacher in the system for the next school year at the same salary she is now receiving, provided she is willing to accept the position with the distinct understanding that she waive her tenure right."

On May 29, Mrs. Chalmers sent to the Board a resignation to take effect June 18, 1931.

She entered into the fourth contract, above mentioned, on June 24, 1931, and was refused re-employment for the school year 1932-1933.

Appellant asks for reinstatement as a teacher under protection of the Tenure of Office Act and petitions the Commissioner to require the Board of Education to expunge from the minutes any resolution relative to married women teachers as being made in violation of Chapter 238, P. L. 1923.

The minutes of the Board do not show the receipt or acceptance of Mrs. Chalmers' resignation nor do they make any reference to it. Several members of the Board testified that they recall the acceptance of the resignation, but the evidence is clear that she received no acceptance notice from the Board of Education or any official, and that she had no knowledge of any action taken by the Board in relation to her resignation. Mrs. Chalmers continued her work on June 19, the closing day of school, the same as other teachers, and returned the first part of the following week to complete her reports and received at that time with the other teachers the final payment of salary in full for the last month of the school year.

It is the contention of the Raritan Township Board of Education that Mrs. Chalmers of her own volition resigned before the close of the school year 1930-31, and thereby did not complete even three academic years (September to June inclusive) of consecutive service, that it did not have knowledge of her service or payment after June 18, the date her resignation was to be effective, that the contract for the school year 1931-32 had no relation to her previous employment so far as the Tenure of Office Act is concerned, and that even if all four contracts had been fulfilled, she had not served the district for three consecutive calendar years and is, therefore, ineligible to protection under the law.

For over twenty years it has been the general interpretation that a teacher is protected under the provisions of Chapter 243, P. L. 1909, after the fulfillment of contracts for three consecutive academic years and beginning of service under a contract for the next succeeding year. Such has been the ruling of the Commissioner and State Board of Education and the accepted interpretation by local boards of education, and teachers. The rulings of the Supreme Court in the cases of Davis *vs.* Overpeck and Carroll *vs.* Matawan are based on calendar year contracts, and do not affect those of the State Board of Education upon contracts for only that part of the year during which the schools are in session.

It is the opinion of the Commissioner that this case rests upon the effect of appellant's letter of resignation, the action of the Board in relation to it, and her subsequent re-employment of June 24.

Mrs. Chalmers had no means of knowing that her resignation was accepted. The minutes of the Board do not disclose it, and she was not notified. Moreover, the president and district clerk, who had full knowledge of the matter, signed the warrant for the entire month's salary, and the supervising principal, who was aware of her continued service, handed to her a warrant which he knew included payment for the time after which her resignation was intended to take effect.

The Supreme Court in the case of Nicholson *vs.* Swedesboro Board of Education (1928 Compilation of School Law Decisions) said:

> *"The Board was charged with a knowledge of* its own minutes and the *official acts of its officers."*

Based upon these conditions, the Board cannot disavow the acceptance of appellant's services for the full period of the third contract and payments therefor.

The resolution of the Board employing Mrs. Chalmers for the fourth year "provided she is willing to accept the position with the distinct understanding that she waive her tenure rights," had no effect upon her contract. The proviso was not a part of the contract and even if it had been, appellant could not be held to have waived her benefits under the Teachers' Tenure of Office Act since that statute was enacted not for the purpose of conferring a personal privilege but of establishing public policy for the benefit of the school system.

The Court of Errors and Appeals in the case of Brooks *vs.* Cooper, 26 Atl. 978, held:

> "Contracts which have for their object the violation, defeat or evasion of a statute are illegal and void."

Any agreement, whether oral or written, made by a teacher and a Board of Education for the purpose of evading the Teachers' Tenure Law is null and void. Therefore, any resolution by the Raritan Township Board of Education or any understanding between the Board and Mrs. Chalmers has no effect upon the fourth contract.

Appellant having served for more than three consecutive years in the School District of the Township of Raritan, is now protected by the Teachers' Tenure of Office Act and cannot be removed except under its provisions.

Mrs. Chalmers has no standing as a citizen and taxpayer of the district and, therefore, is ineligible to petition the Commissioner to expunge rules of the Board of Education.

August 8, 1932.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education whereby he adjudges that respondent, Helen W. Chalmers, was protected in her position of teacher in the school of appellant Board of Education, and was subject to removal only under the Teachers' Tenure of Office Act.

It appears by the evidence adduced before the Commissioner, that respondent was engaged to teach in the school of the appellant by a contract in writing, dated June 28, 1928, for a term of 10 months from September 1, 1928, by a contract in writing, dated July 29, 1930, from the first day of September, 1929, to the thirtieth day of June, 1930; by a contract in writing, dated May 7, 1930, from the first day of September, 1930, to the thirtieth day of June, 1931, and by a contract in writing, dated June 24, 1931, from the first day of September, 1931, to the thirtieth day of June, 1932.

On April 29, 1931, appellant Board adopted a resolution to the effect that thereafter no married teacher should be allowed to acquire tenure, except those who could satisfy the Board they were self-supporting, and on the day following, the secretary of the Board sent a copy of the resolution to respondent and notified her, since she was completing her third consecutive year of teaching in that district, to re-employ her would place her under the protection of the tenure law, that therefore her services would not be needed in the district after the expiration of her present contract, on June 30, 1931.

Upon receiving this notice, respondent, on May 1, 1931, addressed a letter to the supervising principal of appellant, acknowledging it and inquired "if waiving tenure rights or re-employing would make it possible for her to receive consideration for the coming school year."

What conversations were had by respondent with members of appellant Board after the letter last above referred to was written, does not appear, but the Board, at a meeting held on May 18, 1931, adopted the recommendation of its Employee's Committee, by a resolution which, after reciting that: "Whereas, Mrs. Helen Chalmers * * * has made it appear to the committee her necessity for her continuance in service in order to properly support her aged parents, to re-employ her as a teacher for the next school year * * * provided, she was willing to accept the position with the distinct understanding that she waive her tenure rights."

Respondent denied any knowledge of this proviso.

On May 20, 1931, respondent wrote her resignation, which she addressed to the Board of Education, to take effect on June 18, 1931. The resignation was received by the supervising principal, who marked or stamped it "Received May 26, 1931," the date of its receipt, and later, wrote upon it, in pencil, the word, "accepted". Nothing appears in the minutes of the Board relating to the receipt or acceptance of the resignation, but the supervising principal testified he had received it, stamped upon it the date of its receipt, and later presented it to the Board at its meeting, and that the Board accepted it, whereupon he wrote the word "accepted" on the written resignation. He explains the omission of mention in the minutes of the Board of its action, with reference to the resignation, that after its acceptance and his notation thereof

thereon, he put it with other papers he then had at the meeting and failed to turn it over to the secretary. Mr. VanDuyn; Mr. Kirkpatrick and Mr. Troger, members of the Board of Education, also testify to being present at a Board meeting when respondent's resignation was presented and accepted. They all fix the time of the meeting early in June, about two weeks before school closed. Mr. Troger says, "Mrs. Chalmers agreed to waive her tenure rights and wanted her resignation to be accepted so that there would be a break between contracts."

No notice was sent to respondent of any action by the Board with respect to her resignation.

The school sessions appear to have ended for the year on June 18, but the classes convened on June 19, to be promoted. Respondent attended on the nineteenth, promoted her class, and received the pupils from the lower grade into her class. She then worked on her register and report. On the twenty-second, the Monday after schools closed, respondent, with the other teachers, received her salary check for the full month.

On June 24, 1931, the fourth contract between appellant and respondent was executed, under which she taught until the close of the school year in June, 1932. On June 1, 1932, the Board notified her she would not be needed after the expiration of that contract on June 30, 1932.

Mrs. Chalmers appealed from the action of the Board of Education to the Commissioner of Education, setting forth that by virtue of her aforementioned continued service for a period of more than three consecutive years, she had attained tenure status by virtue of the statute in such case provided, and upon the further ground that a resolution of the Board of Education, adopted April 6, 1932, providing that the services of all married teachers not under tenure be dispensed with, except in cases where they are the support of themselves, or for their children, was illegal, in that it was a discrimination based on sex and is contrary to the statutes of New Jersey in such cases provided. She prayed an order by the Commissioner of Education that she be reinstated as a teacher in the school district of Raritan Township and that the said Board be required to expunge the said resolution from its minutes.

The Board of Education, in its answer to the petition of appeal, alleges that there was a break in the continuity of respondent's service, inasmuch as it accepted her resignation, effective on June 18, 1931, by a reason whereof no contract existed between her and the Board between June 18 and September 1, 1931, and it denied that respondent had attained tenure status.

A hearing was had before the Commissioner of Education at which both parties submitted evidence.

The Commissioner of Education held that respondent having served three full academic years in appellant's district, and having been re-employed for a fourth academic year, she was protected again removal by the tenure of service act. That the proviso contained in the resolution of the Board, authorizing her employment for the fourth year, was ineffective as being in violation of public policy.

The Board of Education of Raritan Township appeals from that decision to this Board. We have heard the respective parties by their counsel in oral argument, and they have each submitted briefs.

The Commission of Education, in his opinion, says "this case rests upon the effect of appellant's letter of resignation, the action of the Board in relation to it, and her subsequent re-employment of June 24." Evidently he considered that upon the acceptance of the resignation an interruption would be created in the continuous service required by the tenure act, and thus the benefit of previous service by respondent lost to her. (Fountain *vs.* Board of Education of Madison Township, 1928, Dec. on page 180.) We agree with him that to acquire protection under the tenure act there must have been a continuous, uninterrupted service of a period of three years, and a re-employment immediately thereafter. The tenure act provides:

> "The service of all teachers * * * shall be during good behavior and efficiency, *after* the expiration of *a period* of employment of three consecutive years *in that district,* unless a shorter period is fixed by the employing board." Chapter 243, P. L. 1909.

The Commissioner deemed the resignation of respondent to be ineffective because she did not know of its acceptance by the Board, and moreover, he says: "the president and district clerk, who had full knowledge of the matter, signed the warrant for the entire month's salary, and the supervising principal, who was aware of her continued service handed to her a warrant which he knew included payment for the time after which her resignation was intended to take effect, and further, that the Board was charged with a knowledge of its own minutes and the official acts of its officers and it cannot therefore disavow the acceptance of appellant's services for the full period of the third contract and payments therefore."

We do not agree with the Commissioner in his view that respondent did not know of the acceptance by the Board of her resignation. That method of avoiding the acquisition by her of tenure, was her own suggestion. The language of her letter of May 1, where she inquires if "re-employing" would make it possible for her to receive consideration, can mean nothing else. She must have meant a re-employing after an interruption of her present service before the end of the school year, otherwise her language would be without sense. Both she and the Board believed that if she were re-employed after full performance of her contract ending on June 30, she would come under tenure protection. The sequence of events negatives such lack of knowledge. She was notified on April 30, 1931, she would not be re-employed after June 30. On May 1, she wrote asking if waiving tenure or re-employment would make it possible she be considered for next year. On May 18, the Board adopted the resolution to re-employ her for the next school year, provided she waive tenure rights. On May 20, she wrote her resignation, which was received by the supervising principal on May 26, and by him presented to the Board early in June, and by it accepted. We are not so credulous as to believe respondent was ignorant of any step in a matter which concerned her so vitally, and that the course that was followed was not fully concurred in by her.

The absence of a record of the receipt and action of the Board upon the resignation does not preclude oral evidence of the Board's acts in reference

thereto. The School Law prescribes that the secretary shall record the proceedings of the board and its committees, but that requirement does not preclude other evidence of the acts of a board. Where the minutes contain no reference to such acts, the testimony of those who participated in them is original evidence and should be given consideration, if it is clear and certain. Here we have the positive statement of the supervising principal that he submitted the resignation to the Board, and that it was by it accepted. That he at the time of its acceptance noted the fact on the resignation itself. Messrs. Van Duyn, Kirkpatrick, and Troger, members of the Board, testify positively the Board received the resignation and accepted it. Mr. Troger further testified to the effect the resignation was part of a plan entered into with respondent to avoid the acquisition of tenure. No member of the Board was produced to deny it had acted upon respondent's resignation. Nor, in our opinion, is it of any effect that formal notice of the acceptance of the resignation was not given. The resignation became effective according to its terms, when it was accepted. Reeves *vs.* Ferguson, 31 N. J. L. 107. Whitney *vs.* Van Buskirk, 49 N. J. L. 463. The fact that respondent returned to the school on June 19, the day following that upon which her resignation became effective, did not, in our opinion, operate to annul the acceptance of the resignation. All that was done on that day was the promotion of the pupils. What respondent did was voluntary. There is nothing in the evidence to show the Board knew anything about it. The payment to respondent of a full month's salary for June did not affect the resignation. Respondent had performed all the service that a teacher was called upon to give when her resignation became effective. Teaching sessions ended for the month on that day.

The payment was probably binding on the Board and could not be disavowed, but it is untenable to hold the Board was thereby bound to regard respondent as being in its employ, notwithstanding the resignation and its acceptance. On what theory could it be so held? There is no estoppel. Respondent was not misled in any way to her damage. At most, the officers of the Board paid to respondent as salary a small sum in excess of what she was entitled to. The Board had no knowledge of it and cannot be held to have ratified or to be under an obligation to disavow the payment.

An interruption of the service of respondent in the district of appellant Board having been created by the petitioner's action and her resignation, she had not served for the period necessary to confer the right of tenure upon her under that statute.

Having reached this conclusion it is unnecessary to consider the other points raised by appellant. We recommend that the decision of the Commissioner of Education be reversed and the appeal of the respondent from the action of appellant Board be dismissed.

December 3, 1932.

DECISION OF THE SUPREME COURT
No. 215. May Term, 1933.

Submitted May 12, 1933; decided .....

On writ of *certiorari*.

Before Justices Case, Bodine and Donges.
For the prosecutrix: Kass & Kass, Esqs.
For the defendant: Sorg, Duncan & Bailey, Esqs.

PER CURIAM.

This writ brings up a decision of the State Board of Education holding that prosecutrix was not entitled to the protection of the Teachers' Tenure of Office Act.

The prosecutrix was engaged by the Board of Education of the Township of Raritan in Middlesex County, to teach in Oak Tree public school, by a contract in writing, dated June 28, 1928, for a period of ten months from September 14, 1928; by a contract, dated July 29, 1930 (obviously an error and should be 1929), from September 1, 1929, to June 30, 1930; by a contract, dated May 7, 1930, from September 1, 1930, to June 30, 1931; and by a contract, dated June 24, 1931, from September 1, 1931, to June 30, 1932.

On April 29, 1931, the local Board adopted a resolution that, thereafter, no married teacher should be allowed to acquire tenure, unless they were self-supporting. Prosecutrix was therefore notified that she would not be re-employed, because to do so would bring her within the provisions of the statute referred to, and that, therefore, her services would not be needed by that Board after the expiration of her then existing contract. The prosecutrix thereupon offered to waive her right to acquire tenure. Subsequently, prosecutrix, on May 20, 1931, tendered her resignation in writing, to be effective June 18, 1931. The resignation was received by the supervising principal, and by him submitted to the local Board of Education, some weeks prior to the date when it was to take effect. The proofs are uncontradicted that it was acted upon by the Board at a regular meeting and that it was duly accepted, although the clerk of the Board made no entry of such action in the minutes. The word "Accepted" was noted on the resignation, when the Board acted upon it. The testimony was that the prosecutrix was desirous of resigning in order that she should not be subject to the provisions of the resolution of the Board that married women should not acquire tenure.

In this situation, and on June 4, 1931, the fourth contract was entered into. Under it, prosecutrix taught until the close of the school year in June, 1932. On June 1, 1932, she was notified that her services would not be needed after June 30, 1932. She appealed to the Commissioner of Education, who decided in her favor. Whereupon the local Board appealed to the State Board of Education, which reversed the finding of the Commissioner of Education.

Four reasons for reversal are written down by prosecutrix. These are

1. "The State Board of Education erred in finding that the resignation of the prosecutrix had been accepted."

2. "The State Board of Education erred in holding that 'the commissioner deemed the resignation of respondent to be ineffective because she did not know of its acceptance by the Board * * *'."

3. "The State Board of Education erred in holding that the prosecutrix 'had not served for the period necessary to confer the right to tenure upon her under the statute,' because tenure under the statute does not depend upon a contract but upon service and the prosecutrix having rendered the statutory service is entitled to tenure protection by virtue of operation of law."

4. "Any resignation offered by the prosecutrix, or any notice terminating service served by the Raritan Township Board of Education, was part of a scheme to evade the operation of the Teachers' Tenure of Service Act, and was not operative because evasion of the Teachers' Tenure of Service Act is against public policy."

Both the Commissioner of Education and the State Board of Education appear to have believed that the determination of the matter rested upon the effect of the letter of resignation sent by prosecutrix to the local Board.

In its finding, the State Board well states the situation as follows:

"The Commissioner of Education, in his opinion, says: 'this case rests upon the effect of appellant's letter of resignation, the action of the Board in relation to it, and her subsequent re-employment of June 24.' Evidently he considered that upon the acceptance of the resignation an interruption would be created in the continuous service required by the tenure act, and thus the benefit of previous service by respondent lost to her. (Fountain *vs.* Board of Education of Madison Township, 1928, Dec. on page 180). We agree with him that to acquire protection under the tenure act there must have been a continuous, uninterrupted service of a period of three years, and a re-employment immediately thereafter. The tenure act provides:

"'The service of all teachers * * * shall be during good behavior and efficiency, *after* the expiration of *a period* of employment of three consecutive years *in that district* unless a shorter period is fixed by the employing board.' Chapter 243, P. L. 1909

"The Commissioner deemed the resignation of respondent to be ineffective because she did not know of its acceptance by the Board, and moreover, he says: 'the president and district clerk, who had full knowledge of the matter, signed the warrant for the entire month's salary, and the supervising principal, who was aware of her continued service, handed to her a warrant which he knew included payment for the time after which her resignation was intended to take effect, and further, that the Board was charged with a knowledge of its own minutes and the official acts of its officers and it cannot therefore disavow the acceptance of appellant's services for the full period of the third contract and payments therefor.'"

"We do not agree with the Commissioner in his view that respondent did not know of the acceptance by the Board of her resignation. That

method of avoiding the acquisition by her of tenure, was her own suggestion. The language of her letter of May 1, where she inquires if 're-employing' would make it possible for her to receive consideration, can mean nothing else. She must have meant a re-employing after an interruption of her present service before the end of the school year, otherwise her language would be without sense. Both she and the Board believed that if she were re-employed after full performance of her contract ending on June 30, she would come under tenure protection. The sequence of events negatives such lack of knowledge. She was notified on April 30, 1931, she would not be re-employed after June 30. On May 1, she wrote asking if waiving tenure or re-employment would make it possible she be considered for next year. On May 18, the Board adopted the resolution to re-employ her for the next school year, provided she waive tenure rights. On May 20, she wrote her resignation, which was received by the supervising principal on May 26, and by him presented to the Board early in June, and by it accepted. We are not so credulous as to believe respondent was ignorant of any step in a matter which concerned her so vitally, and that the course that was followed was not fully concurred in by her.

"The absence of a record of the receipt and action of the Board upon the resignation does not preclude oral evidence of the Board's acts in reference thereto. The School Law prescribes that the secretary shall record the proceedings of the Board and its committees, but that requirement does not preclude other evidence of the acts of a Board. Where the minutes contain no reference to such acts, the testimony of those who participated in them is original evidence and should be given consideration, if it is clear and certain. Here we have the positive statement of the supervising principal that he submitted the resignation to the Board, and that it was, by it accepted. That he at the time of its acceptance noted the fact on the resignation itself. Messrs. Van Duyn, Kirkpatrick and Troger, members of the Board, testify positively the Board received the resignation and accepted it. Mr. Troger further testified to the effect the resignation was part of a plan entered into with respondent to avoid the acquisition of tenure. No member of the Board was produced to deny it had acted upon respondent's resignation. Nor, in our opinion, is it of any effect that formal notice of the acceptance of the resignation was not given. The resignation became effective according to its terms, when it was accepted. Reeves *vs.* Ferguson, 31 N. J. L. 107. Whitney *vs.* Van Buskirk, 40 N. J. L. 463. The fact that respondent returned to the school on June 19, the day following that upon which her resignation became effective, did not, in our opinion, operate to annul the acceptance of the resignation. All that was done on that day was the promotion of the pupils. What respondent did was voluntary. There is nothing in the evidence to show the Board knew anything about it. The payment to respondent of a full month's salary for June did not affect the resignation. Respondent had performed all the service that a teacher was called upon to give when her resignation became effective. Teaching sessions ended for the month on that day.

> "The payment was probably binding on the Board and could not be disavowed, but it is untenable to hold the Board was thereby bound to regard respondent as being in its employ, notwithstanding the resignation and its acceptance. On what theory could it be so held? There is no estoppel. Respondent was not misled in any way to her damage. At most, the officers of the Board paid to respondent as salary a small sum in excess of what she was entitled to. The Board had no knowledge of it and cannot be held to have ratified or to be under an obligation to disavow the payment.
>
> "An interruption of the service of respondent in the district of appellant Board having been created by the petitioner's action and her resignation, she had not served for the period necessary to confer the right to tenure upon her under the statute."

We agree with the conclusion of the State Board of Education that the prosecutrix tendered her resignation before the expiration of the three-year period; that such resignation was duly accepted; and that she did not have "a period of employment of three consecutive years in that district."

There remains to be considered only the fourth point urged by prosecutrix, namely, that the conduct of the parties was illegal and against public policy and, therefore, there was no interruption of the service of prosecutrix.

It is clear that prosecutrix obtained no tenure rights until "*after* the expiration of a period of employment of three consecutive years." Therefore, having, by her own act, terminated the service before she became entitled to such rights, w are not dealing with a situation where an effort is made to avoid recognition of an existing right. It was within the competence of either party to terminate the service before the right had been acquired, and prosecutrix concedes this would be lawful. This is what was done in the instant case.

The statutory right of tenure never having been acquired, the objection of the prosecutrix is without merit. Carroll *vs.* State Board of Education, 8 N. J. Misc. Rep. 859.

The writ will be dismissed, with costs, and the judgment under review affirmed.

Filed September 18, 1933.

VIOLATION OF PRINCIPAL'S RULES JUSTIFICATION FOR DISMISSAL OF TEACHER UNDER TENURE

BERTHA S. GEBHART,

Appellant.

vs.

HOPEWELL TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is brought on appeal by Mrs. Bertha S. Gebhart, a teacher in the high school of the Township of Hopewell because of her dismissal by the Board of Education upon written charges and after a hearing held before the said Board on the 28th day of September, 1927. The Board found appellant guilty of insubordination because of failure to report at school on time as directed by the high school principal and the supervising principal, and because of failure, refusal and neglect to file reports and furnish information as and when requested by her superior, the principal of the high school. The testimony taken before the Board of Education discloses the following:

Wylie George Pate, principal of the high school, held a faculty meeting during the latter part of September or the first part of October, 1926, at which he stated that he wanted the teachers in their rooms not later than 8:45 o'clock, which would necessitate their being in the building by 8:40, and while the testimony varies slightly as to whether the teachers were to be in the building at 8:40 or 8:45 the appellant does not attempt to deny the rule made by the principal. In fact Miss Katherine Taylor Hodgson, a witness produced by her testified "Mr. Pate requested us the first day at the first faculty meeting, he said that he would like us to be at the school at 8:45 in the morning and at 12:45 at noon, and later we were asked to come at 8:40 so that we would be there when the bus came in." The majority of the teachers complied with these requests and the evidence shows that in the case of other teachers the failure to be on time was an exception whereas in the case of the appellant a compliance with the rule was the exception. About the first of October or November the principal inaugurated a system of records requiring each teacher to write down on a time sheet in his office the hour of her arrival and these sheets submitted in evidence disclose the almost continuous tardiness of Mrs. Gebhart. About January in his office and during March in her home, Mr. Pate spoke personally to Mrs. Gebhart about her tardiness, and during the month of November he called the matter to the attention of the supervising principal who testified that he also spoke to Mrs. Gebhart about her lateness in arriving at school and advising her to be on time. Mrs. Gebhart on cross-examination testified as follows:

Q. "Do you say that Mr. Wagner never approached you in reference to your being late at school as a main subject?

A. No, sir.

Q. He did, on one or two occasions, didn't it—?

A. No, sir.

Q. Talked to you on other matters and in the course of conversation mentioned something about being late?

A. Once last year he did and at the end of the year in June.

Q. What did he say the other time?

A. He visited my class one time, he really made a visit. Then he was talking over some troubles with me, and I asked him right out 'What is wrong here? Why is it that I am tolerating some of the things I am?' And he mentioned to me about coming late. He said, 'You come late,' and he also mentioned to me about another matter, which is not brought up here. Two little things he mentioned, the one was coming late."

Mr. Pate further testified that during the last week in September he requested all teachers to hand in within two or three weeks outlines of the work they proposed to cover during the year, one outline for the first semester and one for the second semester. He made several requests for Mrs. Gebhart's report but she did not hand in such an outline until June. Mrs. Gebhart's testimony does not agree with that of the high school principal on this point, although she states that she did not hand in the first semester outline until the beginning of the second semester, several months after the other teachers handed in the first semester outline.

About the time for the closing of the schools the principal asked the teachers to hand in the grade marks of the senior class on Friday, the tests for which had been given the previous Monday. He testified that these marks were needed to decide upon graduations. All the teachers complied with the request except Mrs. Gebhart, who handed her report in the following Monday. He also told the teachers to take their school registers to Mr. Wagner, the supervising principal, on Saturday afternoon, following the closing of the schools and to have them at Mr. Wagner's office at one o'clock and return them directly to him after they were approved. Mrs. Gebhart was tardy in arriving at Mr. Wagner's office and returned her register by another person so that it did not arrive until about 4.30 to 5:00 o'clock that afternoon.

The appellant objected to the hearing of this case by the Hopewell Township Board of Education because the charges were brought by two members of the Board and also because another member of the Board had made a remark about "getting this teacher now or at some future time." The record contains no testimony as to any such statement by a Board member and the point cannot therefore now be considered by this tribunal.

Attorney for appellant therefore contends that the appeal should be dismissed on the ground that persons bringing the charges also sat as judges in the case, and on the further ground that since the rules of the Board of Education, submitted as a part of the evidence, stated that the sessions of the school shall be from 9:00 A. M. until 12:00 and from 1:00 to 3:40, the rule made by the

principal requiring a teacher to be present at 8:40 or 8:45 in the morning or at 12:40 or 12:45 in the afternoon was not a valid rule, and even if considered valid, the failure of a teacher to comply with such rule did not constitute insubordination.

It is admitted that appellant is protected in her position by the provisions of the Tenure of Service Act, which provides in relation to dismissals as follows:

> "176. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said board or not."

Counsel for appellant cites a number of cases which he contends support his opinion that the action of the Board of Education in dismissing the teacher is invalidated by the presence on the Board of the members signing the complaint. The Commissioner cannot agree that the citations are applicable to the case before him. According to the law quoted above "Charges may be filed by any person, whether a member of said board or not." Appellant's counsel believes that this law conferring authority upon a member to bring charges and then sit as one of the judges on the hearing of such charges is unconstitutional. This, however, is a matter upon which this tribunal cannot rule and which can legally be determined only by the Supreme Court. Counsel for the respondent, on the other hand, defends the presence on the trial body of members preferring the charges by the citation of the case of Ayers *vs.* Newark, 49 N. J. L. p. 172, in which the Supreme Court held in part as follows:

> "The reasons assigned for reversal are, first, that the charge was not made by the Chief of Police on his own motion, or voluntarily, but by the direction of the Commissioners. * * * There is no objection to this action by the Chief of Police and the Board of Commissioners. Their proceeding was a mere form to put the charge in shape for a proper investigation; not voluntarily and without assigning good cause, but in the discharge of their official duty, and for the cause based on the report of the examining physician of the board."

The respondent's contention is further supported by the following authorities: 35 Cyc. 1093:

> "Where a school board constitutes the only tribunal authorized to try charges against a teacher, it is no ground of objection to a trial before them that they were accusers rather than judges, and because of their

> prejudice." 84 N. W. 1026, White *vs.* Wohlenberg: "Some question is made as to the propriety of the members of the board acting as judges. It is said they are accusers rather than judges. and the plaintiff could not secure a fair and impartial hearing before them. Neverthless these defendants constitute the only tribunal before which such hearing could be originally had. Code 2782."

In view of the fact that such opinions were reached by the Courts as to the right of accusing members of a Board to sit in the trial of the defandant even when the statute contained no provision to that effect, there would seem to be no question whatever as to the existence of this right under a statutory provision such as that contained in Section 176, of the New Jersey School Law above quoted.

The testimony clearly shows and it is not denied by the appellant that the latter was uniformly late in arriving at school at the time designated by the principal. The question to be decided therefore is: "Did the principal have authority to make the rules and requests which have been cited, and if so, did the failure to comply with such rules or requests constitute insubordination to a degree sufficient to justify dismissal?" Voorhees on "The Law of Public Schools," p. 214, par. 85, states

> "The power to make rules does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. Nor is it necessary that any prohibitive rule exist in order to justify punishment for flagrant misconduct. No system of rules however carefully prepared can provide for every possible emergency or meet every requirement. In consquence much must necessarily be left to the individual members of the school board, and to the superintendents of and the teachers in the several schools. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils."

Perry, p. 104, in his book "The Management of a City School," says in relation to the principal and the teacher

> "All instructions should be definite and to the point. * * * They should not be hastily issued but should be the result of deliberation and should be reasonable and justifiable. In any system the teacher should at all times have the right to appeal from the decisions of the principal. Good teachers will never appeal from reasonable orders. * * * For example, the principal may order teachers to report for a certain duty at a certain time. If they wilfully fail to comply with this direction they are guilty of insubordination and may be treated accordingly."

Trusler in "Essentials of School Law" under the "Authority to Make Rules," pp. 84 and 85, treats the matter as follows:

> "The right of the teacher to formulate reasonable rules and regulations for the government of the school has been excellently expressed by Mr. Justice Lyon, as follows: 'While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school and execute all its lawful orders in its behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and, because of that relation, must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exists on the part of the pupils the obligation of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed, it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is likely to encounter daily and hourly. * * *'"

When the Board of Education designated the hours of the morning and afternoon sessions of the school it is not to be assumed that they intended such designation for the arrival and departure of teachers since many administrative reasons might necessitate the teachers' presence before or after the hours named for the conduct of the school sessions, and in the absence of other rules by the Board of Education or supervising principal it is well within the inherent power and duty of his office for the principal to make reasonable rules for the proper organization of his school. Such power on the part of the principal to make reasonable rules for the effective organization of his school is recognized as the common law of school procedure. When regulations of the Board of Education require that transportation buses arrive at a school from fifteen minutes to a half hour before the regular session of the school begins, it would seem to be only prudent for the principal to make a rule to require that teachers arrive at approximately the same time so that the latter can assume some responsibility for the pupils of their respective grades, and even in the absence of transportation buses it is clearly not reasonable to expect that all pupils will arrive at just the minute for the opening of school. Good organization would anticipate the arrival of many pupils from fifteen to twenty minutes before the hour of opening. It is common practice, moreover, throughout the State for teachers to be in the classrooms fifteen or twenty minutes before the school session begins. It is therefore the opinion of the Commissioner that in the absence of rules of the Board of Education or supervising principal, the principal had the authority and it became his duty to make reasonable rules as to the time

the teachers should arrive at school before sessions or to remain at school after sessions and also to make rules in relation to the type of reports to be made by teachers and the time of filing such reports; and that upon failure to appeal to a higher authority against such rules so formulated by the principal, the teacher is bound to observe them.

Mrs. Gebhart did not comply with the rule requiring her presence in the school at designated hours nor did she file reports as and when requested. While she did not declare that she would not obey the rules, the evidence shows that she did not obey them and this continuous failure to obey after repeated reminders by the principal and after the establishment of the time sheet system, and the advice of the supervising principal constitute in the mind of the Commissioner insubordination to a degree quite sufficient to justify her dismissal by the Hopewell Township Board of Education.

The appeal is hereby dismissed.

December 16, 1927.

Decision of State Board of Education

The appellant was employed as a teacher in the high school in Hopewell Township from the year 1920 until June, 1927. In July, 1927 charges were preferred against her, signed by two members of the Board of Education and after a trial, as provided in the Tenure of Office Act, she was found guilty on two of the charges by a unanimous vote of the seven members of the Board, all of whom were present during the trial, and was not reemployed for the ensuing school year. She appealed to the Commissioner who, after hearing argument on the record of the trial before the Board, has dismissed her petition. From his decision this appeal is taken on the grounds that she did not receive a fair trial and that the judgment of the Board was not justified by the evidence.

The first ground upon which the appellant contends that there was unfairness or prejudice in her trial is that two of the Board, who sat as judges in her case, signed and swore to the complaint against her. The Tenure of Office Act provides that no teacher who is under tenure, shall be dismissed until after a written charge of the causes is preferred, signed by the persons making the same, and after it has been examined into and found true by the Board upon reasonable notice to the person charged. The Act further provides "charges may be filed by any person whether a member of said School Board or not" (School Laws, Edition 1925, Sec. 176). The Act clearly contemplates and authorizes the preference of charges by members of Boards of Education, and no other tribunal than the Boards of Education is provided by law for the hearing of charges pursuant to the statute.

Furthermore, as a general principle of law, the "proceeding being administrative in its purpose, the fact that the charges are preferred by the trial board or officer is not a ground for disqualifying unless it should appear from the conduct of the trial board or judge that his attitude toward the accused officer is such that the decision of removal is not, in fact, the decision of an impartial or fair tribunal." (2 Dillon's Municipal Corporations (5th Ed.) Sec. 483, p. 812.)

In Ayres *vs.* Newark, 49 N. J. L. 472, the Supreme Court held that the fact that the charge against a police officer, was made by the chief of police by direction of the Commissioners in the discharge of their official duty did not disqualify them from acting as judges on the trial of the charges.

The second ground of objection is that Mr. Savidge, chairman of the Board at the trial, who took part therein and in the making of the decision, over the defendant's objection, stated before the trial, "We are going to get Mrs. Gebhart and if we don't get her this time, we will get her at a later time as the Board of Education of Hopewell Township were determined to get rid of her." No proof on this point was taken at the trial or before the Commissioner but even if such proof were in the record, it would not, in our opinion, invalidate the Board's decision. Not only was that decision not dependent upon Mr. Savidge's vote, the six other members of the Board having voted to sustain the charges, but the statements if made would not amount to a disqualification as a matter of law. While he should be cautious, a judge is not disqualified by a declaration as to the guilt of the defendant. (28 Cyc. p. 586.) "Interest on the part of a member of the trial board which might disqualify a strictly judicial officer will not necessarily invalidate a removal". (2 Dillon's Municipal Corporations (5th Edition) Sec. 484, p. 812. People *vs.* Partridge, 99 N. Y. App. Div. 410).

After examination of the entire record, we can find no evidence that the defendant was not fairly treated at the trial. In our opinion the record shows that she and her counsel received every opportunity to be heard and to present evidence in her defence. There is no showing of any passion of prejudice on the part of the Board during the trial or in the rendering of the decision.

The ground of appeal that the Board's decision was not justified by the evidence remains to be considered. This board has repeatedly held that in the absence of a showing of passion or prejudice, the determination of a district board on a question of this kind will not be disturbed unless the record contains no evidence to support it. If there are reasonable grounds to sustain the decision, it will not be reversed. (Ayres *vs.* Newark, 20 Vroom, 170 Ackerly *vs.* Jersey City, 54 N. J. L. 311).

We cannot say that there was no evidence in this case to support the decision. The first charge sustained was that the appellant was guilty of insubordination in that she repeatedly failed to report at school at the times directed by the high school principal and the supervising principal. The record shows that she was habitually late. The second charge was that she was guilty of insubordination "for failure, refusal and neglect to file reports and furnish information as and when requested by" the high school principal. The record contains evidence to this effect.

For the reasons stated we recommend that the Commissioner's decision be affirmed.

May 5, 1928.

RIGHT OF TEACHER TO MAKE RULES FOR DISCIPLINE OF SCHOOL

THOMAS J. McCURRAN ET AL.,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Paul H. Wendel, for the Appellants.
H. G. Mueller, President of the Board of Education, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The question involved in this controversy centers around the right of a teacher or principal of a school to make rules and regulations governing the discipline of the school during recess periods. The law bearing upon this is found in Artivle VIII, section 125, of the 1914 edition of the School Law, and reads as follows:

> "A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess, and shall suspend from school any pupil for good cause; *provided,* that such suspension shall be reported forthwith by the teacher to the Board of Education; *provided further,* that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil."

This paragraph of the statute law clearly holds the teacher or principal responsible for the conduct of the children under his charge during recess as well as all of the school hours of the day. It also implies that he shall have power to make rules and regulations concerning the discipline of his school.

Section 144 says:

> "Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools. * * * Continued and willful disobedience, open defiance of the authority of the teacher * * * shall be good cause for suspension or expulsion from school."

Here again we have the statute law giving authority to the teacher to govern his schcol.

In compliance with the laws above quoted the principal of the junior high school made a regulation that during the noon recess children who did not go to their homes should not leave the school grounds without permission. The rule specifically applied to those who were not to return to their homes during the noon recess for lunch.

It is claimed by the appellants that the principal had no right to make a rule restraining the pupils from leaving the school grounds because it worked an injury to the trades-people in the neighborhood where children might have an opportunity to purchase their lunch.

Petitions of various kinds and letters have been filed with the Commissioner in the matter. After carefully considering these and the whole question before me I have reached the following conclusion:

1. The principal of the junior high school has authority under the law to make rules and regulations that tend to the better control and discipline of his school.

2. The regulation that prohibited the children who did not return to their homes during the noon recess from leaving the school grounds during that period is a fair and necessary regulation looking to the general welfare of the children and to the better control and discipline of the school.

The petition of the appellants is hereby dismissed.

January 25, 1917.

Decision of the State Board of Education

Paul H. Wendel, for the Appellants.

Malcolm G. Buchanan, for the Respondent.

In this case the principal of the junior high school in Trenton made a rule that during the noon recesses the school children who did not go home to their luncheon should not leave the school grounds. To those who remained on the grounds a luncheon was provided by the school at a reasonable figure. The appellants insist that this rule works a hardship to them; that they are makers and sellers of luncheons without the grounds; that they have an "unalienable right" to sell luncheons to the children; that the principal has no authority to make such a rule; that the authority rests with the school Board and that the board cannot delegate its authority to the principal.

It may be generally true that a school board cannot delegate its own peculiar powers to a principal, but it can give authority to that principal to establish rules regarding schedules, recitations, recesses and general discipline. Article VIII, section 125, of the School Law reads: "A teacher shall hold every pupil accountable in the school for disorderly conduct, on the way to or from school, or on the playgrounds of the school, or during recess," which shows that the law itself contemplated such general authority should be vested in the principal or teacher.

Again, it may be vaguely true that merchants have a right to sell luncheons to school children, but the reverse of the contention, namely, that the principal of a school must unlock the school gates and give up his control and guardianship of the children in order to facilitate the luncheon business of the merchants is by no means equally true. The school children are in charge of the principal when not under the direct supervision of their parents. He has as much authority to close the gates upon them on the playground as to close the doors upon them in the schoolroom.

Objections to such restraint might come with better grace perhaps from the parents of the children; but no such objection is forthcoming because those children who wish to go home during the noon recess are allowed to do so.

We can see no merit in the contention of the appellants, and the appeal is, therefore, dismissed, and the decision of the Commissioner of Education affirmed.

June 2, 1917.

DURATION OF MATERNITY LEAVE DETERMINED BY TEACHER IN ABSENCE OF BOARD RULES

ETHEL C. PRINCE,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Appellant, Samuel Samuelson.
For the Respondent, John F. Ryan.

The appellant was continuously employed in the school district of the borough of Kenilworth from September 1, 1924, to April 30, 1932, at which time she received a salary of $1,525 per year. It is admitted that she was protected in her position by the Tenure of Office Act.

About April 1, 1932, she notified the Board that she was an expectant mother and asked for a leave of absence effective between May 1, 1932, and February 1, 1933. Appellant did not receive a reply from the Board, but a substitute, procured and assigned by the supervising principal, spent April 29 observing the work of her class in anticipation of taking charge the following Monday. Having no definite information from the Board that the leave of absence was granted. Mrs. Prince wrote again under date of May 3 withdrawing her previous application for a leave and informing the Board that she would be

unable to perform her duties from May to September, inclusive, but would report for duty on October 3, 1932. On May 14 Mrs. Prince received a letter from the Board stating that a leave of absence was granted from the first day of May, 1932, until September 1, 1933. Upon receipt of such letter, appellant notified the respondent that the leave granted was not in compliance with her request, and she would accordingly report for duty on October 3.

Appellant became a mother on July 14 and on September 21 she again notified the Board of her intention to present herself for service on October 3, and of her physician's confirmation of her physical fitness to resume her duties. Upon application for a position on that date she was denied employment, but continued to report daily until October 13 and has since held herself ready and willing to teach in respondent's schools. Petitioner claims she was illegally denied her position on October 3 and asks for reinstatement in the Kenilworth public schools with pay from that date. There was no testimony that the Board had any rule governing leaves of absence for maternity purposes at the time Mrs. Prince left school on May 3 nor that any had been adopted prior to the hearing in this case. In the absence of a rule affecting maternity leaves, a teacher may return upon reasonable notice after she is physically able to resume her duties. In the case of Almira C. Vetter *vs.* Board of Education of Galloway Township, the Commissioner held in part as follows:

> "The testimony of the school medical inspector to the effect that a woman is not fit for work within a certain definite time after the birth of a child is, in the Commissioner's opinion, too general a statement since conditions must necessarily vary in different cases, and such a theory cannot therefore be applied with any degree of certainty to the particular instance under consideration."

No decisions have been rendered in this State upon rules of a board of education determining the time a teacher is required to be absent prior and subsequent to childbirth. It is the opinion of the Commissioner that a rule would be valid which requires absence for a reasonable time for the benefit of the mother and child and the protection of the school from the optional return of a teacher, which may break the continuity of class instruction.

Mrs. Prince asked for a sick leave of nine months and stated the cause. The Board did not comply with her request but after its withdrawal notified appellant that it had granted the leave of absence which extended beyond the date specified in her application. While a reasonable rule passed prior to the asking of the leave would probably be binding upon the teacher, the legal effect of a rule passed during a teacher's absence is questionable. Boards have statutory authority to make rules for the conduct of schools, but such rules should be prospective and not *ex post facto*. The Board did not notify appellant of a fixed rule but merely informed her that it had *granted* a leave for a time for which no request had been made. There was no offer and acceptance.

In *Corpus Juris*, Volume 13, at pages 281 and 293, respectively, the law of offer and acceptance is interpreted as follows:

> "An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. This is true, for example, where an acceptance varies from the offer as to time of performance, place of performance, price, quantity, quality, and in other like cases. A promise to give an offer consideration cannot be regarded as an acceptance, nor can a statement that the offeree is prepared to make arrangements on the terms named."
>
> "An offer, if not under seal, may be revoked or withdrawn, at any time before it is accepted, and the acceptance communicated when communication is necessary, for until then there is neither agreement nor consideration."

The Commissioner cannot agree with the contention of respondent's counsel that appellant, having left the school without receiving a reply from the Board, was absent without leave, and therefore subject to dismissal under the Teachers' Tenure Law. The Board did not prefer charges upon such grounds, and could not have legally dismissed her under the conditions set forth. Since appellant is not on trial for inefficiency or other cause, the attempt to show that she did not fill out a certain report has no bearing in this case.

Since a definite period for a maternity leave is not established by the evidence and the Board and teacher had not agreed upon the duration of her absence, it could not deprive the appellant of her position when she was physically fit to perform her duties and gave the Board due notice of the date she would be present to resume teaching. Mrs. Prince was illegally denied employment on her return October 3, and the Board of Education of the Borough of Kenilworth is hereby directed to immediately reinstate her and to pay her salary from October 3, 1932.

February 28, 1933.

Decision of the State Board of Education

The respondent appeals from a decision of the Commissioner of Education, holding that it had, on October 3, 1932, deprived appellant, Ethel C. Prince, of her position, when she was physically fit to perform her duties, and had given the Board due notice she would resume them on that date, and directing she be immediately reinstated and her salary paid her from October 3, 1932.

It appears by the record before us that appellant had been in the employ of respondent from September 1, 1924, and was therefore within the protection of the Teachers' Tenure Act. On April 1, 1932, she wrote the respondent Board, asking for a leave of absence from May 1, then next, until February 1, 1933, further stating she was an expectant mother and it was necessary she leave on the date mentioned. On April 29, 1932, which was the last school

day of that month, a substitute teacher attended the class which Mrs. Prince was teaching, for observation of the work, although no reply had been received by Mrs. Prince from the Board, to her request for leave.

On May 1, 1933, not having received any communication from the Board, appellant wrote it a second letter in which she stated that upon the advice of her physician, she would not be physically able to teach during the months of May, June and September of the present year, and that having employed a substitute in her place, and it not having answered her letter as to the granting of a leave of absence, she withdrew her request for it, and that she would report for work on October 3, 1932. The two letters were duly received by the Board. On May 14, 1932, the Board wrote Mrs. Prince, advising her that at its regular meeting held on May 9, she was granted a leave of absence from May 1, 1932, until September 1, 1933. Mrs. Prince made no reply to this communication until June 10, when she wrote to the Board, referring to its letter of May 14, and stated she did not request such a leave and that she would report for work on October 1 as she had informed it in her letter of May 3. Thereafter, on September 21, 1932, she again wrote the Board that in accordance with her letters of May 3 and June 13, she would report for work on the first school day in October, and that her physician had advised her she was in good health and able to resume her work. No reply was made by the Board to these letters. On the first school day in October, Mrs. Prince did report for work and was informed by the principal of the school there was no position for her. Appellant reported at the school regularly for several days thereafter, with like result, and on October 15, 1932, she wrote the Board that as she held herself ready, able and willing to report immediately upon notice, she looked for full satisfaction of all salary due her. The Board has no rule respecting the granting of leaves of absences for incapacity of married teachers on account of maternity. The evidence showing that appellant below was physicially able to perform her duties on October 3, 1932, was not disputed.

From the foregoing facts the question presented is whether the Board was justified in imposing upon Mrs. Prince a leave of absence during the period from May 1, 1932, to September 1, 1933, and whether she was entitled to resume her duties on October 3, 1932.

In our view the request of Mrs. Prince for a leave of absence for a stipulated time was not a finality. Until the Board had finally acted upon it, the request might be withdrawn. The Board held a meeting on April 11, after it received the communication from Mrs. Prince, and referred her request to a committee to report upon. Before any other action by the Board, the application for leave was withdrawn. On May 9, when the Board voted the leave of absence, it had before it the letter of withdrawal. That left nothing relating to a leave of absence, to act upon. The action of the Board, under the circumstances, was tantamount to a suspension of Mrs. Prince from her position. Our attention has not been called to any provision of the school law granting to a board of education, authority to suspend a teacher under such circumstances. Section 105 (page 46, Comp. 1931) authorizes suspension of a teacher by a superintendent of schools, and subsequent action by the Board for restoration or removal, as it may deem proper. The implication is that such suspension is on account of some dereliction. Nothing of the kind is suggested in this case.

There being no request for a leave of absence before the Board, but a notice that due to physical incapacity Mrs. Prince would be unable to perform her duties for the months of May, June and September, the only reason apparent for the Board's action was the physical incapacity of appellant to perform her duties. Our view is that a teacher can be disciplined only upon charges of inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, and after a written charge of the cause or causes shall have been preferred against her, as provided in chapter 243, 1909, Teachers' Tenure Act. No charges were preferred against Mrs. Prince. She presents the fact of her physical incapacity as an excuse for her failure to perform her duties as a teacher from May 1 to October 3, 1932. Her physical incapacity is not disputed, neither is the fact that on the latter date she was physically able and willing to resume the performance of her duties. In a case arising in the city of New York, entitled, "In the Matter of the Appeal of Bridget C. Peixotto," reported as Case No. 216, State Department Reports, decided January 11, 1915, it was held by the Commissioner of Education of the State of New York that non-performance by a teacher of her duties and absence from school by reason of childbirth did not constitute "neglect of duty" which under the rules of a board of education was ground for dismissal. If a board cannot dismiss a teacher for such reason, neither can it suspend.

In the absence of rules adopted by the Board of Education of the Borough of Kenilworth regulating periods of absence due to maternity on the part of married women teachers, it is our opinion that Mrs. Prince was entitled to resume her duties when physically able so to do and the denial of such right by the Board was without justification. We recommend that the decision of the Commissioner of Education requiring her reinstatement and the payment of her salary from October 3, 1932, be affirmed.

June 3, 1933.

TEACHER UNDER TENURE CANNOT BE DENIED POSITION WHEN TEACHERS NOT UNDER TENURE ARE EMPLOYED IN SIMILAR CAPACITIES

GERTRUDE REINMANN,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Appellant, Herman Lipschitz.
For the Respondent, Reinholl Hekeler.

Appellant taught in the schools of West New York from September 1, 1924, until September 1, 1931, when she was granted a leave of absence to February 1, 1932. Upon appellant's request this leave was extended to June 30, 1932.

In May, 1932, appellant notified the Board that she would report for duty in September, and on the opening day of the school term she signed the register and was about to enter her assigned classroom when she was requested to report to the superintendent of schools, who informed her that the Board had further extended her leave of absence and that consequently her services would not be required. Mrs. Reinmann reported daily from that time until January 16, 1933, the date of her appeal to the Commissioner, but has been denied a position. It is admitted that she was protected in her position by the Teachers' Tenure Act (Chapter 243, P. L. 1909), and at the hearing counsel for the Board conveyed its offer to reinstate appellant beginning February 1, 1933. Petitioner, therefore, appeals only for her salary from September 1 to February 1.

The testimony discloses no reason for denying appellant her position other than the Board's desire to employ unmarried, resident teachers. Respondent defends its refusal to pay salary from September 1 on the ground that appellant is guilty of laches in that she failed to bring a formal appeal prior to January 16, 1933.

Counsel for respondent quotes eminent authorities to support his contention of laches on the part of the appellant. The Commissioner agrees with such authorities in that dismissed public employees should promptly prosecute appeals from what they believe to be illegal removals from offices or positions. There are, extenuating circumstances in this case which make counsel's citations inapplicable.

While appellant delayed approximately four months in bringing her appeal—which is the time after which the court would not reinstate the prosecutor in

the case of People ex rel. Young *vs.* Collis, 6 N. Y. App. Div. 467—it is to be noted that Mrs. Reinmann not only reported every school day, but was unable to obtain any definite information when she interviewed members of the Board to ascertain when she might return. It clearly appears that her delay in prosecuting her case was due to the fact that she was hoping for reinstatement by personal appeal rather than resorting to legal action.

The Commissioner in the case of Gleason *vs.* Bayonne, recently decided, held that a delay in making a formal appeal does militate against an appellant. However, the delay in this case is not of such duration as to constitute laches in view of appellant's daily personal application for the position and her attempts to persuade members of the Board to terminate the unrequested leave of absence. Mrs. Reinmann was illegally restrained from performing her duties as a teacher in the schools of West New York and accordingly the Board is hereby directed to pay appellant her salary from September 1, 1933, in the amount to which she would have been entitled had her services been accepted.

February 28, 1933.

Affirmed by State Board of Education May 6, 1933.

INTENT TO PUNISH MUST BE SHOWN TO CONSTITUTE CORPORAL PUNISHMENT

EVANGELINE CRAZE,

Appellant,

vs.

BOARD OF EDUCATION OF ALLENDALE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant, who was under tenure as a teacher in the public schools of Allendale, was on November 4, 1929, given a hearing by the Board of Education of that district to determine the truth of charges preferred by one R. A. Phair to the effect that appellant had on September 23, 1929, and contrary to law inflicted corporal punishment upon his son, Daniel Phair. The Board of Education after considering the testimony before it, found appellant guilty of the charge preferred and on the same date, namely, November 4th, dismissed her from its employ. Appellant accordingly proceeded to bring this action before the Commissioner of Education to secure her reinstatement as a teacher in the Allendale schools.

The Commissioner has before him the stenographic record of the testimony taken before the local Board of Education and briefs have been presented by counsel for both appellant and respondent upon the legal points involved.

Section 173, Article VIII of the 1928 Compilation of the School Law provides as follows:

> "No principal, teacher or other person employed or engaged in any capacity in any school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon any pupil attending such school or institution, and every resolution, by-law, rule, ordinance or other act of authority heretofore or hereafter passed, adopted, approved, made or given by any person or persons whomsoever, natural or artificial, permitting or authorizing corporal punishment to be inflicted upon any pupil attending or that may attend any school or educational institution shall be henceforth void and of no force or effect."

Corporal punishment may in the Commissioner's opinion be defined as any punishment causing or intended to cause bodily pain or suffering, and in the case under consideration the testimony indicates that on September 23, 1929, appellant did pull the hair of Daniel Phair, a pupil, so as to cause in some degree at least pain and suffering. It is conceivable that a teacher might lay hands upon a pupil in order to restrain his progress or correct or straighten his position without being considered to have inflicted or to have intended to inflict corporal punishment upon him. In fact, in the case of Mary M. Leistner *vs.* Board of Education of Landis Township reported on p. 130 of the 1928 Compilation of Decisions, the Commissioner, whose decision was sustained by the State Board of Education, held that for a teacher to merely forcibly restrain a child running through a school corridor by seizing her by the shoulder did not constitute corporal punishment. In the present case, however, the testimony indicates an intention on the part of appellant to hurt or inflict suffering upon Daniel Phair even though in no great degree. Appellant herself testified that she "nipped" the boy's hair "to make him sit up and pay attention," and this statement certainly has a disciplinary flavor. Moreover, according to Stephen's Digest of the Law of Evidence, p. 76, whenever there is question as to a person's intention in doing a certain act

> "the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, etc.,"

and not only was there testimony by a number of other pupils to the effect that appellant had on various occasions pulled their hair, but such action with regard to such other pupils was even admitted by appellant herself at the hearing. The testimony therefore both as regards the pulling of the Phair boy's hair and that of the other pupils definitely indicates in the Commissioner's opinion a general policy on the part of the appellant of inflicting corporal punishment of the nature complained of by Mr. Phair as a method of disciplining the pupils in her charge. In the case of L. W. Smith *vs.* Phillipsburg Board of Education, p. 132, 1928 Compilation of Decisions, the Commissioner, whose decision was later sustained by the State Board of Education, remarked that

corporal punishment was definitely prohibited by the School Law and then proceeded to condemn the action of the teacher in kicking or shoving a boy with his foot, whether it hurt him or not, and upheld the local Board of Education in dismissing such teacher from its employ.

It is therefore the opinion of the Commissioner that the testimony before the Allendale Board of Education supported the conclusion reached by the Board that the appellant was guilty of having on September 23d inflicted corporal punishment contrary to the express provisions of the School Law upon Daniel Phair, the son of R. A. Phair, who preferred the charges; and in this connection the Supreme Court has held in a number of cases, notably, Martin *vs.* Smith, 125 Atl. Rep. 142, Ayers *vs.* Newark, 20 Vroom 170, and Hoar *vs.* Preiskel, 128 Atl. Rep. 857, that

> "where the judgment of the trial court is fairly supported by the record, its findings of fact will not be disturbed by the appellate court," and that "even if it were possible to reach a different conclusion, they will not review the testimony upon which a municipal officer was dismissed."

The Commissioner can, therefore, find no ground for interfering with the dismissal of the appellant on November 4, 1929, by the Allendale Board of Education and the appeal is accordingly hereby dismissed.

January 7, 1930.

Decision of State Board of Education

This is an appeal from the decision of the Commissioner of Education, in which he declines to interfere with the action of respondent in dismissing appellant as a teacher in its service. Appellant had been in the employ of respondent about eight years past and was therefore entitled to protection from dismissal except under the provisions of the tenure of office law.

On or about September 23, 1929, appellant was conducting her (fifth grade) class of thirty-one pupils in the school of respondent. One of her pupils was a boy, nine years old, named Daniel Phair. Daniel had turned in his seat and was talking. Appellant went to him, and to direct his attention to the class work, pulled, or, as appellant describes it, "nipped" his hair, whereupon Daniel turned again to attention. He said she pulled it "a little bit" and that it "hurt a little while." He did not cry. When he went home to lunch he told his mother of the incident, and on the following day the boy's father wrote a letter to the president of the Board of Education, complaining that appellant had "used corporal punishment on my son Daniel. She pulled his hair and hurt him badly." On October 18, following, or soon thereafter, appellant was notified that written charges had been preferred against her and filed with the clerk of the Board, setting forth that on September 23, 1929, she did inflict corporal punishment upon one Daniel Phair, and designating November 4, 1929, at eight o'clock P. M., at the school house in the Borough of Allendale, as the time and place for a hearing upon said charges. Appellant appeared at the hearing attended by her counsel, counsel for the Board attending in its behalf.

Daniel was sworn and testified as above recited. Appellant testified that Daniel was shouting, and when she "nipped" his hair he looked up, it didn't affect him at all; he didn't cry, "he sat up and took notice for a few minutes." She also admitted having "nipped" the hair of two other boys upon different occasions. Upon this evidence, the respondent adopted a resolution that the charge against appellant was true in fact and that she had inflicted corporal punishment upon Daniel Phair, contrary to the statute in such case made and provided, and that such conduct was just cause for a removal from her position as teacher and that she be and thereby was dismissed from her employment as teacher, and from the employment of respondent Board in any position, and that she be paid no further salary after November 4, 1929.

The Commissioner deemed the evidence submitted to the Board sufficient to support the conclusion of the Board that appellant was guilty of having inflicted corporal punishment upon Daniel Phair, and he found no ground for interfering with the dismissal of appellant.

We have been provided with the record of the proceedings before the respondent Board, counsel have submitted briefs, and we have heard counsel for both sides orally. Upon consideration of the evidence and after hearing the parties, we feel constrained to differ with the Commissioner of Education. We are of opinion that what appellant did when she "pulled" or "nipped" the hair of Daniel Phair was not "corporal punishment." The act was not done with any intent to punish, to inflict pain as a penalty for an infraction, but merely to direct the attention of a pupil; it was no more a battery than if she had put her hand upon the boy's shoulder or upon his head for the same purpose. We are not impressed by the boy's statement "that it hurt a little while." What he probably meant was that he felt the slight pull of his hair. For such an act to be unlawful there must be an unlawful intent, and this is absent in the present case. To support a judgment involving such serious consequences to the appellant, the proof against her should be clear, positive and convincing, and we do not believe it is.

The result is that the dismissal of appellant by respondent was without right, and it is ordered she be reinstated in her position as teacher and that she be paid her salary from November 4, 1929.

May 10, 1930.

CORPORAL PUNISHMENT SUFFICIENT CAUSE FOR DISMISSAL OF TEACHER

FRANCIS H. SECO,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

Respondent.

For the Appellant, Orlando H. Dey.
For the Respondent, Kealey & Gilfert.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant was employed by the Board of Education under contracts for the following terms:

May 1, 1930, to June 30, 1930
September 1, 1930, to June 30, 1931
September 1, 1931, to June 30, 1932
September 1, 1932, to June 30, 1933.

A complaint to the Superintendent of Schools by the Supervisor of Retarded Classes, that the appellant inflicted corporal punishment upon the pupils of his class, was reported to the president of the Board by the superintendent. After a preliminary investigation, the superintendent, with the approval of the president, and under the authority of Section 69, Chapter 1, P. L. 1903, S. S., suspended the appellant on March 10, 1933, which suspension was reported to the Board of Education by the superintendent on March 13, 1933. Appellant was then requested to appear before the Board of Education at its regular meeting on March 8, at 8:00 P. M., for further consideration of his suspension, at which time he appeared with counsel, who contended that he could not be dismissed without a hearing because of his protection under the Veterans' Tenure of Office Act. (Chapter 29, P. L. 1929.) In view of this contention, no action was taken by the Board at this meeting.

On April 24, written charges for the removal of the appellant were filed with the secretary of the Board, and on April 27, the charges, together with a notice that a hearing thereon would be held on May 2, were served upon the appellant. The hearing was adjourned until May 5, at the request of appellant's attorney. Prior to that date, at a special meeting on April 29, the appellant was dismissed by the respondent effective as of March 10, 1933. The matter was then formally appealed to the Commissioner of Education.

A hearing was conducted by the Commissioner to determine the rights of the appellant under the Veterans' Tenure Act, and in a decision dated July

27, 1933, the Commissioner held that he had waived his tenure by the acceptance of definite term employments under the contracts above set forth, which decision was not appealed.

Since the appellant began his employment in the schools of Rahway on May 1, 1930, he had not, at the time of his dismissal on April 28, 1933, served three consecutive calendar years in the district and was not protected under the Teachers' Tenure of Office Act. His case, accordingly, comes to the Commissioner under the provisions of Section 107, Chapter 1, P. L. 1903, S. S., which reads as follows:

> "In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a board of education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the board of education whether such teacher shall or shall not teach for the unexpired term."

Section 64 of the Rules and Regulations of the Rahway Board of Education reads as follows:

> "Teachers shall maintain discipline by reasonable and proper means. They shall not inflict corporal punishment and in no case shall they resort to any form of cruel or unnatural punishment. Ridicule, sarcasm and all harsh expressions are to be studiously avoided."

Each of appellant's written contracts expressly provides that:

> "* * * he will faithfully do and perform his duty under the employment mentioned, will comply with the school laws of the State of New Jersey relative to the said position, and will observe and enforce the rules and regulations as prescribed for the government of the schools by the board of education as they now are or may be changed from time to time."

Since section 107, chapter 1, P. L. 1903, S. S. permits a board of education to determine whether a teacher under contract shall or shall not teach, the first question to be decided in this case is: Did the Board have good cause for the dismissal of appellant? If this is answered in the affirmative, the following question is presented: Is appellant entitled to compensation from the date of his suspension on March 10 to the date of his dismissal on April 29?

Among the reasons for Mr. Seco's dismissal by the Rahway Board of Education are: He failed to maintain discipline by reasonable and proper means; has inflicted corporal punishment; resorted to ridicule, sarcasm, and the use of harsh expressions; has produced in his pupils an unfortunate and undesirable reaction and mental attitude.

Evidence to support the reasons for dismissal must naturally come from the pupils in the classroom. While the testimony of the boys was questioned by appellant's counsel on the ground that they are incompetent, their understanding of an oath and their mental alertness in responding to questions of counsel

makes their testimony unquestionably admissible. In many instances the acts of the appellant, which were classified as corporal punishment, should probably be considered as correctional measures without intent to punish, as defined by the State Board of Education in the decision of Craze *vs.* Allendale, 1932 Compilation of School Law Decisions, page 881, but the evidence fully supports the charges that appellant frequently resorted to corporal punishment, called the pupils inbeciles and other names quite as uncomplimentary, and produced an undesirable mental attitude on the part of the pupils. The supervisor of retarded classes testified that on several occasions she cautioned Mr. Seco about the further use of corporal punishment, and her testimony as well as that of the principal and janitor of the school which housed appellant's class, supports that of the pupils.

Appellant was employed to instruct a class of pupils who were mostly below the average in academic accomplishment in relation to their ages, and some were not adjusted to the general classroom program. The pupils of this class needed a teacher whose attitude was sympathetic, encouraging, and friendly. These qualities appear to have been lacking in appellant. Other members of the faculty testified that these pupils created no disciplinary problem when enrolled in their classes.

Section 64 of the Board's rules, above referred to, requires discipline by reasonable and proper means and specifically prohibits unnatural punishment, ridicule, sarcasm, and all harsh expressions, and the Teachers' Tenure of Office Act (Chapter 243, P. L. 1909) sets forth that a teacher so protected may be dismissed for "conduct unbecoming a teacher." Appellant violated Section 112, Chapter 1, P. L. 1903, S. S., as well as Rule 64 of the Board of Education, when he resorted to corporal punishment to maintain discipline in his classroom.

In referring to corporal punishment, an Indiana court ruled more than eighty years ago (Cooper *vs.* McJunkin, 4 Ind. 290).

> "The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. * * * The very act of resorting to the rod demonstrates incapacity of the teacher for one of the most important parts of his vocation, namely, school government. * * * The taking of the ferule from the hands of the teacher is the only policy worthy of the State, and of her otherwise enlightened and liberal institutions."

It is interesting to note that New Jersey has prohibited corporal punishment since the approval of Chapter 179, on March 21, 1867, and this prohibitory law has ben continuously included in all subsequent revisions. The prohibition of corporal punishment, therefore, is fully understood by all persons in the teaching profession of this State, and not only its violence but the humiliation of the victim has been ruled upon by the Commissioner of Education, and affirmed by the State Board of Education, in the decision of Smith *vs.* Phillips-

burg, 1928 Compilation of School Law Decisions, page 132. In this decision the Commissioner said:

> "The question in this case is, was this action of Mr. Smith in using his foot to compel the boy's obedience to the order given by him conduct unbecoming a teacher? Mr. Smith's explanation or excuse for using his foot was, first, that the boy assumed a threatening attitude and a defiant look and hence that force was necessary to have his order carried out; and, secondly, that he used his foot because a physical infirmity on that day prevented him from using his hands. * * * In this case the appellant was within his right in ordering the boy to the principal for investigation of the alleged offense. If the boy resisted the appellant or used defiant language or refused to obey the order to 'get out' there might have been justification in using reasonable physical force to get him to the principal's office.
>
> "I do not find that there was any resistance nor any defiance of authority of the teacher and hence no excuse for using force and much less was there necessity for using the foot to hasten the movement of the boy. The boy was not injured, but the insult, humiliation, quite as much as the injury, must be considered.
>
> "I, therefore, agree with the action of the Board in finding the appellant guilty of conduct unbecoming a teacher and dismissing him from service."

There was no evidence of prejudice on the part of the respondent in its decision to dismiss the appellant. Complaints in reference to his failure to use approved methods of discipline, his violation of the rule of the Board and the statutes prohibiting corporal punishment, emanated from the supervisor of retarded classes and the principal of the building and came from them to the board of education through the superintendent of schools. The Board appears to have carefully investigated these complaints before the dismissal action was taken.

Mr. Seco violated a reasonable rule of the Rahway Board of Education as well as the statute prohibiting corporal punishment, and his services were, therefore, legally terminated. Since his dismissal was made effective as of the date of his suspension, he is not entitled to compensation after March 10, 1933. The appeal is dismissed.

April 18, 1934.

FAILURE TO OFFER SERVICES AT BEGINNING OF SCHOOL YEAR AND DELAY IN PROSECUTING CASE HELD TO CONSTITUTE ABANDONMENT AND LACHES

LELIA CARPENTER,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK,

Respondent.

For the Appellant, N. Demarest Campbell.
For the Respondent, Hart & Vanderwart.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was first employed by the respondent Board of Education under a contract dated July 26, 1922, "to teach in the Hackensack Public Schools for the term September-June 1922-1923," and continued in the district until June 30, 1932. On or about February 12, she was notified by the supervising principal that the Board at a meeting held February 8, 1932, adopted the following resolution:

> "That the supervising principal be instructed to notify supervisors at present holding the following positions (supervisor of physical training, supervisor of sewing, supervisor of music) that these positions will be abolished at the close of the present school year and that this action by the Board will terminate the services of such supervisors at the close of the present school year."

The notification further stated that since the Board abolished the position of appellant effective June 30, 1932, it would of necessity follow that her services would terminate on that date. This action of the Board was not contested by appellant until on January 6, 1933, there was served upon the respondent a copy of the petition of appeal to the Commissioner o fEducation.

Counsel for appellant contends that Mrs. Carpenter was both a teacher and supervisor of sewing and, therefore, if her supervisory position was abolished, she had a valid claim to a teaching position under the ruling of the Supreme Court in the case of Seidel *vs.* Ventnor City Board of Education, 110 N. J. L. 31, and that she does and always has held herself ready and willing to perform the duties of teaching of sewing. On the other hand, it is the contention of respondent that while appellant was originally employed as a teacher, after the year 1925 she became a supervisor of sewing and accordingly she is not entitled to a teaching position; and, furthermore, if such teaching rights existed as the result of the supervisory position, appellant's delay in prosecuting her action constitutes laches and thereby nullifies her petitions.

It is the opinion of the Commissioner on consideration both of contracts and of work performed by appellant that under the ruling of the Supreme Court in the case of Seidel *vs.* Ventnor City, Mrs. Carpenter had a legal right to supplant at the close of the school year a teacher of sewing if there were not, on February 8, sufficient tenure teachers to fill the positions to be provided for the ensuing year.

There were on February 8, 1932, four teachers of sewing, three of whom were not protected in their employment by the provisions of the Teachers' Tenure of Office Act, Chapter 243, P. L. 1909. In April a contract was given to the non-tenure teacher under which tenure protection accrued to her. Surely in April, appellant could not be held to be guilty of laches in contesting the validity of her dismissal. She was at that time entitled to a position and the Board acted at its peril in offering a contract to a person not legally entilted thereto when another had a valid claim to the position for which she was employed.

There remains only to be considered the effect of petitioner's delay until January, 1933, for the prosecution of her case. Mrs. Carpenter left school at the close of the school year (June 30, 1932) without any intimation to the Board, or an expressed belief on her part, that she was being illegally deprived of a position. She did not appear at school in September, 1932, nor did she, prior to January 6, 1933, either formally or informally, notify the Board of her willingness or readiness to serve as a teacher of sewing, but appears to have abandoned her position under the assumption that she could not successfully contest the action of the Board.

The Commissioner has on several occasions during the school year 1932-1933 emphasized the importance of promptitude in prosecuting appeals when public school employees believe they have been illegally dismissed. (Griff *vs.* Elizabeth Board of Education, affirmed by the State Board of Education; Suiters *vs.* Hackensack Board of Education; Fortune *vs.* Haddonfield Board of Education; Gleason *vs.* Bayonne Board of Education.) In some of these decisions appellate courts have been cited as follows:

> "The intent to abandon an office may be inferred by the conduct of the party. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created and no judicial determination is necessary." (Attorney General *vs.* Mayberry, 104 N. W. Rep. 324.)
>
> "The fact that the position had not been filled can make no difference. It might not have been filled for the reason that the Police Commissioners thought it unnecessary to employ as many detective sergeants as before." (Glori *vs.* Board of Commissioners of Newark, 72 N. J. L. 131.)

The Commissioner in the case of Fortune *vs.* Haddonfield Board of Education held:

> "While it is urged by appellant's counsel that in this case another employee did not fill the position, and therefore, laches cannot be set up as a claim for dismissal of the appellant, the Commissioner is of the opinion that the right to make the economy proposed should have been tested at

once so that if appellant's position could not have been legally abolished, the Board could have determined the legality of abolishing other positions or discontinuing the services of other employees to effect the economies which it believed to be advisable to decrease school costs."

The failure of Mrs. Carpenter to offer her services in September, 1932, and her delay until January, 1933, to contest their termination by the Board in June, 1932, constitutes both abandonment and laches. The appeal is accordingly dismissed.

July 18, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, who had acquired tenure of office, was notified by the supervising principal in Hackensack, on February 12, 1932, that the Board of Education had, on February 8, 1932, adopted a resolution that her position of supervisor of sewing would be abolished at the close of the school year and her service along with that of other supervisors would then be terminated. At that time there were teachers of sewing in the Hackensack schools who were not entitled to protection under the Tenure of Office Act and the Commissioner has held, correctly as we believe, that Mrs. Carpenter had a legal right to supplant one of these teachers, under the decision in the case of Seidel *vs.* Ventnor City Board of Education, 110 N. J. L. 31.

It appeared, however, that, in the words of the Commissioner's decision:

"Mrs. Carpenter left school at the close of the school year (June 30, 1932) without any intimation to the Board, or an expressed belief on her part, that she was being illegally deprived of a position. She did not appear at school in September, 1932, nor did she, prior to January 6, 1933, either formally or informally, notify the Board of her willingness or readiness to serve as a teacher of sewing, but appears to have abandoned her position under the assumption that she could not successfully contest the action of the Board."

It further appears that during the period of nearly a year which elapsed berore the appellant made any protest or gave any notice of appeal from her dismissal, the Board of Education had made up its budget and made contracts with its teachers for the ensuing school year. Her complete silence during this period was prejudicial to the interests of the Board and in our opinion the Commissioner was correct in holding that her failure to appeal until January, 1933, "constitutes both abandonment and laches." It is, therefore, recommended that his decision dismissing the proceeding be affirmed.

April 14, 1934.

DELAY IN PROSECUTING APPEAL INVALIDATES IT

FANNY GRIFF,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

For the Appellant, Avidan & Avidan.
For the Respondent, Martin P. O'Connor.

DECISION OF THE COMMISSIONER OF EDUCATION

Fanny Griff, the petitioner, has been employed for more than ten years as a teacher in the public schools of the City of Elizabeth, and it is admitted that after three years of service she came under the protection of Chapter 243, P. L. 1909, the Teachers' Tenure of Office Act. She contends that she has been illegally dismissed and petitions the Commissioner for reinstatement with salary from September 1, 1931.

It appears that for the past several years there has been some dissatisfaction with the teaching work of Miss Graff. Appellant's unfavorable attitude toward her pupils and professional associates was discussed in a written communication to her from the Superintendent of Schools under date of October 20, 1925; and in a letter dated May 7, 1926, the Superintendent stated that he would recommend her continuance in the school system, but without an increment. The letter read in part:

> "It will be very necessary for you to show marked improvement next year in classroom procedure, if, as Superintendent of Schools in Elizabeth I am to recommend your continuance in service."

It is evident that the services continued unsatisfactory. On May 20, 1931, the Superintendent wrote to appellant setting forth her ratings as given by her principals and intimated that he was seriously considering the question of her dismissal, and on July 1, in another communication, he stated that the principals' and supervisors' reports indicated that she should not be retained as a teacher. He said:

> "Your record indicates that if you do return it will be necessary to prefer charges agianst you."

During July and August, 1931, Mrs. Griff wrote four letters to Dr. Chapman stating that she would be willing to resume teaching at any salary he might state. Appellant testified that she called at the Superintenden's office early in September and was unable to see him, but admitted that she did not menion

her name to any of the four secretaries in the office. These employees testified that Mrs. Griff did not appear at the office during the time they were on duty. Dr. Chapman, the Superintendent of Schools, testified that no knowing whether appellant would return, he filled her position with a substitute teacher until January 1. He then concluded that Mrs. Griff did not intend to return and secured a regular teacher to fill the vacancy. Appellant testified that she was not offered a contract for the school year 1931-32 in accordance with the Board's custom in previous years. There was no obligation on the part of the Board to send a contract to a teacher under the protection of the Teachers' Tenure of Office Act. However, any change from the usual procedure should have served as a notice to Mrs. Griff of the Board's intention to discontinue her services.

Appellant was not told that she would be denied employment if she returned, but was informed that her return would make necessary the filing of charges against her. It appears that while appellant might have been willing to teach, she did not present herself for that purpose either at the opening of school in September or at any time during the school year. She was evidently under the impression that she was dismissed, or, upon return, would be dismissed on the grounds of inefficiency. While she may have visited the Superintendent's office, the testimony indicates that her intention was to pursuade him to give her an opportunity to teach rather than to demand any rights to which she might have been entitled.

Counsel for appellant relies partly upon the case of Raritan Water Co. *vs.* Veghte, 21 N. J. E. 463, 480, in which the Court ruled upon the abandonment of riparian rights. It is the Commissioner's opinion that no analogy can be drawn between inaction on the part of a freeholder in relation to property and inaction on the part of a teacher whose duties are confined to a class of pupils assembled for her instruction. Counsel for respondent cites the case of Attorney General *vs.* Maybury, 104 N. W. Rep. 324, and its application to the present case is argued by appellant's counsel in his rebuttal brief. The Court said:

> "The intention to abandon an office may be inferred from the conduct of the party. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created and no judicial determination is necessary."

An entirely different situation exists when a public office is abandoned by the incumbent thereof than when a class of children is abandoned by its teacher. In the first instance, the work may be seasonal or may be distributed, assigned, or delegated to competent subordinates with no apparent demoralization of the organization. In the second instance, the class is in need of the constant supervision of the teacher, who should not except in cases of emergency desert it even for a day without specific arrangements with the principal or superintendent. When a teacher absents herself from her duties for several months without any dclaration of intention to return, the Board is justified in concluding that her position is abandoned.

Mrs. Griff did not return to school in September nor did she offer her services during the entire year. In accordance with the opinion of the Court above cited, a vacancy existed without a judicial determination by the Board of Education. The appeal is dismissed.

November 30, 1932.

Affirmed by State Board of Education without written opinion, April 1, 1933.

TEACHER NOT GUILTY OF LACHES WHEN BOARD HAS REASONABLE NOTICE AND HER DELAY IN PROSECUTION IS ADVISED BY BOARD OFFICIALS

EDNA AESCHBACH,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,

Respondent.

For the Appellant, J. Raymond Tiffany.
For the Respondent, George W. King, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant began her employment in the schools of Secaucus in September, 1926, and continued until June, 1932. She was officially notified that her services were terminated by the following letter:

"August 2, 1932.

Mrs. Edna Aeschbach
251 Palisade Ave.
Union City, N. J.

Dear Madam:

You are hereby notified that at a special meeting of the Board of Education held on August 2, 1932, a resolution was adopted abolishing your position as teacher at Lincoln School, and dispensing with your services as teacher in the Secaucus Public Schools, effective immediately.

You are further informed that your position was abolished and your services as teacher terminated and dispensed with as a result of adjustment of grades and in the interest of economy, in order to reduce the cost of operation of the Secaucus Public Schools.

Very truly yours,

(Signed) THOMAS C. ROONEY, [SEAL]
Secretary."

Mrs. Ruth Billings Hilbert and Mrs. Ella Robinson, who, like appellant, are admitted by the respondent to have been protected by the provisions of the Teachers' Tenure of Office Act, received similar notices, and proceeded at once to contest the dismissal action of the Board.

This testimony of the appellant, which is undisputed, is that after June, 1932, she discussed her status with Mr. Rooney, the secretary, and Mr. Huber, the president of the Board of Education. She next talked with the former by telephone during the latter part of November or December and asked if the other two teachers had been reinstated. The secretary told her that he believed they would not be reinstated but that her case was idential with theirs. On December 6, 1932, appellant prepared and presented to the secretary for certification an application to the Teachers' Pension and Annuity Fund for the withdrawal of her contributions, and it was understood by the secretary at that time that her act was not to be considered by the Board as a resignation. (It was stipulated at the hearing that this application was to have no adverse effect upon appellant's case.) About the middle of January, she again discussed her case with Mr. Huber and asked if he considered her case identical with those of Mrs. Hilbert and Mrs. Robinson, to which he replied in the affirmative and stated that if the other teachers should win their cases in the higher courts, she would also be reinstated. She again went to the president of the Board in July, 1933, after having heard that the courts had ordered the reinstatement of the other teachers, and was informed that they would not be reinstated until the higher courts had ruled upon the Seidel *vs.* Ventnor City Board of Education case which was then before the Court of Errors and Appeals and in which the facts were almost identical with those in the Hilbert and Robinson cases. She asked if she should appeal before the Board and he said "No," and that she could take his word for it, as president, that she would be reinstated if the others were. Appellant did not report at the school at its opening in September, 1932, nor at any time since the date of her dismissal. Neither did she bring a formal complaint to the local Board nor the Commissioner of Education until October 6, 1933.

In a letter under date of August 19, appellant requested from the Board of Education information about her reinstatement and received from its counsel the following reply:

"August 28, 1933.

Mrs. Edna Aeschbach
251 Palisade Ave.
Union City, N. J.

Dear Madam:

The Board of Education of Secaucus has directed me to reply to your letter of the 19.

While it is true that the Commissioner of Education has directed the reinstatement of Mrs. Hilbert and Mrs. Robinson, and this action has been affirmed by the State Board of Education the case is by no means completed. The Board is contemplating an appeal to the courts.

> I shall, of course, be pleased to give you any information as to the status of this matter from time to time until it is definitely determined. If you wish, I shall be pleased to talk over the status of this case with you.
>
> Very truly yours,
>
> (Signed) C. W. KING, JR."

It is the contention of respondent's counsel that since Mrs. Aeschbach did not file a formal appeal until October 6, 1933, she is guilty of laches, and he cites the cases of Griff *vs.* Elizabeth, Gleason *vs.* Bayonne, and Carpenter *vs.* Hackensack, the first two of which were affirmed by the State Board of Education, and the last is still before that Board. He further contends that the Board could not be bound by the unauthorized statements of its officers.

In the Griff decision, above referred to, it is to be noted that the case was dismissed upon the grounds of abandonment, and the Commissioner cited in support thereof Attorney General *vs.* Maybury, 104 N. W. Rep. 324, in which the Court said:

> "The intention to abandon an office may be inferred from the conduct of the party. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created and no judicial determination is necessary."

In the Gleason case, appellant was dismissed January 22, 1932, and did not appeal until September 15 of the succeeding fiscal year, during which time he neither indicated to the Board nor any of its officials that he intended to contest the dismissal. In Carpenter *vs.* Hackensack, appellant who was dismissed in June, gave no intimation of objection to the Board's action until the following January, when the Board was functioning under a different appropriation. In all of these cited cases, the appellants evidently considered that their dismissals were legal, and gave no indication of contesting them until seven or more months had elapsed from the time of the termination of their services. Therefore, these citations are not in point and do not control the instant case, in which the officials were consulted at frequent intervals and the Board had knowledge of appellant's expectant reinstatement.

The Commissioner concurs with respondent's counsel that unauthorized statements and acts of individual members of a board of education do not bind the board and that citizens dealing with public officials are presumed to know the limitations of their respective authority. However, officials owe a service not only to the citizens, as a group which they are elected or appointed to serve, but to the individuals of that group, who consult or complain to them upon matters incident to their offices. When appellant went to the office of the respondent for consultation with the secretary and called upon the president of the Board in reference to her dismissal, it became their duty to notify the Board of such conversations the same as if she presented written memoranda. The evidence is clear that the officials did so report and that the Board acquiesced in the statements of its president.

In the case of Stevinson *vs.* San Joaquin, etc., 162 Cal. 141, the Court, in ruling upon the effect of the action of the president of a corporation said:

> "Appellant's argument is addressed wholly to the proposition that plaintiff by his laches and delay in commencing his action after knowledge of all the facts, deprived himself of any right which he might otherwise have had to an injunction under the familiar and well settled principles declared in such cases as Fresno, etc., *vs.* B. & P., 135 Cal. 27-2.
>
> It appears that plaintiff hearing a rumor concerning an increased diversion wrote immediately to the defendant president in relation to the rumor, and received the following letter in reply: 'Dear Sir: Yours at hand and contents noted regarding as to putting in a dam in the river. It shall not be done unless I can convince you and the neighbors that it will not deprive you nor them of the quantity of water which would otherwise flow in the channel. Either myself or someone who represents me will see you regarding the above. Yours truly, Henry Miller.' Here was not only a distinct declaration from the president of the defendant that the plaintiff's rights were not to be invaded, but Mr. Miller himself testified. There was an assurance of defendant's president that no increased diversion of water was contemplated."

In deciding in favor of the plaintiff considerable stress was given in the opinion to the action of the letter of the president which was over his own signature and not in his official capacity. While the above ruling is upon the action of the president of a private corporation, it reflects the attitude of the Court toward an official who contributes to the delay of legal action against the corporation.

It is true that after appellant's dismissal she did not: Appear at the school to offer her services as a teacher; attend a meeting of the Board; during the school year 1932-33, file a formal complaint with the Board of Education nor the Commissioner of Education; however, she went to the offices of the Board of Education soon after the closing of school in June, 1932, to discuss her status with the secretary; consulted him on the telephone during the latter part of November or early in December as to whether the other teachers were reinstated; had the secretary strike out on an application for withdrawal of money from the Teachers' Pension and Annuity Fund the words indicating that she had resigned from her position; on at least two occasions discussed with the president of the Board her reinstatement if the decisions in the cases of the other teachers were favorable to them; and wrote to the Board on August 19, 1933, making further inquiry about the status of her case.

Under all the conditions involved in this case, it is the opinion of the Commissioner that the Board of Education was not justified in setting up laches as its defense in denying appellant reinstatement. It is further the opinion of the Commissioner that appellant is neither guilty of abandonment nor laches; and since teachers not protected by the Tenure of Office Act were in the employ of the Board at the time of the attempted abolition of appellant's position, she is entitled to reinstatement as of the date of her dismissal. (Seidel *vs.* Ventnor, 110 N. J. L. 31.) The Board of Education of the Town of Se-

caucus is, therefore, directed to reinstate Mrs. Aeschbach with the salary she would have received if her services had been continuous from June, 1932.

January 17, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

Edna S. Aeschbach, the respondent here and appellant before the Commissioner of Education, was employed as a teacher by the Board of Education of Secaucus, in Hudson County, in September, 1926, and continued uninterruptedly in such employment until August 2, 1932, on which date the Board of Education notified her that by resolution adopted by it, her position was abolished and her services as teacher terminated and dispensed with as a result of an adjustment of grades and in the interest of economy. At this time respondent was under the protection of the tenure of office law. Her salary was $1,700.00 per annum. At the same time the foregoing action was taken with reference to Mrs. Aeschbach, a similar resolution was adopted terminating, for the same reason, the services of two other teachers, Hilbert and Robinson, who were also protected by the tenure law. The two teachers last named promptly appealed to the Commissioner of Education, maintaining their dismissal was illegal. Their contention was sustained by the Commissioner and by the State Board of Education, and they were reinstated in their positions in October, 1933.

While the Hilbert and Robinson cases were pending, Mrs. Aeschbach had several conversations with the president and the secretary of the Board of Education regarding these cases and her own status. She had a telephone conversation with Mr. Rooney, the secretary, in November or December, 1932, and she spoke with Mr. Huber, the president, at his home, in January, and again in July, 1933. Mrs. Aeschbach says that she was told by the president of the Board that if the Hilbert and Robinson cases were decided in favor of the teachers and they were reinstated, she would also be reinstated. The president admitted he so stated.

In August, 1933, Mrs. Aeschbach learned that the appeal in the Hilbert and Robinson cases had been finally decided favorably to the teachers. She then wrote to the Board of Education that she considered these cases identical with hers and inquired what action the Board was taking regarding her. Some days later, counsel for the Board of Education replied to her letter, in its behalf, stating that an appeal was contemplated by the Board to the courts, and invited Mrs. Aeschbach to discuss the cases with him. These letters will be quoted and referred to later on. On September 11, 1933, Mrs. Aeschbach applied to the Superintendent of Schools to be assigned to work and was informed there was no position for her.

She thereupon filed her petition with the Commissioner of Education, setting forth that at the time of her dismissal, teachers who were not under tenure protection were in the employ of the Board of Education, and that her dismissal was illegal on that ground. The Board of Education, answering her petition, admitted non-tenure teachers were in the employ of the Board at

the time she was dismissed, but pleaded that her position having been abolished on August 2, 1932, and her appeal having been filed on or about September 12, 1933, she was guilty of laches, and that she had acquiesced in her dismissal.

Evidence of the parties was taken before the Assistant Commissioner of Education and briefs submitted. The Commissioner of Education held that Mrs. Aeschbach had been lulled into a sense of security by the conversations which she had with the president and the secretary of the Board of Education; that the alleged statements made by such of its officers were reported by them to the Board, which acquiesced in and became bound by them; that the Board was not justified in setting up laches as its defense; that Mrs. Aeschbach was neither guilty of abandonment nor laches, and that under authority of the case of Seidel *vs.* Ventnor, 110 N. J. L. 31, she was entitled to be reinstated, and the salary paid her which she would have received if her service had been continuous from June, 1932. From that decision the Board of Education appeals to this Board.

There having been teachers in the employ of the Board of Education, not protected by the tenure law, on August 2, 1932, when it abolished the position of respondent here, its action was clearly illegal under the rule in Seidel *vs.* Board of Education of Ventnor City, 110 N. J. L. 31. Affirmed 111 N. J. L. 240.

The sole question for decision, therefore, is whether Mrs. Aeschbach's failure to prosecute her appeal until September, 1933, prevents her from obtaining the relief which was obtained by her fellow teachers above-named.

The Commissioner's opinion states that the evidence is clear that the president and secretary reported the conversations had by them with Mrs. Aeschbach to the Board, and that it acquiesced in the statements of its president.

We do not find support for this finding in the record. There is nothing in the evidence to indicate that the president or secretary (or Mrs. Aeschbach until her letter of August 19) ever brought her case before the Board of Education. In the absence of evidence that her conversations with the officers of the Board were communicated to the Board and acquiesced in by it, we are of the opinion that their statements were not binding on the Board. They were in no sense its agents and they could not, by their promises, or by their expressions of belief as to what would be done by the Board, obligate the Board to do what they promised or believed would be done. Sooy *vs.* State, 41 N. J. Law 394, at 399. It is our opinion therefore that the petitioner was not justified in relying upon her conversations with the president and secretary of the Board of Education.

It remains to be decided whether the petitioner is estopped to obtain relief in this proceeding because of laches. The Board contends that the petitioner's delay of a year or more in filing her petition to the Commissioner for reinstatement is such laches as should bar the proceedings.

The equitable principle commonly termed "laches" has frequently been defined by the courts of New Jersey. In a recent case it was explained thus:

> "The defense of laches involves more than mere lapse of time; its essence is estoppel. It involves a combination of negligence on the part of complainant, good faith on the part of defendant, and prejudice occasioned,

or the likelihood thereof, to defendant." Oysterman's National Bank of Sayville *vs.* Edwards, 112 N. J. Eq. 148.

Vice-Chancellor Green said:

"I do not understand that *mere delay* in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations that it would be unjust to now permit him to exercise his right." Tyman *vs.* Warren, 53 N. J. Eq. 313.

To the same effect are:

Massie *vs.* Asbestos Brake Co., 95 N. J. Eq. 298, at 311.
Daggers *vs.* VanDyke, 37 N. J. Eq. 130

The opinion of a high court of a western State, quoted at length in one of the leading textbooks, expresses the doctrine more fully and is in point in the present case.

"If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the Court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances." Wilson *vs.* Wilson, 41 Or. 459. Quoted in 4 Pomeroy's Equity Jurisprudence, page 3423.

Whether or not the undisputed evidence that the petitioner brought her protest to the attention of the officers of the Board of Education and was assured by the president of the Board that if the teachers Hilbert and Robinson were reinstated she also would be reinstated, presents "peculiar circumstances entitled to consideration as excusing the delay" of the petitioner in filing her proceeding, we cannot find evidence that the Board of Education was prejudiced or that the "condition and relative positions of the parties were changed by reason of the delay in filing the formal petition to the Commissioner.

It is true that during the year which elapsed between the petitioner's discharge and the filing of her appeal, a new budget was made up and new teachers were engaged by the Board of Education, but it does not appear that the Board was influenced in any action it took in either of these particulars by the absence of appeal proceedings on the part of Mrs. Aeschbach. On the contrary, we find evidence in the record which, in our opinion, indicates that the Board was not prejudiced by any delay on the part of the petitioner. This evidence consists of two letters already referred to, which are here set forth in full.

"August 19, 1933.

Board of Education
Secaucus, N. J.
Gentlemen:

I understand that two of the teachers who had been dismissed last year have been reinstated. I consider my case identical to theirs and would like to know what action you are taking in this matter regarding myself.

Kindly inform me at your earliest convenience as I would prefer an amicable settlement in preference to litigation.

Sincerely,

(Signed) EDNA AESCHBACH."

"August 28, 1933.

Mrs. Edna Aeschbach,
251 Palisade Ave.,
Union City, N. J.

Dear Madam:

The Board of Education of Secaucus has directed me to reply to your letter of the 19th.

While it is true that the Commissioner of Education has directed the reinstatement of Mrs. Hilbert and Mrs. Robinson, and this action has been affirmed by the State Board of Education the case is by no means completed. The Board is contemplating an appeal to the courts.

I shall, of course, be pleased to give you any information as to the status of this matter from time to time until it is definitely determined. If you wish, I shall be pleased to talk over the status of this case with you.

Very truly yours,

(Signed) G. W. KING, JR."

Mr. King was counsel for the Board. It will be noticed that his letter is written by direction of the Board and that he represents it, also that while the letter is a direct answer to Mrs. Aeschbach's letter of August 19, it is not confined to her case but treats it and the cases of Mrs. Hilbert and Mrs. Robinson as part of the same "matter." Its clear implication, as it seems to us, is that the answer to her inquiry depended upon the final outcome of the Hilbert and Robinson cases. There is no indication whatever that her case was regarded as standing by itself, or that the Board up to that time believed that her failure to appeal or file a protest debarred her from reinstatement.

Subsequent to the Hilbert and Robinson appeals, the actions of the Board were of necessity taken in the face of the possibility that it might be compelled to reinstate those teachers in case of the success of their appeals to the Commissioner, and as Mrs. Aeschbach's case was, as appears from the letter of the Board's counsel above referred to, regarded and treated by the Board as

in the same condition as those two cases, it seems clear that the Board suffered no prejudice other than that resulting from its defeat in those proceedings. In other words, the absence of a formal appeal on the part of Mrs. Aeschbach did not affect the actions of the Board with respect to its budget or employment of teachers, nor as far as is shown in the record, did it cause a change in the relations or positions of the Board and Mrs. Aeschbach in any other respect.

Applying to this situation the principles of law above stated, we cannot find that the petitioner is estopped by laches to maintain her appeal, and on that ground it is recommended that this Board affirm the conclusion of the Commissioner that the petitioner be reinstated in her position with salary.

In arriving at this conclusion we have not overlooked the rule that the employees of municipalities who claim protection by virtue of tenure of office are bound to assert their claims promptly, but in our opinion the rule is not applicable to the circumstances of the present case. We might say however for the benefit of the teachers and other employees of the public school systems throughout the State that the simplest and best course for them to pursue in asserting their rights under the tenure of office statutes is to file their appeal with the employing board of education without delay and without regard to the actions of fellow employees who may be in similar circumstances. By so doing all questions of so-called laches will be eliminated.

May 12, 1934.

LEGALITY OF REFUSAL TO GRANT TEACHER'S CERTIFICATE

HELEN M. CLARK,

Appellant,

vs.

STATE BOARD OF EXAMINERS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by Miss Helen M. Clark, who had been a teacher in the public schools of Secaucus, to contest the validity of the action of the State Board of Examiners at its meeting on October 21, 1925, in refusing to make permanent the elementary certificate under which appellant had been teaching in this State since 1923. This action was taken by the State Board of Examiners after the Superintendent of Schools of Hudson County had in accordance with the rules of the State Board of Education filed with the Board of Examiners his reasons for having refused to certify as to appellant's competency and success in teaching, from which refusal of the County Superintendent appellant had appealed to the State Board of Examiners as provided by the rules above referred to.

A hearing in this case was conducted by the Commissioner of Education at Trenton on February 10, 1926, at which testimony of witnesses was heard. Since the hearing moreover a brief upon the legal points involved has been filed by counsel for the appellant.

It appears that at the same meeting, on October 21, 1925, which the State Board of Examiners fixed to consider the appeal of Miss Clark and at which the latter was present, the Board received the letter from the Superintendent of Schools of Hudson County containing his reasons for his refusal to certify to Miss Clark's competency and success in teaching, which reasons consisted chiefly of reports which had come to him of various indiscretions on the part of the teacher in question and an alleged failure on her part to meet an obligation for tuition at the New Hampshire State Normal School. It appears that thereupon after a brief discussion the Board proceeded at once to sustain the county superintendent and summarily refused to grant to the appellant the permanent teaching certificate.

Rule 7 of "Rules Concerning Teachers' Certificates" adopted by the State Board of Education provides as follows:

> "To have his certificate renewed or made permanent an applicant shall cause his county or city superintendent to file with the State Board of Examiners a testimonial of competency and success in teaching of said applicant. In case a county or city superintendent shall refuse to issue such testimonial of competency and success he shall file a statement of his reasons with the State Board of Examiners. If a county or city superintendent either refuses or omits to issue a testimonial of competency and success, the applicant may appeal to the State Board of Examiners, and the said Board may, in its discretion, renew or make permanent the certificate of the applicant."

In 18 Corpus Juris, 1134, discretion as vested in public officials is defined as follows:

> "The lawful exercise of discretion involves a fair consideration of all peculiar features of the particular question, to the disposition of which it is to be applied; it excludes not only the play of fancy or caprice, but also servile adherence to a hard and fast rule, and is confined within those limits within which an honest man competent to discharge the duties of his office ought to confine himself. * * * Discretion when vested in an officer does not mean absolute or arbitrary power. The discretion must be exercised in a reasonable manner and not maliciously, wantonly and arbitrarily to the wrong and injury of another. This is held to be the rule applicable to public officers who are bound to exercise their deliberate judgment in the discharge of their official duties."

It is the opinion of the Commissioner of Education that the State Board of Examiners in order to be deemed to have exercised a fair and sound discretion in the case under consideration should have investigated, weighed and considered the grounds upon which the Superintendent of Schools of Hudson County

defended his refusal to certify as to appellant's competency and success as a teacher, with the view of ascertaining whether such grounds were sufficient to support the conclusion reached by him and accordingly to justify the Board itself in withholding the permanent teaching certificate. The evidence shows that no such inquiry and deliberation were ever made by the State Board of Examiners in this case.

In view of these facts, namely, the failure on the part of the State Board of Examiners to exercise in this matter the fair and sound discretion which Rule 7 above quoted requires, it is hereby ordered by the Commissioner of Education that the decision of the Board adopted at its meeting on October 21, 1925, to refuse permanent certification to the appellant, Miss Helen M. Clark, be hereby set aside; and that all the parties concerned be hereby restored to the status quo of October 21, 1925, prior to the rendering of any decision by the State Board of Examiners as to the certification of appellant.

March 15, 1926.

DECISION OF THE STATE BOARD OF EDUCATION

The appellant, who was a teacher in the public schools of Secaucus in Hudson County, appeals from a decision of the Commissioner ordering that a decision of the Board of Examiners refusing permanent certification to her be set aside and that all parties be restored to the *statu quo* existing prior to the Board of Examiners' decision which was rendered on October 21, 1925. It appears from the record and the Commissioner's decision that after the Superintendent of Schools of Hudson County had, in accordance with the rules of this Board, filed with the Board of Examiners his reasons for refusing to certify to the appellant's competency and success in teaching from which refusal she had appealed to the Board of Examiners, that Board refused to make permanent the elementary certificate upon which the appellant had been teaching in this State since 1923. This action of the Board of Examiners was summarily taken after a brief discussion of the County Superintendent's recommendation and without any further investigation of the facts. The Commissioner has ruled that the Board of Examiners should have "investigated, weighed and considered the grounds on which the Superintendent of Schools in Hudson County refused the appellant a certificate." We think he was right in so doing and in directing, as he has done in effect, that the matter be reopened for investigation and decision by the State Board of Examiners in conformity with Rule 7 of this Board. We therefore recommend that his opinion be affirmed.

June 5, 1926.

DECISION OF THE SUPREME COURT

We do not think relator is entitled to a mandamus, particularly at the present stage.

Her rights are to be determined in view of the rules promulgated by the State Board of Education by authority of the School Law.

Relator graduated at a normal school in New Hampshire, and obtained a temporary license to teach in the public schools of this State. Under the

rules, this might be made permanent after two years' service, on filing with the State Board of Examiners a testimonial of competency and success from the County Superintendent of Schools. This latter could grant or refuse such testimonial; in the latter case he was required to file with the State Board of Examiners a statement of his reasons for so refusing. He did refuse, and filed the statement. The rules provide that the applicant may appeal to the State Board of Examiners and that Board, "may in its discretion renew or make permanent the certificate of the applicant." She appealed accordingly, and that Board, for reasons satisfactory to them, declined to make the certificate permanent. She appealed to the Commissioner of Education and, after producing evidence as to what had taken place before the State Board of Examiners, her counsel asked the Commissioner of Education to rehear the main case on the merits to the end that if satisfied of her qualifications, he award a permanent certificate. He refused to go into the general merits of the case, and decided that the application should be sent back to the State Board of Examiners for a rehearing. Relator then appealed from this decision to the State Board of Education which affirmed the action of the Commissioner.

In this posture of affairs we are asked to mandamus the examiners to award a permanent certificate as though relator had had the full hearing of which she was apparently deprived, and as though she had proved a bona fide case before the examiners which would make it an abuse of discretion on their part to refuse a certificate. This would be tantamount to awarding her a judgment when she was entitled to nothing more than a new trial, or perhaps a hearing *de novo* on appeal, though we have not gone particularly into this phase of the case. It may be that the decisions of the Commissioner and the State Board of Education could be attacked on certiorari; but that is not this case. As the matter stands, we are clear that relator is not entitled to the relief sought herein. The rule to show cause is, therefore, discharged, with costs.

January 25, 1927.

DISMISSAL OF TEACHER BECAUSE OF LACK OF CERTIFICATE

MILDRED MCAULEY,

Appellant,

vs.

THE BOARD OF EDUCATION OF PROSPECT PARK,

Respondent.

Henry Marelli, for the Appellant.
J. W. DeYoe, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is an appeal taken by Miss Mildred McAuley from the action of the Board of Education of Prospect Park in dismissing her, in January, 1914, as teacher in its schools. The appeal was filed with the Commissioner of

Education on May 26, 1915. A hearing was held in the city of Paterson on September 15, 1915. At this hearing the following facts developed:

Mildred McAuley began teaching in the Prospect Park schools in September, 1907, and served in the schools continuously until the time of her dismissal. She held at first a third grade county teacher's certificate, and obtained in June, 1910, a second grade county teacher's certificate, which expired in June, 1915.

In April, 1913, just previous to the expiration of her second grade county certificate, she attended the examination and took two subjects, general history and drawing, which entitled her, so far as the examination goes, to an elementary limited certificate, and also entitled her to a renewal of her second grade certificate. Under the rules governing examinations for limited elementary certificates it is necessary to file with the county superintendent a physician's certificate stating as to the general health of the applicant, and also a testimonial as to moral character. The rule further states that in case of previous experience as a teacher a testimonial as to success in teaching shall also be filed.

At the hearing evidence was given by the appellant to the effect that she attended the April examination, took general history and drawing, and filed with the attendant at the examination a health certificate and a testimonial as to her character. In June following the examination, as shown by the testimony, Miss McAuley received notice that she had successfully passed her examination in the two subjects which she had taken in April. Some time in the fall Miss McAuley wrote to the State Board of Examiners making inquiry in regard to her certificate. She was referred to the county superintendent, Mr. Edward W. Garrison. Mr. Garrison had informed her that she must obtain a recommendation from the Board of Education in order to obtain a certificate. The appellant delayed making a formal request for this recommendation until December, 1913. The Board acted upon this request on December 26, 1913, refusing to give Miss McAuley a recommendation. On January 5, 1914, the Board of Education at a meeting passed the following resolutions dismissing Miss McAuley from service as a teacher:

> "WHEREAS, For a long time the Board of Education has been dissatisfied with the work of Miss Mildred McAuley as teacher in Prospect Park school; and
>
> "WHEREAS, Miss McAuley's certificate has expired and can not be renewed or a new one granted without the recommendation of this Board; and
>
> "WHEREAS, The Board of Education, by a majority vote on December 26, 1913, refused to furnish said recommendation, the said Mildred McAuley is not legally licensed to teach in the schools of New Jersey;
>
> *"Therefore, be it resolved,* That her position be and hereby is declared vacant, and *be it further resolved* that the teachers' committee, together with the principal, be and hereby are authorized to procure a person with the proper credentials, as provided by law, to fill such vacancy.
>
> *"Be it further resolved,* That a copy of these resolutions be forwarded to the county superintendent of schools of the county of Passaic, and that a copy also be forwarded to the principal of Prospect Park School No. 1 of the borough of Prospect Park."

It will be noted in the recital of the resolution of dismissal that it is done because Miss McAuley did not have a legal teacher's certificate as required by law. It is also set forth in the recital of the resolutions that "the Board of Education has been dissatisfied with the work of Miss Mildred McAuley as teacher in Prospect Park School." This was given as a just cause for dismissal, as well as the fact that Miss McAuley did not possess at that time a teacher's certificate in full force and effect.

At a meeting of the Board of Education on June 11, 1914, the Board ordered that the district clerk write a recommendation for Miss McAuley. The district clerk, who is not a member of the Board and was not present at the meeting, declined to write the recommendation because he said he did not know how to do it. The Board of Education, at its meeting July 14 following rescinded its resolution ordering the district clerk to write a recommendation for the appellant.

It appears from the foregoing that there are two questions involved in this case.

First. Is it required by the rules governing the licensing of teachers that a recommendation as to the success of a teacher shall be given by the employing board of education? I find nowhere in the rules that there is any such requirement made for the obtaining of a limited elementary certificate or any other kind of certificate. The Board, therefore, erred in assuming that a recommendation given by it was necessary to the procuring of Miss McAuley's certificate.

Rule 6 of the State Board of Education, governing the issuing of certificates, is as follows:

> "Certificates in force July 1, 1911, and June 14, 1913, shall be renewed, upon application, by the State Board of Examiners, but shall be valid only as originally issued; provided, that in renewing or making permanent such certificates the State Board of Examiners shall be governed by the rules in force at the time the certificates were originally granted."

The appellant in this case held a second grade certificate in force on July 1, 1911. The rules for renewing a second grade certificate in force at that time provided that an examination in any two subjects of a higher grade entitled the applicant to a renewal of a second grade certificate. Miss McAuley took the two necessary subjects at the April examination and successfully passed them, and this met the law as it existed at the time her second grade certificate was in force. The rules at that time nowhere provided that letters of recommendation must be obtained from the Board of Education employing the applicant. I am therefore clearly of the opinion that the appellant was, upon application, entitled to a renewal of her second grade certificate which expired in June, 1913.

As to the limited elementary certificate for which the appellant applied this, under the rules, requires a testimonial as to success in teaching, obtained from any reliable authority. This is in addition to passing the required examination. Miss McAuley furnished a testimonial as to character and a medical certificate stating as to her general health, but has not filed a testimonial as to her success

in teaching. Until this is done, under the rules. she is not entitled to a limited elementary State certificate.

The second question. Did the Board act illegally in dismissing the appellant, who was protected under the tenure of service act, without first preferring charges and giving her opportunity to answer? Miss McAuley did not have, at the time of her dismissal, a teacher's certificate in full force and effect in her possession, and this in itself would seem to justify the Board of Education in dismissing her under the law. It must, however, be considered that the reason that the certificate was withheld was because of the action of the Board of Education in refusing to give her a recommendation as to her success in teaching. The Board, in the dismissal resolution, says, "Miss McAuley's certificate has expired and cannot be renewed or a new one granted without the recommendation of this Board."

This is an assumption of power over granting certificates that has no justification in the laws or rules governing the certificating of teachers. The State Board of Examiners, the proper body for granting certificates, had not finally passed on the question. Hence it did not lie with the Board of Education to revoke all certificate privileges and say that the appellant could not get a certificate because the Board would not give her a recommendation. If this were the law, then boards of education would have the power of revoking arbitrarily hundreds of certificates coming up for renewal in this State.

The Board of Education dismissed Miss McAuley because she had no certificate in her possession. She had no certificate because the Board had convicted her of inefficiency without trial in that they had refused to grant her a recommendation as to her success as a teacher.

I am therefore of the opinion that the appellant was dismissed in clear violation of the provisions of the teachers' tenure of service act and of her contractual rights as a teacher in the schools of the borough of Prospect Park.

December 2, 1915.

Decision of the State Board of Education

The respondent in this case seems to have taught in the Prospect Park school since September, 1907, and to have continued to teach until her dismissal, January 5, 1914. She held at first a third grade county teacher's certificate, then a second grade county teacher's certificate, the latter expiring in June, 1913. Just before the expiration of the latter certificate—that is, in April, 1913—she tried to secure an elementary limited certificate. She succeeded in complying with the rules governing examinations for limited certificates in three respects, namely, passing an examination in general history and drawing, filing a physician's certificate of good general health, filing a testimonial as to good moral character. But there was a fourth requirement under the rules, that a teacher having previous experience should furnish *"testimonials* as to his or her success in teaching, and shall also present a written statement giving the places in which he or she has taught, and terms of service in each." This fourth requirement was not fulfilled by the respondent, and in consequence thereof no certificate was issued to her, and when she was dismissed January 5, 1914, she held no certificate entitling her to teach.

It seems that she made application to the appellant, the Board of Education of Prospect Park, for a testimonial of success in teaching, but the appellant refused to grant the application because the respondent's teaching had not been satisfactory. The respondent thereupon put the blame of having no certificate upon the Board of Education. But the Board of Education, the appellant, was under no obligation to give a testimonial, and if the services of the respondent were unsatisfactory the Board was in duty bound to decline to certify to the success of her services. There is no rule or law requiring the respondent to get a testimonial only from the Board she was serving—that is, the Board of Education of Prospect Park. She could have obtained it from anyone who knew anything about her teaching. This she did not do. That she was ignorant of the rules and took advice from the wrong people is unfortunate and regrettable, but cannot be accepted as an excuse.

It seems further that the passing of the examinations in general history and drawing would have entitled the respondent to a renewal of her second grade certificate, as the Commissioner in his opinion has pointed out. But here again there appears to have been negligence or oversight or bad judgment on the respondent's part, for which she alone must be held responsible. Rule 6 of the State Board of Education states:

> "Certificates in force July 1, 1911, and June 14, 1913, shall be renewed, *upon application,* by the State Board of Examiners, but shall be valid only as originally issued; provided, that in renewing or making permanent such certificates the State Board of Examiners shall be governed by the rules in force at the time the certificates were originally granted."

The respondent could have gotten a renewal of her second grade certificate "upon application" but she did not apply, and therefore did not get it.

The glaring fact that protrudes itself is that the respondent at the time of her dismissal had no teacher's certificate of any kind. It was her affair, her business to see to it that she had a certificate. Not having it she was not under the tenure of service act, and the Board of Education was not only justified in dismissing her in January, 1914, but should not have employed her or paid her after the expiration of her second grade county teacher's certificate in June, 1913. From that time on she was not entitled to teach in the public schools of New Jersey.

The decision of the Commissioner is reversed.

May 6, 1916.

INCIDENTAL ABSENCE AND TEACHER'S TENURE NOT AFFECTED BY EMPLOYMENT AS SUBSTITUTE

MARGARET M. WALL,

Petitioner,

vs.

BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,

Respondent.

For the Petitioner, William C. Wall.

For the Respondent, Aloysius McMahon.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner is the holder of a bachelor of arts degree and a New Jersey State Permanent Secondary Certificate dated July 1, 1930. She was employed by the respondent as a substitute to teach mathematics in its high school for the entire summer sessions during the years 1930 to 1932 inclusive, in the evening high school from October to March during 1931 and 1932, and in the regular day school at intervals for forty-eight and one-half days from September, 1930, to June, 1931.

On September 17, 1931, the Board of Education of Jersey City adopted the following resolutions:

> *"Resolved,* That the following named persons be and they are hereby employed as substitute teachers in the positions herein designated and are assigned to the schools herein indicated at the monthly salary herein fixed when employed, these employments to be effective on September 22, 1931, and to be subject to such further acts as the board of education may direct. Dickinson High—$8.00 per day when employed—Madeline Bennett, Mathematics, etc., Margaret Wall, Mathematics."

On September 1, 1932, the minutes show the following:

> *"Resolved,* That the following named persons be and they are hereby employed in the position of substitute teacher and are assigned to the schools herein indicated at compensation of $8.00 per day when employed, these employments to be effective September 7, 1932, and to be subject to such further acts as the board of education may direct. Madeline Bennett, Mathematics, etc., Margaret Wall, Mathematics."

On August 29, 1933, February 3, 1934, June 21, 1934, and February 7, 1935, resolutions were adopted similar to that of September 1, 1932, by which appointments were made at a rate of $6.00 per day; and while there is no resolution showing employment from September, 1935, to January, 1936, it is admitted by

the respondent that petitioner worked during that period as a substitute at $6.00 per day when employed. It is to be noted that while the word "monthly" appears in the resolution of September 17, 1931, it does not appear in any subsequent resolution of the other employments, all of which were on a per diem basis.

Miss Wall was absent the entire days of June 8 and 17, 1932, September 15, 1933, September 14, 1934, June 13 and 14, 1935. She was also absent for three and one-half hours on November 19, 1934. Her absences on the days designated were due to illness, to taking of examinations, and to attendance at a college commencement, except on June 13 and 14, 1935, when she was requested to absent herself for the avowed purpose of breaking the continuity of her service in order to avoid the protection of the Teachers' Tenure of Office Act. She remained away on these days without protest. The assistant superintendent testified that it was the policy of the Board of Education to break the continuity of service of substitute teachers with the deliberate purpose of preventing them from securing tenure protection. Petitioner was not paid for these times that she was absent nor for holidays or vacation periods for which payment is prescribed by the rules for teachers who hold the city certificates.

The petitioner in September of the years 1934 and 1935 took examinations in the subject which she was teaching in order to qualify for a city certificate, as required by the rules of the Board. Rule 32, which was adopted in the year 1900 and which has been in effect ever since, except for minor changes which do not apply to high school teachers, reads as follows:

> "No person shall be appointed a kindergarten, an assistant teacher, head assistant teacher, vice-principal, principal of the department or school or supervisor, unless such appointee shall at the time of his or her appointment possess a proper certificate or license to teach, granted by the Board of Examiners as required by these rules; provided, that any person who on May 24, 1900, occupied any position above mentioned shall be regarded as holding certificate required by these rules for such position."

The rule in reference to high school substitutes provides that the superintendent shall keep a file of the persons eligible to act as substitutes in the high school and that a graduate from an approved college may be placed on this list of substitute teachers by a majority vote of the board of education; provided, such graduate holds at least a New Jersey Limited Secondary Certificate or some other New Jersey certificate of eligibility for the position; and provided, that such graduate has been a bona fide resident of Jersey City for two years, the names of substitutes to be grouped in the order of the school year in which the application was made, and within each group the substitutes are to be ranked according to their success in teaching. Each person who has been placed on the list of high school substitutes shall as soon as he or she has attained three years' experience in teaching or supervision, submit to the first examination given thereafter by the Jersey City Board of Examiners in his or her special field. In case of failure to obtain a certificate issued by the Jersey City Board of Examiners after two examinations in those fields have been offered, he or she shall be placed at the end of the list of substitutes at the beginning of the term following the second examination offered.

The petitioner failed in each of the examinations and the superintendent on January 22, 1936, notified her of the termination of her substitute work in a letter dated January 31, 1936, which reads:

> "I regret to inform you that, in accordance with the rules of the Board, your place on the list of substitutes has been changed. You will therefore not be assigned to steady employment during the coming term."

On or about January 30, 1936, the petitioner demanded a regular assignment as teacher of mathematics in a Jersey City high school, which demand was refused. She thereafter filed a petition with the Commissioner of Education, alleging that on September 1, 1934, she came under the protection of the Teachers' Tenure of Office Act and was, accordingly, entitled to a minimum salary of $2,200.00 per annum, and asking that the discontinuance of her teaching services in January, 1936, be declared illegal, and further that the Board be required to reinstate her as a teacher at a salary of $2,400.00 per annum and to make payment of the difference between the amount that she received as a substitute since September 1, 1934, and that which she would have received if she had at that time been placed upon a salary of $2,400.00 per year.

Petitioner was employed as a substitute teacher and it is admitted that a number of others similarly qualified were employed in the type of work which she was performing who have less service credit in the district. Accordingly, if the petitioner is protected under the Tenure of Office Act, she has a prior right to a position over such other teachers. Seidel *vs.* Ventnor City, 110 N. J. L. 31, and 111 N. J. L. 240.

The word "substitute" does not describe adequately the type of employment of petitioner and possibly a hundred others similarly employed by the Jersey City Board of Education. It denotes one put in the place of another, or one acting for or taking the place of another. The petitioner and other so-called substitutes were not acting in place of teachers who were absent, but were assigned to positions in practically the same manner as teachers under tenure in the school system. A "substitute" in the Jersey City schools serves as a probationer. She must possess basic qualifications for teaching in the State, and in addition is required to have a certain amount of experience and pass examinations before the board considers her to be eligible to receive pay under the salary schedule or to receive tenure credit accorded those who have met the Jersey City requirements.

The Jersey City Board of Education has authority under section 31, chapter 1, P. L. 1903, S. S., to make rules demanding further qualifications for teaching than these prescribed by the State Board of Education, but if in contravention of its own rules it employs a teacher qualified with a State certificate for a term sufficient to acquire tenure under chapter 243, P. L. 1909, such teacher would be entitled to the protection of that act so long as positions of that type continue to exist in the school system. Waters *vs.* Newark Board of Education, 1932 Compilation of School Law Decisions, 804. Therefore, even if petitioner could be held to be protected in her position as a probationary teacher, she would be entitled only to that salary which she received as such, which is $6.00 per day

for the actual days she teaches, and not to a per annum salary as provided for those who have qualified for a Jersey City teacher's certificate.

The Tenure of Office Act provides protection

> "* * * after the expiration of a period of *employment of three consecutive calendar years* in that district unless a shorter period is fixed by the employing board; or after *employment for three consecutive academic years* together with employment at the beginning of the next succeeding academic year; * * *"

It appears to have been the purpose of the Jersey City Board of Education to so employ substitute teachers that they may not acquire tenure nor render service to count toward tenure protection until after they secure Jersey City teachers' certificates. To accomplish this purpose, it made the employment of substitutes not for academic or calendar years, but on a per diem basis, evidently with the belief that any day upon which a teacher was absent without pay broke the continuity of employment; and to further assure a hiatus, the Board not only refused to consider a substitute teacher as being employed when she was absent from school upon her own volition, but required the teacher to discontinue service on certain days with mutual knowledge that such absence was to break the continuity of service in order that tenure rights would not accrue.

While, as contemplated by the provisions of the tenure act, duly qualified teachers should be employed by the academic or calendar year in order that they may have protection if their services are satisfactory to the board, it cannot be held to be an illegal evasion of the tenure law if a city board employs probationary teachers or substitutes who have not met the professional and service requirements for the city certificates on a basis which will prevent tenure from accruing.

Tenure protection after a prescribed employment period is provided by statute as a matter of public policy for the welfare of the schools. A teacher cannot demand such protection even though she gives satisfactory service, if for any reason the board of education decides to discontinue her services prior to the protection becoming effective. If a board offers irregular employment so that the continuity of service is broken before the time when tenure protection would otherwise accrue, and the teacher accepts such employment, or if the teacher legally resigns so that the necessary continuity of service is broken, it would appear that the tenure act has been legally evaded and that such act is not against public policy. The Supreme Court in the case of Chalmers *vs.* State Board of Education, 11 N. J. Misc. Rep. 781, in ruling upon the question of public policy where a teacher resigned two days before the close of the third academic year in order to break the continuity of service so that tenure might be evaded, held:

> "It is clear that prosecutrix obtained no tenure rights until 'after the expiration of a period of employment of three consecutive years.' Therefore, having, by her own act, terminated the service before she became entitled to such rights, we are not dealing with a situation where an effort

> is made to avoid recognition of an existing right. It was within the competence of either party to terminate the service before the right had been acquired, and prosecutrix conceded this would be lawful. This is what was done in the instant case. The statutory right of tenure never having been acquired, the objection of the prosecutrix is without merit. Carroll *vs.* State Board of Education, 8 N. J. Misc. Rep. 859."

In accordance with this ruling of the Supreme Court, it was legal for the Board of Education to regulate the terms of employment of the petitioner so as to prevent her from coming under the protection of the Tenure of Office Act.

Miss Wall claims tenure as of September 1, 1934; yet, when she was told to absent herself on June 13 and 14, 1935, for the purpose of avoiding the application of the provisions of the Teachers' Tenure of Office Act, she complied with the instruction without protest. Petitioner cannot in May, 1936, come into court and claim a right to a higher salary as of September 1, 1934, after accepting a smaller per diem pay until January, 1936. Neither can she in May, 1936, protest the action of the Board requiring her absence on June 13 and 14, 1935. Such delay constitutes laches. Glori *vs.* Board of Police Commissioners of Newark, 72 N. J. L. 131; People ex rel. Connolly *vs.* Board of Education, 144 N. Y. App. Div. 1.

Petitioner has not been employed in Jersey City for "three consecutive calendar years" nor for "three consecutive academic years together with employment at the beginning of the next succeeding year." Even her per diem employment during the days the schools were in session was interrupted by voluntary absences and others required by the Board. Miss Wall has no valid claim to tenure protection either as a regular teacher or as a substitute teacher in the schools of Jersey City. The appeal is dismissed.

November 9, 1936.

Decision of the State Board of Education

It appears in this case that the appellant, Margaret M. Wall, who possessed a New Jersey State permanent secondary certificate to teach, was employed by the Jersey City Board of Education as a so-called "substitute" teacher of mathematics in the Board's high schools, from September, 1931, to January, 1936, continuously. Her compensation was fixed by resolution of the Board at $8.00 per day in 1931 and 1932, and thereafter was at the rate of $6.00 per day. She was assigned to the Dickinson High School and taught a mathematics class there continuously for three and one-half years. In February of 1935 she was transferred to another high school, where she taught a class until January, 1936, when she was informed by a letter from the Superintendent of Schools that she would "not be assigned to steady employment during the coming term." On February 3, 1936, Miss Wall presented herself at the office of the superintendent ready for duty but was refused assignment and had been paid no salary since on or about February 1, 1936.

She brought this proceeding to set aside the action of the Board of Education in dispensing with her services and to compel it to pay her "the difference

in salary ordinarily paid a permanent teacher in the Jersey City High School" and that paid the appellant for the period commencing September 1, 1934, to date, approximately the sum of $2,500.00. This last demand is made on the theory, as we understand it, that on September 1, 1934 she has acquired tenure, and was therefore a permanent teacher and entitled to be paid as such.

The Commissioner held that she had no valid claim to tenure protection and dismissed her petition. From that decision she has appealed to this Board.

For a considerable period the Jersey City Board of Education has employed a large number of teachers who are termed "substitutes" but who are in reality assigned to steady employment. The practice of the Board with respect to them and its purpose are accurately described in the following extract from the Commissioner's opinion:

> "It appears to have been the purpose of the Jersey City Board of Education to so employ substitute teachers that they may not acquire tenure nor render service to count toward tenure protection until after they secure Jersey City teachers' certificates. To accomplish this purpose, it made the employment of substitutes not for academic or calendar years, but on a per diem basis, evidently with the belief that any day upon which a teacher was absent without pay broke the continuity of employment, and to further assure a hiatus, the Board not only refused to consider a substitute teacher as being employed when she was absent from school upon her own volition, but required the teacher to discontinue service on certain days with mutual knowledge that such absence was to break the continuity of service in order that tenure rights would not accrue."

This controversy arises because the practice above described was followed in the case of the appellant.

It is a misnomer to apply the name "substitute" to teachers who are steadily employed. We agree with the following statement in the Commissioner's opinion:

> "The word 'substitute' does not describe adequately the type of employment of petitioner and possibly a hundred others similarly employed by the Jersey City Board of Education. It denotes one put in the place of another, or one acting for or taking the place of another. The petitioner and other so-called substitutes were not acting in place of teachers who were absent, but were assigned to positions in practically the same manner as teachers under tenure in the school system. A 'substitute' in the Jersey City schools serves as a probationer. She must possess basic qualifications for teaching in the State, and in addition is required to have a certain amount of experience and pass examinations before the Board considers her to be eligible to receive pay under the salary schedule or to receive tenure credit accorded those who have met the Jersey City requirements."

Miss Shanley, the Assistant Superintendent of Schools, testified as follows in answer to questions of the counsel of the Board:

> "Q. Miss Shanley, is it the policy of the Board of Education to break tenure of teachers employed as substitutes?
> "A. It is.
> "Q. And has the tenure of substitutes been broken with the deliberate purpose of preventing them from getting tenure?
> "A. Yes."

At the argument of this case before the Law Committee, the Board's counsel likewise stated, with commendable frankness, that the Board had adopted its policy of payment of the so-called "substitutes" at a daily rate and requiring them to remain absent a few days, for the express purpose of avoiding the Tenure of Service Act. Also he expressed the opinion in answer to questions from members of the committee, that any board in the State could avoid the Act by adopting the same practice.

The question presented for decision is whether in the light of the facts and circumstances above stated the appellant had acquired tenure at the time she was refused an assignment to teach. If she had, she is entitled to be reinstated, for no charges were preferred against her.

Preliminarily to the consideration of the grounds upon which the Board justifies its action, it is desirable to note carefully the terms of the Tenure of Office statute. Its pertinent provisions are as follows (as amended by the Act approved February 13, 1935):

> "The services of all teachers * * * shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive calendar years in that district * * *; or after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year * * *. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, *and* after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charge shall have been examined into and found true in fact by said board of education * * *."

Miss Wall had received employment for three consecutive school years at the end of the school year in June, 1934, and was given "employment at the beginning of the next succeeding academic year," which was in September, 1934. It follows that she had acquired tenure of office under the statute unless her service was so interrupted that it did not continue for "three consecutive academic years." The Board maintains, and the Commissioner, as we understand him, has held that there was such an interruption.

The basis asserted for this holding is that she was absent on June 8 and 17, 1932; September 15, 1933; September 14, 1934; June 13 and 14, 1935. At least one of her absences was due to illness, for which she was excused by

the proper authority. The others were due to her examinations required by the Board of Education and to attendance at a college commencement which, also, was with permission. The absences on June 13 and 14, 1935, were at the direction of some one in the superintendent's office, in pursuance of the practice above described. It will be observed, however, that at the date of these absences the three-year period preliminary to tenure had already expired, since at that time she had served three academic years and had been engaged for the fourth year. In our opinion, absence for such a short time and under the circumstances above stated is not such an interruption as to enable us to say that the appellant was not employed for three consecutive academic years. We know of no principle or precedent which requires such a ruling. To say that a teacher has not served three academic years because she has been absent four or five days during that period is to take a position so narrow and technical as to defeat the purpose of the statute. Many teachers of the State who have served the required three-year period and believed themselves protected by the tenure statute, might lose that protection if the Act can be so interpreted. Illness, family bereavement, and other legitimate causes for absence are frequent occurrences and have not heretofore been regarded, as far as we are aware, as ground for avoiding the statute.

The Board of Education says further however, and we understand the Commissioner to agree, that since the appellant—and the other so-called "substitute" teachers—were paid at a daily rate and not at a regular yearly or monthly salary, as in the case of those termed "permanent" teachers, this short absence is sufficient to break the tenure period. In our opinion this is error. The statute is silent as to the rate or method of payment. It simply requires "employment" for the period stated. The appellant was certainly "employed" during the period of her teaching in Jersey City. She taught the same classes in the high schools through the years of her employment. That she was paid at a per diem rate instead of by the month or the year does not change the fact that she had regular, continuous employment. The letter of the superintendent confirms this when it states that she will not be assigned to "steady employment," that is, such employment as she had theretofore.

It is urged by the Board of Education that the failure of the applicant to pass two examinations required pursuant to a rule of the Board, justified them in placing her name at the bottom of the list of the so-called "substitutes" so that others who preceded her in standing on the list received assignment to the teaching positions which were open. Pursuant to the rule of the Board with respect to substitute teachers the appellant, in September, 1934, and September, 1935, took examinations in the subject in which she was teaching in order to qualify for a city certificate. She failed in each examination, but in accordance with the practice customarily followed under the rule above referred to, no action was taken by the Board until the beginning of the next term subsequent to her second failure, that is, about February 1, 1936. It will be observed that at least one of these examinations was taken *after* the expiration of the tenure period, viz., September, 1934. Assuming that it was the intention of the Board of Education to provide a probationary period of its own, it could not by so doing prevent the operation of the tenure statute

applicable to all teachers in the State. (See Nommensen *vs.* Hoboken Board of Education, School Law Decisions, 1928, page 166.) The Commissioner correctly states that the Board had authority "to make rules demanding further qualifications for teaching than those prescribed by the State Board of Education, but if in contravention of its rules it employs a teacher qualified with a State certificate for a term sufficient to acquire tenure" under the statute such teacher is "entitled to the protection of that Act so long as positions of that type continue to exist in the school system."

The Commissioner says in his opinion that "it cannot be held to be an illegal evasion of the tenure law if a city board employs probationary teachers or substitutes who have not met the professional and service requirements for the city certificates on a basis which will prevent tenure from accruing." But the *statute* provides a certain probationary period during which boards of education may determine whether the work of the teacher is of a character to induce it to employ her beyond that period.

They cannot, in our opinion, "legally evade" the statute—to use the words of the Commissioner—by providing for a further probationary period.

The appellant's tenure protection became effective, as we have above held, in September, 1934. It was necessary for the Board to determine by that date whether it would or would not continue the appellant's employment. Until then it had every right to require examinations and whatever standards it chose to set and demote her if it saw fit, but the only way that it could *thereafter* refuse the appellant the right to teach in the Jersey City schools was by the particular method prescribed in the statute, namely, preferring charges against her.

The tenure of office statute was enacted for what the Legislature believed to be the good of the schools of the State. It has been upheld by the courts, as well as by this Board, in numerous decisions. It has been amended in the interest of the teachers, thus indicating that the Legislature believes it to be beneficent legislation. We think that under these circumstances, it should be construed liberally and not be "avoidable" or "evadable" by resort to technical positions. It seems to us that to say that a few days absence from a position paid for on a per diem basis by a teacher steadily employed for four or more academic years, though she is termed a "substitute," is to state a narrow, illiberal ground for avoidance of the statute.

The appellant was a teacher, duly certified by the State authorities. That she was so regarded by the Board of Education appears not only from the fact that she was steadily employed for a long period but also from the circumstances—not controlling but of significance—that she was included in the list of high school teachers reported to the County Superintendent of Schools for the purpose of receiving the $400 appropriation of the State for each teacher of that character. The Board is entitled under the statute to receive that amount only for a "permanent teacher." (School Laws, Edition of 1931, page 192.) This confirms our belief and finding that though the appellant was termed a "substitute," her regular continuous teaching of the same classes in the same schools for over three years made her in fact a regular steadily employed teacher regardless of the terms used to describe her position. It is

the actual realities of the situation which count, not the words used to describe them.

Nor can we agree that the appellant's submission without protest to the instructions of her superiors that she absent herself on June 13 and 14, 1935, was a waiver of her right to employment under the statute. At that date she was possessed of tenure and, even if she knew the Board's practice and failed to protest against the instruction, that would not, in our opinion, amount to such a waiver.

The cases of Waters *vs.* Newark Board and Chalmers *vs.* State Board of Education cited by the Commissioner have received our attention. The facts there present were quite different from those now presented to us and in our opinion these decisions do not apply to the present case.

In accordance with the above, it is recommended that the Commissioner's opinion be reversed so far as it denies the appellant's right to tenure, and that the case be remanded to the Commissioner with instructions that he direct the Jersey City Board of Education to assign the appellant to duty in its schools and to pay her salary for the period beginning February 1, 1936, at the rate of compensation she was receiving prior to that date. We agree with the Commissioner that she is not entitled to the higher salary prayed for in her petition.

May 1, 1937.

SPECIAL SUBSTITUTE TEACHERS NOT PROTECTED BY TENURE OF OFFICE ACT

STELLA C. WATERS,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant, Stella C. Waters, applied for employment as a substitute teacher in the school system of the city of Newark, and on May 3, 1924, was given by the respondent's Board of Examiners, a certificate qualifying her for substitute teaching in that city. From the date of the receipt of said certificate down to February 1, 1928, appellant served as substitute in the Newark school system in positions designated by the superintendent of schools. The payment for services during this time was not on the basis of annual salaries but per diem for service during each school month. On January 28, 1928, appellant was notified to report for a term of substitute service beginning February 1, 1928,

and continuing for the remainder of that school year. She was subsequently designated substitute teacher to serve yearly appointments beginning September 1, 1928, September 1, 1929, and September 1, 1930. On May 20, 1931, respondent notified appellant that she would not be employed during the school year 1931-1932.

Mrs. Waters served continuously as substitute teacher in respondent's system from February 1, 1928, to June 30, 1931, under semi-annual or annual appointments. These employments were to fill positions made vacant for those years because of leaves of absence granted to the regular teachers. At no time during the continuance of petitioner's services was she the holder of a valid State certificate. The only certificate which may be presumed to qualify her for teaching was the certificate issued for substitute teaching by the Newark Board of Examiners during May, 1924. It was not until September, 1931, that appellant secured a New Jersey State Teachers' Certificate.

Appellant seeks to compel respondent to reinstate her as a substitute teacher and pay her salary, claiming that by reason of more than three years of continuous service as substitute teacher she is under tenure and cannot be dismissed except as provided in Chapter 243, P. L. 1909, the Teachers' Tenure of Office Act.

In attempting to show that the certificate held by Mrs. Waters is valid for the position to which she claims tenure, counsel for appellant cites Chapter 364, P. L. 1912: "In each city school district there may be a board of examiners * * * . Said board of examiners shall, under such rules and regulations as the State Board of Education shall prescribe, grant certificates to teach which shall be valid for all schools of such school district."

We agree with counsel that the Board of Examiners of the school district had a right to grant certificates under the rules prescribed by the State Board of Education. The certificate given by the Board of Examiners to Mrs. Waters was, however, not the kind of certificate issued to permanent teachers in the city but one which qualified her for daily substitute teaching only, and while the Board of Education evidently accepted the certificate for annual substitute employment from February 1, 1928, to June 30, 1931, there is no evidence to show that it legally qualified appellant for annual employments. The testimony also fails to disclose that the certificate given to her for daily substitute work has been renewed to constitute a valid certificate for that type of work at the time of the hearing in this case.

Section 3 of Chapter 243, P. L. 1909 reads in part as follows:

> "the services of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect."

It is the opinion of the Commissioner of Education that appellant did not, at the close of the school year, June 30, 1931, hold a valid certificate for a permanent position. The boardest interpretation that can be given to the certificate held by the appellant is that it qualified for temporary substitute teaching, which

is not classified as a permanent position and therefore the certificate was for a position not protected by the provisions of the Tenure of Office Act.

A regular substitute under full time employment, who serves more than three consecutive years has tenure rights as long as the Board continues the services of full time substitutes. The evidence in this case shows that the Newark Board of Education does not employ general substitutes on annual salaries. Mrs. Waters was appointed during the three and one-half years preceding the termination of her services, for particular substitute work. When the regular teachers for whom she was appointed to substitute returned, the substitute positions for the respective terms were automatically abolished and her services as special substitute thereby terminated.

Appellant has never been employed as a full time general substitute and the positions in which she served between February 1, 1928, and June 30, 1931, have ceased to exist, and since on June 30, 1931 she held no permanent position she is, therefore, not protected by the provisons of (Chapter 243, P. L. 1909), the Teachers' Tenure of Office Act. The appeal is dismissed.

November 25, 1931.

Decision of the State Board of Education

On May 3, 1924, the respondent's Board of Examiners gave the appellant a certificate qualifying her for substitute teaching in the Newark public schools and from that date to February 1, 1928, she served as substitute in positions designated by the superintendent of schools, her payment being per diem for service during each school month and not on the basis of an annual salary. Each of her employments was to fill a position which was vacant because of the absence of a particular or regular teacher, specified in her notice of appointment. She had no contract as a regularly employed substitute teacher. Neither did she have a New Jersey teachers' certificate during the period in question.

On May 20, 1931, she was notified by the respondent that she would not be employed during the year 1931-1932. She claims she is entitled to Tenure of Office and should be reinstated in her position as a substitute teacher. The Commissioner, dismissing her petition, finds in his written opinion: (1) That the broadest interpretation that can be given to the certificate she obtained from the respondent's Board of Examiners was that it qualified her for temporary substitute teaching and was for a position not protected by the provisions of the Tenure of Office Act; (2) That the appellant was appointed during the three and one-half years preceding the termination of her services for particular substitute work; (3) That when the regular teachers for whom she was appointed to substitute returned, the substitute positions for the respective terms were automatically abolished and her services as special substitute thereby terminated; (4) That she was never employed as a full-time general substitute, the positions in which she served have ceased to exist, and on June 30, 1931, she held no permanent position. He therefore holds that she is not protected by the provisions of the Tenure of Office Act.

In our opinion, his conclusion is correct and we recommend that his decision be affirmed.

April 2, 1932.

MEMBER OF TEACHERS' PENSION AND ANNUITY FUND MAY BE RETIRED AFTER REACHING AGE OF SIXTY-TWO YEARS IF NOT UNDER CONTRACT

ISABELLA F. SOPER,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF BEACH HAVEN, COUNTY OF OCEAN,

Respondent.

For the Appellant, Franklin H. Berry.
For the Respondent, Howard Ewart.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner, a holder of a permanent teacher's certificate, with a teaching experience of thirty-six years, and a member of the Teachers' Pension and Annuity Fund, became sixty-two years of age on August 28, 1931. During the last nineteen years appellant has been employed in the School District of Beach Haven and was, prior to February 1, 1934, protected in her position by Chapter 243, P. L. 1909, the Teachers' Tenure of Office Act. Under such tenure protection, appellant on July 28, 1933, entered into a written contract with the respondent to teach from September 11, 1933, to June 14, 1934, said contract containing a bilateral provision whereby it could be terminated by either party giving to the other thirty days written notice of such intention.

At a meeting on December 28, 1933, a resolution was adopted by the respondent requesting the Board of Trustees of the Teachers' Pension and Annuity Fund to retire Miss Soper as of February 1, 1934, which request was granted by the Board of Trustees at its meeting on January 12, 1934.

It is admitted by respondent that written notice of the termination of the contract was not given to the petitioner.

Section 251, as amended by Chapter 57, P. L. 1928, reads in part as follows:

> "A member who has attained the age of sixty-two (62) may retire upon his request or, upon the request of his employer, shall be retired from the service if a written statement duly attested is filed by him or by his employer with the board of trustees setting forth at what time subsequent to the execution and filing thereof, he or his employer desires such retirement. The board of trustees shall retire said member at the time specified, or at such other time within thirty days after the date so specified as the board of trustees may find it advisable."

This statute is part of the General School Act and, therefore, the petition comes to the Commissioner not as a member of the Board of Trustees of the

Teachers' Pension and Annuity Fund, but under section 10 of Chapter 1, P. L. 1903, S. S.

Counsel for appellant contends that Chapter 80, P. L. 1919, does not contemplate the retirement of a member of the Teachers' Pension and Annuity Fund during the school term without the consent of both parties, but even if it did, the contract estops appellant's retirement except by written notice; while respondent holds that the provisions of section 251, above cited, are by implication part of appellant's contract, with the same force as if expressly incorporated therein, and that the statutory right is absolute and could have been exercised by either party after appellant's sixty-second birthday.

There is nothing in section 251 to imply that it contemplates the retirement of a teacher only during the time between the closing of school for one academic year, and its reopening for the succeeding year. The statute appears to be very clear in that a member of the Teachers' Pension Fund, after reaching the age of sixty-two, shall be retired either upon her request or that of her employer, and in the opinion of the Commissioner such retirement can take place at any time, unless either party has legally waived its right.

This case is, therefore, to be decided upon the effect of the contract between the parties for the school year 1933-1934.

The law states a teacher may be retired after the age of sixty-two and makes no reference to the manner of employment. It does not distinguish between teachers holding contracts or having tenure rights. The statutory rights are absolute and may be exercised at any time by either party. Since the statute antedates the contract, the latter must be held to include the former either by implication or definite provision. In support of this ruling, counsel for respondent cites the following:

> "The existing statutes and the settled law of the land at the time a contract is made become part of it and must be read into it. All contracts are therefore to be construed in the light of the rules and principles of law applicable to the subject matter of the transaction, and those rules and principles control the rights of the parties, * * *." (6 R. C. L. p. 855, Sec. 243.)
>
> "The law of the place where the contract is entered into at the time of making the same is as much a part of the contract as though it were expressed or referred to therein. So when a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract; *or where the law authorizes the regulation of service rendered the public,* such law becomes a part of and controls contracts providing for the public service." (13 C. J. pp. 560, 561.)
>
> "Provisions of law applicable to the subject matter of contracts are parts of the contracts, whether so expressed or referred to in the contracts or not." (State of Florida *vs.* Tampa Water Works Co., 56 Fla. 858.)
>
> "The laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms; and this rule embraces alike those which affect its validity, construction, discharge and enforcement." (Globe Slicing Machine Co. *vs.* Murphy, 158, Atl. 26.)

> "Contracts cannot change statutory laws. It is, therefore, a general principle of construction, that statutory provisions which are applicable to, consequently enter into, and form a part of, the contract, as much as if incorporated therein." (Sullivan *vs.* Prudential Insurance Co., 160 Atl. 777.)

In ruling upon contracts with tenure teachers and their waiver of rights, under the provisions of Chapter 243, P. L. 1909, the Attorney General in a letter to the Department under date of May 23, 1924, held:

> "I find nothing in the act of 1909, which authorizes the board of education to expressly contract for the services of a teacher by an agreement entered into after three consecutive years of service."
>
> "Statutory provisions designed for the benefit of individuals, may be waived, but where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual, citing Sedg. on Stat. and Cons. Law 109-421."
>
> "It will be noticed that the act of 1909, as above cited, provides that after three consecutive years of service, that the tenure should be during good behavior and efficiency, and is not so worded as to indicate that the intention of the Legislature was merely to provide for the class mentioned in the statute a personal privilege, but indicates to my mind that the legislative intention was the expression of a public policy for the benefit of the school system."

When a contract is legally authorized, pertinent statutory provisions then in effect enter into and form a part of it. If a contract between a board of education and a tenure teacher were legal, section 251 of the pension act must be considered as part of any agreement which postdates the enactment of that law. It is, however, the opinion of the Attorney General, as expressed above, that a teacher is held not to waive her tenure rights by the signing of a definite term contract and, furthermore, there is no direct or implied authorization for a contract between a board of education and a teacher protected by the Tenure of Office Act. If a teacher does not waive her right to tenure protection by signing a contract, the board cannot be held to waive its right to retire her.

In accordance with the rulings above cited, the contract between Miss Soper and the Board of Education of the Borough of Beach Haven, even if legal, did not deny to either party the right to act under the provisions of section 251, Chapter 80, P. L. 1919; but since there is no legal authorization for its execution, the contract is declared null and void. Respondent's action in requesting appellant's retirement is sustained, and the appeal is dismissed.

May 31, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

This case was submitted without argument.

The undisputed facts are as follows:

The appellant, Miss Soper, is the holder of a permanent teacher's certificate, had a teaching experience of thirty-six years, and was a member of the Teachers' Pension and Annuity Fund. For nineteen years she was a teacher in the school district of Beach Haven. On July 28, 1933, she entered into a written contract with the Beach Haven Board of Education to teach from September 11, 1933, to June 14, 1934, the contract containing a provision for termination by either party on thirty days' written notice.

She assumed her duties and continued to teach until she was compelled to retire under the following circumstances:

Section 251 of the School Law, as amended by the laws of 1928, provides with respect to the aforesaid fund, that:

> "A member who has attained the age of sixty-two (62) may retire upon his request or, upon the request of his employer, shall be retired from the service if a written statement duly attested is filed by him or by his employer with the board of trustees setting forth at what time subsequent to the execution and filing thereof, he or his employer desires such retirement. The board of trustees shall retire said member at the time specified, or at such other time within thirty days after the date so specified as the board of trustees may find it advisable.

At a meeting on December 28, 1933, the Board of Education of Beach Haven, by resolution, requested the Board of Trustees of the Teachers' Pension and Annuity Fund to retire Miss Soper as of February 1, 1934. The request was granted by the Board of Trustees at its meeting on January 12, 1934. She was accordingly retired and was not thereafter permitted to resume her position, although she was ready and willing to complete her contract service and offered so to do. No written notice of termination was given her.

From this action of the Board, Miss Soper appealed to the Commissioner who held that the contract contemplated the right of the Board to retire Miss Soper under the statute above quoted and accordingly dismissed her appeal.

We cannot agree with him. There was an express, effective contract between the parties. At the time it was made Miss Soper had reached the retirement age. She was under tenure of office and could have been retired at her own request at any time, but when she signed the contract she surrendered her right to resign or to apply for retirement during its duration. We think that by the same token the Board relinquished *its* right to apply for her retirement. The retirement statute is not compulsory. In our opinion each party waived the right to invoke it when it entered into the contract. Consequently that instrument is binding upon both of them.

Furthermore, the fact that the thirty-day notice clause is the only provision in the contract for its termination before its expiration seems to us to indicate the intent to exclude termination or rescission by means of the retirement statute, action under that statute being elective and not compulsory as is pointed out above.

In our opinion the authorities and principles relied on in the Commissioner's opinion are not applicable to the situation, nor does it seem to us that the opinion of the Attorney General, quoted at length in the Commissioner's opinion, is in point. We think there was good consideration for the agreement; that it was binding upon both parties and that it could not be avoided in the manner adopted by the Board of Education. It is therefore recommended that the Commissioner's decision be reversed, that the case be remanded to him with instructions that the appellant, Mrs. Soper, is to be reinstated for the term of her contract, which expired in June, 1934, and that the Board of Education of Beach Haven be required to pay her salary from the time of her enforced retirement to said date, namely, June 14, 1934.

December 1, 1934.

DECISION OF THE SUPREME COURT

No. 257, May Term, 1935.

Submitted May Term, 1935. Decided , 1935.

On *certiorari*.

Before Justices Parker, Case and Bodine.

For prosecutor, Howard Ewart.

For defendant, Franklin H. Berry.

The opinion of the Court was delivered by Case, J.

The Board of Education of the Borough of Beach Haven, prosecutor herein, passed a resolution to seek the retirement by the Teachers' Pension and Annuity Fund of Isabella F. Soper, one of its teachers. Application was accordingly made by the Board to the Board of Trustees of the fund, and the teacher was retired. Mrs. Soper appealed to the Commissioner of Education from the action taken by the borough board in making the request for the retirement. The Commission dismissed the appeal upon the ground that the Board had acted within its rights. Thereupon Mrs. Soper appealed from that determination to the State Board of Education. The latter body reversed the Commissioner, found that there was an existing contract between the Board of Education of the Borough of Beach Haven and Mrs. Soper which the borough Board could not void and that by virtue thereof the borough Board should pay to Mrs. Soper an amount equal to what her salary would have been had she not been retired. The borough Board of Education now prosecutes a writ of *certiorari* to review that order of the State Board of Education.

Mrs. Soper became sixty-two years of age on August 28, 1931, was a member of the Teachers' Pension and Annuity Fund and by reason of her years of service was then entitled to be retired on pension. She had already taught for many years in the Beach Haven schools and continued thereafter to teach in those schools. On July 28, 1933, she entered into a contract with the Beach Haven Board of Education whereby she agreed to teach, and the Board employed her so to do, from September 11, 1933, to June 14, 1934, at a named salary, and whereby, also both parties agreed that either of them could terminate the same by giving to the other thirty days' notice in writing of intention to

terminate. There was no notice of intention to terminate given by either side, but on December 28, 1933, the borough Board passed a resolution wherein it determined to make application to the Trustees of the Teachers' Pension and Annuity Fund for Mrs. Soper's retirement, effective February 1, 1934. The Board of Trustees of the Teachers' Pension and Annuity Fund, on January 12, 1934, approved the retirement effective February 1, 1934.

The prosecutor's first point is that both the Commissioner of Education of the State of New Jersey and the State Board of Education were without jurisdiction, power or authority to entertain an appeal from the action of the Board of Trustees of the Teachers' Pension and Annuity Fund in retiring Mrs. Soper as a teacher in the Beach Haven school. The appeal to the Commissioner was from the action taken by the local Board by way of instituting the retirement proceedings and not from the action of the trustees of the Fund. Technically, that is a complete answer to the point; but an amplification is necessary to meet other portions of prosecutor's argument and may well be made here.

Retirement becomes optional—either at the instance of the teacher or of the employing board—at age 62 (School Law article XVII, section 251, subdivision 1, as amended by chapter 57, P. L. 1928) and mandatory at age 70 (id. section 251, subdivision 2). During the intervening period, neither the teacher nor the board having applied for retirement, the teaching services continue. The action of the Trustees of the Fund on an application coming in is usually, and was in this instance, ministerial. Mrs. Soper's record was such that she was entitled to a pension either at her or the Board's request. The statute was mandatory upon the trustees, and they took affirmative action. But Mrs. Soper's complaint was that the Board had agreed not to terminate her teaching for the year without giving thirty days' notice in writing and that the action of the Board in proceeding toward her retirement was a termination of her employment and therefore, in the absence of the notice, a violation of the contract. A board of education has, under the school law, the right to make contracts with teachers. Thereupon there arose a dispute as to whether or not the Board, in view of its contract, could lawfully take its action of December 28, 1933. Section 10 of the 1903 school law, 4 C. S. page 4727, provides that "The State superintendent of public instruction shall decide, subject to appeal to the State Board of Education and without cost to the parties, all controversies and disputes that shall arise under the school laws * * *." The duties and powers incident to such supervision have been carried over to the Commissioner of Education. See also section 5, subdivision VI of chapter 231, P. L. 1911, 2 Cum. Supp. page 3167. That legislative policy did not originate in the act of 1903 but went back through the act of 1867 at least as far as 1851. Ridgway *vs.* Upper Freehold Board of Education, 88 N. J. L. 530. It was said in the Ridgway case that "The law is settled that the prerogative writs of the State should not be awarded until the remedies provided by the school law have been exhausted." The Teachers' Pension and Retirement Fund was set up by Article XXV of the 1903 statute as subsequently amended and by Article XXVIII passed as chapter 80, P. L. 1919, amended by chapter 173, P. L. 1920. The whole structure is part of the school

law under one title. We consider that the dispute between Mrs. Soper and the Board of Education as to the obligations of the latter under its contract was one that by the broad and ancient provisions of the statute was within the cognizance of the Commissioner of Education subject to appeal to the State Board of Education. Prosecutor rests in part upon the rule stated in Home Building & Loan Association *vs.* Blaisdell, 290 U. S. 398, 78 Law. Ed. 413, and quoted in Hourigan *vs.* North Bergen Township, 113 N. J. L. 143, that existing laws are read into contracts in order to fix obligations as between the parties and that the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order; but we find no support for the prosecutor in the application of that rule to the instant case. There is no public policy that a teacher shall be retired at age 62, and the law does not so require. Granting, for the purposes of the argument, that a yearly contract is not, under the circumstances, necessary, we think it is neither inconsistent with the school law nor subversive of the aims and principles thereof for a teacher and a board, during the mutually optional period between the ages of sixty-two and seventy, to agree annually upon employment for the school year and as an incident to agree that neither of them will terminate the year's employment without reasonable notices to the other. The disruption in school courses that might follow sudden retirement, in midyear and without notice to the board, of skillful and dependable teachers, from whom a full year's work was expected, is obvious. It is clear that foreknowledge of the event by the board would be helpful. So, also, the other way around. That the notice should be in writing and that it should be thirty days in extent are reasonable provisions.

Prosecutor's second point is that the contract between the Board of Education and Mrs. Soper included as an implied provision, and is subject and subordinate to the provisions of, section 251, chapter 80, P. L. 1919, as amended by chapter 57, P. L. 1928; and its third point is that the contract between the Board and Mrs. Soper is a nullity and unenforceable because the relationship was controlled and regulated by statute. For the reasons already biven these points are decided adversely.

Prosecutor's fourth point is a corollary of its second and third points and falls with them.

The writ of *certiorari* will be dismissed, with costs.

RESIDENCE OF PUPIL FOR SCHOOL PURPOSES

MARY M. TOWNER,

Appellant,

vs.

MANSFIELD TOWNSHIP BOARD OF EDUCATION,

Respondent.

J. M. Roseberry, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal was brought by Mary M. Towner, a resident of Mansfield Township, Warren County, New Jersey, who alleges in her petition that she stands in *loco parentis* to Lillian Baysdorf, a minor thirteen years of age, and that by virtue of such relationship she appeals from the action of the Mansfield Township Board of Education on July 31, 1923, in refusing to provide tuition and transportation to the Hackettstown High School for the said Lillian Baysdorf for the coming year.

Respondent in its answer, duly filed, defended its action of July 31, 1923, on the ground that the actual home of the said Lillian Baysdorf is with her parents in New York or Brooklyn and that she actually is not a resident of Mansfield Township but merely boards at appellant's residence, which is known as the "Junior School," and at which a number of children board and receive instruction in the elementary subjects.

A hearing in this case was conducted by the Assistant Commissioner of Education on September 14, 1923, at the Court House in Belvidere, at which hearing the testimony of witnesses on both sides was heard; and when the case was remanded by the State Board of Education for a stenographic record, a second hearing was held on January 4, 1924, at which the testimony was taken stenographically.

From the facts established at the hearings it appears that the so-called "Junior School" maintained by appellant is more or less of a private home in which the children living with appellant are instructed in elementary subjects only. Appellant does not in the Commissioner's opinion pretend to maintain such an educational institution as would prevent its inmates of actual all the year residence therein from looking to the public schools of such district for high school facilities, since there is no pretention on her part to instruct such children beyond eighth grade elementary subjects. The fact that there was no pretention on the part of the appellant to furnish instruction for children beyond the elementary grades renders irrelevant any statement which the evidence might contain as to the amount of money received by appellant from the parents of Lillian Baysdorf toward the child's living expenses after the completion by her of the elementary instruction.

The essential point to be determined, therefore, in the case at hand, is whether Lillian Baysdorf is an actual resident of the school district of Mansfield Township so as to entitle her to free high school facilities at the expense of that district.

It has been the ruling of this department that a child may be said to be a resident of a school district so as to be entitled to free school facilities when such child has its actual and bona fide all the year around home in such district, even though the parents reside elsewhere and the child's residence be merely with distant relatives or friends. In this case the actual good faith home of the child and not the parents is to be regarded as the determining factor in the question of the right to free school facilities. This view is upheld in the case of Yale *vs.* The West Middle School District, 59 Conn. 489, in which the opinion is in part as follows:

> "If any child is actually dwelling in any school district, so that some person there has charge of it, is within the school age and not incapable, by reason of physical infirmity, of attending school, and is not instructed elsewhere, then such child must go to the public school."

The above principle is further supported in 35 Cyc., page 1113, note 23:

> "A child whose parents are non-resident and who lives, with his parents' consent, with others who care for him and with whom he and his parents expect him to live permanently, has a right to attend the schools in the district in which he thus resides."

The facts in the case under consideration plainly indicate that the actual all the year around residence of Lillian Baysdorf is at the home of the appellant in Mansfield Township and not with her parents who live in New York or Brooklyn. The parents have not, according to the testimony, maintained a home together for ten years and accordingly consented that the child make her home with appellant and this she is doing and has been doing for two years or more past. The testimony further shows that the child during such time has not visited either of her parents more than once.

In view of all the facts in the case, therefore, and of the authorities upon the subject, it is the opinion of the Commissioner of Education that Lillian Baysdorf is a resident of Mansfield Township, Warren County, New Jersey, and is thus entitled to be provided with free high school facilities by the Board of Education of such district.

The appeal is accordingly hereby sustained.

January 11, 1924.

Decision of the State Board of Education

I regret that I cannot agree with the majority of the Committee in their disposition of this case. The facts shown in the record are as follows:

The parents of the girl Lillian Baysdorf reside in the City of New York, but have not lived together for ten years or more. Ever since their separation the

girl has been in the custody of the father, but has not lived with him. He has resided with his mother at the home of his aunt in Brooklyn, but the child, with an older sister, was placed in the care of another person in New York City until she was between eleven and twelve years old. At that time, the father placed her at school with and in the care of the respondent, Mrs. Mary M. Towner, in the village of Port Murray, in Mansfield Township.

Mrs. Towner has for several years conducted a school there where she has had four or five boarding pupils, whom she does not teach beyond the eighth grade. Lillian Baysdorf finished that grade in June, 1923, but continued to make her home with Mrs. Towner to whom her father continued to pay $60 a month, the amount he had theretofore paid for her board and tuition, and since then she has not been a pupil of Mrs. Towner's school, but an inmate of her home and in her care and control.

The uncontradicted testimony is that after the child finished her school work with Mrs. Towner, who did not teach beyond the eighth grade, she continued to be an inmate of Mrs. Towner's home, not as a pupil, and on account of her increased requirements as she became older the father continued to pay Mrs. Towner for board and her care of the child the same amount that he had theretofore paid both for board and tuition.

The Commissioner, after hearing the testimony, has found as a fact that the "actual all the year round residence of Lillian Baysdorf is at the home of the appellant (Mrs. Towner) in Mansfield Township," and also that the child does not receive any tuition from Mrs. Towner.

The Constitution and laws of New Jersey require that all children of school age shall attend school and that schools shall be provided for them. The language of the Constitution is that the Legislature shall provide a system of free public schools for the instruction "of all the children in this State between the ages of five and eighteen years."

Section 116 of the General School Law provides that the public schools shall be free to all persons who shall be "residents of the school district."

Section 126 provides that school facilities shall be provided "for all children residing in the district."

Section 153 (New Jersey School Law, Ed. 1921, page 111, section 214) provides that "every parent, guardian or other person having custody and control of a child between the ages of seven and sixteen years, shall cause such child regularly to attend a day school," etc.

In my opinion, the evidence in this case shows that Mrs. Towner has the custody and control of Lillian Baysdorf, and the law requires her to send the child to school. The fact that it is in the power of the father to remove her from Mrs. Towner's control and custody does not relieve her of this duty or the school district of the duty of providing school facilities as required by the statute.

In Board of Education *vs.* Lease, 64 Ill., the Court said:

> "Very many conditions may occur which might render the residence of the parent or person in control of the child more or less indefinite as to the time and more or less dependent upon contingencies, and yet the child should not be deprived of school privileges."

In New York, People ex rel Brooklyn Children's Aid Society *vs.* Hendrickson, 54 Misc. 337, is to the same effect.

In Connecticut, the Court said:

> "If any child is actually dwelling in any school district, so that some person there had the care of it, and is within the school age, and not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school."
> Yale *vs.* West Middle District, 59 Conn. 489.

The Commissioner states in his opinion that this has heretofore been the ruling of the Department of Public Instruction in this State. The subject appears not to have been presented to the courts of New Jersey.

The question is one of good faith. If a child for any reason becomes a *bona fide* resident of a State or district other than that in which his parents reside, it is nevertheless entitled to attend the public schools.

In the present case the evidence, as it seems to me and as the Commissioner has found, shows that Mansfield Township is the *bona fide* residence of the child. Her father did not send her there to attend the public schools and I do not believe that he keeps her there because he prefers the schools of Warren County to those of the City of New York.

Nor do I believe that the circumstances of this case, which are unusual, will furnish a harmful precedent. If any case arises where children are sent to New Jersey from other States merely for the purpose of obtaining a free education in our public schools, the local boards and the Department of Public Instruction can prevent such an abuse.

There is another aspect of the matter which it seems to me requires our affirmance of the decision. The determination of the case depends solely on the facts. The Commissioner has found, *as a fact,* that the *bona fide* residence of Lillian Baysdorf is in Mansfield Township. He made this finding after hearing the witnesses and having the opportunity, which we have not, to observe them and their demeanor on the witness stand and to judge of their credibility. Under these circumstances, his findings of fact have every presumption in their favor and while we have the power to reverse them they should not be disturbed unless we find from our examination of the evidence that he was clearly in error. In my opinion, the record in this case affords no basis for finding any such error. On the contrary, I think that the evidence clearly sustains his findings, and that being so, they should be affirmed, and I so recommend.

Decision of the Supreme Court

This cause was submitted on briefs, at the October Term, 1924, on a writ of *certiorari* sued out by the prosecutor against the State Board of Education. The cause was erroneously entitled by counsel of the respective litigants as Mary Towner, Prosecutor-Respondent, *vs.* Mansfield Township Board of Education, Appellant, and is so reported in 3 Adv. Rep. No. 19, page 448; 128

Atl. Rep. 602; whereas it was the township which prosecuted the writ and the State Board of Education which was defendant. Neither Mary Towner nor Lillian Baysdorf a minor, was made a party to the writ, nor was either served with a copy of it. The testimony taken in the cause developed that both Mary Towner and Lillian Baysdorf would be vitally affected by the outcome of the proceedings and hence were necessary parties thereto, and as it further appeared that Lillian was a minor that her interests should be taken care of by a guardian *ad litem*. Decision was therefore reserved until a proper record was completed and this appears now to have been done, and counsel of the respective parties have consented that the cause be disposed of on the state of the case and briefs originally submitted.

The facts present the legal question: Has Lillian Baysdorf acquired such a residence in Mansfield Township as would entitle her to the benefit of the provision of section 116 of the General School Law of 1903, 4 Comp. Stats., page 4675, and as amended P. L. 1912, page 284, which *inter alia* provides, that public schools shall be free to all persons over five and under twenty years of age, who shall be residents of the school district?

An application was made by Lillian Baysdorf, on June 25, 1923, to the Board of Education of the School District of Mansfield Township, in Warren County, for the privilege of taking the first year of work in a high school commencing on September 4, the expense of tuition and transportation connected therewith, if any, to be paid by the Board of Education of said district; and that she desired to attend the Hackettstown High School. At the time of the making of this application Lillian was thirteen years of age. The Board of Education denied her application upon the ground that she was not a *bona fide* resident of the township. Thereupon Miss Towner filed a petition with the State Commissioner of Public Instruction in which petition she set forth that she was a resident of the Township of Mansfield, standing in *loco parentis* to Lillian, "who for the last two years has continuously resided with the subscriber appellant herein, at her home" in the said Township of Mansfield, and that she appealed to the State Commissioner from the decision of the Board of Education by which it denied the application to furnish transportation to the Hackettstown High School and tuition fees therein for the said Lillian. To this petition the Mansfield Board of Education made answer that Miss Towner "has added an addition to her dwelling house and has advertised it as the 'The Junior School' for children to be educated as far as the eighth grade;" that at the present time she has about ten or twelve children and sometimes a much larger number at her house; that she makes it a business to furnish these children board and she teaches them as far as the eighth grade; that she follows this as a business, and receives compensation for her services as a teacher, and also received compensation for boarding said children; that the said Lillian is not a resident of the township but is simply a boarder at the home of the petitioner and that Lillian is a resident of the City of New York. The parties were given an oral hearing at which the testimony of Miss Towner, Lillian and Lillian's father and others was taken, from which it appears that Lillian's father and mother are residents of the City of New York, where they have resided for many years; that they are and have been living in a

state of separation for ten years or more, and that Lillian's father makes his home at his mother's, where his aunt also lives, and there is a legitimate inference from his testimony that he provides for their support; that for a period of ten years Lillian and an older sister were placed by their father under the care of a Mrs. Rasch who resided in the Bronx and until Lillian was sent by her father to Miss Towner's school, paying to the latter sixty dollars a month for Lillian's board and tuition, and in addition provided Lillian with such necessaries as her comfort and well being required.

The State Board of Education considered its task to be to decide whether Lillian Baysdorf was an actual resident of the School District of Mansfield Township so as to entitle her to free high school facilities at the expense of that district, without regard to whether or not it was the place of her domicile, and accordingly held that because Lillian's all year around residence was at the home of Miss Towner, to which her father had consented for two years or more past, she was entitled to be provided with free high school facilities by the Board of Education of the district. There is no case in this State which deals with the precise point in question. There are cases to be found in other jurisdictions which deal with the subject mooted here. The case relied on by the State Board for the result it reached is Yale *vs.* West Middle Dist., 59 Conn. 489, which will be later commented upon.

To determine properly whether or not Lillian is entitled to free school facilities in view of the circumstances as disclosed by the testimony as to her residence in New Jersey we must not only have recourse to the constitutional provision and statutes relating to the education of children residing in this State in our public schools but also to consider the sound public policy upon which these provisions were designed to rest.

Article VI, Section 7, Plac. 6, of the State Constitution *inter alia* declares: "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years." It needs no argument to demonstrate the unreasonableness of any view that tends to uphold a theory that this declaration is designed to include children from other States who may be sent by their parents or guardian, into this State, and who actually take up their residence here for instruction in our public schools. By section 116 of the General School Law of 1903, *supra,* as amended in 1912, page 285, it is provided: "Public schools shall be free to all persons over five and under twenty years of age, and to such persons over the age of twenty years as the board of education of any school district may deem it wise to offer instruction, who shall be residents of the school district. Non-residents of a school district, if otherwise competent, may be admitted to the schools of said district with the consent of the board of education upon such terms as said board may prescribe; provided, that the authority to charge tuition for non-resident pupils conferred by this section shall not apply to non-resident pupils transferred to any district by an order of the county superintendent of schools."

Considering the facts of the case most favorably to Lillian's application for admission to the high school, we cannot fail to observe that they fall short of establishing any legal right in her to the privilege she seeks, since the

facts relied on in her behalf do not prove that she was a domiciliary resident of the school district, which, in our view, seems to be necessary. The fact that she intends to remain in the home of Miss Towner, during her attendance at the high school or for an indeterminate period, does not make her residence a permanent one, especially since it does not appear that she was emancipated or was under the legal control of Miss Towner, but on the contrary it appears that she was in neither situation, and that her father who is domiciled and actually resides in the State of New York will continue to make provision for her future support and comfort.

The term "a resident," in a broad sense, includes any person who comes into this State and remains here with the intention to make it his permanent abode. But this legal status is not applicable to a child who is brought or sent into this State by a parent or guardian who is a non-resident for the purpose of receiving an education in the public schools of this State. The permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own. Considerable force is derived by this view from the provisions of the School Law relating to compulsory education of children in our public schools. Thus, for instance, section 153 of the School Law, 4 Comp. Stats. 4775, provides that every parent, guardian or other person having control of a child between the ages of seven and seventeen years, inclusive, shall cause such child to regularly attend a day school, etc. The succeeding section 154 defines, in a measure, the character of the control of the child, by providing that any parent, guardian or other person having the legal control of any child who shall fail to comply with the provisions of section one hundred and fifty-three, etc. So that it is clear that the persons who are designated by the statute upon whom the duties outlined by it rests are parents, guardians or persons having legal control of the child.

Now the phrase "legal control" signifies a *status* of the person in whose custody the child is. It cannot reasonably mean the relation between pupil and teacher, which control begins and ends with the school sessions; or the relation existing between the teacher and her pupil boarder, however intimate their friendship may be.

The phrase "other persons having legal control" would manifestly include foster parents, who have lawfully adopted children, or those to whose care and custody children are committed by operation of law, etc. By applying the maxim *noscitur a sociis* to the phrase used, the persons indicated by the sections, as those having legal control, must have the legal status of parent or guardian.

The testimony fails to show that any such situation existed in the instant case. The case of Yale *vs.* West Middle School District, 59 Conn. 489; 22 Atl. Rep. 295, relied on by the State Board of Education appears to have been decided strictly upon the language used in the school act of that State to which Andrews, C. J., refers and says: "All through these sections the expression, 'those having the care of children' is used as exactly equivalent to parents or guardians; and nowhere is it indicated that the duty to send children to school, or the duty of the district to furnish instruction, depends on anything other than the residence of the child. All distinction between domi-

cile and actual residence seems to be carefully excluded." In these respects our school law differs essentially from the one in Connecticut in that the duty to send children to school devolves upon those having *legal control* of them, such as a parent or guardian, and that actual place of sojourn of the child, whether for a long or short period, does not establish its residence within the meaning of the school law unless it is the place of residence of its parent or guardian or other person having legal control of it. A child, in law, can have no residence of its own and can only lawfully acquire one when it has been emancipated. Its residence under the school law follows that of its parent or guardian or other person having legal control of it.

The various sections of our school law exhibit State policy to continue children to attend the public schools in the respective districts where their parents or guardians reside.

The school law requires the consent of the local board of education or of the county superintendent, to the attendance of a child at a public school in a district other than the one in which it actually resides. It does not seem consistent with sound public policy to open our public schools to the admission of pupils from other States and whose parents reside there, to be educated here at the expense of the taxpayers. The mere length of time of Lillian's sojourn at Miss Towner's residence is inconsequential. Such a situation might easily manifest itself in every case where parents or guardians send children in their care to be educated in the public schools here, and who were boarded and lodged at the residence of a relative or friend residing in the school district.

The testimony before us does not sustain the finding of the State Board of Education that Lillian was a bona fide resident of the school district and hence entitled to have the local Board of Education furnish her with transportation to and from the High School at Hackettstown and to pay her tuition therein.

For the reasons herein given the order of the State Board of Education is set aside, and the action of the local Board of Education is affirmed.

RIGHT TO SCHOOL FACILITIES NOT AFFECTED BY RESIDENCE ON PROPERTY OWNED BY COUNTY PARK COMMISSION

M. D. GRIFFITH,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEW PROVIDENCE, UNION COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant with his family, which includes a wife and three children of school age, moved June 10, 1931, from Brooklyn, New York, to a one-family dwelling on that part of the Union County Park reservation which is within

the political boundary lines of the Township of New Providence. He pays rent for the property to the Union County Park Commission, which is exempted by statute from the payment of taxes to the various municipalities in which it has taken title to property that is now a part of the park reservation. Appellant claims that his home on the reservation is his legal residence and that his children are, therefore, entitled to educational facilities furnished by the Board of Education of the Township of New Providence.

It is the contention of counsel for respondent that since the property of the Union County Park Commission is not subject to taxation by the municipality, the School Board is not required to provide facilities for any children living on the reservation, even though the residence is within the boundaries of the school district.

The Supreme Court in the case of Towner *vs.* Mansfield Township Board of Education (page 216, 1928 Compilation of School Law Decisions) said:

> "The various sections of our School Law exhibit a State policy to continue children to attend school in the respective district where their parents or guardians reside."

The Legislature in Chapter 1, P. L. 1903, S. S., as amended, made the following provisions:

> "116. Public schools shall be free to all persons over five and under twenty years of age * * * who shall be residents of the school district."
>
> "126. Each school district shall provide suitable school facilities and accommodations for *all* children residing in the district and desiring to attend the public schools therein."
>
> "32. Each township, city, incorporated town and borough shall be a separate school district * * * provided, however, that from and after the passage of this act whenever a municipality heretofore or hereafter shall under authorization of a legislative enactment have been divided into two or more smaller municipalities, such municipalities shall remain and constitute but one school district until such time as at an election duly called * * * it shall be determined by a majority vote of the inhabitants of either * * * that one or more such municipalities shall separate and constitute separate school districts."
>
> "179. Whenever there shall be certified * * * pupils * * * who are approved by the county superintendent as residents of such district residing on property belonging to the State which is not taxable * * * there shall be apportioned to such district * * * for each such pupil * * * the sum of forty-five dollars."

From the above citations of law, it is clear that the Legislature has provided free public schools for all children who are residents of New Jersey. The Supreme Court has held such residence to be controlled by the legal residence of parents. There is imposed upon the Board of Education of each school district the duty of providing educational facilities for children who are legal residents of such district. A school district, except under special provision of the Legislature, is co-extensive with the municipality.

No testimony was presented in this case to show that the boundaries of New Providence Township have changed so that the residence of appellant is now located in another school district. It must, therefore, be held that the appellant is a legal resident of the School District of the Township of New Providence.

Under Section 179 above quoted, the State has provided for a partial reimbursement of the cost of educating children residing on State property located in any school district. There is no statutory provision making it mandatory for boards of education to furnish educational facilities for such children. The right to school facilities is axiomatic under the School Law. A liberal construction of this section would include apportionments for children living on county property which the State has exempted from taxation, but if the statute is not broad enough to legalize such an apportionment, it can only be interpreted to mean that while the Legislature has provided for partial reimbursement for children living on State property, it has failed to make such provision for children living on county property. It is to be noted that the Legislature exempts church properties from taxation, but children living in parsonages, rectories or parish-houses have a legal right to educational facilities at the expense of districts even though the Legislature makes no provision for any reimbursement for the cost of such education.

It is possible that the Legislature should require county park commissions to pay tuition fees for children residing on their reservations. If the Legislature has neglected or refused to enact statutes for that purpose, it has nevertheless definitely provided that a board of education shall furnish educational facilities for all pupils whose parents are legal residents of the school district.

Mr. Griffith, the petitioner, has established a legal residence within the political boundaries of the School District of New Providence Township. The Board of Education of that district is hereby directed to furnish facilities suited to the ages and attainments of his children.

December 21, 1931.

Decision of the State Board of Education

On June 10, 1931, the above named respondent entered into possession of a one-family dwelling house located in the Union County Park Reservation and has since then resided there with his wife and three children. One child attends high school at Summit and the two remaining children attend the school of the Borough of New Providence.

That part of the Park Reservation where the house occupied by respondent is located is within the territorial limits of the Township and School District of New Providence.

Respondent requested the Board of Education of the township to pay the cost of tuition of his child attending Summit High School, and to admit the two other children to the Township School. This request was denied by the township Board of Education upon the ground, as it alleges, that since respondent resides within the Union County Park Reservation owned by Union County Park Commission, which property is exempt from taxation by the township, it was under no responsibility to provide educational facilities for respondent's

children. The Commissioner of Education, in his written decision, has fully discussed and considered the reasons offered by appellant in support of its contention and concludes they are without merit, and directs the appellant to furnish facilities for the education of respondent's children suited to their ages and attainments.

We have carefully perused the evidence taken before the Commissioner and briefs of counsel for the respective parties, and agree with the conclusion of the Commissioner of Education. The Committee recommends that his decision be affirmed.

We wish to add that while the Committee has been unable to see any escape from this conclusion under the law as it stands, it feels that the situation is most unfortunate and unjust to the citizens and taxpayers of the Township of New Providence and that they are entitled to ask for relief from the Legislature, which alone can remedy the condition, in our opinion.

April 2, 1932.

RIGHT OF BOARD OF EDUCATION TO TRANSFER PUPILS FROM ONE SCHOOL TO ANOTHER

CITIZENS OF THE TOWN OF HARRISON, HUDSON COUNTY, N. J., BY FRANK CUNDARI,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF HARRISON,

Respondent.

John J. Lenahan, for Appellants.
Davis & Hastings, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On September 1, 1921, a petition was filed with this department by Frank Cundari on behalf of one thousand citizens of the town of Harrison appealing from the action taken by the Harrison Board of Education at its regular monthly meeting in June, 1921, in transferring the high school from School No. 1, situate on Washington Street, south of Harrison Avenue, to School No. 2, situate on Hamilton Street north of Harrison Avenue. Petitioner bases his protest against such transfer on the ground of the danger to which the children effected by such transfer will be subjected in being compelled to cross street car tracks and streets laden with traffic. Petitioner also alleges in his petition that at the time the construction of School No. 2 was authorized by the district voters it was understood and intended by the voters that such school should be used for primary and grammar departments and not for a high school.

On September 19, 1921, the Harrison Board of Education filed with this office an answer to the above mentioned petition of appeal, and in such answer defended its action in designating School No. 2 as the high school on the ground that such action had been taken by the Board in the exercise of its best discretion with a view to the interests of the school children of the town as a whole. The respondent contends, furthermore, that the transfer of grammar school pupils to School No. 1 only involves those of the fifth, sixth and seventh grades, since the other grammar grades are already accommodated in School No. 1. It is also the contention of the respondent that the authorization by the voters in 1919 for the construction of School No. 2 was a general one and that there was no restriction in such authorization of the use of such new school building to grammar and primary purposes.

There seem to be no questions of fact involved in this dispute. The case, on the contrary, hinges entirely upon the question of whether the Harrison Board of Education has under the law a right to designate School No. 2 as a high school and thus require the transfer of high school pupils to such school and the transfer of pupils of the fifth, sixth and seventh grades to School No. 1, and upon these questions of law briefs have been filed by both sides to the controversy.

The law requires only that suitable and proper school facilities shall be provided by every school district in the State for the pupils residing therein. The exact method of providing such facilities is left to the discretion of the boards of education, who are also empowered by statute to make rules and regulations for the government and management of the public schools and the public school property. It is also apparent from the proceedings on file in this office authorizing in 1919 the bonding of the School District of the Town of Harrison for the erection of the said School No. 2, situate on Hamilton Street, that the authorization is a general one with no designation of the proposed school building as either a high school or a grammar school.

In view, therefore, of the discretion given by law to a board of education as to management of the schools of its district and as to designation of the schools pupils shall attend, and in view of the fact that School No. 2 was not limited by the voters' authorization to either a high school or grammar school, it is the opinion of the Commissioner of Education that the action of the Board of Education in June, 1921, in designating such School No. 2 as the Harrison High School is entirely legal and should not be interfered with.

The appeal is accordingly hereby dismissed.

Dated November 28, 1921.

IN ABSENCE OF PREJUDICE OR DISCRIMINATION BOARD MAY LEGALLY TRANSFER CHILDREN FROM SCHOOL TO SCHOOL

EDWARD CLAUSNER, ET ALS.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,

Respondent.

For the Petitioners, John O. Muller.
For the Respondent, Stickel & Stickel.

DECISION OF THE COMMISSIONER OF EDUCATION

As a result of increased enrollments in the first two grades of the Wyoming School of the Township of Millburn during September and October, 1935, respondent decided to transfer pupils of these grades living in a certain section of the township from the Wyoming School to the Washington School and the supervising principal wrote to the parents of the pupils affected, as follows:

> "The first two grades in the Wyoming School have continued to increase to such unwieldy proportions that it is impossible to carry successfully all of the pupils in those two grades through the school year. Should we continue the present numbers in those two classes, a very considerable proportion would be certain to fail at the close of the school year. This would be unfortunate for the children, and most disappointing to the parents.
>
> "The whole matter has had full and careful consideration for some time, and for the remainder of the present school year, the Board of Education voted to transfer to the Washington School ten first grade children living in the area on both sides of South Mountain Road, and on Undercliff Road between South Slope Drive, and Undercliff Place, and including first grade children westward from this line. This will relieve the situation in the Wyoming School first grades, and will not overload the first grades in the Washington School. By this plan we can hope that all children of normal intelligence can pass their first grade work and go into second grade next year. This naturally is the desire of every parent, and is certainly the desire of the Board of Education.
>
> "We should like to make this transfer effective as of next Monday morning. Mr. Eugene G. Wilkins, principal of the Washington School, will make every proper arrangement to receive these first grade pupils.
>
> "If you desire any further explanation of the reasons for this transfer by the Board of Education, I shall be glad to confer with you at your convenience."

Following the receipt of the foregoing, certain parents objected to the transfer, but after further consideration of the matter, the Board of Education made the transfer effective November 22.

Petitioners allege that a transfer after the children attended classes for approximately two months is detrimental to their welfare, that the curriculum in the Washington School is not the same as in the Wyoming School which causes maladjustments and retards their progress, that their transfer was discriminatory, and that a new school is now being erected to which the pupils will be assigned in September, 1936. Based on the foregoing, petitioners hold that the action is unfair and unreasonable and ask that the Commissioner declare the transfer illegal and direct the respondent to permit the children to return to the Wyoming School.

The Board of Education and its educational advisor, the supervising principal, believed that the general welfare of the first two grades of the Wyoming and Washington Schools would best be served by a transfer of ten pupils from the former to the latter. The supervising principal, Mr. Dyke, testified that while the methods of instruction differ in certain classes of the first two grades in the Millburn school system, practically the same subject matter is taught in all classes of any grade. It appears that some teachers of the first grade begin with more formal number work, while others during the early part of the year attempt to develop the general intelligence of the pupil and take up the formal number work in the latter half of the year.

The Commissioner must take judicial notice of the fact that the work in the first two grades of the schools throughout the State is much less formal than that in the higher grades. While transfers during a school year may affect the work of pupils in the higher grades where certain subjects or phases of them are essential to the class work, they are less harmful in the lower grades because of the informality of instruction. There may have been some slight disadvantage to the children of petitioners in transferring them from one teacher to another, but in the opinion of the Commissioner no harmful affect has resulted.

It may appear that first grade pupils learning to write and add numbers during the early months of the year are making greater progress than those who are not given such formal work at the beginning of the year, but there is no evidence in this case that the former type of instruction is superior, nor, in the opinion of the Commissioner, do leading educational authorities hold that view.

There is no evidence of discrimination in the transfer of the pupils, since they were not selected as individuals but upon the territorial basis as described in the second paragraph of the supervising principal's letter.

The fact that these pupils will enter another school in September means nothing to their educational progress, since they would naturally have other teachers at that time, whether in the Washington, Wyoming, or the school now under construction.

Since the children have now been enrolled nearly two months in the Washington School, their return to the school they attended during September and October would have the same effect as the original transfer and is subversive to the claims of the parents.

The Legislature has required each school district to provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. (Section 126, Chapter 1, P. L. 1903, S. S.) The Board of Education of the Township of Millburn is elected by the voters of the district and is vested with broad discretionary authority. It is required to provide facilities for the children of the district and in the absence of evidence showing prejudice or discrimination, it may determine the school to which pupils may be assigned. The time of making transfers is likewise discretionary, and while the Board's action may be reversed upon evidence of discrimination or prejudice, in the absence of such evidence the Commissioner, even though he may believe another plan more advisable, cannot substitute his judgment for that of the board to whom the Legislature has given the determination. Unless there is good reason therefor, a board of education should permit each child to attend school in the building nearest its home, but whenever the enrollment in a building, or in certain of its classrooms, is in the judgment of the board excessive for the best interest of the pupils, the board has a legal right to transfer to another school with more adequate accommodations on a non-discriminatory basis.

Since the Board of Education of the Township of Millburn acted without prejudice and within its legal authority when it transferred the children of petitioners from the Washington to the Wyoming School, the petition is dismissed.

January 20, 1936.

WITHOUT EVIDENCE OF UNJUST DISCRIMINATION COMMISSIONER WILL NOT INTERFERE WITH DETERMINATION OF LOCAL BOARD IN DETERMINATION OF SCHOOL DISTRICT LINES

JOHN A. KENNEY AND FREIDA A. KENNEY,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,

Respondent.

For the Appellants, W. P. Allen.
For the Respondents, Lindabury, Depue & Faulks.

DECISION OF THE COMMISSIONER OF EDUCATION

The Town of Montclair has a school population of more than seven thousand, of which approximately one-sixth belong to the Negro race. There are no schools exclusively for either colored or white children, but both races share

the senior high school, four sectional junior high schools, and ten elementary schools. With the exception of the senior high school, which serves the entire district, the other schools have distinct district boundaries, controlling the attendance of children unless transfers are granted in cases where they appear to promote the best interest of the applicants or schools affected.

Immediately prior to the opening of schools in September, 1933, an addition had been constructed to the Glenfield School which had theretofore housed grades up to and including the eighth. With this addition, the full junior high school course, including the ninth grade, was established in this building. The district lines of several schools were then revised among which were those of the Glenfield School. The change of boundaries resulted in setting over into the Nishuane district a part of the Glenfield district and accordingly some of the pupils, who completed the eighth grade at Glenfield School in June, 1933, were required to continue there for the ninth grade, while others were required to attend the ninth grade at Hillside. Among those continued at Glenfield School were the children of appellants, for whom transfers to the Hillside School were requested because many of their eighth grade classmates were now required to go to the latter school. While appellants admit that the Glenfield building is in excellent condition and the evidence shows a complete program of junior high school studies offered at that building, they requested transfers to the Hillside building principally because the new boundaries separated their children from former classmates. They contend they have a right to such transfers mainly on the ground that children from a section known as Marston Place, within the Glenfield boundaries, are allowed to attend the Hillside School; and while admitting that their own children are nearer the Glenfield School than the Hillside School, they set forth that Marston Place children are also nearer the Glenfield School and still more remote than their children from the Hillside building. Appellants further show that individual transfers have been granted to other children while denied to theirs.

The evidence discloses that the Marston Place children are, and have been, located within the Glenfield district boundaries, but have not for a period of at least fifteen years attended the Glenfield School and, while belonging to the Glenfield district, practically, these children have been in the Hillside district.

It appears that five individual transfers have been granted to children in the Glenfield district, with valid reasons set forth therefor. Three of these pupils were white and two colored. There is no evidence to support appellant's contention that their children were not granted transfers because of their color. Neither white nor colored children were granted transfers simply for the asking. Respondent, following a practice for a period of at least fifteen years, has continued to allow the Marston Place children, regardless of color, to attend school in another district, but does not permit either white or colored children of the remaining part of the district to be transferred except for valid reasons. The Board shows that in order to avoid confusion during a transitional period, children living on the north side of Lincoln Street and the east side of Elm Street, forming a boundary between the Glenfield and

Hillside districts, were to be considered in optional territory and transferable upon request, and that accordingly transfers were granted to six colored and nine white children. The evidence does not disclose the exclusion of any children from school on account of race or color, in violation of Section 125, Chapter 1, P. L. 1903, S. S.

As the Commissioner views the case, the principal questions are whether individual pupils of a district, either white or colored, must be granted a transfer for the reason that district boundaries separate certain pupils from previous classmates, and for the reason that pupils of other sections of the district were allowed to attend school in another district.

If any one must be granted a transfer upon request, then all may ask for transfers to another district which would result in the overcrowding of one school and the practical abandonment of another. Moreover, a board of education must have reasonable discretion in determining where pupils shall attend. While it is true that pupils of Marston Place have attended a school outside of district boundaries, the right of children in that section to attend elsewhere has not been denied to some pupils and granted to others; nor does this right require the indiscriminate transfer of pupils in other sections of the district.

The Board of Education of the Town of Montclair acted within the authority conferred upon it by statute in fixing district lines (Pierce *vs.* Union District School Trustees, 46 N. J. L. 77; Citizens of Town of Harrison *vs.* Board of Education of the Town of Harrison, 1928 Compilation of School Law Decisions, 215) and denying transfers to children of appellants. (Edwards *vs.* Board of Education of Atlantic City, 1932 Supplement to School Law Decisions, 962.) The appeal is dismissed.

August 21, 1934.

Decision of the State Board of Education

Appellants (people of color), are parents of children and residents of the school district of the Town of Montclair, in the County of Essex. They all reside in the square bounded northeasterly by Lexington Avenue, easterly by Irving Street, southerly by Lincoln Street and westerly by Elm Street. Before February, 1933, the square described was included in the Nishuane elementary and junior high school districts, and the children of appellants, attended classes there, either in the elementary or in the junior high school grades.

Before September 11, 1933, respondent maintained, among others, elementary schools as follows: Spaulding School, on Orange Road, between Hillside and Bloomfield Avenues; the Nishuane School, corner of Cedar Avenue and High Street; and Glenfield School, on Maple Avenue, between Woodland and Bloomfield Avenues, and also the following junior high schools: Hillside School, on corner of Hillside Avenue and Orange Road; Nishuane School, corner of Cedar Avenue and High Street, in which the seventh, eighth and ninth grades were taught; and the Glenfield School, on Maple Avenue, between Woodland and Bloomfield Avenues, in which only the seventh and eighth grades were taught. In 1931, respondent contracted for the erection of an addition to the

Glenfield School, to afford increased facilities for elementary pupils and to conduct a junior high school consisting of grades seven, eight, and nine as all other of its junior high schools. Preparatory to the use of the completed addition to the Glenfield School, and the teaching of the ninth grade of the Junior High School there, in February, 1933, respondent changed the lines between the Nishuane and Glenfield elementary and junior high school districts, so as to include within the Glenfield district the square before mentioned. At the same time the junior high school grades at the Nishuane School were discontinued.

Before September 11, 1933, the opening day of the fall term, the children of appellants had attended Nishuane School, either as elementary or junior high school pupils. Upon the opening of school on that day, they were required to attend the Glenfield School, as they then resided within the boundaries of that district. Appellants preferred that their children attend the Nishuane School and Hillside Junior High School, and accordingly made application for transfers for their respective children.

There is a part of the Glenfield School district which adjoins the Borough of Glen Ridge, which for brevity is referred to as the Marsten Place section. This section is to all intents and purposes, except governmental, part of Glen Ridge. Indeed, there is a concrete wall erected along the entire length of Willowdale Avenue, from Woodland Avenue to Lincoln Street, which separates it from the remaining part of the Glenfield School district. The neighborhood is entirely residential, as distinct from the territory westerly of the dividing wall, which is partly commercial with some multi-family dwellings. For twelve to fifteen years past, the children of this section have attended the Nishuane School. The Board of Education has during that time always acted with regard to this section as if it were included in the Nishuane and not in the Glenfield district. No objection to this course appears to have been made by anyone, until the present controversy arose. Upon the opening of school, the children from the Marsten Place section continued as a matter of course, in the Nishuane Elementary School, or attended the Hillside Avenue Junior High School.

The applications of appellants to have their children transferred from the Glenfield School to the Nishuane School and Hillside Junior High School were denied by respondent, and appellants thereupon appealed to the Commissioner of Education, contending that such denial was evidence of illegal discrimination against their children on account of race or color, and a violation of Section 125, of the School Law, which prohibits the exclusion of any child between the ages of four and twenty years from any public school on account of his or her religion, nationality or color, and of Chapter 174, P. L. 1921, which is an act to protect all citizens in their civil and legal rights. Evidence was taken before the Assistant Commissioner of Education and briefs submitted. The Commissioner decided there was no evidence to support appellants' contention that their children were not granted transfers because of their color, and he dismissed the appeal. Appellants appeal to this Board. We have read the pleadings of the parties, the evidence submitted and their briefs, and have heard their counsel orally. Because of the nature of the complaint,

we have given the facts in this case the most careful consideration. The evidence discloses that the School District of the Town of Montclair maintains ten elementary schools, four junior high schools and one high school. The school population is about 7,400, of whom 1,230 are colored children. White and colored children attend all schools located in districts where colored children reside. The sites of the elementary and junior high schools have been selected with a view to convenient access for pupils, by the creation of a district for each school, and all children residing in a district are, generally speaking, required to attend the school within that district. The educational standards of all the elementary schools are identical, as are those of the junior high schools. The policy of respondent with respect to the selection of teachers is to employ teachers for the school system as a whole, and not for service in any one school, all of which is conceded by appellants.

It appears that some apprehension of intended discrimination on account of race or color was expressed when the purpose to enlarge the Glenfield School was under consideration, but no contention that such fear was well founded is now pressed. Nor does there appear to be any dispute of the right of respondent, in the exercise of its discretion, to create and to change the lines of the various school districts. We are satisfied there is no general policy of respondent to segregate colored children in its schools. Respondent has submitted in evidence a tabulation of the number and percentage of white and colored children in each of its schools, as of October, 1933, which is as follows:

Elementary	*Colored*		*White*		
	No.	*%*	*No.*	*%*	*Total*
Bradford			326	100.0	326
Edgemont	5	1.4	349	98.6	354
George Washington	95	18.7	414	81.3	509
Glenfield	365	62.5	219	37.5	584
Grove	45	12.5	314	87.5	359
Hillside (Spauld.)	88	25.9	252	74.1	340
Mt. Hebron	2	.5	404	99.5	406
Nishuane	93	17.2	448	82.8	541
Rand	127	34.0	246	66.0	373
Watchung	20	3.4	569	96.6	589
Total	840	19.2	3541	80.8	4381
Junior High					
George Inness	37	6.6	521	93.4	558
Glenfield	62	54.4	52	45.6	114
Hillside	111	25.9	317	74.1	428
Mt. Hebron	2	.4	449	99.6	451
Nishuane	38	20.1	151	79.9	189
Total	250	14.3	1490	85.7	1740

There being no general policy of respondent of segregation of its colored pupils, was there specific discrimination in the case of appellants? The addition to the Glenfield School was made necessary, as stated by respondent, by the increase of population in the Glenfield district. Children from this district, by reason of insufficient accommodation in the elementary grades were required to travel considerable distances, and over dangerous crossings to the Spaulding School, and ninth grade junior high school pupils to Hillside School. The Spaulding School was of obsolete construction, and it was deemed provident to abandon it. In contemplation of the completion of the addition to Glenfield School and the establishment there of a complete junior high school course, the junior high school at Nishuane was discontinued and the lines of the Glenfield and Nishuane School districts revised as before stated. These reasons seem valid and we can perceive in them no purpose of discrimination.

The change of the boundaries of the two districts brought appellants' residences in the Glenfield district and they, preferring that their children attend Nishuane Elementary School or Hillside Junior High School, made application for transfers, which were denied. There can be no doubt that it is within the discretion of respondent to grant or refuse to transfer a pupil to a school in a district other than the one in which the pupil resides. The most that can be said of the duty of respondent in this connection, is that the pupil is entitled to be admitted to the school nearest his residence. Pierce *vs.* Union District School Trustees, 46 N. J. L. 77. All the appellants reside nearest the Glenfield School. Respondent appears to have no definite policy with respect to transfers. It has been its practice, for special reasons and where it was deemed to be for the welfare of the pupil and in the interest of the system as a whole to grant a transfer to a district other than that in which the pupil resides, and when a pupil resides on the boundary line of a district to leave to the option of the pupil to attend the school in the district of residence or in the adjacent district. During the school year 1933-1934, there were twenty-one transfers granted to pupils residing in the Glenfield district, one for reasons of health on the recommendation of a physician approved by respondent's physical training department; five because of registry by error in another school, and fifteen because the children resided in optional territory, namely, on the boundary lines of the Glenfield district. Of the total, eight were colored and thirteen white children. Two applications for transfers by children residing on border streets, one by a colored and one by a white child, were denied on special grounds. Appellants stress the fact that the children from the Marsten Place section are permitted as a matter of course to attend the Nishuane and Hillside schools without even the formality of asking for transfers. It happens that all the children of this section are white. In this, respondent is following a practice which has existed for the past fifteen years. It has, in effect, during that period, treated this entire section as part of the Nishuane district, although it did not, as it legally and properly might have done, included it within that district when the lines were revised. Granting the course of respondent with respect to the Marsten place children may be an extreme exercise of its discretion, that does not violate any right of appellant's children, nor does it impose upon respondent the duty to grant a transfer to any pupil because of

the asking. Such a rule would produce chaos in the administration of the schools. The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. The appellants are entitled to have their children admitted to the school nearest their residence. This right is not denied to them. There is no exclusion of their children from the school which they are entitled to attend, by reason of religion, nationality or color. We concur in the conclusion of the Commissioner of Education, and recommend that his decision be affirmed.

February 9, 1935.

DESIGNATION OF HIGH SCHOOL MAY NOT BE CHANGED WHERE GOOD CAUSE IS NOT SHOWN

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,

Respondent.

For the Appellant, Adrien B. Hommell.
For the Respondent, Charles T. Downing.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of Frankford Township at a regular meeting on Tuesday, September 4, 1934, voted to designate the Sussex High School for all of its pupils eligible to attend a high school, effective September, 1935, due notice of which was submitted to the Department of Public Instruction together with a formal petition addressed to the Commissioner of Education. The Newton Board of Education objected to this proposed change and requested an opportunity to be heard, which hearing was conducted by the Commissioner on January 3, 1935, with representatives of both boards present.

The Frankford Township Board bases its application on the following reasons:

1. The crowded condition of the Newton High School.
2. An estimated saving in tuition charges.
3. An estimated saving to itself as well as the State of New Jersey in transportation costs.
4. The physical welfare of the pupils and the desire of their parents.

It was shown by the appellant that there are 621 pupils enrolled in the Newton High School, whereas, the normal capacity of the building is estimated to be 420 pupils, causing great inconvenience to pupils and the formation of classes of excessive size; that Newton's tuition rate is $100.00 per pupil and Sussex's is $95.00 per pupil, resulting in an estimated saving of $210.00 based on 42 pupils; that a further estimated saving of $1,200.00 could be effected in transportation costs, of which $300.00 would accrue to appellant; that the distribution of pupils in Sussex County among the existing high schools is inequitable in that the Newton High School receives the largest proportion and that the cafeteria service in the Sussex High School would be not only more prompt and convenient but less expensive than the service now offered in the Newton High School.

The respondent in opposing this application and in answering appellant's petition sets forth:

1. The Newton High School is less crowded than it was last year and that an authorized addition to the building will before next year substantially reduce the present overcrowding.
2. The Sussex High School does not have sufficient accommodations to accommodate a considerably increased secondary school enrollment without either overcrowding or placing on part time a considerable number of elementary school pupils.
3. The saving, both in tuition charges and in transportation, is not sufficient to justify a change of designation for 42 pupils.
4. The opportunities for satisfactory secondary school education are better in the Newton High School than in the Sussex High School.

Testimony concerning the possible saving in transportation cost was not entirely conclusive. Neither board was able to present definite figures based on contracts now in effect, nor was evidence presented to show the precise amount of transportation cost which could be saved if the petition were granted.

It is necessary at this point to review briefly the history of applications made by Frankford Township for a change of designation from Newton to Sussex. Prior to 1934, the Frankford Township Board made application to the State Department of Public Instruction for such a change, and on the advice of the Assistant Commissioner in Charge of Secondary Schools it was not formally pressed at the time but was renewed on June 14, 1934, to be effective in September, 1934. After a hearing, at which both boards of education were represented, the application was denied by the Commissioner. The following is a quotation from the Commissioner's decision:

> "After careful comparison of enrollments and available facilities in both schools, the Commissioner does not find that there is sufficient difference in the accommodations to justify granting the application of the Frankford Township Board on the basis of objectionable overcrowding in the Newton High School. A study of the possible savings to the Frankford Township Board does not reveal sufficient saving to warrant the

change of designation. Due consideration has also been given to the fact that the budget of the Newton Board of Education was prepared for next year's operation on the basis of the expected continuance of the Frankford Township pupils in the Newton High School."

The present application is the third which has been received by the Commissioner of Education and the second on which a formal hearing has been held. It is to be noted that the assured savings in transportation and tuition charges are not in themselves considerable, since the per capita cost of high school tuition, both in Newton and in Sussex, exceeds the amount charged in this year's contracts. The per capita cost in Sussex is $127.21 and in Newton $125.56, and while the law permits a board of education to charge an amount not exceeding the per capita cost, no board of education may make a contract binding beyond its own term. Consequently, there can be no assurance that even the relatively small difference in tuition cost would be continued through a term of years. It is evident that the Frankford Township Board of Education has made this application in good faith and in time to remove the objection that the budgets of both boards have already been made, which was a factor in the denial of the application made last July. Both boards of education have been advised to provide in next year's budgets an amount of money sufficient to meet the current expenses of the school district, regardless of the Commissioner's decision in this case.

There is no claim that the Newton Board of Education is planning to provide additional high school space at the request of the Frankford Township Board, and although the petition of the Frankford Township Board had been made in advance of the preparation of budgets for the ensuing year, the grounds on which the petition is based are not materially different from those presented at the former hearing.

It is the duty of the Commissioner to consider both the interests of the boards of education concerned in this petition and the future distribution of high school pupils among the available high schools of the county. A study of the accommodations available in the various high schools of Sussex County and of the possible savings to the Frankford Township Board of Education does not show sufficient reason for granting the petition. The petition of the Frankford Township Board of Education is, therefore, denied.

January 23, 1935.

GOOD CAUSE MUST BE ESTABLISHED FOR CHANGE IN DESIGNATION OF HIGH SCHOOL

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,

Respondent.

For the Respondent, Norris & Downing Charles T. Downing, of Counsel.

DECISION OF THE COMMISSIONER OF EDUCATION

The Green Township high school pupils have for more than fifteen years attended the Newton High School and under the provisions of Chapter 281, P. L. 1929, and 301, P. L. 1933, it became the designated high school for the pupils of Green Township. The statutes above cited provide that a designation so established

> "* * * shall continue until the board of education thereof shall for good and sufficient reasons desire a change in such existing designation and shall secure the approval of the Commissioner of Education therefor."

The petitioner appealed for a change in the existing designation from Newton to Hackettstown beginning with the school year 1937-1938, and at a hearing conducted in the Sussex County Court House on December 6, 1936, members of the Green Township Board of Education offered the following reasons for the requested change in designation:

(1) The number of pupils attending Newton High School from Green Township averages about twenty-five, and the tuition at Newton for the current year is $5.00 per pupil higher than that of Hackettstown which would result in a saving of approximately $125.00.
(2) Some members were of the opinion that since Newton had recently constructed an expensive addition to its high school building, the tuition rate might increase while that at Hackettstown would remain stationary or probably decrease.
(3) It was also the opinion of certain members that the educational opportunities and pupil discipline are better in the Hackettstown High School than in the Newton High School.

In relation to the foregoing, the Newton Board of Education admitted that there had been a $15.00 increase in tuition during the past year, thereby making the fee $5.00 higher than that at Hackettstown, although it appears that in the preceding year the Newton tuition was $10.00 less than the Hackettstown rate. The Newton Board showed that the addition to the high school was built not only for resident pupils of Newton, but for the pupils of the districts for which Newton High School was then designated, that while a change of designation might result in a tuition saving of $125.00 to Green Township, the loss to Newton would be nearly $3,000. Since the tuition rate is $115.00 each for approximately twenty-five pupils and there are ample building accommodations for them, the reduction of twenty-five pupils distributed in the four high school grades would not decrease the teaching staff and accordingly the withdrawal of the pupils would work a hardship on the district which had made provision for them.

The view of the members of the Green Township Board of Education that the high school tuition would be advanced at Newton was merely opinion and members of the Newton Board stated that at the present time no such action is contemplated.

No evidence was offered by the Green Township Board to show that educational opportunities and pupil discipline are better at Hackettstown than at Newton. Petitioners referred principally to one difficult case of truancy which has been satisfactorily adjusted. They objected to the permission given to students at Newton to leave the school premises during the noon hour. Inquiry into the Newton High School schedule revealed that the noon recess is long enough to permit pupils to leave the school property without damage to their program. It was the opinion of the Newton Board members that the privilege of walking down to the business section of the town with proper behavior was a valuable part of the pupils' education.

The testimony shows that the center of Green Township is approximately the same distance from Newton as from Hackettstown. The road to Hackettstown is more mountainous. Therefore, while the distance might be equal, the danger of travel to Hackettstown would be greater than the present transportation to Newton.

The reasons submitted by the Green Township Board of Education are not in the opinion of the Commissioner sufficient to justify a change in designation. The petition is accordingly dismissed.

January 7, 1937.

CHANGE OF DESIGNATION OF HIGH SCHOOL FOR GOOD CAUSE APPROVED BY THE COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,

Respondent.

For the Appellant, John J. Rafferty.

DECISION OF THE COMMISSIONER OF EDUCATION

During the years immediately preceding September, 1931, several districts in Middlesex County experienced considerable difficulty in securing tuition privileges for their pupils in nearby high schools. There were conferences in which the county superintendent, members of the State Department of Public Instruction, and representatives of these districts participated, at one of which it was proposed that the high school program at Dunellen be extended to provide instruction for the ninth grade pupils of two or three other districts, including Middlesex Borough. At this conference a question was raised as to whether the change in designation for this grade to Dunellen High School would be permanently binding upon the sending districts under the provisions of Chapters 281, P. L. 1929 and 301, P. L. 1933. A member of the State Department of Public Instruction advised the boards that since Dunellen was not enlarging its school plant to accommodate pupils from other districts, sending boards would not be so obligated, and this ruling would not be affected even though pupils of this grade should be sent to Dunellen for two or more years.

In accordance with arrangements previously made for the school year 1931-32, the ninth grade pupils of Middlesex Borough were enrolled and instructed in the Dunellen High School, but during the latter part of that year certain acts of the appellant indicated to the respondent that the former was considering the withdrawal of its pupils for 1932-33; whereupon, the Dunellen Board sought the advice of the Commissioner of Education upon the rights of the Middlesex Board to withdraw its pupils. In response, Howard Dare White, the Assistant Commissioner in Charge of Secondary Education, wrote to the Dunellen Board under date of January 18, 1932, stating:

> "* * * my opinion is that your school is legally the designated school for the ninth grade and that Piscataway Township and Middlesex Borough may not withdraw ninth grade pupils or designate another school for those pupils."

There is nothing before the Commissioner to indicate that Middlesex Borough received a copy of the above ruling.

The tuition service for the ninth grade pupils at Dunellen was continued during 1932-33, but early in the second semester the Board of Education of Middlesex Borough requested the Commissioner to approve the transfer of this grade to Bound Brook for the ensuing year. It secured a conference with Mr. White, at which it was agreed that the pupils should continue at Dunellen another year; provided, that such action would not in any wise prejudice the Board's right to request a transfer for the following year. This was confirmed by the Middlesex Borough Board of Education in a letter to Mr. White under date of March 17th, which reads in part as follows:

> "you will no doubt recall that some time ago a delegation of members from this Board discussed the subject of a change in designation with you and Assistant Commissioner Strahan. After the committee reported the result of the conference, it was decided not to ask for a change in designation at this time but at a later date and in proper form provided, of course, we have assurance from the Bound Brook Board they could accommodate our pupils."

The ninth grade Middlesex Borough pupils were again sent to Dunellen for the school year 1933-34. In October, 1933, the appellant made inquiry of the Bound Brook Board as to whether it could accommodate these pupils for the succeeding school year, and on November 18 was informed that facilities would be available. (It may be well to note that for a number of years all high school pupils from Middlesex Borough had been attending the Bound Brook High School, and that the ninth grade was excluded by Bound Brook at the time of the 1931 transfer to Dunellen; and while the Dunellen Board rendered a valuable service to the Middlesex Borough Board during the period of such exclusion, it was the desire of appellant, for the welfare of its pupils, to have them enrolled at Bound Brook for their full high school course.)

On January 3, 1934, the Middlesex Borough Board of Education notified the Commissioner of its desire to have its ninth grade pupils attend the Bound Brook school for the year 1934-35 and set forth the latter's consent to accept such pupils, and also notified the Dunellen Board of the proposed withdrawal. Mr. White wrote to the Middlesex Board on January 15th and advised that the pupils continue another year in the Dunellen School and that the appellant renew its application for a transfer to take effect September 1, 1935. On January 22nd, the Board of Education of Middlesex Borough addressed to the Commissioner a reply to Mr. White's letter, expressing appreciation of the advice, but announcing that it did not wish to continue the present arrangement and had, therefore, decided to make a formal appeal for a change in designation. Attached to this letter was the petition to which the Dunellen Board replied. There being no disagreement as to the facts involved, argument was heard on March 7, 1934, at which time the above cited correspondence was made a part of the record. Representatives of the two boards, who were present at this hearing, were of the opinion that a compromise might be reached by having the Middlesex pupils continue at

Dunellen one year and the transfer granted by the Commissioner of Education to become effective July 1, 1935. It was agreed that the decision of the Commissioner should be withheld pending a discussion of the proposal with their respective boards, but during the latter part of April the Commissioner was orally notified by counsel for the Middlesex Borough Board of Education that his client desired to press the original petition; namely, for a transfer effective as of July 1, 1934.

In view of the advice given by a representative of the State Department at the conference held prior to the 1931 transfer (that the designation of Dunellen for the ninth grade pupils of Middlesex would not be controlled by Chapter 281, P. L. 1929), and in consideration of the notice by appellant to respondent early in January, 1934, the Commissioner is constrained to grant the petition and to direct that the Bound Brook High School be designated for the pupils of Middlesex Borough.

June 21, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a ruling of the Commissioner made in the exercise of the authority conferred upon him by Chapter 301 of the Laws of 1933, which provides in part as follows:

> "1. Excepting school districts which have heretofore designated high schools located outside said districts for the children thereof to attend and which school districts are referred to and are regulated in this particular in and by the act to which this act is a supplement, any school district heretofore or hereafter created which lacks or shall lack high school facilities within said district for the children thereof may designate any high school or schools of this State as the school or schools which the children of such district are to attend. After any such district shall so designate a high school or schools which the children of the district are to attend, said district may not change the designation and name of the school or schools of any other district for said children to attend unless good and sufficient reason exists for such change and unless the Commissioner of Education approves such change of designation;
>
> "Provided, however, that in the event the said Commissioner refuses to approve an application of a district to make a new designation, the district may appeal from such determination to the State Board of Education and, in its discretion, that body may affirm the determination of the Commissioner, or may approve the change of designation sought.
>
> "2. The board of education of any school district having a high school now designated for the children of another school district to attend or which shall be hereafter designated may, in the event that the Commissioner of Education approves an application of a district to make a new designation, appeal from such determination to the State Board of Education, and in its discretion that body may affirm or deny the application."

The record shows that in years beginning with the school year 1931 and ending with the school year June, 1934, the Borough of Middlesex sent its ninth grade pupils to the Dunellen High School. At various times during that period and prior to January 1, 1934, the Middlesex Board discussed with the Assistant Commissioners of Education, White and Strahan, the question of transferring these pupils to the Bound Brook High School, it appearing to be the preference of the Middlesex Board to have these pupils attend the latter school.

In January, 1934, the Middlesex Board notified the Commissioner, and also the Dunellen Board, of their desire to send their ninth grade pupils to the Bound Brook High School for the year 1934-1935 and on or about January 5, 1934, filed with the Commissioner a "Petition of Appeal," praying that he issue an order permitting the Board to do so. A copy of the petition was served upon the Dunellen Board which, in due course, filed its answer. Therein it admitted the Middlesex Board's allegations that a large number of the citizens of the Borough of Middlesex protested against the sending of the pupils to the Dunellen High School, largely because the tuition rate in that school was considerably higher than the rate charged at Bound Brook.

Assistant Commissioner Strahan held a hearing at which both boards were represented and received the evidence in the matter, which consisted principally of copies of correspondence on the subject which had passed between the two boards and also between them and the Commissioner's office. Thereafter the Commissioner filed his opinion, in which he set forth the history of the matter, granted the petition and directed that the Bound Brook High School be designated for the pupils of the Borough of Middlesex. In so doing he exercised the discretion conferred upon him by the statute. After hearing the argument on behalf of the Dunellen Board and careful consideration of its position, we cannot find any ground for holding that the Commissioner improperly exercised that discretion, but on the contrary it seems to the Committee that his ruling was correct.

It is therefore recommended that his decision be affirmed and the application of the Dunellen Board be denied.

November 3, 1934.

HIGH SCHOOL DESIGNATION MAY BE CHANGED FOR GOOD CAUSE UPON APPLICATION TO AND APPROVAL OF THE COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF OXFORD, WARREN COUNTY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The high school which, for a number of years, had been conducted in the school district of the Township of Oxford was discontinued in 1929, and the Oxford Board of Education then designated for its pupils the high school at Hackettstown, which was at that time the only one in that vicinity having sufficient facilities for the Oxford pupils.

During the last year a new high school building has been erected in the Borough of Washington and adequate facilities are now available in that district for the pupils of the Township of Oxford.

The Oxford Board of Education petitioned for a change of designation for its high school pupils from Hackettstown to Washington, and a hearing was conducted by the Assistant Commissioner on December 9, 1935, at which representatives of the Oxford and Hackettstown Boards of Education were heard.

Representatives of the Oxford Board stated that it had been entirely satisfied with the service rendered by the Hackettstown High School, which had made adjustments in personnel and equipment to care for the Oxford pupils, and that the principal reason for desiring the change in designation is the convenience of the Washington High School, a distance of about four miles; whereas, that from Oxford to Hackettstown is approximately fourteen miles. It was also set forth that the pupils must not only ride nine miles each way, or eighteen miles per day further to go to Hackettstown, but that the mountain grades and truck traffic on the route are more extensive. It holds that these conditions constitute good cause for a change in designation.

Representatives of the Hackettstown Board admit that the Washington High School is much more convenient for Oxford pupils, but show that they provided facilities for them when others were not reasonably available and object to an abrupt transfer of the pupils which would, to some extent, adversely affect the Hackettstown school budget.

Decision in the case has been delayed due to the desire of both boards of education that the Assistant Commissioner in charge of high schools investigate

the new facilities at Washington to ascertain their present and future adequacy for the Oxford pupils. On January 15, the Assistant Commissioner filed a report setting forth that the Washington Board of Education would be able to adequately care for the Oxford pupils for several years, and that he was reasonably assured of further facilities when the enrollment in the school requires them.

The benefit to the pupils resulting from the shorter distance to the Washington High School establishes good and sufficient reason for the change in the designation to Washington for the pupils of the Township of Oxford; but due to plans already in effect for the ensuing school year, change of designation is approved, effective September 1, 1937, for Oxford high school pupils excepting those who at that time shall have been promoted to grades eleven and twelve. The pupils of these grades shall continue to attend the Hackettstown school unless the conditions at the close of the school year 1936-1937 shall justify a further consideration of a change in designation for them.

January 31, 1936.

HIGH SCHOOL DESIGNATION MAY BE CHANGED FOR GOOD CAUSE UPON APPLICATION TO AND APPROVAL OF THE COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF PRINCETON AND BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

The South Brunswick Board of Education petitions for a change of high school designation for South Brunswick pupils from the Borough of Princeton and the City of New Brunswick to the Borough of Jamesburg.

A similar petition was presented last year and opposed by the Borough of Princeton. The decision of the Commissioner dated June 5, 1935, granted the petition. After the petition of the South Brunswick Township Board was granted last year by the Commissioner of Education, the South Brunswick Board decided, in response to a petition of citizens, to continue the designation of Princeton and New Brunswick. The Commissioner reapproved the original designation and, consequently, the Princeton High School and the New Brunswick High School continued to be designated high schools for the South Brunswick pupils.

The petition now under consideration differs from last year's petition in that the Board of Education of South Brunswick Township asks permission not only to send beginning high school pupils to Jamesburg in September, 1936, but to withdraw tenth grade pupils from Princeton and New Brunswick, sending them also to the Jamesburg High School.

The present petition of the South Brunswick Board is based entirely upon considerations of economy in tuition costs and transportation. No complaint is made of the tuition service received at Princeton or at New Brunswick, although it is admitted that the New Brunswick High School is crowded.

The petition is opposed by Princeton and New Brunswick. The Princeton Board of Education replies that the pupils in Kingston and the neighborhood of Kingston are within the area which has been served by the Princeton High School for many years and can most naturally and conveniently receive their high school service from the Princeton High School.

The New Brunswick Board of Education claims that the withdrawal of South Brunswick pupils now enrolled in the New Brunswick High School would be a financial hardship to New Brunswick and would not be in the educational interest of pupils who are now attending this school and have completed a part of their high school program.

In the judgment of the Commissioner, it would be undesirable to transfer pupils from a high school in which they have completed a part of the course and require them to attend a newly designated school. The financial saving which might be effected by such a transfer would be offset by the educational loss which the pupils would suffer. That part of the petition, therefore, which asks for permission to withdraw tenth year pupils from the Princeton High School and the New Brunswick High School is denied.

It remains to determine a permanent and reasonable policy concerning the designation of high school for the pupils of South Brunswick Township beginning September 1, 1936. It is true that economy in tuition costs and transportation would be effected by designating the Jamesburg High School for a considerable proportion of the South Brunswick Township pupils. It is the belief of the Commissioner, however, that pupils who live in the vicinity of Princeton, and can be cared for in the Princeton High School, should be permitted to attend that school as the designated school.

The decision of the Commissioner is that pupils from South Brunswick Township who begin their high school course in September, 1936, shall be sent to the Jamesburg High School and that the Jamesburg High School shall become the designated high school for South Brunswick Township with the following exception: The Princeton High School shall continue to be the designated high school for South Brunswick Township pupils who live in the area described as follows: All of South Brunswick Township between the Lincoln highway and the Brunswick pike extending as far as the road leading from Ten Mile Run to the Brunswick pike; provided, that for convenience and economy of transportation those pupils who live immediately adjacent to the described boundary may be considered as within designated area.

April 2, 1936.

PUPILS MAY BE WITHDRAWN FROM HIGH SCHOOL OUTSIDE DISTRICT UPON ERECTION OF AN APPROVED HIGH SCHOOL WITHIN THEIR DISTRICT

IN THE MATTER OF THE WITHDRAWAL OF STUDENTS OF THE BOROUGH OF HAWTHORNE FROM CENTRAL HIGH SCHOOL, PATERSON, NEW JERSEY.

For the Paterson Board of Education, Harold D. Green.

DECISION OF THE COMMISSIONER OF EDUCATION

During the school year 1930-1931 the Board of Education of the Borough of Hawthorne in Bergen County, which for a number of years has been sending its high school pupils to the City of Paterson, notified the Commissioner of Education that it was desirous of providing high school education within the district and of erecting a building for that purpose. In support of its argument that the Commissioner recommend to the State Board of Education the approval of a high school for the Borough of Hawthorne, the board of education set forth that at the time it was sending 315 high school pupils to the City of Paterson at an annual tuition cost of $52,000.00, and that because of the increasing population of Hawthorne there would be approximately 200 pupils graduating annually from the elementary schools.

On February 9, 1931, the Commissioner wrote to the Board of Education of the City of Paterson the following letter:

"Board of Education,
City of Paterson,
Paterson, New Jersey.

Gentlemen:

The Borough of Hawthorne contemplates the erection of a high school. Although the question of the withdrawal of the pupils of a district which provides its own high school facilities from schools in which the children of that district are enrolled does not require the approval of the Commissioner, I am nevertheless writing you in regard to the probable development of this high school because when such a high school is opened, the Hawthorne pupils will be withdrawn from your school system.

Hawthorne has a sufficient number of pupils and contemplates organizing a school which will meet the requirements of the Department for approval.

Very sincerely yours,

(Signed) CHARLES H. ELLIOTT,
Commissioner of Education."

On February 20, 1931, the Commissioner sent a letter to the Board of Education of Hawthorne which reads:

"Board of Education,
Hawthorne, New Jersey.

Gentlemen:

Your request for approval of a plan for the organization of a four-year high school for your community has been before the Department. Following careful examination of this question by members of the Department and based upon a report by the Assistant Commissioner in charge of Secondary Schools, we believe that conditions are such that you should have your own high school. Accordingly, sometime ago we notified the Board of Education of the City of Paterson of our intention to approve the curriculum of such high school when established on the ground that we believe that you have a sufficient number of pupils and sufficient resources to offer an adequate program.

My understanding is that you will now proceed to establish a four-year high school and that you will submit to the Department a program of studies, a list of teachers, and general description of facilities as a basis for our approval.

In the organization of this school it is to be understood that you will not withdraw the students enrolled in the eleventh and twelfth grades as that would interfere with the continuity of work of the students who began their work in the Paterson or other high schools. My understanding is that you will open your school with the ninth and tenth grades, adding in succession the eleventh and twelfth as students enrolled in those grades are graduated from the receiving districts to which they have been sent.

Very sincerely yours,

(Signed) CHARLES H. ELLIOTT,
Commissioner of Education."

Following receipt of the latter communication, the Hawthorne Board of Education, under authorization of the voters of that district, erected a new high school building in which instruction will be offered beginning September, 1933.

During December, 1932, a representative of the Board of Education of Hawthorne discussed with the Assistant Commissioner in charge of Secondary Schools the withdrawal from the Paterson High School of the pupils now completing the tenth grade who will be in the eleventh grade during the ensuing school year, instead of allowing both the eleventh and twelfth grades to continue at Paterson as proposed in the Commissioner's letter of February 20. Subsequently conferences were held and letters exchanged in reference to the withdrawal of the aforesaid class, and on February 2, 1933, the Commissioner notified the Board of Education of Hawthorne and the City Superintendent of Paterson that the request for the withdrawal of this class was granted.

The Board of Education of the City of Paterson having received the information conveyed by the Commissioner to the Board of Education of Hawthorne under date of February 20th, wherein he told the latter board that the eleventh and twelfth grades should remain in Paterson, raised an objection to the transfer and requested a hearing before the State Board of Education. This hearing was held before a committee of the State Board on February 23, 1933, at which time it was the opinion of the committee that the appeal was not properly presented inasmuch as it had not been heard by the Commissioner of Education, and accordingly advised the Paterson Board to present formal appeal to the Commissioner. This appeal was made and the Commissioner heard the oral argument of the board members and their counsel, at the conclusion of which it was agreed that counsel should prepare a statement of facts and present a brief on behalf of the Board of Education of the City of Paterson.

It is the principal contention of the appellant that since the Commissioner had notified Hawthorne that the eleventh and twelfth grade classes should continue at Paterson during the ensuing year, and that they had anticipated tuition receipts for the eleventh grade pupils, the transfer granted by the Commissioner should be rescinded and the pupils of this class accordingly should be required to attend the Paterson High School.

The Commissioner has reviewed all the conditions involved in this case and has concluded that the transfer was justified. The appeal is therefore dismissed.

June 8, 1933.

TRANSFER OF HIGH SCHOOL PUPILS BECAUSE OF FINANCIAL CONDITION OF SENDING DISTRICT APPROVED BY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE APPEAL OF THE BOARD OF EDUCATION OF MIDLAND PARK, BERGEN COUNTY, NEW JERSEY, TO TRANSFER CERTAIN OF ITS HIGH SCHOOL PUPILS ATTENDING RIDGEWOOD HIGH SCHOOL, EFFECTIVE SEPTEMBER, 1933.

For the Appellant, J. Vincent Barnitt.

DECISION OF THE COMMISSIONER OF EDUCATION

For a number of years the Ridgewood High School was designated for the pupils of the Borough of Midland Park. During the school year 1932-1933, with the approval of the Commissioner of Education and the consent of the Ridgewood Board of Education, the designation was changed from Ridgewood to Pompton Lakes, with the provision that the pupils already attending the Ridgewood High School should not be affected by the change.

The Board of Education of the Borough of Midland Park now petitions the Commissioner to extend the change in designation to include the pupils of the eleventh grade without affecting the continuance of the senior class at the Ridgewood High School.

Chapter 281, P. L. 1929, as amended by Chapter 301, P. L. 1933, provides in part as follows:

> "After any such district shall so designate a high school or schools which the children of the district are to attend, said district may not change the designation and name the school or schools of another district for said children to attend unless good and sufficient reason exists for such change and unless the Commissioner of Education approves such change of designation."

Prior to 1929, when the above statute became effective, boards of education frequently changed the designation of the high schools for the pupils of their respective districts without apparent good cause for such action after the district to which they had been sending their pupils had erected buildings for their accommodation and had otherwise provided for their education. It is clearly the purpose of this statute to protect the districts which have provided high school facilities for other districts from the withdrawal of pupils without good cause being shown for such action, which good cause appears to have been established by the change of designation above set forth. There is involved in this case only the question of whether there is good cause for now extending the designation to include the thirty-eight pupils who will enter the junior class in September, 1933.

It is the contention of the Midland Park Board of Education that the financial condition of the borough does not justify it in continuing to pay for the eleventh grade the tuition charged by the Ridgewood Board of Education since satisfactory education can be provided in the Pompton Lakes High School at a rate which will save the borough approximately $4,000 for each of the next two years. The Board of Education of Ridgewood shows that it made its school budget for the year 1933-1934 contemplating the receipt of tuition for these pupils and has provided educational facilities for them. It holds that a withdrawal at this time is unfair since the Board made an adequate concession to the Midland Park Board in consenting to the original change in designation.

Briefs have been filed by both Boards of Education which set forth the financial conditions of the districts. Upon a careful reading of these briefs, it is the conclusion of the Commissioner of Education that, in view of the present economic conditions and their effect upon the Borough of Midland Park, there is good cause for the change of designation for the pupils of the eleventh grade, and their withdrawal will not seriously affect the school situation in the Borough of Ridgewood. This conclusion is reached despite the fact that the educational interest of the pupils should also be protected against the loss involved in a transfer to another school and the resulting interruption in the continuity of their work. This latter consideration would forbid grant-

ing the approval of the Midland Park Board under any ordinary circumstances. The extremely unfavorable financial situation of the Borough of Midland Park does, in the opinion of the Commissioner, outweigh these considerations and he is constrained to grant the appeal of the Midland Park Board of Education. Therefore, the Pompton Lakes High School is hereby designated for the pupils of the eleventh grade of the School District of Midland Park.

July 26, 1933.

PUPIL'S RIGHT TO HIGH SCHOOL FACILITIES

FREDERICK STAATS,

vs.

BOARD OF EDUCATION OF MONTGOMERY TOWNSHIP, SOMERSET COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

No formal complaint, or answer, has been filed in this case, but at a hearing before me it was agreed that Frederick and Lloyd Staats, sons of the complainant, were residents of Montgomery Township; that they had taken the eighth grade work in a school in said township during the school years of 1911-1912 and 1912-1913; that they took the county examination at the close of the school year of 1912-1913, but failed to pass; that the appellant applied to the respondent to have his sons sent to the high school at New Brunswick, which application was refused, and that the sole reason for such refusal was that they had failed to pass the county examination.

It was admitted by the respondent that at the time the application was received no rule had been adopted by it requiring a pupil to pass the county examination as a condition precedent to promotion to a high school, but claimed that such had been the custom for some years. A rule to this effect has recently been adopted.

The law requires a board of education to provide suitable school facilities for all children residing in the district and desiring to attend school. It further provides that when a district does not maintain a high school that pupils who have completed the grammar school course shall be sent to a high school in another district, and that the district in which they reside shall pay the cost of tuition and also of transportation, if transportation be necessary.

The law gives to the local Board of Education, in the first instance, the right to decide whether or not a pupil should be promoted to the high school, but in exercising this right great care should be taken not to unnecessarily retard the progress of a pupil, whose school life, even under the most favorable circumstances, is very short.

Examinations are held each year. The questions are prepared by the Commissioner of Education. In Somerset County pupils who pass these examinations are granted certificates by the County Superintendent. These examina-

tions are quite as much a test of the efficiency of the schools and the teachers as they are of the progress of the pupils. An examination is only one factor in determining the right of a pupil to promotion. A far more reliable test is the work actually done during the year.

I am of the opinion that refusing to promote a pupil to the high school for the sole reason that he has failed to pass the county examination is not only unwise but that it may result in depriving him of suitable school facilities. For this reason the rule adopted by the respondent is null and void.

The question to be decided is, does the record of the sons of the appellant show that they were entitled to promotion to a high school? The reports of their work in the eighth grade during the school year of 1912-1913 are remarkably good, with the exception of the month of September, which usually is low, neither boy had a monthly average below eighty-one, the general average of Lloyd Staats was 86 6-9, and of Frederick Staats, 87 4-9. It appears from the reports of the superintendent and principal of the schools in New Brunswick that both boys are doing good work except in English, and that their general standing is equal to that of other pupils in the same class.

The respondent erred in refusing to provide high school facilities for the sons of the appellant.

It is ordered that the respondent provide proper high school facilities for Lloyd and Frederick Staats, and that it pay to the appellant any expenses incurred by him in sending said boys to the high school at New Brunswick during the current school year.

February 20, 1914.

Decision of the State Board of Education

1. It appears in this case that two boys of the respondent failed to graduate from the eighth grade of the Grammar School in Montgomery Township, but in spite of this failure to graduate, the respondent insisted upon their being promoted and sent to a high school at New Brunswick.

2. The appellant agreed to send them there and passed a resolution to the effect that the Board of Education of Montgomery Township would pay the transportation of the boys ($4.03 per month), if the boys passed the entrance examination at the New Brunswick High School and if the respondent paid the difference in tuition between New Brunswick and Bound Brook or Hopewell.

3. The respondent was present when this resolution was passed and assented to it.

4. The boys went to New Brunswick, but were given no examination and passed no examination. Without the knowledge or consent of the appellant they were placed in the school on trial. They are apparently still there "on trial."

5. Before the first of the year 1914, Mr. Staats, the respondent, presented the appellant with a bill for full tuition, instead of paying the difference as agreed, and *full* transportation from his house to New Brunswick and return.

This bill the appellant declined to pay. The respondent then brought this action.

6. The State Board of Education holds that a local board of education has authority to prescribe its own rules for promotion. It is given that express right by statute. The appellant was within its rights in stipulating that the boys should pass an examination and thus demonstrate their fitness to attend high school. The result of the subsequent trial at New Brunswick, whether good or bad, is beside the question. The appellant had stipulated for an examination—not a trial. If the ruling of the local school Board in this case is not binding, then anyone could send his children to what school he pleased, at what expense he pleased, and afterward send the bill to the local school Board for payment. The respondent should have lived up to his agreement with the appellant. Instead of doing so he took upon himself the right and the risk of sending his boys to the high school at New Brunswick and incurring expense therewith. He has not come into court with clean hands and his contention should not be sustained.

The decision of the Commissioner of Education is reversed.

April 4, 1914.

VACCINATION

CLARENCE S. CURTIS, ET AL.,
Appellants,
vs.
THE BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

For the Appellant, Theodore D. Gottlieb.
For the Respondent, Charles M. Myers.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is taken by Clarence S. Curtis, whose son was excluded from the Newark schools because he refused to be vaccinated.

The law in this case provides that "a board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination."

Based upon this statute, the Board of Education of the City of Newark enacted a rule whereby all pupils were required to be vaccinated before entering its schools, unless "unfitness for vaccination be claimed, and demonstrated by certificate of a physician."

It was sought to enforce this rule in the case of Laurence Curtis, son of the appellant, Clarence S. Curtis.

Mr. Curtis refused to allow his son to be vaccinated, not on the ground of the physical unfitness of his son, but because he was opposed to the theory and practice of vaccination. The boy was then excluded from school by authority of the Board of Education; whereupon Mr. Curtis demanded of the board a hearing on the merits of the question of vaccination. This request was refused. Mr. Curtis then took an appeal to the Commissioner of Education, desiring "an opportunity to demonstrate the reasonableness of his position to the Newark Board of Education and to that end he desired a ruling remitting the case back to the Newark Board of Education with instructions to grant such hearing."

The whole case was submitted to the Commissioner by mutual agreement on brief of counsel. The counsel for the appellant ably argued the demerits of vaccination. The counsel for the respondent answered equally well in reply, giving the law in the matter as quoted from the courts of other States as well as from the Supreme Court of the United States.

The question at issue resolves itself into the meaning of our New Jersey law, as quoted above. Does it give to a Board of Education discretionary power, or is it mandatory? If it gives discretionary power, then a Board of Education becomes the judge of the merits of vaccination as a preventive of smallpox. It follows in such case that the Board of Education should give a hearing to Mr. Clarence S. Curtis, in which he should be allowed to give not only his own opinion, but also whatever of expert medical opinion he could bring to bear in the case. The opposition would bring its expert medical opinion also.

Thus there would be given to the Board of Education a prerogative in the matter of judging the efficacy of vaccination as a preventive of smallpox vouchsafed to no other public body in the world, outside of State Legislatures.

On the other hand, if the statute is mandatory, then the Board of Education has no power to pass on the question of the efficacy of vaccination as a preventive of smallpox. Neither has it power to pass upon the dangers that may follow in case of its performance.

These two views are the only things that it would seem within the legal scope of the Commissioner to consider.

Plainly it is a duty that is imposed on the Board of Education by the statute, in which both public and private persons have a deep interest, namely, the protection of their bodies from an alarming disease. The clause in the statute "may exclude from school," etc., taking all things into consideration in connection with health legislation, should be construed as conveying a command.

The definition of the auxiliary "may," as given in the Century Dictionary, is as follows: "'May' in a statute is usually interpreted to mean 'must,' when used not to confer a favor but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest."

It is plain that the statute does not confer a favor but it does impose a duty. It is equally plain that a public interest is involved. Besides, to interpret the word "may" as only permissive, would be to render the statute ineffective and would defeat the very object to be attained, namely, the protection of the children and the community at large from the ravages of a loathsome disease.

It is my opinion, therefore, that the statute relating to vaccination is mandatory—hence a Board of Education cannot consider the question raised by the appellant, namely, the efficacy of vaccination as a preventive of smallpox.

Further, the said Laurence Curtis, not seeking exemption from vaccination by reason of physical unfitness, but because of the personal opinions held by his father on the question of the efficacy and dangers of vaccination was lawfully excluded from school.

The appeal is dismissed.

August 2, 1915.

Decision of the State Board of Education

This is an appeal from a decision of the Commissioner which sustained the exclusion of appellant's son from the schools of Newark because he had not been vaccinated.

The law provides that "a Board of Education may exclude from school any teacher or pupil who shall not have been successfuly vaccinated." If the words *may exclude* mean *must exclude,* then clearly the Newark school authorities would have been guilty of a violation of the law if they did not exclude appellant's son. If the words *may exclude* are to be construed as permissive, then we find that the Newark School Board has availed itself of the permission and has enacted a rule providing that vaccination, except in certain cases, shall be a condition for admission to school.

Whether the words *may exclude* are to be considered as mandatory or as permissive, we cannot hold that the exclusion of appellant's son was unlawful.

Neither are we prepared to hold if such words are permissive that a hearing on the general subject of vaccination must be granted to every parent who, like appellant, contends that compulsory vaccination is an infringement of personal liberty and is unsanitary, not in the particular case, but generally.

The decision of the Commissioner is affirmed.

September 11, 1915.

EXCLUSION OF PUPILS FROM SCHOOL FOR REFUSAL TO COMPLY WITH VACCINATION REQUIREMENT

JAMES ADAMS, SR., ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN,
Respondent.

Walter S. Keown, for Appellant.
Edwin G. Scovel, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by James Adams, Sr., George Ware and Luke Bate from the action of the Berlin Township Board of Education in suspending appellants' children from the schools of the district under the following resolution passed by the Board in January, 1922:

> "On motion of Mr. Parker and seconded by Mr. Egler that the resolution enforcing vaccination as ordered by the Board of Health and adopted by the Board of Education be enforced, and if there are any pupils in Berlin or West Berlin schools that have not done that they be excluded from school."

Upon the advice of the Board of Health it appears that previous to January, 1922, other resolutions requiring vaccination for all teachers and pupils in the township schools had been adopted by the Board of Education, the first of which resolutions was passed in October and the other in November, 1921.

The respondent, the Berlin Township Board of Education, admits the passage of the resolutions and the exclusion of appellants' children from school for violation of the requirements as to vaccination contained therein, but asserts that according to law such action is entirely justified and legal.

Section 173, Article IX, of the 1921 Edition of the School Law provides upon the subject of vaccination as follows:

> "A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination; *provided,* that in any district having a medical inspector appointed by the board of education the certificate hereinbefore provided for shall be furnished by such medical inspector."

From the above provision of law it is very apparent that authority is expressly given to boards of education throughout the State to exclude from school any

teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil produces a certificate to the effect that he or she is an unfit subject for such vaccination. Such right of exclusion on the part of the Board of Education is upheld in the decision of the Commissioner of Education and of the State Board of Education in the case of Clarence S. Curtis *vs.* The Board of Education of Newark, N. J., cited on page 656 of the 1921 Edition of the School Law. In this case the action of the board of education in excluding appellant's son from school was upheld on the ground that the board had merely exercised the authority granted it by statute of excluding from school a child who had not complied with its vaccination requirements.

It cannot in the opinion of the Commissioner of Education be successfully argued that an exclusion from school for failure to comply with a vaccination requirement is in conflict with the provisions of the Compulsory Education Law which requires the attendance at school of every child between the ages of 7 and 16, unless regularly and lawfully employed or unless receiving equivalent instruction elsewhere. A child excluded from school by a board of education under statutory authority for such exclusion is an exception to the Compulsory School Law requirements, or, in other words, is in reality outside the law and remains an exception to or outside the law until he or she has complied with the regulations which the board is legally authorized to make. Neither, in the opinion of the Commissioner, can the statutory authority for such exclusion for failure to be vaccinated be said to be in conflict with the Constitutional provision for the establishment of a system of public schools for all the children of the State between the ages of 5 and 18 years, since the statute authorizing the exclusion for failure to be vaccinated is a justifiable exercise of police power by the Legislature in protecting the health of people.

It is, therefore, the opinion of the Commissioner of Education that the action of the Berlin Township Board of Education in excluding from school the appellants' children for an admitted violation of the board's vaccination requirements as set forth in the resolutions above referred to was entirely justified by the statute above cited and was merely a legal exercise of the authority conferred upon it by such statute.

The appeal is accordingly hereby dismissed.

Dated August 22, 1922.

Decision of the State Board of Education

On October 22 and November 9, 1921, and January 7, 1922, the Board of Education of the Township of Berlin, in Camden County, passed resolutions requiring that "in the future all children must be vaccinated before being admitted as pupils" of the schools of the township. Pursuant to this resolution, children of the appellants who had not been vaccinated were refused admission to the schools by the Board, and thereupon their fathers appealed to the Commissioner, who has held that the Board's action was justified by Section 173 of Article IX of the School Law (1921 Edition, p. 93), which reads in part as follows:

"A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination;"

The language of the statute is so clear that there can be no room for doubt that the Berlin Board of Education had the right to exclude pupils who were not vaccinated. Curtis *vs.* The Board of Education of Newark, New Jersey School Laws (1921 Edition, p. 656).

It is recommended that the decision of the Commissioner of Education be affirmed.

SUSPENSION OF PUPIL INDEFINITELY

EDWARD BOYD,

vs.

Appellant,

THE BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD,

Respondent.

Frederick A. Boyd, for the Appellant.
E. Howard Foster, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

It is alleged in this case that on November 6, 1916, Edward Boyd, a pupil in the sixth grade of the school in the Borough of Bergenfield, acted disrespectfully to his teacher, Miss Gertrude Morton, whereupon he was requested to apologize for his conduct. He refused and was ordered to report to the principal of the school, Miss Lachmund. The following is a part of Miss Lachmund's testimony in the case: I said: "Were you respectful when you spoke to Miss Morton?" He said he did not know. I asked him "Would you have spoken to your mother in the same manner?" He said "No." "Then you were not respectful?" and he said "No, I was not respectful." I asked him: "Edward, what is the proper thing to do when you have been discourteous to anyone?" He said "Apologize." "Then you will apologize to Miss Morton in the morning," and Edward replied that he would. Edward returned in the morning with a note from his mother and stated to Miss Lachmund: "If I am to apologize I am to go back home."

On November 15, 1916, a special meeting of the Board of Education was held at which Edward was permitted to return to school temporarily until the Board could investigate the matter through its Teachers' Committee. A special meeting of the Board of Education was held on November 21, 1916, with the entire Board present. Edward Boyd and his parents were present. At this meeting the Board passed the following resolution: "That if Edward

Boyd does not apologize tonight he be suspended until such time as he does apologize to Miss Morton."

The question to be considered is: Has a board of education the right under the law to force an apology by preventing a boy from attending school until he makes such an apology? Section 97, division VIII, of the School Law, edition of 1914, provides that a board of education shall have power to suspend or expel pupils from school. Section 125 gives a teacher the right to suspend from school any pupil for good cause, provided that such suspension shall be reported forthwith by the teacher to the board of education, and provided further that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil. Section 144 states that "continued and willful disobedience, open defiance of the authority of the teacher, the use of habitual profanity or obscene language shall be good cause for suspension or expulsion from school." It thus appears that there is abundant authority in the law for a board of education to suspend a pupil from school for good cause.

There is no doubt that it was the intention of the Board of Education to suspend Edward Boyd from school because of open defiance of the authority of the teacher. It however appears in the case that if Edward Boyd apologized to the teacher there would have been no suspension. The apology related to the act of defiance, and thus cannot be the primary reason for a suspension. Teachers or boards of education cannot make a rule providing for the enforcement of an apology. The offense on the part of the pupil is the primary thing that must be taken into consideration. A pupil may voluntarily apologize for an offense. He cannot, however, be made to apologize for an offense. The only punishment for disobedience that the law provides is suspension or expulsion from school. It does not provide that a pupil for a certain act can be suspended and at the same time can be forced to make an apology. The Board, therefore, had no right under the law to suspend Edward Boyd from school and at the same time say that he could not return until he apologized to the teacher for his conduct. In other words, there was a double punishment provided: first, suspension, which the law recognizes; second, a forced apology, which the law does not recognize. The error the Board made was in not making the suspension definite in time. If Edward Boyd had voluntarily apologized to the teacher for his misconduct the teacher might or might not have accepted the apology as proper amends for the offense committed in school. She still would have the right to suspend him. It is a very doubtful practice and one that has led to a great deal of trouble to base the suspension of a boy from school on the making of an apology, for it will appear that if he refuses to make an apology then he will have been suspended because of the refusal and not because he has committed an offense against the good order of the schoolroom.

I am therefore of the opinion that the suspension of Edward Boyd was wrong only because it was indefinite in time and because it was based upon the boy's refusal to make an apology. From the circumstances as related, the Board, in my opinion, would be justified in suspending the boy for a definite period of time for his defiant attitude and bad conduct. Being suspended from

the 21st of November until the present time is punishment quite sufficient for the offense committed. Hence Edward Boyd should be reinstated in school, and has a right to remain there so long as he is obedient to the rules of the school and respects the authority of the teacher.

January 2, 1917.

SUSPENSION OF PUPIL

SIDNEY HOEY,

Appellant,

vs.

BOARD OF EDUCATION OF LAKEWOOD,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant in this case, Sidney Hoey, is a resident of the School District of Lakewood, Ocean County, and had been such resident for three years previous to the date of this appeal.

Sidney Hoey, Jr., the son of the appellant, entered the Lakewood high school, regularly promoted from the grammar school, in September, 1919. He continued to attend the said high school as a student in the first year class until November 24, 1919, upon which date he was suspended by the principal, William M. Austin, until the meeting of the Board of Education. At the meeting of the Board on December 13 the suspension of Sidney Hoey, Jr., was taken up and considered by the said Board.

In the notice furnished the Board of Education by the principal appeared the statement that the boy had been suspended until the meeting of the Board of Education, and a request that the boy be suspended from school by the Board for the remainder of the school year. The reasons given by the principal in the notice for the suspension of the boy were truancy, disobedience, swearing, insubordination, dismissal from algebra, dismissal from physical training, dismissal from chapel, and insolence.

At the meeting of the Board of Education on December 13 the father of the boy, Sidney Hoey, Sr., appeared and protested against the suspension of his son from school and asked that he be reinstated. After considering the case the Board not only approved the suspension by the principal but extended the suspension for the remainder of the school year.

In his petition of appeal to the Commissioner of Education the appellant prayed that the facts involved in the controversy be reviewed by the Commissioner and that the said Sidney Hoey, Jr., be permitted to resume his attendance at the Lakewood high school. A hearing was granted by the Commissioner of Education and held at Lakewood on April 14, 1920. At this hearing counsel appeared for both appellant and the Board of Education, and

witnesses were examined and testimony taken as to the cause for the suspension of the boy from school. Teachers in whose classes Sidney Hoey, Jr., had been a student were called as witnesses and testified as to his general conduct in their classes. All these witnesses bore testimony to the fact that the boy was a restless, disturbing element in recitation classes and that he frequently left the room without permission. It was also stated that on one occasion he swore at a boy who was standing between him and the blackboard from which he desired to copy some work. It was shown by the teachers that the boy had been frequently reported to the principal for disturbing the class exercise, but there was no testimony that tended to establish any capital offense in the schoolroom, if we except the one instance upon which a teacher testified that the boy used language which might be called "swearing."

The testimony of the teachers also indicated that the conduct in the school of Sidney Hoey, Jr., had been frequently the subject of discussion in faculty meetings. No teacher testified to the fact that the boy was wilfully disobedient, and it was stated by some of the teachers that the trouble with the boy was caused largely by his physically nervous condition. The substance of the testimony, when summed up, was to the effect that the boy was constantly bringing irrelevant things into his conversation in class; that he frequently did things to make the pupils laugh and cause a general disturbance, and that the conclusion of the teachers upon discussing his conduct at faculty meetings was that he should be suspended from school.

The conclusion reached by the Commissioner of Education from the testimony taken at the hearing is that the suspension from school of Sidney Hoey, Jr., by the principal, William M. Austin, was justified. This appeal, however, is not taken from the act of the principal in suspending the boy until the meeting of the Board, but from the action of the Board of Education in suspending him for the remainder of the school year.

The question really involved is whether the suspension of so long a time as to take in the remainder of the school year after December 13, 1919, is excessive in its severity. This is the important question for consideration.

The only punishment the law permits in the public schools of New Jersey is suspension or expulsion from school for offenses against the good government and discipline of a school. The object to be attained by suspension or expulsion is to have some means of maintaining good order and respect for authority in the schoolroom, but the punishment must not be so excessive and unreasonable in its severity as to cause disrespect for the authority that administers the punishment. The following is laid down as a fundamental proposition by Sir William Blackstone in his Commentaries on the Laws of England (Edition by George Chase):

> "Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that offenses are more effectually prevented by the *certainty* than by the *severity* of punishment."

It is, therefore, a very grave question whether the manners of this boy could not be amended by less harsh treatment than that which was equivalent to expulsion from school for the greater part of a year. A high school education is of tremendous value to a boy or girl, and no boy or girl should be deprived for such a long period of time of the right to such an education without most serious consideration.

It is, therefore, the opinion of the Commissioner of Education that the suspension from school of the appellant's son, Sidney Hoey, Jr., was reasonable only to the extent of the time covered by the suspension prescribed by the principal of the school, namely, until the meeting of the Board of Education. This was in itself a sufficient punishment to meet the offenses as they were presented at the hearing, and sufficient in the judgment of the Commissioner to accomplish the proper disciplinary effect as an example to the rest of the school.

It is, therefore, the conclusion of the Commissioner of Education that sufficient and more than sufficient punishment has already been inflicted upon the appellant's son, Sidney Hoey, Jr., and it is herewith ordered that the said Sidney Hoey, Jr., be reinstated in his classes at the Lakewood high school from the date hereof.

April 28, 1920.

SUSPENSION OF PUPILS FOR DISOBEDIENCE OUTSIDE OF SCHOOL HOURS

CHARLES LAEHDER AND E. K. EDICK,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The son of the appellant, Laehder, was a pupil in the Manasquan High School, and manager of the High School Baseball Team. The son of the appellant, Edick, was also a pupil in said school and a member of the ball team.

On Wednesday, May 20, the baseball team, accompanied by Mr. Satchel, the principal of the high school, went to Trenton to play a game. After the game was over, young Laehder and two other boys returned to Manasquan in the automobile with Mr. Satchel. It was understood that the boys in the other cars would follow immediately, but they failed to do so, and did not reach Manasquan until between two and three o'clock Thursday morning. At the school session on Thursday, Mr. Satchel, who, as principal of the high school, had charge of the athletics of the school, stated that as a punishment for

remaining in Trenton, the team could not play a game scheduled for Lakewood, on Saturday, May 23. This action of Mr. Satchel was later confirmed by Mr. Richardson, the supervising principal of the schools in the district. Thereupon, young Laehder notified the Lakewood team that the game was cancelled. Upon being urged by the Lakewood team to play the game, the Manasquan High School Team was disbanded, and a team known as "The Independent Baseball Team of Manasquan" was organized. Seven of the members of this team were pupils in the Manasquan School, and members of the High School Team. The pupils were warned that if they went to Lakewood they would be suspended. Notwithstanding this warning, they went to Lakewood on Saturday, May 23. The following Monday, Mr. Richardson suspended the seven boys who went to Lakewood, and notified the Board of Education that he suspended them "for wilful disobedience of school orders on Wednesday, May 20, and for further disobedience and defying school authority on Saturday, May 23." Among those suspended were the sons of the appellants. At a meeting of the Board, held June 3, the action of the supervising principal was ratified and confirmed.

It is from this action that the appeal is taken.

Mr. Laehder claims that, as his son returned from Trenton in the car with Mr. Satchel, he could not be punished for what occurred on that day, and that his son went to Lakewood by his permission, and, further, that the principal and the Board exceeded their authority in punishing pupils for going to Lakewood on Saturday, a school holiday.

The claim of Mr. Edick is the same as that of Mr. Laehder, except that his son did remain in Trenton, but with his knowledge and consent.

I have been unable to find any decision by the courts in this State as to the right of a principal of a public school or a board of education to punish pupils for acts committed when the school was not in session, but there have been numerous cases in other states.

In the case of Dresser *vs.* Dist. Board, 116 N. W. Rep. 235, the court said:

> "This court recognizes certain obligations on the part of the pupil which are inherent in any proper school system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject. This court, therefore, holds that the school authorities have the power to suspend a pupil for an offence committed outside of school hours, and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught the proper discipline of the school, to impair the authority of the teachers and to bring them into ridicule and contempt. Such power is essential to the preservation of order, decency, decorum and good government in the public schools."

35 Cyc. 1137, says: "It has been held that a rule of a school board forbidding pupils to play football games under the auspices of the school is not unreasonable or an excess of the authority of the board, although applied to conduct on holidays and away from the school grounds."

Section 111 of the School Law provides that "a teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the play-grounds of the school, or during recess, and shall suspend from school any pupil for good cause; provided, that such suspension shall be reported forthwith to the board of education," and section 86, paragraph VIII, gives to a board of education power to suspend or expel pupils from school.

The action of the supervising principal and the Board of Education was strictly in accordance with the provisions of the statute. The only question, therefore, is: Was the action of the sons of the appellants good cause for suspension from school?

In the case of Edick, there can be no doubt. He went to Trenton as a member of the High School Team, and was clearly under the control of the principal. His father had no legal right to give him permission to remain in Trenton. Such permission could only be given by the principal. Edick was forbidden to go to Lakewood as a punishment, and his going there was an open defiance of the authority of the teacher. Laehder was not under discipline for anything which occurred at Trenton, but his going to Lakewood was in defiance of the authority of the principal, as defined in the decision quoted above.

The supervising principal would have been derelict in his duty had he failed to punish the sons of the appellants for their disobedience. The discipline of the school would have been injured and the authority of the teachers impaired.

The appeal is dismissed.

Albert Laehder has asked that, notwithstanding his suspension, he be granted a diploma of graduation from the high school course, on the ground that he had practically completed the course at the time of his suspension. While this question was not included in the appeal, with the consent of the Board of Education, testimony was taken. From the testimony of Laehder himself, it is clear that he has not completed the work of the fourth year in the high school. He is not, therefore, entitled to a diploma.

October 26, 1914.

PROTEST AGAINST EXCLUSION OF CHILD FROM SCHOOL

MARGUERITE EDWARDS,
Appellant,

vs.

BOARD OF EDUCATION OF ATLANTIC CITY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is brought by the appellant, Marguerite Edwards, against the Atlantic City Board of Education on the grounds that her child was unlawfully excluded from the Massachusetts Avenue school because she belongs to the negro race.

Testimony in this case was taken February 21, 1923, and was conclusive as to the following:

Catherine Edwards, daughter of the appellant, graduated in June, 1922, from the sixth grade of the New Jersey Avenue school, which provides only for the first six grades. The appellant directed her daughter to attend the Massachusetts Avenue school on the opening day in September, 1922, without any authority from the school officials, but because that building was the nearest seventh grade building to her home, and did not require her child to go over dangerous railroad crossings.

On the opening day of school the Massachusetts Avenue building was overcrowded, and during the first two days, more than one hundred pupils were assigned to the other buildings from this school. In general, those pupils who were assigned to the other buildings were new applicants for admission to the Massachusetts Avenue school. Among the one hundred or more thus assigned was Catherine Edwards, who was given a note by the principal of the Massachusetts Avenue school directed to the principal of the Indiana Avenue school, and was told that she should attend the Indiana Avenue school. This building is one of the best equipped buildings in the city, and may be reached without uncommon danger of travel. It is true that to reach this school the daughter of the appellant is required to cross certain railroad tracks, but it is also shown that in order to reach the Massachusetts Avenue school, she was required to cross a street with a double trolley track, with cars running at about three minute intervals on each track.

Instead of going to the Indiana Avenue school, she returned home, as directed by her mother, and her mother immediately appealed to the superintendent, for the admission of her daughter to the Massachusetts Avenue school; and upon refusal of the superintendent, she engaged counsel and presented the case to the Board of Education, which also directed that the child attend the Indiana Avenue school.

The principal questions before us in this case are:

1. Should the appellant have the right to select the building her child should attend, or does this power belong to the school authorities?
2. Was she excluded from school as comprehended by the Law?
3. Is there any discrimination as to races in the conduct of the schools of Atlantic City?

To permit all parents to select the schools which they desire their chilldren to attend, would be demoralizing. The regularly constituted local school authorities must, of necessity, have power to determine the grade of pupils, and the building which each shall attend; and this cannot be changed by higher authority unless discrimination or unreasonable requirements can be proven; neither of which have been shown in the case before us.

As to the exclusion from school—Catherine was sent to the school building which her mother selected for her, and she was notified by the school authorities to enroll in another school building. To say she was excluded from this school (Massachusetts Avenue), because she was directed to attend the Indiana Avenue school, would be to say that all children assigned to other schools in the city were also excluded from this Massachusetts Avenue building. This is not exclusion from school or the privileges of schools, as comprehended by the law.

As to the discrimination against any race in the schools of Atlantic City, the testimony showed, and it is general knowledge of people familiar with school conditions in Atlantic City, that the schools there are organized for the best development of each pupil without discrimination as to race, color or religion.

The high school and many of the elementary schools admit both colored and white pupils; while some buildings are organized especially for colored children, and others especially for white children. The superintendent and principals acting under this policy of the Board of Education, i. e., to place each child in a school environment which will be for the child's greatest development, direct the attendance of the children to accomplish this purpose. In a large number of cases, both white and colored children are directed to attend school at buildings more remote than other buildings from the homes of the children for the organization of the schools as before mentioned.

In view of all the testimony in the case, the Commissioner is very clearly of the opinion that appellant's daughter was refused admission to the Massachusetts Avenue school not because of race or color, but solely because of the crowded conditions which resulted in the refusal to admit to such school many white children as well. The Commissioner is further of the opinion that in designating for appellant's daughter the Indiana Avenue school, the Board of Education acted entirely in keeping with its demonstrated policy of placing children where their best interests will be served.

The appeal is accordingly hereby dismissed.

March 23, 1923.

DECISION OF THE STATE BOARD OF EDUCATION

Catherine Edwards, daughter of the appellant, who graduated in June, 1922, from an Altantic City school containing only six grades, was sent by her mother to attend the Massachusetts Avenue School on the opening day in September, 1922, because it was the nearest seventh grade school building to her home, and as appellant claims, avoided dangerous railroad crossings. The child was sent by the principal of the Massachusetts Avenue School to the Indiana Avenue School and was told that she should attend that school. She returned home and the mother immediately appealed to the superintendent of schools for the admission of her daughter to the Massachusetts Avenue School. The superintendent refusing, she engaged counsel, and presented the case to the Board of Education, which also directed that the child should attend the Indiana Avenue School. That school is organized especially for, and at its regular sessions is occupied only by, colored children. The appellant refused to send her daughter to that school and appealed to the Commissioner of Education, alleging that her daughter was excluded from the Massachusetts Avenue School solely on account of her color and was transferred to the Indiana Avenue School because that school is set apart for colored pupils exclusively. After hearing a considerable amount of testimony on behalf of both parties, the Commissioner sustained the action of the Board and from his decision this appeal is taken.

The Commissioner's opinion is based upon his finding of fact "that appellant's daughter was refused admission to the Massachusetts Avenue School not because of race or color, but solely because of the crowded conditions which resulted in the refusal to admit to such school many white children as well." It appears from the evidence that on the opening day last September, the Massachusetts Avenue School was overcrowded and that during the first two days more than one hundred (100) pupils were sent to other schools, most of whom were now applicants for admission to the Massachusetts Avenue School. This overcrowded condition appears to have existed in the seventh grade to which the appellant applied to be admitted. The record also shows that while it was necessary for Catherine Edwards to cross some railroad tracks in order to reach the Indiana Avenue School, it was likewise necessary that, in order to reach the Massachusetts Avenue School, she cross trolley tracks upon which cars ran at frequent intervals on each track, so that in that respect there was little, if any, difference in the safety of access to the two schools in question. There is no showing that the Indiana Avenue School was any more inconvenient of access to the appellant's residence than any other school containing a seventh grade to which the child might have been sent. It likewise appears that the equipment and quality of teaching in the Indiana Avenue School is equal to that in the other schools in Atlantic City containing seventh and eighth grades and there is no contention to the contrary.

The position of the appellant, as stated by her counsel at the argument before us, is, that the Commissioner erred in the finding of fact above quoted and that, for that reason, his decision should be reversed. The record does not sustain this contention. We can find in it no reason for holding that the finding is

contrary to or against the weight of the evidence. It was held by Justice Dixon in State Ex. rel. Pierce *vs.* Union District School Trustees, 46 N. J. Law, p 76, that a refusal to admit a child to school which is founded on the fact that the school selected by its parents was full, would be legal. On the evidence, that situation existed in the present case, and the Board of Education, through the superintendent of schools, had the right to assign the appellant's daughter to another school convenient of access to her home where the quality of education was equal to that of the other schools in the district. For these reasons, it seems to us that the Commissioner's decision was correct and it is recommended that it be affirmed.

June 2, 1923.

ILLEGALITY OF EXCLUSION OF PUPILS FROM SCHOOL ON GROUND OF COLOR

NANCY WORTHY, WILLIAM KELL, LESTER CRAFT, CHARLES STEWART, CLARENCE STEWART, MERIDY M. WORTHY, ERNEST STEWART, LONNIE MAY HAMMOND, JOSEPH SUTTON, LONNIE MAY JAMES, OZIEBELLE WORTHY, RALPH SAUNDERS, DOROTHY SAUNDERS, WINNIE WORTHY, LEAH WORTHY, JOSEPH WORTHY, CLARA HICKS, JAMES HICKS, Infants,
Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY and BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER,
Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

It is the contention of parents and guardians acting on behalf of appellants in this case, in which a hearing was conducted by Assistant Commissioner C. J. Strahan on May 16 and May 23, 1927, that by virtue of an agreement between the Board of Education of the Township of Berkeley, in which they reside, and the Board of Education of the Township of Dover appellants were to receive instruction at the expense of the former district in the schools of the latter for the school year 1926-27; that appellants accordingly received such instruction as grade pupils in the Toms River School until February 1, 1927, upon which date they together with all the other colored pupils from Berkeley Township, a total of about 30 colored out of 115 Berkeley Township pupils, and a number of

colored pupils from Dover Township were transported by order of the Board of Education of the latter district to a school building at South Toms River in Berkeley Township and directed to attend school at that point thereafter. It is contended by appellants that the Dover Township Board has repeatedly since February 1st refused to re-admit them to the Toms River School but has continued an exclusion which appellants insist is based solely on the ground of color. Appellants also contend that the facilities provided for them in the South Toms River School are entirely inadequate and dangerous to the health of the pupils.

The Dover Township Board of Education in defending the action maintains that the exclusion of the appellants from the Toms River School was based on the fact that all of such appellants were either from one to three years below normal or so unruly and insubordinate as to constitute a menace to the discipline of the Toms River School, and that these facts made necessary the establishment of a special class in the building at South Toms River.

The Commissioner is unable to agree with appellants' contention that the school facilities which were assigned to them at South Toms River in Berkeley Township are inadequate. The building is a new one, and while constructed for church purposes, is reasonably well lighted and ventilated and is better than some of the other school buildings provided by the Dover Township Board of Education for its pupils.

The only question which remains to be decided, therefore, is whether the appellants were, as they contend, excluded from the Toms River School because of color and hence in contravention of the School Law.

Section 190, Art. IX of the 1925 Compilation of the School Law provides in part as follows:

> "No child between the age of four and twenty years shall be excluded from any public school on account of his or her religion, nationality or color."

Unquestionably in the Commissioner's opinion (contrary to respondent's contention) the action of the Dover Township Board of Education in taking from the 155 Berkeley Township pupils all those who were colored, adding to the latter certain other colored pupils from Dover Township and establishing them all without a white pupil among them under a colored teacher in a school by themselves in South Toms River, constitutes a prima facie case of exclusion on the ground of color within the prohibition of the above quoted statute; and accordingly, by raising a presumption in favor of the appellants, shifts the burden of evidence to the defendant board to justify its action on some other ground. According to Stephen's Digest of the Law of Evidence, while

> "the burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, * * * as the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor."

In the case of Runyon *vs.* Groshon, 12 N. J. Eq. 86, it was held that "possession by the vendor raises a presumption of fraud and shifts the burden of proof from the creditor to the vendee." It was also held in the Application for Probate of the Will of Englina S. White, 25 N. J. Eq. 501, that proof of cancellation of a will raises the presumption that such cancellation was intentional, which presumption is not overcome by evidence of reference to the will by the testator in a letter. The Court also held in the case of Excelsior Electric Company *vs.* Sweet, 57 N. J. L. 228, that "Where the testimony which proves that the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense." Even in the cases cited by respondent's counsel on this point, it is in no way denied that while the burden of proof always rests until the end of the case upon the party holding the affirmative, the burden of evidence shifts to the respondent upon the making out of a prima facie case by the plaintiff.

The leading authority in New Jersey on the question of the exclusion of colored pupils from the public schools is the case of Pierce *vs.* Union District School Trustees, 46 N. J. L. 76, which was decided in 1884. In that case (and under a law substantially the same as the present one regarding the exclusion from school of colored pupils) the Court held that the exclusion of a colored child from a white school must be presumed to have been because of color and hence illegal in the absence of proof that the action of the Board of Education was based on some ground other than color, such as crowded conditions, inability to do the work being performed by pupils in the white school, etc.

In the Commissioner's opinion the exclusion from a certain school and segregation in a school by themselves under a colored teacher of all those tuition pupils in a certain district who are colored together with a number of colored pupils from another district inevitably raises the presumption that color is the peculiar characteristic constituting the basis of the exclusion; and such presumption is not rebutted by proof on the part of the school board of certain mental or temperamental characteristics of the colored pupils, unless it be also proved that such characteristics are peculiar to such colored pupils and in no way shared by the white children who are left.

In the case under consideration the contentions of the eighteen appellants are strongly supported by the fact that not only they alone, but all the other colored pupils from Berkeley Township together with a number of colored pupils from Dover Township were also placed in the South Toms River School. In the case of People *vs.* Mayor, &c., of the City of Alton (54 N. E. 424) it was held to be a very vital part of appellants' case, in which the exclusion of colored children was alleged, to prove "that the same rule of exclusion and assignment was applied to other children of the same race." This evidence the Dover Township Board made no attempt to rebut by proof of any such retardation, unruliness and insubordination on the part of these additional colored pupils as it attempted to prove in the case of the eighteen appellants alone. The Board failed, moreover, in any case to prove that the above mentioned characteristics were entirely peculiar to the colored appellants thus excluded and in no way shared by the white children, so as thus to constitute,

instead of color, the ground for such exclusion. For all that respondent's proof disclosed, any existing retardation or unruliness may have existed among the white pupils as well as among the colored. No marked difference in age was shown between the white and colored pupils, and the necessity of crossing the railroad tracks to reach the Toms River School was a danger shared by the white as well as by the colored pupils. Furthermore, in attempting to further justify the placing of the Berkeley Township colored pupils in the South Toms River School on the ground of convenient geographical location of their homes, the Dover Township Board again failed to explain the apparent color segregation by the essential proof that colored pupils only resided in that neighborhood.

It is therefore the opinion of the Commissioner of Education that the Dover Township School Board was bound by its arrangement with the Berkeley Township Board of Education to so care for the Berkeley Township pupils as to enable the latter district to discharge its own primary obligation of providing adequate school facilities for them; that any segregation of the colored from the white pupils of Berkley Township by excluding them from the Toms River School and placing them by themselves in the South Toms River School is contrary to the above quoted statute, unless such action can be justified by proof of certain characteristics other than color on the part of the excluded pupils peculiar to them and in no way shared by those who were left.

It would appear from the facts in the case that the facilities provided by the Dover Township Board in the South Toms River School were better than other facilities furnished to some of the white pupils, and that the Dover Township Board of Education in the first instance intended in good faith to provide special class facilities for certain individual cases of retardation or unruliness among the colored pupils. That ultimately, however, the placing of children in such school was determined upon a color basis is evident from the fact that not only appellants, but other colored pupils were sent there, that no white children were ever placed among them, and no characteristics other than color were proved to be peculiar to appellants and in no way shared by the pupils who were left in the Toms River School so as to justify the exclusion of such appellants on other grounds.

It is therefore ordered by the Commissioner of Education that the appellants be reinstated in the Toms River School by the Dover Township Board of Education for as long a time as they shall continue to be received by that district as tuition pupils from Berkeley Township, subject, however, to any such division into special classes or groups as may be determined upon by the Dover Township Board of Education on any basis or ground other than religion, nationality or color."

June 28, 1927.

DECISION OF THE STATE BOARD OF EDUCATION

In the school year 1926-27, the Board of Education of Berkeley Township, in Ocean County, because of lack of accommodations in the district, sent one hundred and fifteen children to the schools in Dover Township at Toms River.

Thirty of these children were colored and resided in a section of Berkeley Township known as South Toms River or Bushwick adjoining Toms River proper. On February 1, 1927, these thirty colored children were transferred by the Dover Township Board of Education to a church building in the Bushwick section which was equipped by that Board for school purposes, and established as a new school. The parents of most of these children refused to permit them to attend this school and the petitioners or some of them applied to be readmitted to the schools of Dover Township. Their application was refused and they petitioned the County Superintendent of Schools of Ocean County to direct the Boards of Education of Dover and Berkeley Townships to admit the petitioners to the public schools of either of those townships. This petition was refused and thereupon they filed a petition with the Commissioner of Education to reverse and set aside the determination of the Board of Education of Dover Township and the decision of the said county superintendent, alleging that the exclusion was solely because of the color of the children. The prayer of the petitioners is to "Direct that the said Board of Education of the Township of Berkeley as the right may be, meet together and by resolution order and direct the teachers and principals of the aforesaid school or schools to receive the petitioners into said school or schools."

The Boards of Education of Dover and Berkeley Townships took issue on this petition, denying that the petitioners or the remainder of the said thirty children had been excluded from the Dover Township schools because of their race, and alleging that they were transferred to the school established at Bushwick in Berkeley Township because the most of them were below normal grade and required special and unusual attention, that they had refused to submit to the school discipline and had created a condition detrimental to the welfare of the schools so that the Dover Township Board decided to set up a special class. The Dover Township Board further alleged that its schools were greatly overcrowded, and that the conditions in some of the schools in that Township were not as good as those in the new school established at Bushwick. Other matters are set up in the pleadings to which it is not necessary to refer.

A considerable amount of testimony was taken by the First Assistant Commissioner on the issues thus presented and thereafter, on June 28, 1927, the then Commissioner of Education rendered a decision in which he held that although the facilities provided in the Bushwick school were better than other facilities furnished to some of the white pupils in the Dover Township schools, and the Board in the first instance intended to provide special class facilities for certain individual cases of retardation or unruliness among these pupils, that "ultimately" the children were placed in that school on account of their color. He ordered "That the appellants be reinstated in the Toms River School by the Dover Township Board of Education for as long a time as they shall continue to be received by that District as tuition pupils from Berkeley Township, subject, however, to any division into special classes or groups as may be determined upon by the Dover Township Board of Education on any basis or ground other than 'religion, nationality or color.'"

From this decision the Board of Education of Dover Township has appealed. The Berkeley Township Board took no action.

In the brief of the Petitioners-Respondents, it is suggested that the controversy is at an end because it is public knowledge that since the opening of the 1927-28 school year the Berkeley Township Board of Education has provided for all of its children from the first to the seventh grades, inclusively, including the petitioners, in its own school building. We are informed to the same effect by a memorandum from the Commissioner, and at the argument before us, counsel for the Dover Township Board admitted that such was the case. It therefore appears that the said Board is no longer required to furnish any school facilities to the petitioners so that no order that can now be made pursuant to our decision can have any effect. Consequently this is a moot question and following the rule universally applied by appellate tribunals in this country, this Board, which, by direction of the School Laws takes this case only as a judicial tribunal, should not in our opinion pass upon this appeal. The principle which must be applied is thus stated by the United States Supreme Court:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact when not appearing on the record, may be proved by extrinsic evidence".
>
> Mills *vs.* Green, 159 U. S. 653.

The Courts of New Jersey apply the same rule. (Freeholders of Essex *vs.* Freeholders of Union, 49 N. J. L. 438.)

Appellants' counsel has urged upon us that since the statute makes it a misdemeanor for a member of a Board of Education to vote to exclude a child from the public schools on account of color, the decision of the Commissioner raises the imputation that the appellants were guilty of a crime. We do not so regard it. In our opinion neither the Commissioner's opinion nor any decision this Board might make can affect any charge of a misdemeanor that might be brought against the appellants under the statute.

For the reason that there is no controversy under the School Laws to be determined, we must recommend that the appeal be dismissed and the Commissioner instructed to terminate the proceeding.

February 4, 1928.

RELATING TO SCHOOL FRATERNITIES

NEWTON SPENCE AND JOHN SPENCE,
Petitioners,
vs.
THE BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY,
Defendant.

For the Petitioners, Lee F. Washington.
For the Defendant, Theo. W. Schimpf.

DECISION OF THE COMMISSIONER OF EDUCATION

On April 27, 1914, the defendant adopted a preamble and resolutions condemning high school fraternities, sororities, and other school secret societies, and providing that unless certain conditions prescribed by the defendant were agreed to by the pupils in the high school, such societies would be prohibited after October 1, 1914. The conditions prescribed by the defendant not being accepted by the pupils, the principal of the high school, in accordance with other provisions of said resolutions, presented to each of the pupils of the high school a printed blank, or pledge, as follows:

> "I, the undersigned, a pupil of the Atlantic City, N. J., High School, hereby declare upon my word of honor that I am not a member of a fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the high school, which has been disapproved by the school authorities because its influence among the high school body is, in the judgment of the principal and teachers, injurious to the best interests of the high school, and I promise not to become a member of such a society or organization during the time I remain a member of this school.
>
> "I further declare that I sign this statement with a complete understanding of its contents and without any evasion or mental reservation of any kind whatever and with the full knowledge that any false statement herein contained or any violation of my promise will subject me to expulsion from school.
>
> "Signature .....
>
> "Dated ....."

One of said blanks or pledges was presented on October 1, 1914, to John Spence, a pupil in the high school, and one of the petitioners in this case. The said Spence, after striking out the words "and I promise not to become a member of such society or organization during the time I remain a member of this school," signed said blank or pledge and tendered it to the school authorities, who refused to accept it. On the same date, the principal of the

high school handed to said Spence the following printed notice of his suspension from school:

"Mr. Newton Spence
2013 Atlantic Ave.
Atlantic City, N. J.

ATLANTIC CITY, N. J., Oct. 1, 1914.

DEAR SIR:

Your son, John A. Spence, is hereby suspended from this school for his failure to obey the following regulations of the Atlantic City Board of Education:

'No pupil in the Atlantic City High School shall be a member of, or in any way connected by pledge or otherwise with any fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the high school, whose influence among the high school body is, in the judgment of the principal and teachers, injurious to the best interests of the high school.

'FOR THE PERSISTENT VIOLATION OF THIS REGULATION THE PRINCIPAL SHALL SUSPEND THE PUPIL AS PROVIDED BY LAW and make an immediate report to the Superintendent of Schools.

'Further resolved that for the purpose of giving effect to this regulation all students of the high school be and they are hereby required to sign before four o'clock on the first day of October, 1914, the following statement, and THAT ALL STUDENTS WHO REFUSE OR NEGLECT SO TO SIGN SHALL THEREUPON BE SUMMARILY SUSPENDED FROM SCHOOL:

"I, the undersigned, a pupil of the Atlantic City, N. J., High School, hereby declare upon my word of honor that I am not a member of a fraternity, sorority, club, society, or other organization composed wholly or in part of pupils of the high school, which has been disapproved by the school authorities because its influence among the high school body is, in the judgment of the principal and teachers, injurious to the best interests of the high school, and I promise not to become a member of such a society or organization during the time I remain a member of this school.

"I further declare that I sign this statement with a complete understanding of its contents and without any evasion or mental reservation of any kind whatever and with the full knowledge that any false statement herein contained or any violation of my promise will subject me to expulsion from school."'

This notice is sent that you may know exactly what has been done in the matter, and that those charged with the administration of your schools may bespeak your hearty co-operation in an effort to secure the prompt return of this pupil under conditions that will insure successful school work.

> After one o'clock, October 6, 1914, to be reinstated the pupil must appear before the City Superintendent of Schools in the High School Building, between the hours of 4:00 and 5:30.
>
> Principal
> CHAS. B. BOYER, Superintendent."

From this action the petitioners appeal, and pray that the said John Spence be restored to his position in the high school. Section III of the School Law reads as follows:

> "A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess, and shall suspend from school any pupil for good cause; provided, that such suspension shall be reported forthwith by the teacher to the board of education; provided further, that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil."

It does not appear that the suspension of John Spence was reported to the defendant, or that it has taken any action thereon.

The defendant, in its answer, admits so much of paragraph 13 of the petitioner as states "that your petitioner, John Spence, has since such expulsion, been denied the right to attend his classes, and is being deprived of his instruction and losing the benefit of lectures being attended by his former classmates." It is evident from this admission, and from the fact that it has not denied that the said Spence has been expelled, that the defendant assumes full responsibility in the matter. The first proviso in section III, above quoted, requires that the suspension of a pupil shall be forthwith reported to the board of education. Section 50 gives to a board of education in a city school district "supervision, control and management of the public schools," etc., and section 86 gives to a board of education in a township or borough district the power "to suspend or expel pupils from school." The duties and powers of a board of education in a township or borough district are prescribed in greater detail than those for a board in a city district, but it is clear that, so far as they are applicable, the powers and duties prescribed for the one are prescribed for the other. The provisions of section III apply to every school district in the State. It follows, therefore, that the suspension of a pupil by the principal is temporary, and can be continued, or the suspended pupil expelled, only by the board of education. The notice of suspension served upon the petitioner, John Spence, contained the following: "After one o'clock, October 6, 1914, to be reinstated the pupil must appear before the City Superintendent of Schools in the High School Building between the hours of 4:00 and 5:30." There is nothing in the papers before me to show that the defendant ever authorized such condition precedent to reinstatement.

A board of education cannot delegate to a superintendent or principal judicial powers conferred upon it by law. It cannot legally delegate to the superintendent or principal the power of deciding whether or not a pupil shall be expelled, any more than it can delegate to one of its committees or to its

business manager, the letting of contracts. Our courts have held that the employment of a teacher "is an act judicial in its character and should be done at a meeting of the trustees, of which all should have notice, and in which all have an opportunity to participate." (Townsend *vs.* Trustees, 12 Vr. 312.) Certainly the inquiry as to whether or not the act for which a pupil has been suspended by the principal is such as to warrant expulsion or a continuation of the suspension, is quite as judicial in character as the determination of the qualifications of a teacher. The defendant never having taken any action in the case of the petitioner, John Spence, he has never legally been expelled, and the failure of the principal to report "forthwith" his suspension, makes his continued suspension illegal, for a pupil cannot be deprived of his right to attend school by the failure of a teacher or principal to perform a duty cast upon him by the statute.

In order to reach a decision in this case it is not necessary to pass upon the other questions raised by the petitioners, but they are of such importance that they should be decided at this time.

As stated in the decision in the case of Laehder *vs.* the Board of Education of Manasquan, recently rendered by me, the right of a board of education to punish pupils for acts committed when the school was not in session has never been before the courts in this State, but there are numerous decisions by the courts in other States. I have no doubt as to the right of a board of education to prohibit pupils from joining fraternities, sororities, or other school societies which, in its judgment, are prejudicial to the best interests of the school or the pupils, even though the meetings of such societies are not held in the schoolhouse, or on a school day. School secret societies are generally regarded as detrimental to discipline, and to the best interests of the pupils. The National Education Association, composed of leading superintendents and teachers, recently adopted resolutions condemning such societies. The resolution reads, in part, as follows: "We condemn these organizations because they are subversive of the principles of democracy which should prevail in the public schools; because they are selfish and tend to narrow the minds and sympathies of the pupils; because they dissipate energy and proper ambition; because they set wrong standards; * * * because they detract interest from study." 35 Cyc. 1136, section D, reads as follows: "The school authorities may also punish, as by suspension for acts committed outside of school hours, even after a pupil has returned to his home, when such acts have a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, or set at naught proper discipline, to impair the authority of the teachers, and to bring them into ridicule and contempt." In the case of Kinzer *vs.* Directors, 105 N. W. Rep. 686, the court said: "The general character of the school and the conduct of its pupils as affecting the efficiency of the work to be done in the schoolroom, and the discipline of the scholars, are matters to be taken into account by the school board making rules for the government of the school. They have no concern, it is true, with the individual conduct of the pupils wholly outside of the schoolroom and school grounds and while they are presumed to be under the control of their parents * * * but the conduct of pupils which directly relates to and affects the management of the school and

its efficiency, is within the proper regulation of the school authorities." 35 Cyc. 1137 says: "It has been held that a rule of a school board forbidding pupils to play football games under the auspices of the school is not unreasonable or an excess of the authority of the board, although applied to conduct on holidays and away from the school grounds."

The defendant in prohibiting pupils in the high school from being members of fraternities, sororities or other school societies composed of high school pupils, acted well within its powers, but the resolutions go further than that. They prohibit a pupil from belonging to any "other organization composed wholly or in part of pupils in the high school, whose influence, among the high school body is, in the judgment of the principal and teachers, injurious to the best interests of the high school." Here again the defendant attempts to delegate to the principal and teachers matters which can be determined only by the board of education. The character and purpose of the organization to which a pupil belonged might be the controlling factor in determining whether or not he should be expelled, and the board of education cannot delegate to any person or persons the power to determine a question which may later come before the board in its judicial capacity.

The defendant also erred in directing each pupil to sign a pledge promising "not to become a member of such a society or organization during the time I remain a member of this school." I do not believe that a board of education has the power to punish a pupil for refusing to promise that sometime in the future he will not commit some act prohibited by the board. In this case, it is admitted that the petitioner, John Spence, does not belong to any fraternity or other organization prohibited by the defendant. His sole offence is that he refused to promise that he would not in the future join any society deemed by the principal and teachers injurious to the best interests of the high school. A pupil should not be denied school privileges except for the most serious offences. In this case, the punishment, if the petitioner was liable to punishment, was entirely too drastic.

It is ordered that the petitioner, John Spence, be immediately restored to his class in the high school under the control of the defendant.

January 4, 1915.

GRADUATING EXERCISES NOT A PART OF THE COURSE OF STUDY

JOHN H. BARTLETT, JR.,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellant is the father of John H. Bartlett, III, who was a pupil in the twelfth year of the West Orange Schools during the school year of 1910-11, and he appeals from the action of the respondent in refusing to deliver to his son a diploma at the graduating exercises held in West Orange on June 23, 1911.

The facts in the case as they appear in the evidence are as follows:

Bartlett was notified on May 15, 1911, that he had been selected by the faculty of the high school as valedictorian of his class. He asked to be excused for the reason that he was busy preparing for his entrance examinations to college, and did not have time to prepare the valedictory. His request was refused and he thereupon prepared a paper and presented it to Miss Drew, his teacher in English, on or about May 29. On the same day the paper was rejected as unsuitable, and he again requested that he be excused. He repeated the request the next day and Miss Drew then told him that she was willing he should be excused, provided, Mr. Todd, the principal, consented. Bartlett testified that Todd did consent, and Todd testifies that he was willing to excuse him and tried to get another boy to take the valedictory. Failing in this the consent was withdrawn. On June 14 Bartlett presented a second paper which was rejected on the ground that, while it was suitable for a Class Day paper, it was not sufficiently dignified for a valedictory.

On June 22, the day before the graduation exercises were to be held, Bartlett presented a thesis in lieu of a valedictory. This was refused on the ground that it was submitted too late.

Bartlett testified that he believed he had been excused, and this is corroborated by his mother who testifies that Miss Drew said to her:

> "It was positively funny the relief John showed at having been excused from giving the valedictory."

The Board of Education took no action in this case. It is true that there was an informal meeting of the members of the Board with the faculty of the high school, but not all the members were notified of the meeting, and no minutes were kept. Any expression of opinion by the members of the Board at that

meeting must be considered as an expression of their individual opinions and not as the action of the Board. Bartlett was not notified of the meeting, was not present, and was not, at any time, given a hearing. The action, such as it was, was *ex parte*.

There are two questions before me for decision, viz.:

Are the graduating exercises a part of the course of study in the West Orange Schools?

Did Bartlett complete the course of study, and, if so, is he entitled to receive a diploma notwithstanding the fact that he did not deliver the valedictory or submit a thesis satisfactory to the faculty of the school?

Section three of the School Law gives to the State Board of Education power "to prescribe and enforce rules and regulations necessary to carry into effect the School Laws of this State," and section 182, paragraph (b) provides for an apportionment of State moneys for a high school "having a full four years' course of study approved by the State Board of Education."

A rule of the State Board of Education reads as follows:

> "Diplomas shall be granted only to pupils who shall have completed a full four year course aggregating at least seventy-two academic counts. The counts shall be reckoned in accordance with the number of recitations per week of a school year of at least thirty-eight weeks, and the recitation periods shall average at least forty minutes."

The course of study in the West Orange High School has been approved by the State Board of Education. It requires for graduation from its college preparatory course eighty-four counts, but does not provide that papers prepared for the graduating exercises shall be a part of the required course. In fact, it makes no reference whatever to the graduating exercises. A diploma is evidence of the completion of a required course of study, and, in the absence of any requirement that the preparation of a paper for the graduating exercises is a part of the course, a pupil who has completed the course and received the required number of credits is entitled to a diploma even though he may not have prepared such a paper.

It is in evidence that Bartlett had completed the course with the exception of the valedictory. The principal, Mr. Todd, testifies that "his work would have been satisfactory if he had presented that valedictory properly written." He also testifies that a "diploma indicates a satisfactory completion of a course of study prescribed by the Board of Education for the High School," and that there was no reason, other than his failure to present and deliver the valedictory, why Bartlett should not have received his diploma.

Mr. Farr, the president of the Board, testifies that Bartlett was an unusually bright pupil, and that the Board would have been only too happy to have permitted the diploma to have been given to Bartlett and would "have been willing to strain a point had his record in previous cases and also at this time shown the right attitude."

It is also in evidence that Bartlett stood at the head of his class. If, therefore, the other members of the class received the required credits, Bartlett also received them.

The testimony of Miss Drew, Mr. Todd and Mr. Farr leads inevitably to the conclusion that the refusal to grant a diploma to Bartlett was not because he had not completed the required course, but as a matter of discipline.

I find that the graduating exercises are not a part of the course of study prescribed for the West Orange High School, and that Bartlett completed the prescribed course.

It is hereby ordered that the Board of Education deliver to John H. Bartlett, III, a diploma dated June 23, 1911.

May 27, 1912.

BOARDS OF EDUCATION MUST PROVIDE ADEQUATE FACILITIES FOR PHYSICALLY HANDICAPPED PUPILS

WILLIAM PRICE,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF BORDENTOWN, BURLINGTON COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant, who has a crippled son assigned to the seventh grade classes of the Bordentown schools, petitions the Commissioner of Education to require the respondent to provide home teaching for his son. Mr. Price sets forth that the boy is not in condition to go to and from school and that it is dangerous for him to traverse the school stairways.

Chapter 53, P. L. 1928, provides in part as follows:

> "The board of education of every school district in this State shall provide special equipment and facilities adapted to the accommodation, care, physical restoration, and instruction of children of school age who are physically crippled to such an extent, or who possess such bodily deformities that they cannot, in the opinion of an orthopedic surgeon of recognized standing or of the director of medical inspection or of the medical inspector of the school district, be properly accommodated and instructed in the classrooms regularly or usually provided; * * *"

While there was introduced into the evidence a letter from an orthopedic surgeon stating that in his opinion the boy's condition would not permit of his going up and down several flights of stairs without great risk of falling and sustaining serious injuries, owing to an organic condition of his nervous system, the testimony of Dr. Clinton D. Mendenhall, the medical inspector, was to the effect that with the exception of being assisted when using the stairs, the boy did not need accommodations other than those usually provided.

Counsel for respondent stated that the Board is willing to provide the method of instruction recommended by the Commissioner of Education whether it be home teaching or transportation with assistance when using the stairways. The statute above cited requires that special facilities shall be provided only when, in the opinion of the medical inspector or an orthopedic surgeon, the child cannot be accommodated and instructed in the classrooms regularly as usually provided. The orthopedic surgeon, whose letter was introduced, was not present at the hearing and, therefore, could not be questioned as to the adaptability of the facilities offered by the Board of Education, which include assistance for the pupil when traversing the stairs; but the testimony of the medical inspector definitely held that the condition of the child did not necessitate special provisions in consideration of the offer of the Board to provide any needed assistance upon the stairways.

In view of the medical inspector's testimony and the offer of the Board to furnish transportation and physical assistance to the pupil as needed, it is the recommendation of the Commissioner that the Board of Education immediately proceed to provide such facilities, and that the medical inspector examine the pupil once every two weeks during the next three months and report his findings to the Commissioner of Education. If the reports of the medical inspector indicate maladjustment, or if the parents show at the expiration of the three-month period that the accommodations provided are unsatisfactory, the Commissioner will reconsider the case and make any changes that he believes will be for the best interest of the pupil. The accommodations provided by the Bordentown Board of Education for the son of William Price are at this time deemed to be suitable and the appeal is accordingly hereby dismissed.

January 9, 1934.

LEGALITY OF BOARD OF EDUCATION EXCUSING PUPILS DURING SCHOOL SESSION TO ATTEND RELIGIOUS INSTRUCTION CLASSES

JOSEPH F. RANDOLPH,

Appellant,

vs.

MORRISTOWN BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by appellant as a citizen, resident and taxpayer of Morristown, New Jersey, to protest against the alleged co-operation of the Board of Education of that district in the week-day religious instruction schools established by the various Morristown churches under the auspices of a Council of Religious Education, which was formed in June, 1923. Appellant contends that such alleged co-operation is in violation of existing statutes of this State.

The respondent defends the appeal on the ground that the alleged co-operation of the Board of Education with the conduct of religious instruction schools extended only to the releasing of pupils of the fifth, sixth, seventh, and eighth grades upon request of the parents for one hour's instruction in the religious schools on Wednesday afternoon of each week. Respondent states that the matter of the releasing of pupils above described was presented to the Board of Education in a formal way on September 14, 1923, and after due consideration decided upon. Respondent denies any control over the course of study, choice of textbooks, discipline, rating, expenditure of moneys or any alleged co-operation with such religious school other than the release of pupils above described.

No hearing was held in the case under consideration, as it was agreed on both sides that the controversy be submitted for decision on briefs, which have accordingly been filed.

In the Commissioner's opinion, the question to be decided in the case resolves itself chiefly into the legality of the action of the Morristown Board of Education in releasing pupils during the continuance of the school session for the purpose of allowing them to attend the religious instruction classes conducted by the various churches.

Section 214, Article XV of the School Law provides in part as follows:

> "Every parent, guardian, or other person having custody and control of a child between the ages of seven and sixteen years, shall cause such child regularly to attend a day school in which at least reading, writing, spelling, English grammar, arithmetic and geography are taught in the English language by a competent teacher, or to receive equivalent instruction elsewhere than at school unless such child is above the age of fourteen years, has been granted an age and schooling certificate and is regularly and lawfully employed in some useful occupation or service; and such regular attendance shall be during all the days and hours that the public schools are in session in said school district, unless it shall be shown to the satisfaction of the Board of Education of said school district that the mental or bodily condition of the child is such as to prevent his or her attendance at school";

The respondent insists that there is no violation of the Compulsory Education Law if the children are in school at least four hours each day, and contends moreover that while the law is mandatory upon the parents or guardian of children of compulsory school age to compel their attendance during every hour of the school session it is discretionary with the Board of Education whether or not the children shall be kept in school every hour the session continues.

The Commissioner cannot agree with respondent's contention that the Compulsory Education Law is satisfied by the attendance of children at least four hours. In the rules of the State Board of Education four hours are fixed as constituting a school day for apportionment purposes, and a Board of Education

would be entirely justified in fixing four hours or, if willing to sacrifice the apportionment, in fixing even a less number of hours as the length of a regular school session. If, however, the Board prescribes a longer session, then the Compulsory Education Law requires the attendance of the individual pupils every hour of the session prescribed by such Board.

Neither can the Commissioner agree that there is not an equal obligation on the part of the Board of Education as upon the child's parents to compel such child's presence in school every hour of the session. The School Law after providing that every child of compulsory school age shall be in school every day and hour such school is in session goes on to provide in Section 229, Article XV that Boards of Education shall appoint attendance officers to enforce the Compulsory Education Law. It is the Commissioner's opinion that this section of the law obligates the Board of Education to enforce the Compulsory Education Law in its entirety and places upon such Board an obligation equal to that placed upon the parents to enforce the child's attendance at school every hour of the session.

Moreover, in that provision of the Compulsory School Law first above quoted requiring the attendance of children every day and hour the school is in session discretion is vested in the Board of Education to grant exemptions only in two cases, namely, the receiving of such child of equivalent instruction elsewhere than at school and when "it shall be shown to the satisfaction of the Board of Education that the mental or bodily condition of the child is such as to prevent his or her attendance at school."

It cannot be considered that the religious instruction received by the individual pupils excused for that purpose is "equivalent instruction" within the meaning of the above law since religious teaching is not only not included in the public school curriculum but is prohibited by statute from being conducted in the public schools.

It is therefore the opinion of the Commissioner of Education that while there is no violation of the Compulsory Education Law in pupils attending outside religious instruction classes when the school session is not in progress, there is involved a violation of such Compulsory School Law in the excusing of individual pupils for such purposes by the Morristown Board of Education while the school session prescribed by the Board continues.

The appeal is accordingly sustained.

March 4, 1924.

Reversed by the State Board of Education, December 6, 1924, without written opinion.

JANITOR EMPLOYED FOR DEFINITE TERM NOT PROTECTED AFTER TERMINATION OF HIS CONTRACT

ARTHUR LYNCH,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,

Respondent.

For the appellant, Thomas L. Hanson.
For the Respondent, John O. Muller.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was first employed by the Board of Education of the Town of Irvington from August to November 1, 1931, on a weekly basis in the Maintenance Department of the schools. On October 14, he received a notice that the Janitors and Maintenance Committee recommended that beginning November 1, 1933, he be employed on probation at $100 per month. On November 19, he received a letter which states:

> "At the regular meeting of the Board held November 13, 1931, you were appointed as a janitor at a salary of $100 per month for a probationary period of three months beginning November 1, 1931."

He continued as a janitor from November 1, 1931, to October 15, 1933, under the following appointments: On February 18, 1932, appellant with other janitors was re-employed for a period beginning February 1, 1932, and expiring March 1, 1932. The testimony does not show that he was notified of this election. On March 9, 1932, the Board appointed certain janitors, including the appellant, for the period from February 1 to March 1, 1932, and from March 1 to July 1, 1932. Appellant testified (page 10) that he was notified of the latter appointment. On July 13, 1932, the Board re-appointed the appellant with other janitors for the school year 1932-33, beginning July 1, 1932. Appellant received notice of this election in a letter dated July 13, which reads:

> "At a regular meeting of the Board of Education held July 1, 1932, you were employed as janitor in the Irvington school system for the school year 1932-33, beginning July 1, 1932, at a salary of $1,200."

The appellant, with a number of other janitors, was appointed for the following periods: On July 12, 1933, for one month beginning July 1, 1933; on August 9 for the period August 1 to August 15, and on October 11 for the period August 15 to October 15. He received no written notice of these ap-

pointments. At the meeting on October 11, 1933, by resolution effective October 15, Arthur Lynch, with two other janitors, was transferred to the inactive list for the purpose of economy, and he was advised thereof by letter under date of October 15. There is no evidence of bad faith in the Board's reduction of the number of janitorial positions.

Appellant states that for the period from March 1 to July 1, 1932, he understood the services of some janitors were to be discontinued and, not knowing whether he would be kept, asked Mr. Mittenmyer, the Chief Janitor, several times about his status (page 14). He testified (page 5) that he continued in the employ of the Board for the one year period ending July 1, 1933, and that he continued to work after July 1, 1933 (pages 13, 14), without further application because he felt that if he applied and was told his position was abolished, he would be through.

The Board of Education appointed the appellant as a janitor for a probationary period of three months beginning November 1, 1931, and the word "probation" is defined as "any proceeding attempting to put a person to a test" or "a period of testing or trial." When, therefore, a janitor continues after the probationary period without appointment for a definite time, he is protected by the Janitors' Tenure Act (Chapter 44, P. L. 1911), and if, after that time, he does not accept a definite term appointment, he cannot be removed except in the manner prescribed by the Tenure Act. In this case, however, the janitor admits that he accepted definite term appointments from March 1 to July 1, 1932, and from July 1, 1932, to June 30, 1933. While it is true that he worked after July 1, 1932, until he received notice in the letter of October 14, 1933, that his services were terminated on October 15, the Board did not elect him for an indeterminate period, but on two occasions employed a number of janitors for short terms, all of whom continued after the definite appointment of August 1 to August 15, 1933. If, therefore, appellant was protected by his continuance after a definite term appointment, all other janitors similarly appointed were likewise protected. It is the opinion of the Commissioner, however, that continuance in service after the expiration of a definite term, does not constitute an indeterminate appointment.

From all the facts involved in this case, appellant is not protected in his position by the provisions of the Janitors' Tenure Act, but if he could be held to be protected, it would only be to the extent to which the other janitors likewise employed were protected. Accordingly, when the number of such employees was reduced in the system, the Board had discretion as to which of the janitorial employees should be retained. (Seidel *vs.* Ventnor, 110 N. J. L. 31; DeBolt *vs.* Mount Laurel Township, 1932 Compilation School Law Decisions, page 930; Suiters *vs.* Hackensack, decided by the Commissioner June 27, 1933; Heaviland *vs.* Board of Freeholders, 64 N. J. L. 176.) The termination of Arthur Lynch's services by the Board of Education of the Town of Irvington under its resolution of October 11, 1933, is, therefore, valid. The appeal is dismissed.

February 27, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education wherein he sustains the transfer of appellant to an inactive list of employees.

Appellant was originally employed by the Committee on Janitors and Maintenance of respondent (hereinafter referred to as the "committee") as an extra helper to move furniture from one school building to another, at a stated daily wage. He was recommended by that committee for a position of janitor, and on November 18, 1931, was notified by the secretary of respondent he had been appointed janitor at a salary of $100.00 per month, beginning November 1, 1931, for a probationary period of three months. On February 18, 1932, the committee recommended appellant be re-employed for the period February 1 to March 1 and from March 1 to July 1, 1932, which recommendation was concurred in by respondent at its regular meeting held on March 9, 1932. No formal notice of this action was given appellant, but it was testified to and found by the Commissioner as a fact, he had knowledge of it communicated by his superior.

On June 27, 1932, the committee recommended to respondent the re-employment of appellant for the school year 1932-1933. This recommendation was concurred in by respondent at its regular meeting held on July 13, 1932, and notice in writing of his re-appointment was sent to appellant by the secretary. On June 27, 1933, the committee recommended the re-appointment of appellant for one month ending July 31, which was concurred in by respondent on July 12, 1933. On July 27, 1933, the committee recommended the re-appointment of appellant from August 1 to August 15, 1933, which was concurred in by respondent on August 9, 1933. On August 29, the committee recommended the re-appointment of appellant from August 15, for the remainder of the school year. At a meeting of respondent on September 13, this recommendation was referred back to the committee for further consideration, whereupon, on September 26, the committee recommended appellant be re-employed for the period August 15 to October 15, 1933, and that on that date certain janitors be retired and others, including appellant, be transferred to the inactive list. This recommendation was adopted by respondent and notice thereof by letter from the secretary, given to appellant. No formal notice was given appellant of the several recommendations and resolutions concerning his re-employment, except as hereinbefore mentioned.

Appellant contends that upon the end of his probationary term on February 1, 1932, he having continued in his employment without interruption thereafter, no notice having been given him until after February 1, his employment became one without term. That the same situation arose on June 30, 1933, when his appointment for the past school year expired, and he continued his employment thereafter without formal notice of the recommendations and resolutions for his re-employment for several periods until October 15, 1933.

It is too well established to need citation of authority, that acceptance of a position for a definite term, is deemed a waiver of tenure rights which would have resulted upon an appointment for an indefinite term. Hardy *vs.* Orange, 61 N. J. L. 623. DeBolt *vs.* Board of Education of Mount Laurel Township, Supplement to School Law Decisions of 1928, page 933.

It will be observed that appellant's appointments were for definite periods upon recommendations to the employing Board by its appropriate committee.

While the facts and circumstances surrounding an employment may be considered to determine its term, the formal acts of respondent and its committee preclude the inference that respondent at any time intended to employ appellant for an indefinite term. The failure of respondent to formally notify him of his re-appointments in the instances mentioned did not operate to effect that result. Appellant refrained from making inquiry concerning his employment status because, as he said, he feared to learn something unfavorable.

Appellant having been appointed for definite terms, in our opinion, he was not protected in his employment by Chapter 44, P. L. 1911, commonly known as the "Janitors' Tenure Act."

This conclusion makes it unnecessary to consider the contention of appellant he had a right to preference in employment over other janitors who were re-appointed and neither do we consider the "Instructions to Janitors" adopted by respondent as part of its rules confer any right of employment or preference in employment. It is recommended the decision of the Commissioner of Education be affirmed.

June 4, 1934.

JANITORS' TENURE PROTECTION UNDER INDEFINITE APPOINTMENT

JAMES CALVERLEY, et al.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LANDIS, CUMBERLAND COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellants, James Calverley, Walter Gledhill, Commandus Cummings and Gertrude Cummings have served as janitors in the Landis Township schools for a number of years. The minutes of the Board of Education of June 29, 1928, show that Calverley was employed by resolution reading as follows:

> "The Board voted to offer the position of fireman at the high school to Warren Cole at a salary of $1,400 per year, and the position of janitor to Mr. James Calverley at $1,400 per year."

The other three janitors were employed by Mr. Heaton, the business manager of the respondent Board of Education and according to their testimony they

were told by him to commence work at designated times but without any statement as to the term. Neither the minutes nor the testimony shows that at any time within the course of employment did they request a re-appointment or that they were re-appointed. They continued in said service from the time of employment to July 2, 1931, when notices were served upon them informing them that their services were no longer needed.

At the meeting of the Board held on June 11, 1931, the question was raised as to whether these janitors were under tenure, and Mr. Heaton was asked whether they had been employed for a definite or indefinite term. The testimony of a large number of witnesses was that when Mr. Heaton was asked by Mr. Murray at the meeting of June 11, 1931, he stated that they were employed from "year to year". Mr. Heaton, in rebutting such testimony, stated that he had said "they were employed and they continued on year to year, year after year", after which counsel for the Board explained the interpretation of the Tenure Act, and advised that in his opinion the janitors were not protected by the act.

The Board thereupon voted to discontinue their services and the district clerk was authorized to notify them of such action and secure from them the keys. The appellants refused to turn over the keys until they received formal notice, which notice was sent by the attorney for the Board. They thereupon discontinued their services, turned over the keys, and proceeded to bring this appeal against the action of the Board.

Counsel for respondent contends:

(1) The Board of Education failed to pass the proper rules and regulations for the employment, discharge, management and control of the public school janitors.

(2) The Board of Education did not legally hire the petitioners.

(3) If it should be construed by ratification or otherwise that they were hired, they were hired as janitors for one year.

(4) Because of the failure of the then existing Board to follow the law in passing proper rules and regulations and because the said janitors, if hired, were hired by Mr. Heaton without any authority, the new Board is not bound by the illegal acts of its former members.

Counsel for appellants, on the other hand, claims that they were elected for indeterminate terms and are therefore protected by the Janitors' Tenure Act.

In the case of Michaelis *vs.* Board of Fire Commissioners of Jersey City, 49 N. J. L. 154, the Board attempted to evade an appointment by it of an engineer on the ground of a violation of a rule of the Board in that the appellant was appointed without having filed a sworn application with physician's certificate attached. The court held that since the appointment was made according to law, the Board would be deemed to have waived its rule in question and accordingly upheld the appointment. The failure to adopt in this case rules and regulations prescribed by Chapter 44, P. L. 1911, in no way affected the validity of the appointments.

The contention of respondent that appellants were illegally employed by reason of the fact that Mr. Heaton was without lawful authority to employ

them is not well-founded. The rendering of services by the janitors and the payment for such services by the Board constituted legal employment.

No formal contracts were submitted, nor was any testimony presented which shows appointments for definite terms. The failure to show definite term employment by respondent and the testimony of appellants' witnesses that they were employed without term clearly establishes indeterminate employment.

As has already been held, the employment of appellants was legal notwithstanding the fact that the Board failed to pass rules and regulations concerning such appointments. The Board is estopped from denying the authority of the business manager, in that it accepted the services of petitioners. A Board of education has authority to employ janitors without term as in this case, and subsequent Boards are bound by the Janitors' Tenure Act in such employment.

Chapter 44, P. L. 1911, Section 2, reads as follows:

> "No public school janitor * * * shall be discharged, dismissed or suspended * * * except upon sworn complaint for cause and upon a hearing had before such Board."

Chapter 29, P. L. 1929, reads in part as follows:

> "No person * * * employed by a school board or Board of Education * * * whose term * * * is not fixed by law * * * who has served * * * in any war of the United States or in the New Jersey State Militia * * * and has been honorably discharged * * * shall be removed from such position or office except for good cause shown. * * *"

The Supreme Court in the case of Hardy *vs.* Orange, 61 N. J. L. 623, regarding the protection of veterans holding public positions, held that the personal protection conferred by such military tenure law would be deemed to be waived if a war veteran in accepting a public position voluntarily entered into a contract for a definite term of service.

While this case was not brought under the Veterans' Preference Act but under the Janitors' Tenure Act, it appears to be identical and the interpretation given in the case of one may be properly cited to support a case of the other. The higher courts have held that this protection given to veterans is a privilege and can be waived by contracts for definite periods. If a janitor or veteran is employed to begin on a specified date at a certain sum per month or per year, he is immediately protected by the tenure provision and cannot be removed except by a subsequent waiving of his tenure rights or by dismissal for cause after hearing. If he is elected for an indeterminate term and later accepts employment for a definite term, he waives his right to tenure.

The State Board of Education in the case of DeBolt *vs.* Mount Laurel Township Board of Education, finding that the employment of the appellant was for a definite term, held that he could not claim protection under the Janitors' Tenure Act and, therefore, the action of the Board in awarding the position to another was legal. Although the findings of the facts in the DeBolt case are the converse of the present, the rule of law in that case is applicable to the present one.

The testimony presents no proof that the employments were for definite terms, but, on the contrary, it shows that the appointments were for indeterminate periods. Appellants are, therefore, protected by the Janitors' Tenure Act and cannot be dismissed except for cause and upon a hearing. The respondent Board is hereby ordered to reinstate appellants in their positions as janitors and to compensate them at their contract rates from the date of their dismissal.

November 24, 1931.

Affirmed by the State Board of Education without written opinion, April 2, 1932.

JANITOR INDETERMINATELY APPOINTED MAY NOT BE REMOVED WITHOUT HEARING

EDWARD RATAJCZAK,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY,

Respondent.

For the Appellant, John C. Stockel.
For the Respondent, Smith & Schwartz.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner was first employed by the respondent in October, 1928, to aid his father, who was the chief janitor in the grammar school, and Mr. Lynch, his assistant, four hours each day at the rate of fifty cents per hour, and later his work was increased to eight hours daily. During the month of August, 1930, Mr. Lynch retired, and the appellant at the direction of Mr. Sheehy, business manager, assumed the duties formerly assigned to Mr. Lynch; namely, the complete charge of one-half of the school building, which included the responsibility for the care of the furnaces and boilers in that part of the building. Upon the assumption of his new duties, appellant's employment by the hour was discontinued and he was paid a salary of $140 per month until October, 1933, when he was discharged and his position filled by John Godlesky, who was appointed on September 15, 1933, by the following resolution of the Board:

> *"Resolved,* That John Godlesky of 362 Oak Street, City, be and is hereby appointed school custodian to fill the vacancy of Edward Ratajczak at the usual salary, less 20%, effective October 1, 1933."

The records of the Board do not show the appointment of appellant as a janitor, nor do they make any reference to his term of employment, although

it is customary for such employees to be elected by definite resolutions. It is, however, admitted that since August, 1930, appellant has regularly received his monthly salary. The testimony further shows that for many years there have been two janitors in this school building and that two are now employed, Mr. Ratajczak, Sr., and Mr. Godlesky. Other janitorial service is performed by employees who are paid on the hourly basis.

When the appellant received $140 per month, the salary schedule for janitors provided for the initial payment of $150 per month. During appellant's employment under the monthly salary, he has been allowed the same vacation period as other janitors and has authorized deductions in compensation in accordance with the forms filed by other salaried employees. The janitorial employees who were paid by the hour were not asked for such authorization.

The testimony appears to be very clear that the appellant is a janitor under the usual interpretation of that word and as comprehended by Chapter 44, P. L. 1911, since from August, 1930, he filled the position of a former janitorial employee in the care of the building and heating apparatus, received his salary monthly and annual vacation, complied with all the regulations pertaining to janitorial employees, permitted a deduction in his salary in the same manner as other janitors, and was succeeded by a janitor who was designated to fill appellant's position.

In the case of Calverley, et als., *vs.* Board of Education of the Township of Landis, Cumberland County, decided by the Commissioner, and affirmed by the State Board of Education (N. J. School Law Decisions, 1932 Edition, page 928), in which the janitors were employed by Mr. Heaton, the business manager, without designation of a definite term and continued in service without any official action of the Board for a period of two or three years, the Commissioner said:

> "The contention of respondent that appellants were illegally employed by reason of the fact that Mr. Heaton was without lawful authority to employ them is not well-founded. The rendering of services by the janitors and the payment for such services by the Board constituted legal employment.
>
> "No formal contracts were submitted, nor was any testimony presented which shows appointments for definite terms. The failure to show definite term employment by respondent and the testimony of appellants' witnesses that they were employed without term clearly establishes indeterminate employment.
>
> "As has already been held, the employment of appellants was legal notwithstanding the fact that the Board failed to pass rules and regulations concerning such appointments. The Board is estopped from denying the authority of the business manager, in that it accepted the services of petitioners. A board of education has authority to employ janitors without term as in this case, and subsequent boards are bound by the Janitors' Tenure Act in such employment."
>
> * * *
>
> "The testimony presents no proof that the employments were for definite terms, but, on the contrary, it shows that the appointments were for inde-

terminate periods. Appellants are, therefore, protected by the Janitors' Tenure Act and cannot be dismissed except for cause and upon a hearing."

This case is on all fours with that of Calverley, above cited, and in accordance with the ruling set forth therein, appellant was protected by the provisions of Chapter 44, P. L. 1911, and was, therefore, illegally dismissed. The Board of Education of the City of Perth Amboy is directed to reinstate Edward Ratajczak as janitor with salary from October 1, 1933, at the rate he was then receiving, subject to the provisions of Chapter 12, P. L. 1933.

February 13, 1934.

Affirmed by State Board of Education without written opinion June 2, 1934.

DECISION OF THE SUPREME COURT

Submitted October Term, 1934; decided March 29, 1935.

On *Certiorari*.

Before Justices Heher and Perskie.

For the Prosecutor, Joseph B. Schwartz.

For the Respondent, John C. Stockel.

The opinion of the Court was delivered by

HEHER, J.

The issue presented for determination is the validity *vel non* of a resolution adopted by the Board of Education of the City of Perth Amboy, on September 15, 1933, whereby one Godlesky was "appointed school custodian to fill vacancy of Edward Ratajczak at usual salary less twenty per cent, effective October 1, 1911." Ratajczak, invoking the provision of Chapter 44 of the Laws of 1933 (Pamph. L. 1911, page 67), which protects public school "janitors" from discharge, dismissal or suspension, "except upon sworn complaint for cause, and upon a hearing had before" the Board of Education, appealed to the State Commissioner of Education, who found that he held the position of "janitor", within the intendment of the act, and ordered his reinstatement. The State Board of Education, upon appeal by the local Board, affirmed this judgment. The local Board sued out a writ of *certiorari*.

The decisive question is whether Ratajczak, at the time of the adoption of the resolution, held a position protected by the act of 1911, supra. This must be answered in the affirmative.

We concur in the findings of fact made by the Commissioner of Education. This is the history: In October, 1928, when Ratajczak was first employed by the local Board, his father, John, and one James Lynch were the school janitors. Edward was employed to assist these janitors. At first he devoted four hours per day to the work, and later eight hours. His compensation was at the rate of fifty cents per hour. He was designated on the Board's records as an "extra"—the classification accorded to those—principally women—who, under the supervision of the janitors, served as cleaners. In August, 1930, Lynch retired from the service, and his duties were thereupon assigned to Edward. The Board insists that the latter's status as a mere employee of

the Board, a relationship terminable at will, was not in anywise altered, while Edward maintains that he was in fact appointed as a school janitor in the place and stead of Lynch. While Edward's status on the school Board's records was not changed—he was still carried as an "extra"—we are not left in doubt as to the intent and purpose of those in authority. He was in point of fact given the position held by Lynch. John Ratajczak and Lynch were each in charge of one-half of the school building. Lynch was, apparently, advanced in years—age was the reason assigned for his retirement—and Edward was employed primarily to assist him. The Board's business manager, and as such its agent charged with the care of school properties, Sheehy, testified thus on this crucial phase of the inquiry:

> "The father (John Ratajczak) spoke to me one day, asking whether it was not possible to have the boy put on as janitor at the regular monthly salary of $175.00. I told him that was up to the Board of Education, but that I would mention it to Mr. Gullman (Goldman), chairman of the Building Committee. I spoke to Mr. Gullman, telling him about the request of the father, and he said that he was not in favor of giving him $175.00 per month, but I was instructed to tell Miss Goldstein, secretary to the superintendent, *to put him on at $140.00 per month.* Q. In place of Mr. Lynch? A. Yes."

Thereafter, Edward was in charge of the portion of the building assigned to Lynch, while his father continued as theretofore in charge of the remainder. Thereafter, his was the self-same service rendered by Lynch. And he was accorded in fact the recognition that goes with the janitorial status. He was given all the privileges of his class—the annual two weeks' vacation, a right not granted to those whose compensation was on an hourly basis, classified as "extras."

And when the Board was compelled to function on a reduced budget, it submitted to its teachers and janitors, for signature, a memorandum expressing the signer's consent to a "donation" of a sum equivalent to six and one-third per cent of the salary, in the case of teachers, and eight and one-third per cent in the case of janitors. Edward was asked to consent to the donation required of the janitors, and he agreed. He signed the memorandum of consent furnished by the Board, which contained a reservation that "this donation shall in no way be construed to be a reduction or alteration of my salary for 1932-33 or a waiver in any respect of any and all rights which I may possess under the tenure and/or retirement laws of the State of New Jersey, and/or the present rules and schedules of the Perth Amboy Board of Education." This memorandum was identical in form with those submitted to and signed by all teachers and janitors in the school system. The chairman of the Board's building committee, Mr. Goldman, on March 3, 1932, reported to the Board that the "janitors" had agreed to accept a reduction in salary, and the superintendent was thereupon directed to "again present the documents for the janitors to sign." No distinction, it will be observed, was made as to Edward. The "extras" were not called upon for a donation, and none was given. The same procedure was followed in the subsequent year when the teachers and janitors

"donated" twenty per cent of their salaries. The "extras" were again omitted from the list of employees called upon for a pro rata contribution from their fixed salaries. And it is significant, too, that the resolution under attack appointed Godlesky "school custodian *to fill vacancy of Edward Ratajczak*, at usual salary." Unquestionably, Edward was appointed a janitor in the statutory sense for an indefinite term. He was appointed by the business manager, Sheehy, and the vice-president of the Board and chairman of its building committee, and as such in charge of janitors, Mr. Goldman, who, quite significantly, was not called as a witness.

But it is insisted that these officers of the local Board had no authority to employ Edward in the capacity of a janitor, and that it was the invariable custom to accomplish that by resolution of the Board. Even so, there was, in the circumstances here presented, indubitable ratification by the Board of the act claimed to be an excess of authority, but in any event done or professedly done on the Board's account. Goldfarb *vs.* Reicher, 112 N. J. L. 413, affirmed 113 N. J. L. 399; Smathers *vs.* Board of Freeholders of Atlantic County, 113 N. J. L. 281; Potter *vs.* Metuchen, 108 N. J .L. 447; Ballagh Realty Co. *vs.* Dumond, 111 N. J. L. 32; Frank *vs.* Board of Education of Jersey City, 90 N. J. L. 273. And there may be a ratification by implication. Ratification may be implied from acts, words or conduct, on the part of the principal, which reasonably tend to show an intention to ratify the unauthorized acts or transactions of the agent. Of course, the principal must act in the premises with knowledge of the material facts. Frank *vs.* Board of Education of Jersey City, supra. Such affirmance may be established by conduct justifiable only if there is ratification. 1 Agency A. L. I., section 93. The Board here is unquestionably charged with knowledge of the official acts of the mentioned agents, and of the contents of its own minutes. Nicholson *vs.* Board of Education of Swedesboro, 83 N. J. L. 36. The Board insists that it was its invariable custom to appoint janitors by resolution, and that this was essential to a valid appointment. It is clear, however, that this custom did not come into being until 1933, after the appointment at issue. Moreover, the customary formalities may be disregarded; the performance of the preparatory steps may be waived. Michaelis *vs.* Board of Fire Commissioners of Jersey City, 49 N. J. L. 154.

Under the circumstances here presented, the failure to change Edward's designation on the Board's books, after his appointment, is of no moment. The business manager instructed the superintendent's secretary "to put him on" the books "at $140.00 per month." The interpretation given this instruction by the secretary is of no significance in the face of what subsequently occurred. It results that the time was correctly decided by the Commissioner of Education.

Judgment affirmed, with costs.

JANITORS INDETERMINATELY APPOINTED MAY NOT BE REMOVED EXCEPT IN ACCORDANCE WITH PROVISIONS OF JANITORS' TENURE ACT

JOHN J. WILLIAMS, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE,

Respondent.

For the Appellant, Harold A. Price.
For the Respondent, Harold W. Barrett.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of West Orange at its meeting of June 27, 1932, passed a resolution setting forth that because of the recognized economic conditions it believed a readjustment of janitors' salaries should be made so that the aggregate salaries for the school year 1931-1932 could be reduced by ten per cent of the total. The Board thereupon readjusted the salaries under what it considered to be a meritorious plan and while a few salaries were not changed, the reductions varied from 3.1 per cent to 27.7 per cent. Contracts were offered to the janitors for 1933, with salaries under the new schedule and a bilateral agreement permitting the termination of the contract by either party upon 60 days notice to the other. The petitioners, while offering to accept the same deduction that would be approved by other groups of employees, refused to sign the contracts offered to them. They, however, continued their work and have accepted the reduced compensation under protest.

The testimony discloses that for a number of years prior to 1928, the resolutions employing janitors show appointments for indefinite terms and such employees received notices reading as follows:

"West Orange, N. J. _____

M_____

You are hereby notified that your salary for the school year of 1926-1927 has been voted upon at the rate of $_____ per annum.

No contract will be necessary as your position comes under the Tenure of Office Law.

Kindly let me know by _____ if this is acceptable to you.

_____

District Clerk."

The resolutions of employment of janitors from 1928 to 1931, inclusive, read as follows:

June 11, 1928:

"Mr. Pierson made the motion, which was seconded by Mr. Kelleher, and duly carried, that contracts for janitors for the school year 1928-1929 be awarded as recommended and as listed above. (List shows salaries assigned.)

April 8, 1929:

"Mr. Pierson made the motion, which was seconded by Mr. Babson, and duly carried, that the following janitors and janitresses be placed on the payroll with salaries as indicated below:

John Williams	$1,700 per year
John Rakley	1,500 per year
Ada McMullen	75 per month
Rachel Steinfels	75 per month

June 10, 1929:

"Mr. Pierson made the motion, which was seconded by Mr. Barry, and duly carried, that increase to janitors' salaries be made as recommended by Mr. Strong, except the first one on the list—Frederick Blank—who will be considered later. (The list recommended by Mr. Strong showed the names of the janitors with the salary for 1928-29, the increase recommended, and the salary for 1929-30.)

June 27, 1930:

"Mr. Pierson made a motion, which was seconded by Mr. Collinson, and duly carried, that the janitors be awarded contracts for the year July 1, 1930, to June 30, 1931, as follows: * * *

June 8, 1931:

"Mr. Pierson made a motion, which was seconded by Mr. Collinson, and duly carried, that the following janitors be reappointed with the salaries listed for 1931-1932: * * *"

During these years janitors did not receive copies of the resolution of the Board of Education, but were notified of their appointments and accepted employment under the following form:

"West Orange, N. J., ...

M.....

You are hereby notified that your salary for the school year ..... has been fixed by the Board of Education at $..... which will be paid in ..... monthly installment.

Your acceptance of this salary is required on or before ..... Failing to receive the attached acceptance by that date, the Board will consider your position vacant.

Board of Education of the
School District of the Town of West Orange
County of Essex

.....
District Clerk.

..... (Perforations) .....

Date .....

BOARD OF EDUCATION
West Orange, N. J.

I hereby accept the salary of $..... for the school year ..... for my services in the Public Schools of West Orange, N. J., and agree to give the Board of Education sixty (60) days notice in writing should I desire to terminate my contract.

Very truly yours,

....."

The contract form for the year 1932 was for a definite term as previously set forth, which apparently had for its purpose the waiving of tenure by the janitors who accepted its provisions.

Petitioners contend that the reductions are discriminatory and in contravention of Chapter 44, P. L. 1911, and that they should not be required to sign contracts which would invalidate their tenure. They appeal to the Commissioner for re-establishment of their salaries in the amounts which they received prior to the adoption of the resolution of June 27, 1932.

It is the opinion of the Commissioner that the case rests entirely upon whether petitioners are protected by the Tenure of Office Act. If they are not subject to its provisions there is no other law prohibiting a board from fixing salaries within its discretion.

Chapter 44, P. L. 1911, provides

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board."

It is admitted that no charges have been filed against appellants. Whether in the absence of such charges a board may reduce salaries has been determined by the Supreme Court and affirmed by the Court of Errors and Appeals in the case of Gowdy *vs.* Paterson (84 N. J. L. 231—89A 1135) where under precisely the same statutory salary protection and where there was an absence of any indication of discrimination, the Court held:

> "* * * nevertheless any change made in the contract by the resolution which makes the contract less effective in that it might under circumstances tend to reduce the salary of the prosecutrix is a violation of said section. * * * We think, therefore, that there was a reduction in salary * * * the action was illegal and must be set aside."

In accordance with this ruling a board of education may not reduce the salary of a janitor protected by the Tenure of Office Act.

The records of the Board and the form sent to the janitors employed prior to 1928 indicate a complete agreement and understanding by both parties that such employees were protected in their positions by the Janitors' Tenure Act, and those who were employed under the resolution of April 8, 1929, were by virtue thereof immediately given tenure protection. Unless any of these janitors have subsequently waived their rights under that statute, they are entitled to its benefits.

In the case of Freeman *vs.* Conover (112 Atl. Rep. 324) Chief Justice Gummere in writing the decision of the Court of Errors and Appeals said:

> "By waiver is meant the act of intentionally relinquishing or abandoning some known right, claim, or privilege."

The testimony does not disclose or indicate that appellants asked for re-employment or that they received information other than that contained in the notice and acceptance forms. Neither is there anything to show that prior to the present school year the Board of Education had under consideration the securing of waivers from its janitorial employees. It appears that appellants signed the acceptance forms during the year 1928 to 1931, which were on small slips of paper about the size of the notice forms sent them in previous years, with the understanding that they merely stated the salary to be accepted; and that if they should decide to discontinue their employment, they would give to the Board sixty days notice before leaving. The signing of the 1928-1931 forms of acceptance under the conditions set forth in the testimony clearly shows that these appellants did not intentionally, or in fact, relinquish their tenure rights and they are, therefore, protected by the tenure act if they have not signed the contract form for the year 1932-1933.

The signing of the acceptance forms for the years 1928 to 1931, inclusive, did not deprive any of the appellants of tenure rights previously acquired; neither did the janitors originally appointed for definite terms by the resolutions of June 11, 1928, and June 27, 1930, who received the notices and signed the acceptance forms, acquire tenure protection. (Hardy *vs.* Orange, 61 N. J. L. 620.)

Appellants employed prior to 1928 and those appointed under the resolution of April 8, 1929, who have not signed the contract form offered in accordance with the resolution of June 27, 1932, are protected by the Janitors Tenure Act (Chapter 44, P. L. 1911) and cannot be required to sign a contract which would deprive them of their tenure and salary protection. The Board of Education of the Town of West Orange is hereby directed to re-establish the salaries of these appellants as of the beginning of the school year 1932-1933 in the amounts received for the preceding year, to cause any balances due to be paid to them, and to adjust payments due the Teachers' Pension and Annuity Fund. Other appellants have a legal right to that salary only which was fixed by the resolution of June 27, 1932.

February 1, 1933.

DECISION OF THE STATE BOARD OF EDUCATION

On June 27, 1932, the Board of Education of the Town of West Orange adopted a resolution regarding janitors, which recited the duty to afford relief in the economic situation by lowering the tax burden and its belief that a readjustment of individual salaries in the direction of present market values to result in a net reduction of ten per cent in the aggregate total of salaries would greatly help to afford the necessary relief, and then specified the amounts of salaries to be contracted for with the persons employed in the janitor service for the term of one year, beginning July 1, 1932, and ending June 30, 1933. A form of contract providing for one year's service, with a sixty-day mutual termination clause, at the revised salary, was tendered to each janitor.

The janitors affected were twenty-four in number, and the salaries specified involved reductions from nothing to upwards of 27 per cent. Twenty of the janitors appealed from the action of the Board to the Commissioner of Education, maintaining:

That the action is violative of Chapter 44, P. L. 1911, page 67, which protects school janitors from decrease in pay or compensation, except upon sworn complaint for cause, and upon a hearing had and a finding by the employing Board of the neglect, misbehavior or other offense set forth in the complaint.

That the reductions in salary are discriminatory in that they vary in percentage, and,

That the Board was without right to require them to execute the form of contract submitted to them to govern their service during the ensuing year.

The Commissioner held that the janitors, excepting such as had signed the new contract, were protected from reduction in salary by the act of the Legislature above mentioned, and that they could not be required to sign a contract which would deprive them of their tenure rights. He directed the Board to re-establish the salaries of those appellants who had not signed the new contract as of the beginning of the school year, 1932-1933, in the amounts received for the preceding school year, to cause any balance due to be paid to them, and to adjust the payments due the Teachers Pension and Annuity Fund.

The Board of Education has appealed to this Board from the decision of the Commissioner.

We have heard the attorneys of the respective parties in oral argument, and have been favored with their briefs.

The insistment of the respondent Board is that the janitors are not protected by the Tenure Act referred to, because, as it says, their employment was on an annual basis, and therefore under authority of the cases of Horan *vs.* Orange, 58 N. J. L. 533; and Hardy *vs.* Orange, 61 N. J. L. 620, the Tenure Act did not apply.

Extracts from the minute books of the Board of Education relating to the employment of janitors and fixing their salaries, covering the period from the year 1910-1911 to 1930-1931, inclusive, were submitted in evidence. An examination of these extracts of minutes shows that down to the year 1925, the salaries of janitors for the then following year were fixed by the Board without mention of anything more than that they should be a certain sum, or the same as the preceding year. In some instances, the salary of the present year was mentioned, increases granted, and the resultant salary for the following year shown. In 1925, the form of the motion regarding janitors' salaries was "that contracts be given to the janitors as follows," naming the janitors, and, following each name, the salary for the present year and for the ensuing year. Nine of the janitors involved in this appeal were then or had before been in the employ of respondent. They were Weigel, Kocher, Robinson, Suetterlein, Blank, Yawger, Morrison, Mills, and Miller. On June 14, 1926, Mooney and Walter were "employed on trial and are recommended for contracts beginning July 1, 1926." On June 13, 1927, the minutes disclosing a list of janitors was submitted, including therein the names of the eleven mentioned, showing present salaries, increases recommended, and the resultant salary for the year 1927-1928. No mention is made of contracts or terms of service. At a meeting on June 11, 1928, a list of janitors was presented, including the eleven above named, and also Bollenbach, and a motion adopted "that contracts for janitors for the school year 1928-1929, be awarded as recommended and as listed above." On April 8, 1929, three more of the appellants below, namely, John Williams, John Eakley and Ada McMullen, were appointed by a motion adopted by respondent Board, "that the following janitors and janitresses be placed on the payroll with salaries as indicated below," and naming a gross sum per year following the names of the two men, and a sum per month that of the woman. On June 10, 1929 ,a list of janitors was submitted, which included the fifteen heretofore named, showing the salaries for the year 1928-1929, the increases recommended, and the salary for 1929-1930. A motion was adopted "that increases to janitors' salaries be made as recommended by Mr. Strong." No mention is made of terms of service. On June 27, 1930, a motion was adopted "that the janitors be awarded contracts for the year July 1, 1930, to June 30, 1931, as follows." Then follow the names including those heretofore named, and names of Marie Platz, Freeman and Keller, three of the appellants below, followed by the salaries paid during 1929-1930, the increases recommended, and the salary for the year 1930-1931. And on June 8, 1931, a motion was adopted by respondent Board, "that the following janitors be reappointed with the salaries listed for 1931-1932." Then follow the names of all the appellants below, except McKenzie, with the salary

for 1930-1931, shown, the increase recommended, and the salary for 1931-1932. The record does not disclose that prior to the tender of the form of contract dated June 27, 1932, any formal contract specifically fixing a term of service, was tendered to or signed by the appellants below. Down to the year 1926-1927, or perhaps the year thereafter, it was the practice of the clerk of the Board to send a notice to each janitor in the following language:

"You are hereby notified that your salary for the school year ..... has been voted upon at the rate of $..... per annum. No contract will be necessary as your position comes under the Tenure of Office Law. Kindly let me know by ..... if this is acceptable to you.

Signature of Clerk,"

These notices were printed and it may be presumed were used by authority of the Board. They would seem to negative the idea the Board considered any of the persons to whom they were directed as being employed for a definite term. After 1927-1928, the practice was to send to each janitor, after the meeting at which salaries were fixed for the ensuing year, a notice in the following form:

"West Orange, N. J.,

Mr. .....

"You are hereby notified that your salary for the school year ....., has been fixed by the Board of Education at $....., which will be paid in .....monthly installments.

Your acceptance of this salary is required on or before .... Failing to receive the attached acceptance by that date, the Board will consider your position vacant.

Board of Education of the
School District of West .....
Orange, County of Essex District Clerk."

To which notice an acceptance was appended, reading:

"Date .....

Board of Education,
West Orange, N. J.

I hereby accept the salary of $....., for the school year ....., for my service in the public schools of West Orange, N. J., and agree to give the Board of Education sixty (60) days notice in writing should I desire to terminate my contract.

Yours very truly,

.....

Teacher.

All of the appellants below signed such acceptance of salary for the year 1931-1932. No notice other than in the foregoing form, of the action of the

Board, was given to appellants. It will be observed that in 1925, when it first appears "contract" between the Board and the nine appellants then in the employ of the Board was mentioned, they had already acquired tenure. The two appointed on June 14, 1926, were employed on trial, and "recommended for contract beginning July 1, 1926." Thereafter, annually, the Board acted in fixing salaries for the following year. Sometimes the motion adopted referred to contracts to be given, sometimes not, as in 1929. Considering the language of the various motions adopted, the lack of any notice to the janitors of the Board's action except as contained in the form hereinbefore shown, and the phraseology of that form of notice and acceptance, we find that no agreements were made by the janitors whereby they were to serve for definite terms; that the annual action of the Board was to fix salaries only, and not terms of service, and that they all were protected by the terms of the tenure act of 1911, on June 27, 1932, when the Board adopted the resolution revising salaries.

The respondent Board contends, however, that irrespective of any question of tenure, it has power to revise salaries of its employees downward as well as upward. On this point we express no opinion, as we base our disposition of the case on other grounds. We do not question the good faith of the Board in making the reductions in salary. We are convinced their motive was to effect economy in the administration of their trust. We believe, however, they fell into error in adopting the method followed. It is the declared policy of the State that reductions in salaries in the public service shall be made without discrimination among those in the same class of service, as witness Chapter 172 of the Laws of 1932, where reductions are directed to be made on a percentage basis, and Chapter 12 of the Laws of 1933, which expressly directs that in fixing salaries or compensation, there shall be no discrimination among or between individuals in the same class of service. In the present case, the reductions are in varying percentages from nothing to upwards of 27 per cent. If employing boards may make reductions of salaries or wages by this method, or lack of method, it is easily seen how favoritism and unjust discrimination under disguise, may intervene and the benefit of the law intended to protect the employee, wholly lost. On this ground we find the reductions of appellants' salaries or compensation cannot be sustained. Being entitled to the protection of the Tenure Act, they cannot be required to execute a contract which would deprive them of that benefit.

Having reached the conclusion that all the appellants are within the protection of Chapter 44, P. L. 1911, and that the reductions of their salaries cannot be sustained, we recommend that the decision of the Commissioner of Education, in so far as he decides that the janitors appointed on June 11, 1928, and on June 27, 1930, are not within the provisions of the Tenure Act, be reversed and in all other respects that it be affirmed.

May 6, 1933.

DISMISSAL OF JANITOR

CHARLES H. EVANS,

Appellant,

vs.

THE BOARD OF EDUCATION OF CHESTER TOWNSHIP,

Respondent.

George B. Evans, for the Appellant.
Kaighn & Woolverton, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Appellant in this case, Charles H. Evans, was in the employ of the Board of Education of the Chester Township as janitor from the year 1908. It was the custom of the Board of Education to re-employ him at the end of each year, from which act it is reasonable to infer that his term of employment ran from year to year. He was not re-employed at the close of the year in June, 1915, as was usual, but was re-employed as janitor of school buildings eight and nine on August 24, 1915. The reason for the unusual delay in re-hiring him was because of some question as to his ability to run the new heating plant that had been placed in the new buildings. The building in which he had been janitor in former years was torn down.

In a letter dated August 30, 1915, notifying the appellant of his reappointment, is the following:

> "The Board of Education of Chester Township at its last meeting instructed me to notify you that as a janitor in the employ of the Board you have been assigned to school buildings number eight and number nine for the school year 1915-16. The duties of the janitor of these buildings include the usual work of operating the heaters.
>
> "The State law may require you to get a permit or certificate of some sort showing your authority to operate the kind of heater installed in school building number nine. On this subject, which is out of the jurisdiction of the Board, you should consult with the Department of Labor, Trenton, New Jersey."

To this letter Mr. Evans, through his attorney, replied as follows:

> "Mr. Evans is glad to do anything he can as janitor of the buildings eight and nine, and will do his utmost to keep these buildings in condition.
>
> "With regard to securing a permit to run the engine, I am not sure that my client can secure such a permit, and in order to place ourselves in the proper position in case this matter comes up in the future, I wish to state that my client in consenting to do the best he can in his new position does not obligate himself to secure a license."

Mr. Evans began work as janitor in the schools at the opening in September and continued to do the work required of a janitor up to September 28, 1915. On this date it was necessary to start up the fires in the heaters and continue to keep the building heated thereafter. This part of the janitor's work Mr. Evans refused to perform. One of the rules of the Board of Education provides that the janitors shall have charge of the fires and shall see that the rooms are properly heated and ventilated. This rule was in force during the time that Mr. Evans had been in the employ of the Board.

It appears that the new heating and ventilating plant in buildings eight and nine to which Mr. Evans had been assigned requires a steam pressure of more than ten pounds. A law enacted in 1913 by the State Legislature requires that no heating and power plant under the control of any person or board requiring a steam pressure greater than ten pounds can be operated by any person without first obtaining a license from the board provided by law for the issuing of such licenses.

It thus appears that the janitor in these schools, in order to run the heating plant, must obtain the proper license. Mr. Evans refused to run the heating plant on the ground, first, that he was not capable of learning how to do it, and second, that he would not apply for a proper license to do so. The appellant claims that it is not the duty of a janitor to run a heating plant which requires a license. He claims especially that it is the duty of the Board of Education to furnish him janitorial work in the schools which work is outside of any work pertaining to running the heaters under the system installed in schools eight and nine.

Charges of inefficiency were brought against Mr. Evans by the principal of the school and a hearing was had before the Board of Education. The main point of inefficiency was that the appellant refused to run the heating plant. The Board adjudged the appellant guilty of incompetency and discharged him from its employ as janitor of schools eight and nine. From this action of the Board appeal is taken.

The question to be decided is this. Is the rule of the Board which requires the janitors to have charge of the fires and see that the rooms are properly heated in any way modified when a heating plant is installed that requires in its running the maintaining of a steam pressure of more than ten pounds?

Chapter 44, Laws of 1911, gives power to a board of education to make "such proper rules and regulations as may be necessary for the employment, discharge, management and control of the public school janitors." The act further states "no public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board." The rule of the Board, which it had a right to make, requires that janitors shall have charge of the fires and shall see that the rooms are properly heated, and in no way limits the Board of Education to any particular system of heating and ventilating. The Board has a right at any time to install a heating and ventilating system which it regards as the best in its judgment. I cannot see wherein a janitor could possibly be given such tenure rights as would give to him the choice of determining the kind of heating

plant that he would run or would not run. That the law leaves clearly in the hands of the Board of Education.

The new plant installed the appellant refused to run because the Legislature had enacted a law providing that a license should be obtained for such a plant. In passing such a law the Legislature in no way limited the choice of heating plants to be installed by boards of education. The requirement of the Board was such as is provided in its rules and such as is usual in school buildings of the size of the buildings eight and nine in this case. The appellant was dismissed after making charges and after he had been given an opportunity to meet those changes. He admits that he refused to run the heating plant. He admits that he was not qualified to do so. Hence the finding of the Board that he was inefficient was based on the appellant's own act and admission.

I find that the rule made by the Board requiring its janitors to have charge of the running of the heating and ventilating plant is a reasonable one, and that the appellant in this case, being given a fair trial under charges and being found guilty of the charges made, was legally dismissed as janitor in the schools of Chester Township.

The appeal is therefore dismissed.

April 24, 1916.

Affirmed by STATE BOARD OF EDUCATION October 7, 1916.

LEGALITY OF DISMISSAL OF SCHOOL JANITOR

JOHN W. EGGERS, JR.,
Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named appellant, who has been employed as janitor in the public schools of Elizabeth since November, 1917, to contest the validity of the action of the Elizabeth Board of Education on April 9, 1926, in suspending him from duty as janitor of School No. 8 without salary and without charge or trial. Appellant further contests the validity of the action of such Board on July 28, 1926, in dismissing appellant from its employ as janitor, after charges had been preferred and a hearing granted, on the ground of misconduct and violation of the rules and regulations of the Board of Education.

Appellant contends that his suspension without salary on April 9, 1926, and without the preferring of charges and the granting of a hearing was in direct violation of the provisions of the School Law, and further contends that the

acts with which he was later charged by Miss Ann M. May, Principal of School No. 8, and for which after a hearing he was dismissed on July 28, 1926, did not constitute on his part such misconduct or violation of the rules and regulations of the Board of Education as to justify his dismissal by the Board.

This case is submitted for decision upon the stenographic record of the testimony before the Elizabeth Board of Education on July 28 and also upon oral argument of counsel heard by the Assistant Commissioner of Education on Thursday, October 7, 1926, at the State House in Trenton.

Section 382, Article XXVII of the 1925 Compilation of the School Law provides as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such board."

In the case under consideration there is no denial of the fact that prior to his suspension as janitor without salary on April 9, 1926, no charges were preferred against appellant, and no opportunity to be heard was given him as required by law. The Commissioner is, therefore, of the opinion that such suspension of appellant by the Elizabeth Board of Education on April 9, 1926, was in violation of the section of the School Law above quoted and, therefore, illegal.

There remains to be considered the question of the legality of the dismissal of appellant as janitor by the Board of Education after the hearing on July 28, 1926, on the ground of misconduct and violation of the rules of the Elizabeth Board of Education.

Section 1, Rule 34, of the "Rules of Government of the Board of Education of Elizabeth," provides as follows:

> "Janitors of the public schools shall be under the immediate direction of the school principals, who are held responsible for the enforcement of the following rules and who are required to report to the Superintendent of Schools any neglect of duty, disrespect towards the teachers or wilful violation of said rules."

From the testimony it appears that on two occasions in February, 1926, Miss Ann M. May, the Principal of School No. 8, in which appellant was employed as janitor, requested the latter to place a desk in classroom No. 10, for the use of one of the pupils. Appellant did not comply with the principal's request immediately, but did place the desk at noontime, two or three hours later. The testimony also shows that on one occasion in February, 1926, when Miss May, the Principal, gave the signal for fire drill, appellant failed to respond or to take his place at the head of the stairway as prescribed by the principal. On the occasion of a second fire drill, appellant while responding to the signal did not take his place at the head of the stairway as required, but seated himself in the hallway. Upon inquiry being made of appellant later by the principal as to why he did not perform his duties in connection with the fire drills, it

appears that the former was insolent in his replies and following the principal to her office continued to address her in an insolent and discourteous manner.

So far as the incident of the placing of the desks is concerned it is the opinion of the Commissioner that allowance must be made for the fact that appellant had no assistance whatever in his janitorial work, and that the requests to the placing of the desks were both made by the principal in mid-winter, when the heaters required the janitor's very frequent attention. Appellant's delay, moreover, in responding to the principal's request does not seem, on either occasion, to have been extreme, since the desk was actually placed by him within two or three hours after he received such request. Under such conditions, especially in view of the paramount need during the cold weather of keeping up the fire in the heaters before performing his other duties, the appellant in the Commissioner's opinion exercised a not unreasonable discretion in complying within two or three hours with the principal's request to place a desk in one of the classrooms.

Appellant's refusal on two different occasions to comply with the principal's orders in the matter of the fire drills undoubtedly constituted some degree of misconduct on his part, as did, also, his discourteous and insolent replies to the principal when she remonstrated with him for his failure to comply with her orders. The question to be considered, however, is whether such misconduct was sufficient to justify appellant's dismissal from the employ of the Elizabeth Board of Education. In the Commissioner's opinion, in order to justify the dismissal of an employee who had been as long in the service of the Board of Education as had appellant, the acts complained of must have been either very grave in nature or have been the subject of complaint on prior occasions during his years of employment. Such was the ruling of the Commissioner of Education in the case of Eden Bennett *vs.* Board of Education of Neptune City, in which the re-instatement of a public school janitor was ordered by the Commissioner. (Reported on p. 517, 1925 Comp. of School Law.) There is nothing in the testimony in the case under consideration to prove that appellant's conduct had prior to February, 1926, ever been the subject of complaint, either to the City Superintendent or the Elizabeth Board of Education, and his conduct on the particular occasions now complained of, while savoring of insubordination, was not in the Commissioner's opinion of a flagrant nature. While, therefore, the acts with which appellant was charged might readily become just cause for dismissal if repeated by him, they should not in the Commissioner's opinion, when occurring for the first time, cause the dismissal of an employee who has been for nine years in the service of the employing Board before any such complaint was made against him.

In view of all the facts, therefore, it is the opinion of the Commissioner of Education that the Board of Education of the City of Elizabeth violated the provisions of Section 382 of the School Law, above quoted, when on April 9, 1926, it suspended appellant without salary and without charge or a trial, and it is further the opinion of the Commissioner, that appellant's misconduct as shown by the testimony produced before the Board of Education at its hearing on July 28, 1926, was not sufficient to legally justify his dismissal under Section 382, above referred to.

It is, therefore, hereby ordered that appellant be re-instated in his position as janitor in the public schools of the City of Elizabeth and that his salary be paid from April 9, 1926, the date of his illegal suspension, at the rate which he was receiving at that time.

October 28, 1926.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education holding that the respondent, John W. Eggers, Jr., was illegally suspended from his position as a janitor in the public school of the City of Elizabeth, and that he should be reinstated and his salary paid from April 9, 1926, the date of his illegal suspension.

Mr. Eggers at the time of his dismissal by the Board of Education had been a janitor in the Elizabeth School for something over nine years. On February 1, 1924, he was assigned to School No. 8, the principal of which was Miss Ann May.

Rule 34 of the rules of the Elizabeth Board provides as follows:

> "Janitors of the public schools shall be under the immediate direction of the school principals, who are held responsible for the enforcement of the following rules and who are required to report to the Superintendent of Schools any neglect of duty, disrespect towards the teachers or wilful violation of said rules."

On March 3, 1926, Miss May, by letter to the business manager of the Board of Education, complained of the conduct of Mr. Eggers, and particularly that he had a tendency to become defiant, rude and abusive, was discourteous in the performance of his duties, and did not comply with her requirements or instructions, and requested that he be removed from the position of janitor of School 8. After investigation and report by its committee on school properties, the Board suspended Mr. Eggers from April 9, 1926, without pay, pending investigation of the principal's complaint. Notice of the charges was given Mr. Eggers, and after due notice to him the charges were heard by the Board on July 28, 1926, when Mr. Eggers was present and represented by counsel, and witnesses were examined on behalf of the Board, and he testified in his own behalf. At the conclusion of the testimony, the Board, after deliberation, passed a resolution adjudging Mr. Eggers guilty of misconduct and violation of the rules of the Board as charged in the complaint, and directed that he be dismissed.

The Commissioner holds first, that Mr. Eggers' suspension by the Board on April 9, 1926, was in violation of Section 382 of the School Law, because no charges were preferred against him and no opportunity was given him to be heard, and second, that although Mr. Eggers was guilty of discourtesy and insolent conduct toward the principal of the school and did not carry out her orders or requests, nevertheless such misconduct, being a first offense, was not sufficient to justify the dismissal after his long service.

Counsel for the Board of Education agrees with the first finding of the Commissioner that the suspension of the respondent, without pay on April 9, was unlawful, and admits that respondent is entitled to his pay from that date to and including July 28th, when he was dismissed after the hearing of the charges preferred against him. The sole question on this appeal therefore is raised by the Commissioner's finding that the respondent's misconduct was not sufficient to justify his dismissal in view of his long service and the fact that this was the first offense. Section 382, Article 27 of the School Laws (1925 Ed., p. 220) is as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause, and upon a hearing had before such Board. * * * If upon such hearing it shall appear that the person charged is guilty of the neglect, misbehavior or other offense set forth in said complaint, then *said Board* may discharge, dismiss or suspend such janitor or reduce his pay or compensation but not otherwise."

The statute above quoted vests in the local Board the authority to determine the punishment to be imposed if the charges are sustained.

Where the judgment of the trial court is fairly supported by the record, its findings of fact will not be disturbed by the Appellate Court. (Martin *vs.* Smith, 125 Atl. Rep. 142.)

The Appellate Courts of this State have held that even if it were possible to reach a different conclusion they will not review the testimony upon which a municipal officer is dismissed. (Hailes *vs.* The Mayor, 128 Atl. Rep. 150.)

On an appeal by a police officer to review the action of the Commissioner of Public Safety of the City of Passaic in dismissing the officer for a dereliction of duty, Judge Minturn held that since there was evidence upon which the Commissioner might reasonably found his conclusion of the officer's guilt he would not weigh the testimony or form an independent judgment. (Hoar *vs.* Preiskel, 128 Atl. Rep. 857.)

The record here contains ample support for the findings of the Board in the present case and the opinion of the Commissioner, in effect, so admits. That being the case and the local Board having authority to prescribe the particular statutory punishment to be inflicted, there is no ground for interfering with its decision and action unless it appears that the respondent did not have a fair trial or that the Board acted with prejudice.

The record of the hearing of the charges before the Board of Education shows that the respondent in fact had a fair trial and there is no evidence of prejudice. This Board has frequently held that in such case the decision of a local Board will not be reversed. (Fitch *vs.* Board of Education of South Amboy (N. J. School Laws, 1925), 568. Cheeseman *vs.* Board of Education of Gloucester City (N. J. School Laws, 1925,) 551, and other cases.)

On the facts and under the principles above referred to, it seems to us that the action of the Board of Education in dismissing the respondent should not be disturbed, and we therefore recommend that the Elizabeth Board of Education be directed by the Commissioner to pay Mr. Eggers his salary, as janitor

from April 9 to July 28, 1926, and that in all other respects the Commissioner's decision be reversed.

November 5, 1927.

SWORN COMPLAINT REQUIRED FOR DISMISSAL OF JANITOR ON CHARGES

FRANCES E. JARVIS,

Appellant,

vs.

LOPATCONG TOWNSHIP BOARD OF EDUCATION,

Respondent.

For the Appellant, Lewis S. Beers.

For the Respondent, Clark C. Bowers.

DECISION OF THE COMMISSIONER OF EDUCATION

On August 7, appellant appeared before the respondent Board to defend herself against charges which had been served upon her at least five days prior to that time. The complaint setting forth the charges was signed by George T. Cole and eight others who are thereby shown to have appeared before a notary public, and to have duly sworn to the matters therein set forth. The testimony shows that among the witnesses were three persons who signed the complaint, each of whom in testifying admitted that the complaint had been signed in his or her home without the presence of a notary public.

The Janitors' Tenure Act, Chapter 44, P. L. 1933, reads in part:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, *except upon sworn complaint* for cause, and upon a hearing had before such board. Upon the filing of *such sworn complaint*, a copy thereof, certified by the secretary or clerk as a true copy, shall be served upon such person at least five days before the hearing * * *"

As a result of the evidence above set forth, appellant's counsel contended that the complaint had not been made in compliance with the statute and he, accordingly, asked (pages 41-42 of testimony) that it be dismissed.

Respondent's counsel stated that counsel for appellant should have challenged the complaint at the beginning of the hearing and that it was not a proper time to raise such defense after several witnesses had testified. The record (page 42) discloses his further statement as follows:

> "I have been informed, Mr. President, that George T. Cole took the affidavits, and took it before a notary public. Inasmuch as it is only necessary to have one sworn affidavit, that will be sufficient, under the statute, in my opinion."

After this statement, the Board, by a vote of seven to two, decided to continue the hearing. The testimony discloses only the statement by respondent's counsel that he was informed Mr. Cole took the affidavit. There was no sworn testimony that any complainant actually subscribed to the oath.

At the conclusion of the hearing appellant was found guilty of the charges and dismissed. Appellant's counsel asks that this dismissal action of the Board be set aside for the following reasons: All complainants did not swear to the charges and when a presumption of the illegality of the complaint was raised, no proof was submitted to establish its validity; the Board members refused to submit to a poll to determine whether they were unprejudiced; and the charges were frivolous, and were unsubstantiated at the hearing.

A board of education in a hearing under this statute is a court of original jurisdiction, and is not required to submit to a poll to determine its lack of prejudice. The prejudice of a board or any of its members has affect upon a hearing only when it results in an improper conduct of the case or in a judgment not warranted by the testimony. It is not necessary in this case to review the acts of Board members in preparing the charges and the conduct of the hearing, since the testimony shows that the complaint setting forth that nine persons made the charges under oath, is not true. It is not even necessary to determine whether the notary public improperly subscribed to their appearance, or whether the names of complainants were inserted after the affidavit was taken. Of course, prospective witnesses are not required to sign a complaint, but when they do so under this statute, it is mandatory that they shall swear to the charges therein set forth. The complaint, being made in violation of the statutory requirements, is illegal and void.

The charges served upon appellant were in statutory form and constituted *prima facie* evidence of a legal complaint. It was only through the testimony that its invalidity became apparent, and thereupon counsel for appellant asked for a dismissal of the proceedings. Under these conditions appellant could not be held to be bound by the complaint because he did not attack it at the beginning of the hearing.

Since the hearing was conducted upon an illegal complaint to which due objection was made, Frances E. Jarvis was illegally dismissed from her employment as janitress. The Board of Education of the Township of Lopatcong is directed to reinstate her with pay from the date of her original dismissal.

November 15, 1934.

DISHONESTY OR LACK OF INTEGRITY GOOD CAUSE FOR DISMISSAL OF JANITOR

JOSEPH F. MORAN,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,

Respondent.

For the Appellant, John F. O'Toole.
For the Respondent, John W. Marini.

DECISION OF THE COMMISSIONER OF EDUCATION

On September 25, 1934, appellant was dismissed as janitor by the respondent after a hearing on charges filed by the supervising principal. A copy of the charges was served upon Mr. Moran, who was represented by counsel at the hearing. From this dismissal action he appeals to the Commissioner contending that his plea in a criminal court on an embezzlement and forgery charge brought by the Firemen's Relief Association was erroneously recorded to show that he made a plea of guilty; whereas, he actually pleaded *non vult.* Appellant further contends that the complaint against him was dismissed by the Grand Jury and, therefore, does not constitute a valid reason for his dismissal by the respondent. Mr. Moran alleges that the absence without leave charge presented by the Board of Education was not sufficiently serious to justify the drastic action of dismissal from service.

The testimony taken before the Board of Education and submitted to the Commissioner shows that while Mr. Moran was absent three days without leave of the supervising principal or Board of Education, the head janitor had knowledge that two of the three days' absence was due to his arrest on charges of embezzlement and forgery, and it was the common knowledge of the school authorities that the third day's absence was caused by the hearing on such charges. Appellant's absences, under these conditions, are not just cause for his dismissal.

Due to the fact that the statute providing for a hearing of a janitor on charges makes no provision for the subpœnaing of witnesses, persons upon whom subpœnas were served by the Board of Education refused to appear as directed, and, therefore, only the criminal court records were submitted to show that Mr. Moran pleaded guilty to charges of embezzlement and forgery. Testimony was presented, however, to show an error in the record of such plea.

In reference to the charge of embezzling funds of the Firemen's Relief Association, Mr. Moran testified on cross-examination (pages 84 and 85) as follows:

> Q. Did you ever have to make restitution to any other organization besides Firemen's Relief?
> A. Yes, I did.
> Q. Two other occasions?
> A. No, only once.
> Q. So with this it is the second time, that is correct?
> A. Yes; why bring that up."

A janitor fills a position in the school system requiring honesty and integrity. The appellant's admission of dishonesty, above set forth, constitutes sufficient evidence of conduct unbecoming a janitor to justify his dismissal by the Cliffside Park Board of Education. The appeal is dismissed.

January 23, 1935.

LEGALITY OF DISMISSAL OF SCHOOL JANITORS UPHELD

JOSEPH MCGARRY, ET ALS.,
Appellant,
vs.
BOARD OF EDUCATION OF THE CITY OF PATERSON,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought to contest the legality of the action of the Board of Education of the City of Paterson in dismissing appellants as janitorial employees in its public schools on May 2, 1925, following a hearing upon charges to the effect that their original appointments on December 23, 1923, were illegal and consequently not binding upon said Board.

Appellants contended at the hearing before the local Board of Education above referred to and contend now in their present appeal to the Commissioner that the former decision of the Commissioner of Education on January 5, 1925, as to the illegality of a previous dismissal of appellants from their janitorial positions on February 14, 1924, and his order of reinstatement and payment of salaries from the date of such unlawful dismissal constituted a bar to the subsequent dismissal of appellants on May 2, 1925. In addition to the claim that the right to their positions is *res adjudicata* appellants insist that the charges upon which the latest dismissal action was taken alleged no neglect, misbehavior or other offense and that illegal appointment is not a cause upon which appellants can legally be tried and dismissed by the Board

of Education. Appellants also insist that the original appointments in December, 1923, were legal.

Since the attempted dismissal of appellants by the Paterson Board of Education in February, 1924, Joseph McCabe has resigned his position as janitor and is not therefore a party to this action. In the absence of such issue of fact and in view of the controversy arising solely from the question of the legality of the Board's dismissal action on May 2, 1925, upon the grounds above set forth, it was agreed by counsel for both sides that the necessity for a hearing was obviated and that the case be presented to the Commissioner for decision upon submission of briefs by counsel upon the legal points involved.

Counsel for appellants cites equity cases in support of his contention that his clients' right to their positions is *res adjudicata* and that the Commissioner's previous decision in January, 1925, as to the illegality of their dismissal by the Paterson Board of Education in February, 1924, is a bar to the later dismissal of May 2, 1925, even though the latter was on different grounds. In one of the cases which he cites, however, namely, Wooster *vs.* Cooper, 59 Eq. 204, it was stated in the opinion that "a demand will be held to be *res adjudicata* when by a former decree or judgment the same claim, based upon the same muniment of title, between the same parties, touching the same subject matter has been determined by a competent court," and in the case of Russell *vs.* Place, 94 U. S. 606, 24 L. Ed. 214, the Court held that "in order that the judgment in a former case may be conclusive in a second suit between the parties, it must be shown either by the record or by extrinsic evidence that the same question was necessarily raised and determined in the former suit."

Substantially the same conclusion was reached in the case of Bond *vs.* Markstrum, 102 Hich. 11, 60 N. W. 232, when the Court held that "such former judgment does not preclude defenses in the second case which might have been made in the first or which were set up in the answer to the first, they not having been, as a matter of fact, litigated and passed on in the first action."

In the case under consideration it must be borne in mind that the Board of Education of the City of Paterson which dismissed appellants on May 2, 1925, was a new Board having come into office on February 1, 1925, and, therefore, according to decisions of the Commissioner and State Board of Education and of other legal authorities, notably, Gulnac *vs.* Board of Chosen Freeholders, 45 Vr. 543, a different and distinct body from that by which the dismissal of appellants was made on other grounds in February, 1924. In the light of all the facts and of the cases above cited it is the opinion of the Commissioner that the previous decision of the Commissioner of Education of January 5, 1925, as to the illegality of appellants' dismissal by the Paterson Board on February 14, 1924 (which dismissal disregarded appellants' tenure rights and was based solely upon the ground that their appointments were made under suspended rules of the Board), is no bar to the later dismissal of appellants on May 2, 1925, by an entirely new Board of Education and on grounds not previously litigated, namely, the permanent nature of appellants' appointments by the Board of Education in office in December, 1923. This Court

is bound to take judicial notice of its own records and we believe, moreover, that it is not disputed by either side to the present controversy that after a suspension of rules providing for a three-months' appointment the following is the text of the original resolution of appointment of December 23, 1923, which was unsuccessfully assailed by the 1924 Board in the previous action before this Court:

> "*Resolved,* That the following named persons be and the same are hereby permanently appointed to the positions as janitors in the public schools of this city, as of the dates indicated at the scheduled salary of $1,200 per annum, etc., etc."

According to the decision of the Commissioner of Education in the case of Serina M. Brown *vs.* Oakland (affirmed by the State Board of Education) a contract of a preceding Board of Education is voidable by an incoming Board when the effect of such contract is to deprive the succeeding Board of its own appointment prerogatives. The appointment of appellants on December 23, 1923, by a Board about to go out of office in a little over a month was specifically termed a permanent one; and should the failure on the part of the Paterson Board of 1924 to attack such appointments on legal grounds be deemed a bar to a subsequent action of dismissal by the Board coming into office in 1925, the latter if bound by the previous permanent appointment of appellants would be thus deprived of its own appointment prerogatives. Such a result would be contrary to the rulings of both the Commissioner and of the State Board of Education notably in the Brown case above referred to. The Paterson Board of Education in dismissing appellants on May 2, 1925, cannot in the Commissioner's opinion be deemed—as their counsel claims in his brief—to have been producing piece-meal grounds for appellants' dismissal after the unsuccessful action of February, 1924. The Board coming into office in February, 1925, was as above stated an entirely new body which, after the State Board of Education had affirmed the Commissioner's decision as to the illegality of the earlier dismissal, took the first opportunity presented to it on grounds not hitherto litigated to rid itself of the illegally binding permanent appointment of appellants of December 23, 1923.

The Commissioner cannot agree, moreover, with the appellants' contention that under the Janitors' Protection Act only neglect of duty, misbehavior or other offense on the part of the incumbent and not illegalities in connection with appointment constitute grounds for dismissal. In the case of O'Neil *vs.* Bayonne, 1 Misc. N. J. Rep., involving a Police Tenure of Service Act the Court of Errors and Appeals stressed the necessity of the proferring and proving of charges and the granting of a hearing as a prerequisite to dismissal and ordered the appellant in that case reinstated in his office because such procedure had been omitted. The Court plainly indicated in its opinion however that ineligibility or illegalities of appointment, if properly presented, would constitute good grounds for dismissal when it held that: "The appointment would be presumed to be *de jure* until the contrary was proved," and that "such lawfully organized Board having made the appointment, the presumption is in favor of the lawfulness of such appointment until the contrary is made

to appear." And this opinion of the Court was in spite of the fact that the provisions of the Police Tenure Act involved appeared to protect the incumbents except when guilty of misbehavior or other misconduct.

If absolute protection were conferred upon incumbents of offices or positions in spite of illegalities of appointment or ineligibility therefor, they would be safe from dismissal until some personal offense could be proved against them even though entirely ineligible for appointment or even though, when appointed by a public body, they might have received less than the statutory number of votes required therefor.

Tenure laws such as that pertaining to teachers (Chapter 243, P. L. 1909) and that applicable to municipal police officers (Article XVI, Chapter 132, P. L. 1917) plainly indicate an intention that the incumbents of such offices shall hold their positions permanently during good behavior and efficiency without giving the appointing power any opportunity to fix their terms of office. The law however pertaining to school janitors (Section 354, Article XXVII of the 1921 Edition of the School Law) provides that boards of education "shall make such proper rules and regulations as may be necessary for the employment, discharge * * * of the public school janitors employed by such board not inconsistent with the provisions of this Act."

The School Janitor Law therefore enables boards of education to fix their terms of employment, and the Attorney-General, moreover, has ruled that the protection afforded by the School Janitors' Act in question exists only during the term for which the incumbents are appointed and thus does not survive the expiration of the term of appointment. In the Commissioner's opinion therefore it necessarily follows that statutory protection during the term presupposes that the term be one a board of education can legally make and one moreover of legal duration. An appointment cannot be deemed of legal duration which, according to the Brown *vs.* Oakland case above referred to, deprives a succeeding board of its appointment prerogatives.

It is, therefore, the opinion of the Commissioner of Education that the doctrine of *res adjudicata* cannot be successfully invoked by appellants against the action of the Paterson Board of Education on May 2, 1925, in dismissing them from its employ by reason of the previous decision of the Commissioner in January, 1925, affirmed by the State Board in April, 1925, as to the illegality of the earlier dismissal of appellants in February, 1924, on different grounds. It is also the opinion of the Commissioner that the permanent nature of the appointment of appellants on December 23, 1923, constituted justifiable grounds under the Janitors' Protection Act for their dismissal by the Paterson Board of Education on May 2, 1925.

The appeal is accordingly hereby dismissed.

December 7, 1925.

Decision of the State Board of Education

On December 13, 1923, the appellants were appointed janitors in the Paterson School District by the Board of Education of that city. On February 14, 1924, the incoming Board adopted a resolution which declared their appointment illegal and void. An appeal was taken from that action to the Com-

missioner, who held that the dismissal was not legal or justifiable and ordered the reinstatement of the appellants to their positions. His decision was affirmed by this Board. The appellants were reinstated in their positions and paid their salaries from February 14, 1924, and continued to perform their duties and receive their salaries until May 2, 1925. Shortly before that date, they were notified to appear before the Board of Education on May 1, 1925, when a hearing would be given them upon the charge that they were illegally appointed. The petitioners presented their case upon that hearing but the charge against them was sustained and they were discharged. The resolution of discharge is dated May 1, 1925, recites the facts above stated and contains the finding that the appellants were illegally appointed to and illegally held their positions and that they be and "are hereby discharged" therefrom.

The appellants then petitioned the Commissioner who has sustained their dismissal. The appellants urge in support of their petition, first, that the matter was *res adjudicata* by reason of the former decision and cannot now be reopened; second, that no neglect, misbehavior or other offense was alleged against them and that they could not legally be tried and dismissed upon a charge that they were illegally appointed; third, that they were legally appointed.

First: In our former decision in this case, we held that inasmuch as these janitors and janitresses were under tenure of office, they could not be discharged without a hearing on charges upon which they could legally be dismissed, and merely because the Paterson Board, without a hearing, held that they were illegally appointed. We did not hold that they were either legally appointed or that they could not be discharged if it was found, upon a proper hearing, that their appointment was illegal. The issues raised in the present case were therefore not before us and, in our opinion, the decision made is not *res adjudicata*. In order that the judgment in the former case be conclusive in this proceeding "it must be shown either by the record or by extrinsic evidence that the same question was necessarily raised and determined in the former suit." Russel *vs.* Place, 94 U. S. 606. The question now before us was not raised in the former proceeding.

Second: We cannot agree with the appellants that the illegality of their appointment is not ground for dismissal. In O'Neill *vs.* Bayonne, 1 Misc. N. J. Rep., in which the Police Tenure of Service Act was before the Court of Errors and Appeals, it was clearly indicated in the opinion that ineligibility or illegality of appointment, if properly presented, would constitue good grounds for dismissal. It seems to us that this decision is conclusive upon this point.

Third: The final question is whether the appointment of the appellants in 1923 was illegal. In Brown *vs.* Oakland, the Commissioner of Education, affirmed by this Board, decided that a contract by a preceding board of education is voidable by an incoming board when it deprives the succeeding board of its right to appoint. The 1923 Board had no right to make the appellants' appointment permanent. In our opinion the appointment was illegal and the Paterson Board was within its rights in discharging the appellants on that ground.

We therefore recommend that the Commissioner's decision be affirmed.

April 3, 1926.

JANITOR MAY NOT BE DISMISSED WHERE TESTIMONY BEFORE LOCAL BOARD DOES NOT SUBSTANTIATE CHARGES

ISAIAH SHEPHERD,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE HEIGHTS,

Respondent.

For Appellant, Ira F. Smith.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Borough of Seaside Heights, which had for several years employed the appellant as janitor and bus driver, by resolution on April 6, 1931, separated the two positions and appointed Mr. Shepherd as janitor at a salary of $900 per year. The minutes of April 4, 1932, contain the statement "Mr. Shepherd appointed as janitor," and the minutes of March 6, 1933, state "Mr. Shepherd, Janitor," but at the meeting of April 3, 1933, there was stricken from the March minutes the reference to the appointment of Mr. Shepherd together with other business for the reason, as stated by the Board, that the newly elected Board which took the action on March 6 could not legally function until the first Monday in April. Following the reference to Mr. Shepherd on March 6, 1933, no further mention is made of his appointment until May 6, 1935, when he was offered a definite term appointment at the reduced salary of $700 for the school year which he refused to accept, contending that he is protected in his position and salary by the Janitors' Tenure Act (Chapter 44, P. L. 1911). On or about June 28, 1935, he filed a petition asking the Commissioner to require the Board to pay him at the rate of $900 per year.

On July 3, 1935, Mr. Shepherd was notified to appear at a hearing before the Board for violating its regulations adopted on May 6, 1935. He was found guilty of the charges and subsequently dismissed. Appellant then filed a supplementary petition for reinstatement.

This case presents three questions:

(1) Was appellant on May 6, 1935, protected in his position under the provisions of Chapter 44, P. L. 1911?

(2) Was his salary legally reduced from $900 to $700 per year?

(3) Was he legally dismissed after the hearing on July 3, 1935?

(1) The appointment of appellant on April 6, 1931, was clearly indeterminate, and even if it were possible to consider the appointment of April 4, 1932, as an annual one, there is no evidence to show that Mr. Shepherd was notified of that appointment, and thereafter no legal appointment was made until May 6, 1935, when Mr. Shepherd was elected for the definite period, which he refused to accept.

Mr. Shepherd, having been appointed for an indeterminate period in 1931 and thereafter not having waived his rights by the acceptance of a definite term appointment, was on July 3, 1935, protected in his position by the Janitors' Tenure Act.

(2) Chapter 6, P. L. 1935, authorizes a board of education to reduce the salaries of employees whether or not they are protected by the Tenure of Office Act, providing there shall be no discrimination among or between individuals in the same class of service.

Mr. Shepherd was the only janitor employed by the Board of Education and was in charge of a four-room building, only three of which were in use. The reduction from $900 to $700 cannot be considered of such extreme nature as to be tantamount to a dismissal and, accordingly, the Board's action was legal under the authority conferred upon it by Chapter 6, P. L. 1935.

(3) On May 6, the Board of Education passed a new rule requiring that the janitor remain in the school building while the school is in session. On the afternoon of May 14 appellant left the school and returned about closing time. The testimony, however, clearly shows that while the Board passed the regulation on May 6, notice thereof was not promptly transmitted by the district clerk to the principal of the school. The latter testified that he was not positive whether the letter was left on his desk for the janitor during the morning or afternoon of May 14.

Even though the Board prior to the hearing on July 3 may have deemed appellant guilty of violating regulations, it is difficult to reconcile its finding of guilt when the evidence before it shows that the notification was not in his possession prior to his absence, and there is no reasonable basis for the assumption that he could otherwise have had knowledge of the rule. The application of the rule to appellant's absence had the effect of an *ex post facto* law.

In Reilly *vs.* Mayor and Board of Aldermen of Jersey City, 64 N. J. L. 508, Justice Gummere speaking for the Court said:

> "In reviewing the action of a board of police commissioners, this Court will not weigh the evidence taken before them for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor. It will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong, this Court will not interfere."

The testimony upon which the appellant was dismissed does not afford a rational basis for the judgment of the Board, and the dismissal action is therefore invalid.

The Board of Education of the Borough of Seaside Heights is directed to reinstate Mr. Shepherd as of the date of his dismissal with salary at the rate of $70 per month from September 1, 1935.

October 18, 1935.

DECISION OF THE STATE BOARD OF EDUCATION

The respondent here, Isaiah A. Shepherd, was named janitor of the school of appellant on April 6, 1931, at a salary of $900 per year, payable in ten monthly installments. He was again appointed on April 4, 1932, and on March 6, 1933. The records of appellant disclose no further appointment until May 6, 1935, when a motion was adopted that he "be reappointed janitor for the coming ten months school year at a salary of $700." At the same meeting certain rules were adopted relating to the janitor, one of which was that he remain at the school at all times while the school was in session, except when other school duties should make it necessary for him to leave.

Respondent appealed to the Commissioner of Education, claiming he was protected in his position under the Janitors' Tenure Act (P. L. 1911, Chapter 44) and that the Board could not lawfully appoint him for a specified term or reduce his salary.

On July 3, 1935, charges were made against respondent by a member of the Board of Education that he had violated the rule above mentioned by leaving the school the entire afternoon of May 14, 1935, while school was in session. A hearing upon the charges was had before the Board on August 5, 1935, and after evidence offered by both parties was heard, respondent was dismissed and his position declared vacant.

Respondent appealed to the Commissioner of Education from this action. The Commissioner of Education, in disposing of the two appeals, held that the Board had authority to make the reduction in salary by force of Chapter 6, P. L. 1935, which provides that boards of education may fix and determine salaries and compensation to officers and employees of and persons holding positions in any school district, between July 1, 1933, and July 1, 1936, notwithstanding any such person be under tenure or not, with the proviso that such reduction shall not affect rights in any employees' pension fund. He further held there was not sufficient evidence before the Board of Education to justify a finding of guilty upon the charge against respondent, and its judgment, having no rational basis, the dismissal of respondent was invalid, and the Board was ordered to reinstate him as of the date of his dismissal with salary at the rate of $70 per month.

The Board of Education appeals from the decision of the Commissioner of Education insofar as it holds the dismissal of respondent invalid and directs his reinstatement.

Appellant contends respondent was present at the meeting where the rule alleged to have been violated was adopted, and therefore, it was immaterial whether other notice of its adoption was given to him. While it is true it was testified he was present, there is nothing to indicate that respondent heard what business was being transacted. He denies any knowledge of the rule until a letter from the clerk of the Board was received by him upon his return to the school after his absence on May 14, 1935. It appears that before the adoption of the rule respondent had been permitted to perform his services much according to his own convenience, and at times left the school building while classes were in session. Apparently the Board, very properly, sought to

correct this situation and to see to it the janitor remained in the school when he might be needed. But in view of the manner in which he had theretofore performed his duties, presumably with the consent or at least the acquiescence of the Board, justice required he be given notice of the change. The evidence discloses no publication or promulgation of the new rule other than by the letter received by him after the alleged violation. The burden of proving notice was upon the Board and it having failed to sustain it, the Commissioner of Education decided rightly that the Board's finding and judgment had no support in the evidence.

However, appellant makes the further contention that, irrespective of the result of the hearing, the Board was within its rights in terminating respondent's employment, because, as it says, he was employed from year to year and the Board had the right to appoint a new janitor in his place; that a board of education being a non-continuous body, it has no power to make an appointment for a period longer than its own existence and cites the cases of Evans *vs.* Board of Education of Gloucester, 13 Misc. 506, and Skladzien *vs.* Board of Education of Bayonne, 12 Misc. 602, affirmed 115 N. J. L. 203, as authority for the contention. In the Evans case the petitioner had been appointed solicitor to the Board of Education by annual appointments for a number of years until in 1932, when he was again appointed without mention of a term. In 1934, the Board of Education appointed another to the position. Evans was a veteran and claimed tenure under the Veteran Act, which protects from removal from any office or position, the term of which is not fixed by law, any veteran, etc. The Supreme Court held that Evans' term of office was fixed at one year either by a resolution adopted when the position was created, or was co-terminous with that of the appointing Board. In the Skladzien case there was an appointment as medical inspector for a term of three years. The Board succeeding the one making the appointment vacated the office and appointed another. Skladzien claimed the protection of the Veteran Act, having been a soldier of the late war. The Supreme Court held that "generally, unless the term be fixed by statute, presently in force, or by ordinance or rule under legislative sanction, by direct delegation of that right of municipal control to the appointing power, the term of an appointee to office cannot be longer than co-terminous with that of the appointing power. Obviously it may be shorter." The above cases are inapplicable to the situation in the present case.

In the two cases cited, the terms were not fixed by statute, otherwise than to hold during a term co-terminous with the board making the appointment. In the Skladzien case, the appointment having been made for a longer period, it was invalid. In the Evans case, the appointments having been made for a definite term, i. e., co-terminous with that of the appointing Board, and in the Skladzien case, the term of appointment being unlawful, the Veterans Tenure Act was held not to apply.

In this case it does not appear that respondent was appointed for and that he accepted an appointment or employment for a definite term, so as to create a contract as in the case of Horan *vs.* Orange, 58 N. J. L. 534. So far as appears in the evidence he may have had no knowledge of the appointments

in 1932 and 1933. When he was apprised of the attempted appointment for a definite term and reduction of salary, on May 6, 1935, he promptly appealed and asserted his rights under the Janitors Tenure Act (Chapter 44, P. L. 1911). That act provides:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon hearing had before such board."

The Tenure Act being in force when respondent was appointed in 1931, it operated to fix his term of employment during good behavior and it was thereafter not within the power of the Board of Education to otherwise limit it. Stewart *vs.* Freeholders of Hudson, 61 N. J. L. 117. The operation of the Tenure Act with reference to janitors is just as effective to protect the incumbent of such positions as the Teachers' Tenure Act is with respect to teachers; otherwise, the Janitors' Tenure Act would be meaningless.

It is recommended the decision of the Commissioner of Education be affirmed and the appeal dismissed.

May 9, 1936.

DECISION OF THE SUPREME COURT

Argued January 19, 1937.
On *Certiorari.*
For the Prosecutor, Francis A. Tanner.
For the Respondent, Ira F. Smith.
Before Justices Parker, Lloyd and Donges.

PER CURIAM:

This case presents the claim of Isaiah A. Shepherd to the office of school janitor. The Board of Education appeals from an order of the State Board of Education directing Shepherd's reinstatement.

The claim is that Shepherd was appointed for a definite term, that he violated a rule of the Board, that his salary was reduced and he refused to accept office thereunder, and finally that he was guilty of such neglect of duty as to justify his dismissal for cause.

Under the proofs Shepherd was holding by an indefinite term and protected by the civil service law.

As to the dismissal for cause. The charge was failure to be on his job one afternoon during school hours in violation of a new rule adopted by the Board. Of this rule Shepherd was not apprised.

We think the proofs did not justify dismissal and the judgment will be affirmed with costs.

Filed April 27, 1937.

Pending before New Jersey Court of Errors and Appeals.

GOOD FAITH ABOLITION OF JANITORIAL POSITION HELD VALID

BENNIE GREENSTEIN,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was employed as a public school janitor by the respondent on January 14, 1930. Since that time other janitors have been appointed and it is admitted that they and appellant are protected in their positions under the provisions of the Janitors' Tenure Act (Chapter 44, P. L. 1911). On May 21, 1934, appellant was dismissed for the alleged reason of economy although some janitors, whose appointments post-date that of the appellant, were retained. On or about the date of appellant's dismissal, twenty teachers, two medical inspectors, a school nurse, a truant officer, and two other janitors were likewise dismissed.

Respondent contends that these reductions in its educational staff were not arbitrary, in bad faith, or for political reasons, but were necessitated by the serious financial condition of the City of Garfield. While counsel for appellant admits the bad financial condition of the school district, he holds that Mr. Greenstein's protection under the Janitors' Tenure Act prevents his removal except as provided therein; but if it should be held that the Board could dismiss janitors so protected in their positions for the reason of economy, they must be removed in order of minimum term of service.

The respondent shows that in deciding which of the janitors should be dismissed, it took into consideration whether they were single or married. The evidence does not disclose bad faith in the selection of employees who were not to be retained in the school system, but the exercise of a reasonable discretion by the Board. The right of a public body to reduce the number of its employees for economical reasons is set forth by the Supreme Court in the cases of Kearny *vs.* Horan, 11 Misc. Rep. 751; Evans *vs.* Hudson Freeholders, 53 N. J. L. 585; Board of Fire Commissioners of Newark *vs.* Henry A. Lyon and Alexander H. Johnston, 53 N. J. L. 632; Boylan *vs.* Newark, 58 N. J. L. 133.

In the tenure acts applicable to teachers and janitors, there is no provision for their protection based on seniority of service. The Supreme Court in the case of Seidel *vs.* Ventnor City, 110 N. J. L. 31, affirmed by the Court of Errors and Appeals, 111 N. J. L. 240, in ruling upon the question as to which of two or more tenure teachers should be retained when only one position is available, said:

"The board must use its discretion in selecting the tenure teachers."

Since there are no seniority rights in either statute, this ruling in reference to teachers must also control in relation to janitors.

The Board of Education of the City of Garfield, having decreased the employees for reasons of economy in school administration and having a right to use its discretion as to which janitors should be retained or dismissed, acted within its legal authority in terminating the services of Mr. Greenstein. The appeal is dismissed.

October 8, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

By stipulation, this case was submitted to the Law Committee without argument.

Chapter 44, section 2 of the Laws of 1911, known as the Janitor's Tenure of Office Act, provides that no public school janitor shall be dismissed except upon a sworn complaint, for cause, and upon a hearing before the board of education.

The appellant, Greenstein, was employed as a public school janitor by the Garfield Board of Education on January 14, 1930. On May 21, 1934, he was dismissed along with twenty teachers and six other employees of the Board, two of whom were janitors. The Board's action was taken, as it alleged, for reasons of economy. The appellant appealed to the Commissioner urging: (1) That his dismissal was not in fact for the purpose of economy, and (2) that in any event the Board should have first dismissed the janitors employed subsequent to the date of appellant's employment, of whom there were at least two.

The proceeding was tried by the First Assistant Commissioner of Education before whom witnesses testified on the issues above stated. Upon the record thus made, the Commissioner found: (1) As a fact, that the evidence does not disclose bad faith in the selection of the janitors who were to be discharged but rather the exercise of a reasonable discretion by the Board, and (2) as a matter of law, that the Board was not bound to base its dismissals on seniority of service.

1. A number of decisions of the Supreme Court of this State, some of which are cited in the Commissioner's opinion, have firmly established the rule that a public body has the right in good faith, in the interests of economy, to reduce the number of its employees notwithstanding the tenure of office statutes. Upon examination of the record we find no reason to disturb the Commissioner's finding of fact that the evidence does not disclose bad faith, and we must therefore find against appellant on his first ground of appeal.

2. Nor do we think the Commissioner was mistaken in his conclusion of law that the Board was not bound to observe seniority of its janitors when it made its dismissals. The discretion of boards of education with respect to the employment and discharge of their employees is complete except as it is limited by *express* statutory provisions. We cannot agree with the argument of appellant's counsel that these is to be read into the statute by implication a provision that where several employees are under tenure and some of them

are to be rightfully discharged, the dismissals must be in the reverse sequence of their employment, that is, that seniority of service shall determine the action of the Board. If the legislature so intended it is to be presumed that the statute would have so provided.

In Seidel *vs.* Ventnor City, 110 N. J. L. 31, affirmed by the Court of Errors and Appeals (111 N. J. L. 240), the Supreme Court said that in determining which one of several tenure teachers should be retained when only one position is available, "the board must use its discretion in selecting the tenure teachers."

Whether or not this announcement was *obiter,* as appellant's counsel asserts, it not only states what, in our opinion, is the correct rule of law applicable in the present situation, but indicates a ruling which this Board should follow until the Court holds otherwise.

It follows that the action of the Garfield Board of Education having been taken in good faith in the interest of economy, it had the right to exercise its discretion in selecting the janitors to be retained in its employ and that the appellant cannot rightfully complain of his dismissal. It is therefore recommended that the Commissioner's decision dismissing the appeal be affirmed.

December 1, 1934.

ATTEMPTED ABOLITION OF POSITION OF SCHOOL JANITOR

S. Cooper Ireland,

Appellant,

vs.

Monroe Township, Gloucester County,
Board of Education,

Respondent.

Decision of the Commissioner of Education

S. Cooper Ireland was employed as janitor of the Grange Hall School in Monroe Township, Gloucester County, on April 2, 1923, at a salary of $18 per month, and began his duties under said employment April 16, 1923. During the latter part of the school year 1923-24, the care of the Town Hall and Hall Street Schools was added to his duties and his salary was increased to $63 per month.

Grange Hall is a two-room school, Town Hall is a three-room building and Hall Street has two classrooms. These seven rooms, with some pupils on part time, accommodated about four hundred pupils. A new school building of twelve rooms, known as the Oak Knoll School, was erected primarily for the purpose of providing proper facilities for pupils living in the territory formerly served by the above-named schools. The Oak Knoll School opened in September with an enrollment of 424 pupils, approximately 90 per cent of whom are from the district indicated, and all teachers who taught in the three schools and who remained in the district were transferred to the new building

with but one exception. One room in the Hall Street School is now occupied with one teacher in charge of forty pupils. Mr. Ireland was assigned to Hall Street School at a salary of $12 per month, and Joseph Dilks was appointed janitor of the new building at a salary of $125 per month.

Mr. Ireland brings this appeal from the action of the Board of Education in employing Joseph Dilks as janitor of the Oak Knoll School and asks that said employment be declared illegal and that the Board of Education be requested to assign petitioner to the janitorship of the new school building at the salary now being paid Joseph Dilks.

Chapter 44, P. L. 1911 (1925 Comp. School Law, page 220), reads in part as follows:

> "No public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased except upon sworn complaint for cause and upon a hearing had before such board."

It is set forth in the appeal and admitted by respondent that Mr. Ireland was not employed for a definite term. He, therefore, comes under the protection of the above act. Edward Deisroth *vs.* Margate City Board of Education (1925 Comp. School Law, page 574), George L. DeBolt *vs.* Board of Education of Mount Laurel Township, decided by the State Board of Education November 6, 1926.

The appellant's rights appear to rest entirely upon whether the position of janitor held by him was abolished. If it was abolished, he could be reemployed at a less salary than he was receiving as such employment would be for another position. If the position was not abolished, he could not be dismissed nor his compensation reduced except for cause after an opportunity to be heard before the Board of Education.

In the case of Albert H. Gordon *vs.* Jefferson Township Board of Education (1925 Comp. School Law, page 563), the opinion of the Commissioner, which was affirmed by the State Board of Education, contains the following statement:

> "It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties to another official, such office may be abolished even though the incumbent be protected by a Tenure of Service statute."

Benjamin Evans *vs.* Board of Chosen Freeholders of Hudson County, 53 N. J. L. 587, holds:

> "Whenever for economical reasons arising from governmental policy it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course that the exertion of the power to disestablish must be bona fide, for it is manifest that if it should

appear that a formal act purporting to abolish such an office or employee, while the officer or position practically still remains in existence, such a subterfuge would be of no avail.

If a school building is abandoned and the pupils and teachers are transferred to and constitute the school in a new building, it is the opinion of the Commissioner that the janitor therefore employed in the old building would have his tenure rights transferred to the new building and that such transfer would apply even though the new building accommodates a slightly larger enrollment if the janitorial duties are practically the same. The testimony indicates a transfer of janitorial duties from the three old buildings to the new building as the number of rooms to be cared for in the new building with the hot air type of heating plant did not substantially enlarge the duties of the janitor over those connected with the three buildings, and, therefore, the position held by appellant was not abolished.

The Commissioner cannot comply with the demand of appellant that the employment of Mr. Dilks be declared illegal and that the Board be required to assign petitioner to the janitorship of the new building. While a board of education cannot dismiss a janitor who has tenure in the district or reduce his compensation without a hearing, it has control of where any janitor shall work, and the employment of all necessary janitorial service.

The Supreme Court, in the case of Helen G. Cheesman *vs.* Board of Education of Gloucester City (1925 Ed. School Law, page 554), held "A transfer is not a demotion or dismissal. Transfers are often advisable in the administration of schools for many reasons."

It appears that the janitorial work in the new building, together with the continuance of school in the Hall Street building, necessitates the employment of more than one janitor. The employment of janitors and the division of the work between such employees rests with the Board, providing the compensation of a janitor under tenure shall not be decreased, and work proportionate to the salary is assigned.

It is the opinion of the Commissioner that the position held by the appellant was not abolished and that he was, therefore, illegally transferred to a position with a reduced salary.

The Monroe Township Board of Education is hereby directed to assign appellant to a position with janitorial duties commensurate with a salary of $63 per month or more and to pay to appellant a salary of not less than $63 per month from this date and also to pay him the difference between what he has been paid and what he would have received at the rate of $63 per month from the beginning of the school year.

December 14, 1925.

ABOLITION OF JANITORIAL POSITION BEFORE ENACTMENT OF CHAPTER 226, P. L. 1936, DOES NOT ENTITLE DISMISSED JANITOR TO SUBSEQUENT RE-EMPLOYMENT

STEVE MARTIN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,

Respondent.

Harvey Bein, for Petitioner.

DECISION OF THE COMMISSIONER OF EDUCATION

For some time prior to March 13, 1935, the petitioner, Steve Martin, was employed as a groundkeeper by the respondent Board of Education. At the regular meeting of the Board of March 13, 1935, which was the last meeting of the then constituted Board, petitioner was appointed janitor and at the same meeting a Walter Tomczuk was employed as groundkeeper. The new Board, which organized and assumed control of the schools on the first Monday in April, 1935, entered into negotiations for the installation of an oil-burning heating system in the high school building, and at about the same time a Federal Works Project Administration project was initiated for the reconstruction of the athletic field to meet the needs of a program including track and field events as well as various competitive games. It appears to have been the opinion of the Board at the time of installation of the oil heater, which eliminated the handling of many tons of coal and the ashes, that the services of the third janitor were unnecessary and also that the condition of the athletic field during reconstruction made likewise unnecessary the services of a groundkeeper. Accordingly, on April 10, 1935, these positions were abolished and the services of the petitioner as janitor and Mr. Tomczuk as groundkeeper were terminated.

During August, 1936, the reconstruction of the athletic field was completed. Testimony in this case shows that it was then the opinion of the Board that the services of the groundkeeper were again needed and, accordingly, on September 9, 1936, Walter Tomczuk was re-appointed to that position. It is the contention of counsel for petitioner that the position of janitor held by Steve Martin was not abolished in good faith for the reason that Mr. Tomczuk, the groundkeeper, is performing some janitorial services and he accordingly asks that the appointment of Mr. Tomczuk be set aside and that petitioner be reinstated as janitor in the high school.

The testimony presented by respondent shows that an extra janitor was not needed in the high school after the installation of the oil-burning equip-

ment, and that the only janitorial service rendered by Mr. Tomczuk since his appointment as groundkeeper is of an incidental nature, principally during stormy weather or when it is impracticable to work on the school grounds, at which time he renders some minor assistance to janitors.

It is to be noted that the Board dismissed the petitioner and Mr. Tomczuk on April 10, 1935, and that the latter was not re-employed until August, 1936—approximately sixteen months later. There is not a scintilla of evidence to indicate bad faith upon the part of the Board of Education in abolishing the positions on April 10, 1935. While the Legislature by Chapter 226, P. L. 1936, provides for the reinstatement of janitors whose positions are abolished, this act has no effect upon the dismissals in this case which preceded the provisions of this statute by approximately a year. Steve Martin has no legal claim to a janitorial position in the public schools of the Borough of Carteret and the appeal is, accordingly, hereby dismissed.

May 20, 1937.

OBLIGATION OF BOARD OF EDUCATION TO PROVIDE TRANSPORTATION FACILITIES

CHRISTOPHER C. PIELL ET AL.,
Appellants,
vs.
UNION TOWNSHIP BOARD OF EDUCATION,
Respondent.

Harry L. Stout, for Appellant.
Marshall Miller, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by Christopher C. Piell, Peter Moebus, John Gyuro, J. B. Probasco, A. W. Groom, Paul Schneider and J. C. Mulligan, all of whose children attend the public school at Jutland, and is directed against the action of the Union Township Board of Education in refusing under a resolution passed July 3, 1922, to provide any transportation facilities whatever for the children of Union Township School District for the year 1922-23. Appellants insist that transportation to and from the school in question is necessary and ask that the Board of Education be required accordingly to furnish such facilities for the pupils living remote from Jutland School for the year 1922-23 as aforesaid.

A hearing in this matter was granted by the Assistant Commissioner of Education and held at the Court House in Flemington on Tuesday, September 26, 1922, at which hearing testimony of a number of witnesses on both sides was heard. At the hearing, however, the Commissioner was informed that

the Board of Education has agreed to transport by railroad to Jutland the children of Peter Moebus, J. B. Probasco, and J. C. Mulligan, which arrangement accordingly removes the grounds of appeal in the case of the three last-mentioned appellants.

The School Law requires that schools must either be so located as to be convenient of access to all the children between the ages of five and twenty years residing in the district and desiring to attend the public schools, or that such schools be made convenient of access by the Board of Education by means of transportation.

The testimony clearly showed a distance of more than two miles to be traversed to the Jutland School in the case of the children of Christopher C. Piell, and in the case of a number of the other appellants, when we consider the drift roads or lanes on which the children reside, which it is necessary to consider in order to determine the actual distance such children must travel, we find the distance equaling or even exceeding two miles.

There are many other factors besides distance which go to make up remoteness from a schoolhouse and the State Board of Education has held in decisions rendered by it that not distance alone, but all the other factors of each individual case must be taken into consideration by a board of education in deciding the necessity for transportation.

In the particular case at hand the testimony disclosed that within recent years the Union Township Board of Education abandoned the use of three schools in close proximity to the residences of the appellants. The abandonment of such schools accordingly necessitated that the children be transported to the Jutland School, then designated by the Board as the school for such pupils to attend, and the Board of Education has accordingly provided such transportation facilities until the passage of the resolution of July 3, 1922, above referred to.

The testimony further disclosed that no one of the roads over which the pupils must pass to the school in question is an improved road, and further that such roads are wooded and are lonely by reason of the fact that houses occur along them only at infrequent intervals. It moreover appears that the County Superintendent approves and has always approved the necessity for transportation in the case of the pupils in question to the Jutland School.

In view therefore of such approval by the County Superintendent; of the distance which some of the children in question must travel; the youth of others; the condition of the roads common in the case of all; and the fact that the Board of Education has created the present situation by its action, the wisdom of which is not questioned, in closing three schools in close proximity to the petitioners, it is the Commissioner's opinion that with the exception of those for whom railroad facilities have been provided the Union Township Board of Education should furnish transportation for appellant's children, all of whom in the Commissioner's opinion are remote from the Jutland School.

It is accordingly hereby ordered that suitable transportation facilities be at once provided by the Union Township Board of Education for the children of the appellants for the remainder of the year 1922-1923.

November 10, 1922.

DECISION OF THE STATE BOARD OF EDUCATION

This case involves the question of transportation of children to the Jutland School in Union Township, Hunterdon County, and comes here on an appeal by the Board. The facts are as follows:

Some years ago three schools in the township were closed by the Board of Education and a new consolidated school built at Jutland. Prior to the school year 1922-23, transportation was provided to this school for the children who lived remote therefrom, and this was always approved by the County Superintendent. On July 3, 1922, the Board of Education passed a resolution that no transportation would be furnished by it during the then approaching school year. On August 2, 1922, the Commissioner wrote the Board calling its attention to the law and stating that it had "no legal right to refuse to furnish transportation in necessary instances." In reply to that letter the District Clerk of the Board, under date of August 14, wrote the Commissioner as follows:

> "Your letter of August 2, which refers to action of Union Township Board of Education at meeting on July 3, abolishing all transportation of school pupils in the township for the coming year, was read at our Board meeting held on Saturday, August 12, and the matter was discussed at considerable length but no action taken to rescind or annul the former action.
>
> "There were seven present, a majority being opposed to furnishing transportation and one, in particular, of the two absent members has always been strongly opposed to transporting pupils at the expense of the taxpayers of the township."

Thereafter seven parents of children who attended the Jutland School filed a petition with the Commissioner to compel the Board to furnish transportation. An answer having been filed the Commissioner took the testimony of a considerable number of witnesses at Flemington. At the beginning of that hearing the attorney for the Board stated that it would furnish transportation by rail to the children of three of the petitioners, whose homes were convenient of access to a station on the Lehigh Valley Railroad, on which Jutland is situated. Testimony was then taken on the issue whether or not the remaining four petitioners lived remote from the school.

The proof shows that the public roads on or adjacent to which the petitioners live are dirt roads with few houses, muddy in the winter and often filled with snow, with bushes along the sides in many places. They are of the type of the country roads usual in that section of the State, away from the State and county highways.

The petitioner Christopher C. Piell has two children, a boy and a girl, aged respectively fourteen and eleven. His house is 2.1 miles from the school on a public road. The petitioner John Gyuro has three children, two boys aged respectively ten and six and a girl aged eight. He lives some distance from a public road and, if the drift roads or private ways by which the children get to the public road are included, about the same distance from the school as Piell. Gyuro is not a farmer, but works in a factory at Pittstown. The

petitioner A. W. Groom lives considerably over two miles from the school, if a private road to his house is included. On the public road the distance is well over a mile. The petitioner Paul Schneider has two children who ages are not stated in the record. He lives about 2.3 miles from the school, including the distance along the private way by which the children get to the public road.

On these facts the Commissioner held that the petitioners lived remote from the Jutland School and ordered "that suitable transportation facilities be at once provided by the Union Township Board of Education" for the children of the petitioners.

The Board's appeal from his decision is based on two grounds: First, that the distance which the petitioners' children traverse along the private ways or drift roads to get to the public road cannot be taken into consideration in determining the question of remoteness; second, that the increase in the cost of conducting the schools is such that the Board should not be required to furnish transportation even for these children who might heretofore have been considered to live remote from the schoolhouse.

On the first point we agree with the Commissioner that, it being necessary to use these private ways to get to the public road, they must be taken into consideration in calculating the distance to the school. It is contended with respect to one or two of the petitioners that they do not use the most direct path from their houses to the public roads. Whether this is so in the case of Gyuro, it is unnecessary to determine, because the age of his children is such that it seems to us they are entitled to transportation even if only the distance along the public highway and the shortest route from the highway to his house is included in the calculation. As to Groom and Schneider, their houses are remote from the school, whichever route may be used.

The second ground above stated is the one principally put forward on behalf of the Board and, as the record shows, was the real cause of its refusal to transport pupils. We fully sympathize with the feeling of the Board that it is its duty to reduce the expenses of the schools in its district as much as possible, and that the cost of transportation is a heavy burden, but that does not justify a disregard of the statute to which the actions of the Board, and of this Board, must conform and which, it is well settled, requires that transportation be furnished for all pupils who live remote.

It is true, as counsel for the Board points out, that the Commissioner and this Board have held that the local Board is the best judge of the circumstances of remoteness under the statute, and that neither the Commissioner nor the State Board should interfere where there appears to have been no bias or prejudice on the part of the local Board and the County Superintendent (Linch *vs.* Board of Education of Upper Pittsgrove Township, School Laws (1921), page 608). The record here shows, however, that the Board did not determine the question of remoteness on its merits, but refused transportation in order to save expenses. This is shown, not only by the letter of the Clerk of the Board to the Commissioner, above quoted, but also by the fact that members of the Board did not, at the time it refused transportation, make any investigation to ascertain how far the petitioners lived from the school and under what conditions the children would travel to school if transportation was not

provided. It is also significant that the homes of the three petitioners to whom the Board agreed to pay transportation by rail were not much, if any, further distant from the schoolhouse than the homes of the remaining petitioners, but were not far from the railroad station, so that, as to them, the Board could furnish convenient transportation.

Also it is to be observed that, as has already been mentioned, up to the present year the Board had furnished transportation for some of these pupils and others living in the same vicinity and the County Superintendent had approved the contracts and arrangements for such transportation. It appears, therefore, that the Board's action was not founded on a consideration of the circumstances on which the law required it should make its determination of the question of remoteness of the residence of these children, but was dictated solely by its desire to save expense.

The Commissioner heard and observed many witnesses and was enabled to obtain a clear understanding of the circumstances upon which the question of remoteness depends. His findings of fact are sustained by the evidence and, for the reasons above stated, we believe he was justified in overruling the action of the Board and making the order appealed from. It is therefore recommended that his decision be affirmed.

OBLIGATION OF SCHOOL BOARD TO PROVIDE TRANSPORTATION FACILITIES

ALBERT S. PHILLIPS,

Appellant,

vs.

WEST AMWELL TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by appellant to protest against the refusal of the West Amwell Township Board of Education to provide for his two children transportation facilities to and from the Mount Airy School, located in West Amwell Township.

Appellant's demand for transportation facilities as aforesaid is based on his contention that the distance involved exceeds two miles and that the age of the children, namely, six and seven years respectively, together with the condition of the roads renders the provision of transportation necessary.

A hearing in this case was conducted by the Assistant Commissioner in Flemington on January 21, 1925, at which time testimony of witnesses on both sides was heard.

From the testimony it appears that the distance from appellant's home to the Mount Airy School is approximately 2.1 miles. It also appears that the

road in question is for a distance of about one mile an unimproved one and for a part of the latter distance is below the average of the usual unimproved rural road. The unimproved mile of road above referred to was also under consideration in the case of Otto Hausler *vs.* West Amwell Township Board of Education, previously decided by this department and was revealed by the testimony in that case to be in such condition as to afford the children no opportunity to walk along the side of the road, but compelled them to walk between heavy ruts.

The fact that the distance from appellant's home to the schoolhouse exceeds two miles, which factor alone is usually held to justify transportation for elementary pupils, together with the admitted youth of the children and the poor condition of the roads over which they must travel, all go to make up, in the Commissioner's opinion, such remoteness of residence from the schoolhouse as to justify within the meaning of the statute the provision of transportation facilities.

It is, therefore, hereby ordered that the Board of Education of West Amwell Township proceed at once to make suitable provision whereby the schoolhouse in question is rendered convenient of access for appellant's two children within the meaning of Section 180, Article X of the 1921 Edition of the School Law.

January 29, 1925.

Decision of the State Board of Education

This appeal is from a decision of the Commissioner requiring the Board of Education of West Amwell Township to provide transportation for two of respondent's children. The route from the respondent's house to the Mount Airy School is slightly over two miles long. About one mile of it is over a dirt road, which is not well kept up and along which there are but four houses. In the winter and early spring this part of the road is difficult to travel. The children are six and eight years old, the younger being a girl. In a similar case where children aged from six to ten lived 2.1 miles from the school, this Board decided that transportation should be furnished. (Piell *vs.* Union Township Board of Education. Opinion printed in the Board minutes of March 10, 1923.)

None of the facts above stated are denied by the appellant, although there is some difference between the parties as to the exact distance the children had to travel. The chief and substantially the only objection by the Board is the expense, which is said to be beyond the means of the school district. It appeared at the hearing that the Board has provided no transportation for any of the children attending the Mount Airy School, and it appears to have made no investigation for the purpose of determining whether transportation was necessary. It seems to have decided that it would furnish no transportation.

The Board invokes our decision in Hausler against the same Board of Education, made on April 5, 1924, in which we held that it was unnecessary for the Board to furnish transportation to the Lambertville High School for a child who lived some distance from a route established by the Board for transporting children to that school. In that case we decided that the Board has endeavored

to comply with the law, had used its best judgment in choosing the transportation route, and that it would be an unjustifiable hardship to compel it to furnish the transportation there asked for. In the present case, the Board has not tried to comply with the law. Its desire for economy is to be commended, but as we have had occasion to say in previous cases, neither a local Board nor this Board can disregard the statute, which distinctly provides that school facilities must be furnished to all children of school age, and this as has often been held, requires that schools shall be located in places convenient of access, or that the pupils be transported.

There can be no question that these little children cannot be expected to walk over two miles to school over a poor and lonely road. The case comes directly within our decision in the Piell case, and other similar decisions, and we therefore recommend that the Commissioner's decision be affirmed.

July 11, 1925.

CONVENIENCE OF ACCESS INCLUDED IN SCHOOL FACILITIES

ALBERT S. PHILLIPS,

Respondent,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL,

Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

On January 29, 1925, the Commissioner of Education rendered a decision, which was affirmed by the State Board of Education on July 11, 1925, to the effect that the residence in West Amwell Township of two small children of Albert S. Phillips was remote from the Mount Airy School located in that district, not only because of a distance exceeding two miles, but because of road conditions and youth of the children, and ordered that transportation facilities be at once provided for such children by the West Amwell Township Board. To date no attempt whatever has been made by the Board of Education to comply with the ordered contained in the decisions above referred to.

A petition is now presented on behalf of the West Amwell Township School Board asking that the case be re-opened and re-heard on the ground of alleged erroneous conclusions of law reached by the Commissioner and State Board of Education in their decisions. It is also requested that judicial notice be taken of certain facts not already included in the record tending to establish the generally central location of the Mount Airy village so far as the remainder of West Amwell Township is concerned, and the numerous good roads approaching and entering it from all sides.

Counsel for the Board of Education insists that the obligations of the school board end with the establishment of a schoolhouse generally convenient for

the inhabitants of the district, and that the law is only concerned with preventing the location of a schoolhouse in a place inaccessible to the community as a whole. He relies chiefly in his contention upon the case of Frelinghuysen Township Board of Education *vs.* Franklin T. Atwood, County Superintendent, decided by the Supreme Court in 1906 and later affirmed by the Court of Errors and Appeals in March, 1907, in which it was held that the refusal of a board of education to provide transportation facilities for children living remote from the schoolhouse was not such a failure to provide adequate and proper school facilities as to justify the withholding of State moneys from a school district. In that case, however, the Courts specifically based their decisions upon the fact that Section 126, of the School Act of 1903, as then enacted and requiring the furnishing by every board of education of suitable school facilities and accommodations, was the first of six sections of Article X dealing exclusively with school buildings. It was concluded, therefore, by the Courts that nothing further was required by the statute in the way of suitable school facilities and accommodations than the school buildings specifically referred to therein, and that consequently transportation could not be considered as a part of the facilities required to be provided by every school district for its pupils. The Supreme Court also commented upon the fact that Section 117 of the School Act of 1903 was merely permissive in its provisions that a board of education may make rules and contracts for transportation of children living remote from schoolhouses.

In 1907, however, subsequent to the decisions of the Supreme Court and Court of Errors above referred to, Section 126 of the School Act of 1903 was amended to read as follows:

> "126. Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils, or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Not only does the section as amended add the requirement of "convenience of access" to the specifically enumerated school facilities and accommodations to be provided by boards of education for all the pupils of their districts, but connects Section 126 as aforesaid with Sections 117, 118 and 119 by requiring that school facilities be provided either in schools within the district convenient of access to the pupils or that the provisions of Sections 117, 118 and 119 be complied with as alternatives. It is obvious from such alternatives that school facilities must either include the establishment within a school district of a schoolhouse convenient of access by location or transportation for all the pupils therein, or that pupils be transported to schools in other districts, or, if remote from the school in their own district, that their tuition be paid in a

nearby school in an adjoining district. Convenience of access, however, by one means or another is specifically provided for in every one of the above quoted alternatives for providing proper school facilities for "all the children residing in the district."

In the opinion of the Commissioner of Education the West Amwell Township School Board produces in its present petition no facts, even though judicial notice be taken of them, nor arguments of law which in any way necessitate a re-opening or re-hearing of its case, or which in any way tends to change the conclusions reached by the Commissioner in his decision of January 29, 1925, above referred to. The cases upon which the Board's counsel relies were decided by the Supreme Court and the Court of Errors and Appeals upon the statute defining school facilities before it was amended in May, 1907, to include convenience of access by the several enumerated alternative methods as one of the essential school facilities, and are therefore not relevant as authorities in cases arising since the amendment. On the contrary, since the enactment of the statutory amendment, many cases have been decided by both the Commissioner and State Board of Education in which school boards have been ordered to provide for individual pupils, as a part of the necessary school facilities, convenience of access by means of transportation in lieu of the location convenient of access of the schoolhouse itself. Such cases are the only relevant and binding authorities at the present time under the law as it now stands.

The petition is accordingly hereby denied.

December 15, 1925.

Decision of the State Board of Education

This case was before the Board a few months ago when we affirmed the Commissioner's decision requiring the West Amwell Township Board to procide transportation for the respondent's children. The appellant thereafter filed a petition for re-hearing, alleging some additional facts not in the record, of which it was asked that judicial notice be taken,—these facts being designed to establish that the school building attended by respondent's children is in the most convenient location in the district for the majority of the pupils. On these facts in addition to those already in the record, it was contended that the law does not compel the appellant to furnish transportation to any children in the district. The Commissioner considered the petition, and, assuming that judicial notice might be taken of the additional facts above mentioned, denied it on grounds which are stated in full in his opinion. From his decision this appeal is taken.

The question involved is one of statutory construction, which can best be understood perhaps if treated historically. Prior to 1907, Section 126 of the School Law read as follows:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Wherever such school facilities or accommodations shall be inadequate and unsuited to the number of pupils attending or desiring to attend such schools, the county superintendent of schools

shall transmit to the custodian of the school moneys of the school district an order directing him to withhold from the district all moneys in his hands to the credit of such school district received from the State appropriation or from the State school tax until suitable facilities or accommodations shall be provided, and shall notify the board of education of such district of his action, with the reasons therefor; such order shall not take effect until approved in writing by the State superintendent of public instruction, and said approval shall state when said order shall take effect."

At that date (1906) Section 117 provided in part—

"Whenever in any district there shall be children living remote from the schoolhouse the board of education of such district may make rules and contracts for the transportation of such children to and from school."

In 1906 the Supreme Court in Frelinghuysen Township Board of Education *vs.* Atwood, County Superintendent, 73 N. J. L. 315, held that the failure of that Board to provide transportation was not a failure to furnish suitable school facilities as provided in Section 126, and also that Section 117 was permissive and not mandatory. In 1907 the Court of Errors affirmed the decision, concurring in the Supreme Court's holding as to Section 126, but declining to express an opinion as to Section 117. The Supreme Court gave as its reason for holding that Section 126 did not cover transportation, that it was the first of six sections which related solely to school buildings and that the words "suitable school facilities and accommodations" referred only to school buildings, and pointed out that Article X, which comprised these sections, was entitled "School Buildings."

Thereupon, in 1907, subsequent to the Court of Errors' decision in the Atwood case, Section 126 and the title preceding it were amended by Chapter 123 of the Laws of 1907 so as to read as follows:

"SCHOOLHOUSES, FACILITIES, AND ACCOMMODATIONS"

"Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. *Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment.*"

(The italics indicate new matter.)

Ever since this change in the statute the Commissioner of Education and this Board in a considerable number of cases have required transportation to be furnished where the school building was not convenient of access and the

power to do so under Section 126 as amended has not been questioned, at least by any appeal to the courts. Counsel for the appellant now contend, however, that the Atwood case still applies, that the 1907 amendment of Section 126 does not clearly require that transportation be furnished, that the statute being punitive in its nature it must be strictly construed, and therefore that inasmuch as appellant has provided a school building convenient of access to the majority of the pupils of the district it cannot be compelled to furnish transportation to those to whom the school building is not conveniently accessible.

It would be a most serious matter to reverse the position of this Board and the Commissioner on this question, after the years in which the transportation system has been developed, but nevertheless appellant is entitled to this Board's consideration and determination of his contentions, regardless of its former decisions. So considering them we are unable to agree with the arguments of appellant's counsel. It seems to us that the clear intent of Section 126 as amended is, as held by the Commissioner, that school facilities must be furnished either by providing schools convenient of access, or by the means recited in Sections 117, 118 and 119, which include the transportation within the district of children whose residences are not convenient of access to the school building or buildings. This reading is not only consistent but is in line with the compulsory education statute which appellant's interpretation of Section 126 would render unenforceable and unavailing as to all children whose homes are not convenient of access to school buildings in their districts and whose parents are unable to provide transportation for them. It is not to be supposed that the Legislature intended to create a condition which would suspend the compulsory education statute in the cases of such children. Rather the presumption is to the contrary and Section 126 itself provides that the "school facilities and accommodations" shall be provided for all children residing in the district.

Therefore, assuming the existence of the additional facts alleged in the petition for re-hearing, we recommend that the Commissioner's decision be affirmed.

January 9, 1926.

DECISION OF THE SUPREME COURT

PER CURIAM:

The writ of *certiorari* seeks to review an order of the Commissioner of Education dated January 27, 1926, directed to the County Collector of Hunterdon County to withhold school moneys, which ordinarily would have been apportioned to the Township of West Amwell in Hunterdon County. The order was made because the prosecutor would not provide transportation facilities for the two children of Albert S. Phillips, aged six and seven years. The Phillips' children reside about two miles from the nearest school located at Mount Airy, a distance of over two miles. The basis of the order was an order of the Commissioner of Education dated January 29, 1925, affirmed by the State Board of Education dated July 11, 1925; by which it was ordered that such school transportation facilities be provided for the Phillips' children.

The prosecutor relies upon the case of Frelinghuysen Township Board of Education *vs.* Atwood, 73 N. J. L. 315, affirmed 74 Id. 638. That case in the Court of Errors and Appeals was decided on March 7, 1907. On May 7, 1907, both the title of Article X and Section 126 of the Act were amended, P. L. 1907, page 291, "convenience of access thereto, etc.," being added.

Our reading of the statute agrees with the construction and application made by the Commissioner of Education; hence, the order of January 27, 1926, now under review is affirmed, and the writ of *certiorari* is dismissed.

BOARD OF EDUCATION MUST PROVIDE TRANSPORTATION FOR CHILDREN REMOTE FROM BUS ROUTE

JULIA WAIS,

Appellant,

vs.

BOARD OF EDUCATION OF TEWKSBURY TOWNSHIP, HUNTERDON COUNTY,

Respondent.

For the Appellant, Voorhees Kline.
For the Respondent, Anthony M. Hauck, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

Mary Wais, the fourteen-year-old daughter of appellant, attends the High Bridge High School which is designated by the respondent for the pupils under its jurisdiction. This pupil is required to leave home about 7:00 A. M. and walk 2,640 feet over a poor country road to a place known as Wilson Apgar's Corner, thence 4,918 feet over a macadam road to Cokesbury, from which place she traverses 3,842 feet over a more improved dirt road to the beginning of the bus route—a total distance of 2.16 miles from her home. She arrives at this point at 7:40 A. M. and is then transported approximately 14 miles to the high school building, arriving there about 8:40. Returning after school, she arrives home about 5:00 or 5:10 P. M.

Appellant claims that her daughter is entitled to more adequate transportation, for which her application to the Board has been denied, but respondent contends that the distance does not constitute remoteness, and even if it did, appellant's daughter could reach the bus route by walking about 1.25 miles over a drift road where she would meet the bus at the Mountainville Elementary School.

The distance of 2.16 miles to a bus route is not much in excess of the generally established two-mile limit for high school pupils, as set forth in a number of decisions, and should not require transportation facilities when the highways are in good condition and the days sufficiently long to permit the

pupil to arrive home before dusk. However, the evidence shows that during the winter and spring months parts of the country road between appellant's home and the macadam road are in very poor condition, and this, together with the distance of over two miles, constitutes remoteness from the bus route.

There is no proof that the drift road is a public highway; therefore, the Board cannot consider this route in establishing the distance to the bus. The testimony shows that it is rarely traveled during the winter, and while there are times that the road could be traversed, there is no evidence that Mary Wais has used it at any time to meet the transportation bus.

At a slight additional expense, the Board could have started transportation from the junction of the dirt and macadam roads at Cokesbury, during at least the winter months, which would have added only 3,842 feet to the route and which, in the opinion of the Commissioner, would constitute satisfactory transportation facilities. Those now provided by the Board are inadequate, particularly during the period from December 1 to April 1.

Since this decision is rendered approximately April 1, the present transportation facilities may be continued for the remainder of the year, but for ensuing years, the Board of Education of Tewksbury Township is directed to provide more adequate transportation for Mary Wais.

March 21, 1934.

ELEMENTARY PUPILS MORE THAN TWO MILES FROM SCHOOL BUILDING ENTITLED TO TRANSPORTATION

JAMES G. SIGAFOOS ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal from the action of the Board of Education of the Town of Phillipsburg in transferring pupils from the seventh and eighth grades of the Brensinger School Building to the so-called Junior School Building without providing transportation for such pupils.

A hearing was held in the school building designated for the attendance of these pupils on November 1, 1928. The testimony discloses the following:

The Board of Education has changed its school organization from what is commonly known as eight years of elementary school and four years of high school to what is termed the "6-3-3" plan providing six years of elementary education followed successively by three years of junior high school and three years of senior high school work, and in accordance with such reorganization transferred seventh and eighth grade pupils in the Brensinger School as indicated.

The ages of the children of appellants affected by this reorganization as distributed in the seventh grade are as follows:

5 are 12
10 are 13
12 are 14
5 are 15

In the eighth grade

5 are 12
3 are 13
10 are 14
7 are 15
1 is 16.

Most of the pupils affected live within two miles of the junior school building. There are sections of several streets which are not paved between the homes of the pupils and the school. In some localities the snow is not promptly removed from paths and sidewalks, and the streets are opened only for autobus traffic. No regular cafeteria is provided in the junior high school building at which pupils can purchase warm lunches, although some provision is made for the purchase of milk.

Several witnesses testified that they believed the health of their chlidren was unfavorably affected by the longer walk to school and in most cases they testified to a loss of weight of three or four pounds per pupil during three months of school attendance. One parent testified that her daughter has a weak heart and that the long walk was therefore injurious to her. The testimony as to health however was not sufficiently substantiated to permit the consideration of its effect in determining remoteness.

The statutes require twelve yearly grades of school work and boards of education must therefore furnish twelve years of graded study. A board of education has authority to determine the organization of the schools comprising twelve years work, and the Board of Education of Phillipsburg has acted entirely within its authority in changing the organization of the schools of that city from the 8-4 plan of organization to the 6-3-3 plan. The mandatory provision in reference to furnishing school facilities for pupils to pursue the work prescribed for the schools of the district is found in Section 193, page 123 of the 1925 Compilation of the School Law, a part of which reads as follows:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attaintments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Section 117 reads in part:

> "Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to or from school."

Section 118 permits of other provisions for children remote from school, and Section 119 provides for education in schools of another district.

In referring to the above provisions in the case of Albert S. Phillips *vs.* Board of Education of the Township of West Amwell the Commissioner of Education said:

> "It is obvious from such alternatives that school facilities must either include the establishment within a school district of a schoolhouse convenient of access by location or transportation for all the pupils therein, or that pupils be transported to schools in other districts, or, if remote from the school in their own district, that their tuition be paid in a nearby school in an adjoining district. Convenience of access, however, by one means or another is specifically provided for in every one of the above quoted alternatives for providing proper school facilities for 'all the children residing in the district.'"

This opinion was affirmed by the State Board of Education and by the Supreme Court.

Since in the opinion of the Commissioner of Education a board of education has discretionary authority to determine the type of organization for the school program so long as the course of study is adapted to the ages and attainments of pupils (which question is not raised in this case) and is required only to provide suitable facilities for such education convenient of access, there remains to be determined whether the children in this case are remote from the school building which they are directed to attend. There have been numerous decisions upon remoteness and in practically all cases pupils enrolled in the last four years of school work have not been considered remote if they lived within two and one-half miles of the school unless the age, sex, health of the children or condition of the road to the school made a shorter distance remote for the particular child or group; and while in general pupils in the first eight grades of school work have not been considered remote within a distance of less than two miles of the school building, exceptions to a distance of less than two miles have been made in cases of very young pupils in the first years of school work. The children in this case are enrolled in the seventh and eighth grades, and the testimony discloses that none is enrolled who is under twelve years of age. Pupils enrolled in a junior high school are in relation to physical development much more comparable with pupils enrolled in regular high schools than with those enrolled in the primary sections of the elementary school, therefore, this case is more in line with high school cases than those of elementary schools.

Although cafeterias are installed in a large percentage of the new high school buildings recently erected in this State, there is no requirement in the statute that lunches shall be purchaseable within the school building.

All of the pupils involved in this case are above the age of twelve years and in the majority of instances the distance involved is less than two miles. It is, therefore, the opinion of the Commissioner that remoteness does not exist in the case of the latter group of children and that provision of transportation is accordingly not necessary. In the case of most of those pupils whose homes are more than two miles distant from the school, it is the Commissioner's opinion that the distance alone would hardly justify transportation for pupils of junior high school grade, but the somewhat poor road conditions above described taken in conjunction with the distance do actually constitute remoteness in these particular instances. It is, therefore, hereby ordered that the Phillipsburg Board of Education proceed after January 1, 1929, to provide transportation facilities for those pupils whose homes are more than two miles distant from the schoolhouse.

December 21, 1928.

DANGER AS A FACTOR OF REMOTENESS IN TRANSPORTATION

MARSHALL W. READ, HARRY G. TODD, GEORGE T. WILSON, J. EMMONS, CARL A. NELSON, FRANK BALL, RAYMOND M. KAAR, GEORGE SCHEER, WEST BUCHANAN, ARTHUR W. STEEBER, HULSE TODD, FRANK FANCHER, HAWLEY G. WEAN, OSCAR BATES, WALTER TODD, CHARLES WACK, REG TWILLEY AND JACOB VALENTINE,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is brought by the above-named appellants against the Board of Education of the Township of Roxbury, Morris County, because of the refusal of the Board to furnish transportation for their children from the vicinity of their homes to the Roxbury School.

Counsel for appellants claims that transportation should be furnished because of the age of the pupils in relation to the distance from their homes to the school, and also because of danger to the pupils due to automobile traffic.

Testimony taken at the Morristown Courthouse on February 25, 1927, discloses that with the exception of Jane Valentine, who lives about two and one-half miles from the school building and for whom the Board agrees to furnish transportation, the most remote are Mildred Steeber, 8 years old, and Wil-

ber Fancher, 15 years of age, who live one and seven-tenths miles from the school. The distances from the homes of the other children to the school range from one and one-quarter to one and one-half miles. The roads to be traveled by these children are hard surfaced county and State roads leading from Dover and Morristown to Phillipsburg and Easton. The widtht of the road ranges throughout the distance from twenty feet in the narrowest place to about twenty-four feet. Due to the summer population at Lake Hopatcong, a part of this road has heavy traffic in the summer and early fall, at a time of day when children are on their way to school; but this danger is confined to a small part of the school year, namely, June, September and October. There was no testimony to show that this road has more extreme traffic or greater danger to pedestrians than other State and county highways in various sections of the State. In fact, it was admitted that the traffic is not nearly so great as that on highways leading to Atlantic City and other main arteries of travel.

The School Law, Section 193 (Edition of 1925), provides:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Section 117, above referred to, provides:

> "Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school."

It is therefore obligatory that boards of education shall furnish buildings convenient of access, or in lieu of such facilities, they shall provide transportation for pupils remote from the school building. In many decisions upon school transportation and in the determination by county superintendents of the necessity for transportation in their apportionment of State money, it has generally been held that children are not considered remote as to distance if they are of high school age and live within two and one-half miles of the school building, or if they are of elementary or grammar school age, and live within two miles of the building. Boards of education may make facilities more convenient by locating school buildings so that children have less distance to walk than that above indicated or they may furnish transportation for shorter distances, but such provisions are not mandatory.

It has, however, been held by the Commissioner of Education that distance is not the only factor to be considered in determining remoteness. In *Foose* vs.

Holland Township Board of Education (page 621, 1925 Edition School Law) it was held that, "The age and sex of the pupil, the condition of the roads, the distance, and, when part of the transportation is by car, the time of departure and arrival of trains, are all factors in determining the necessity for transportation."

Since the roads are hard surfaced, it does not appear from the testimony that the youth of any child in this case is such that combined with distance would constitute remoteness from the school building except in the case of Jane Valentine.

The only questions remaining to be decided is whether danger because of automobile traffic in addition to other factors named would constitute remoteness for any or all children of appellants. The necessity for transportation because of dangerous highways has not previously been before the Commissioner for decision. The factors that contribute to remoteness in Foose *vs.* Holland Township Board of Education, namely, age, sex, condition of the roads, etc., are such as may increase the time necessary to reach a school building. A young child would require more time than an older child; a girl may require more time than a boy of the same age; a child in poor health would need more time than a child in good health, and hence the health of the child would also be a factor in considering the necessity for transportation. It is also true that very poor roads would require more time to traverse them than would good sidewalks or hard surfaced roads. Remoteness is therefore a relative term depending upon a reasonable time. It may, therefore, be conceived that traffic may be so constant and intensive over a limited road space as to delay the progress of a child and hence to contribute to remoteness. Danger does not in itself make a place remote unless it increases the time necessary to cover the distance to such an extent as to constitute remoteness. It seems, therefore, that only in its relation to delay can danger be considered and not because of the possibility of a child being hurt by automobiles.

Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation. While there may be danger to children because of the traffic on highways in this case, as there is now danger upon most of our State and county highways, the testimony does not disclose automobile traffic which would appreciably delay children in going to and from school.

It is therefore the opinion of the Commissioner that danger in itself does not constitute a necessity for transportation and that the various factors which may legally be considered in determining remoteness do not make necessary transportation for any of the children in this case, except Jane Valentine, for whom the Board is directed to provide transportation, and with this exception, the appeal is hereby dismissed.

March 17, 1927.

AGE, SEX, PHYSICAL CONDITION OF PUPILS AND ROADS CONSIDERED IN DETERMINING REMOTENESS OF SCHOOL FACILITIES

DANIEL SERRITELLA,

Appellant,

vs.

BOARD OF EDUCATION OF KINGWOOD TOWNSHIP, HUNTERDON COUNTY,

Respondent.

For the Respondent, Harry Abel.

DECISION OF THE COMMISSIONER OF EDUCATION

Transportation was furnished during the last school year to petitioner's children as well as five others living in the vicinity of the Oak Summit Elementary School which is located more than two and one-half miles from their residences.

Mr. Serritella, having been informed that the Board of Education contemplated the discontinuance of this transportation for the ensuing year, attended a meeting on June 7, 1933, and requested that the transportation provisions of the preceding year be continued. The Board in an effort to decrease school expenses determined that the transportation was not legally required and passed a resolution that the children on the Shepherd, Dalrymple, and Allen farms be compelled to meet the school bus at the lane of Edward Roberson's farm. One of these farms is the residence of appellant. The Board of Education furnished transportation during the school year 1932-1933 at a cost of $338, and the necessity for the route was approved by the County Superintendent of Schools. The distance from the Roberson lane to Mr. Serritella's home is slightly under 1.5 miles, and 1.7 miles to the residence on the Dalrymple farm, and the children range in age from 6 to 14 years. The road is narrow, filled with deep ruts, and difficult to traverse, either on foot or by vehicle. The Assistant Commissioner not only measured the distances, which confirmed those above stated, but found the road to be extremely rough and narrow, and with the exception of a very short distance, to be without foot paths of any type. It was evident from the condition of the road on June 29, the date of the hearing, that it had not been scraped since the thawing period of last spring. The road is built of native clay, indicating extremely conditions from the thaws of the winter, and at other times after storms. At such times it would be necessary for the children to wear rubber boots in order to traverse it. The driver of the bus transporting the children during the school year 1932-1933 considered it to be impassable on seventeen days during the winter and spring and on these days did not attempt to provide transportation for appellant's children.

While the Kingwood Township Board of Education is justified in examining the various educational expenditures to ascertain whether the schools may

be effectively conducted at reduced costs, the elimination of this transportation route until such time as the road has been considerably improved means, during much of the winter and spring, a deprivation of school facilities for this group of approximately ten children.

In view of the many decisions of the Commissioner and the State Board of Education, in which it was held in determining remoteness there must be taken into consideration the distance, *the condition of the roads,* and the age, sex, and physical condition of the pupils, it is the opinion of the Commissioner that these children are remote from school and the plan to provide transportation from the Roberson lane does not constitute adequate school facilities. The Kingwood Township Board of Education is, therefore, directed to provide reasonable transportation for the children of appellant.

July 17, 1933.

AFFORDING TRANSPORTATION FACILITIES FOR PUPIL REMOTE FROM SCHOOL

ALEXANDER LOSKOT,

Appellant,

vs.

BETHLEHEM TOWNSHIP BOARD OF EDUCATION,

Respondent.

Harry L. Stout, for Appellant.
Marshall Miller, for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named appellant to the end that the Bethlehem Township Board of Education may be required to provide transportation facilities for the school year 1922-1923 for appellant's daughter, Mary Loskot, to and from the high school in High Bridge, at which school said Mary Loskot is a student.

Appellant states that on September 8, 1922, the respondent offered to pay him an allowance of $100 for transporting his daughter himself for the school year 1922-1923.

Appellant also alleges that in spite of an agreement entered into by respondent for the school year 1921-22 to pay appellant $200 as an allowance for that year for transporting his daughter to the high school aforesaid, the respondent actually paid to the appellant but $162.25 for the year.

The respondent denies the remoteness of appellant's residence from the high school at High Bridge, and further asserts that the amount received by appellant as a transportation allowance for the school year 1921-22 was the full amount agreed upon.

A hearing in this matter was granted by the Assistant Commissioner of Education and was conducted at the Court House in Flemington on November 3, 1922, at which hearing the testimony of a number of witnesses on both sides was heard.

From such testimony it was plainly established that while appellant had demanded as a transportation allowance for the school year 1921-22 the sum of $200, there was offered to appellant by the Board of Education and actually accepted by him the sum of $162.25. The acceptance by appellant of the latter amount constituted therefore in the Commissioner's opinion a transaction which was binding upon appellant, and one which consequently estopped him from any claim to a higher amount for the year 1921-22 aforesaid.

In regard to the question of distance of appellant's residence from the High Bridge School in the matter of appellant's claim that transportation facilities be provided for his daughter for the school year 1922-23, the testimony disclosed that the distance from appellant's home along a lane or drift road to the point where such road joins the main highway is 1 1-5 miles, and that from that point thence along such main highway to the high school the distance is 2.3 miles.

The main question therefore to be considered is whether the appellant lives so remote from the high school in question as to justify transportation for his daughter.

It is the Commissioner's opinion that in order to determine actual remoteness of a child's residence from a schoolhouse, the entire distance to be traversed must be used as a basis of calculation, whether such distance be entirely along the main highway or partly along such a highway and partly along a drift road or a lane leading from appellant's home. It has of course been frequently held by this department that in a case where the distance necessitating transportation is made up of both lane and highway, the obligation of the board of education is fully discharged by providing transportation merely along the main road, and that the child must consequently meet the transportation vehicle at the point where the lane meets the highway. This does not however alter the fact that whether it is the duty of a board of education to provide transportation for the whole or merely part of the distance, such obligation can only be determined by estimating the entire distance to be traversed from the child's actual residence to the school itself.

In the case at hand therefore where the entire distance for appellant's daughter to travel from her home to the high school is over three miles, it is the opinion of the Commissioner that it is the duty of the Bethlehem Township Board of Education to provide suitable transportation facilities at least along the main highway, a distance of 2.3 miles, and it is hereby ordered that such facilities be at once provided by the respondent for the remainder of the school year 1922-23.

It is also hereby ordered that appellant be reimbursed by the Board of Education at the rate of $20 per month, which rate the Commissioner considers reasonable, from the beginning of the school year 1922-23 to the date when transportation facilities are actually provided as above ordered for the expense

to which appellant has been put in providing transportation himself for his daughter to the high school at High Bridge.

November 23, 1922.

DECISION OF THE STATE BOARD OF EDUCATION

This is another transportation case and is quite similar in its facts to Piell *vs.* The Union Township Board of Education, decided herewith. Bethlehem and Union Townships are adjoining rural townships in Hunterdon County.

Mary Loskot, the daughter of the petitioner, Alexander Loskot, lives in Bethlehem Township and attends the high school at High Bridge. She is fifteen years of age and completed the grammar school course of study at a school in Bethlehem Township. She attended the high school at High Bridge in the year 1921 to 1922, and the Bethlehem Township Board of Education paid the petitioner $162.25 for transporting her himself. At a meeting of the Board in August, 1922, a resolution was passed that transportation would not be provided for high school pupils. On September 8, 1922, however, the District Clerk wrote the petitioner that the Board would pay him $100 for transporting his daughter to High Bridge. He refused to accept this amount as insufficient and appealed to the Commissioner, who took testimony at Flemington, and on the evidence before him filed a decision in which he ordered that the Board should provide suitable transportation facilities along the main highway for the remainder of the present school year, and further that the Board reimburse the petitioner at the rate of $20 per month from the beginning of the present school year to the date when the transportation facilities are actually provided. From that decision the Bethlehem Township Board of Education has appealed to the State Board.

The petitioner's house is situated along a so-called private road about 1 1-5 miles from the public highway. The distance from the point where this private road meets the highway to High Bridge is about 2.3 miles so that it is necessary for the pupil to travel about 3½ miles to get to the High Bridge High School. The so-called private road extends through the property of some half a dozen farmers, all of whom use the road, and the record shows that it is sometimes used by the public as a means of traveling to Glen Gardner, notwithstanding it is very rough and stony and that gates are located at one or two points. The public highway referred to is the usual dirt road of the rural districts of that section of the State—muddy in winter, sometimes filled with snow, and with few houses along it.

As in the Union Township case, the Board did not investigate the remoteness of the petitioner's residence before it refused transportation . It appears from the testimony that the Board did not think the petitioner lived more than two miles from the school. It had formerly believed she lived remote, had paid transportation, and the County Superintendent had approved its action. Its refusal to provide transportation was due solely to its desire to cut down expenses. As we have pointed out in the case of the Union Township Board, its perfectly proper desire to economize did not justify the Board in refusing to provide transportation for a child who actually lived remote from

the school. Therefore, for the reasons which are more fully set forth in our opinion in the Union Township case, we think the Commissioner was right in requiring the Board to furnish transportation to Mary Loskot, at least along the public highway.

The Commissioner, as stated, ordered that the Board should pay the petitioner $20 per month for providing transportation by horse and wagon up to the time when the Board actually furnishes transportation itself. This includes the expense of keeping a horse and wagon at High Bridge during the day as well as the other expenses of keeping them. The petitioner's testimony, which is not denied by the Board, showed that he had to keep this horse and wagon solely for transporting his daughter to the school. The amount allowed by the Commissioner is based on the petitioner's testimony. The Board does not appear to deny that it is a reasonable amount since there was no cross-examination by the Board and no evidence was introduced on behalf of the Board to the contrary.

It is therefore recommended that the Commissioner's decision be affirmed.

TRANSPORTATION ROUTES SHOULD BE ESTABLISHED WITH DUE CONSIDERATION TO COST AND LENGTH OF TIME FOR PUPILS TO BE IN TRANSIT

CHARLES BUELOW ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR, OCEAN COUNTY,

Respondent.

For the Appellants, David A. Veeder.
For the Respondent, Percy Camp.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellants, whose homes vary in distances from five-tenths (.5) to nine-tenths (.9) of a mile from the transportation route, ask that respondent be required to extend transportation facilities from the main route to their homes because there is no shelter where the road from their homes intersects the bus route. They allege that there is illegal discrimination in that the bus leaves the main route to go similar distances to the homes of other pupils. In going to these homes the bus retraces the road to the main highway.

The general plan of transportation throughout the State is for the bus to traverse main highways which serve the largest number of pupils within a reasonable time limit, and at a minimum cost. Transportation routes must be approved by the County Superintendent if the district is to receive State

support. Where pupils' homes are not remote and the bus leaves the main line as an accommodation, the length of time for many of the pupils is unjustly increased, and such extensions to the route add to the cost of transportation. The children of appellants, all of whom live within nine-tenths (.9) of a mile of the main route, are not remote from the facilities provided by the Board of Education, and the Board cannot be legally required to make further provision for them.

The allegation that transportation was provided to other homes for political reasons was not supported by the testimony. The evidence, however, does show discrimination which, in one instance, the Board has attempted to correct; but the contractor has not complied with the Board's instructions to discontinue a certain part of the route designated in his contract. The Board of Education should insist upon a compliance with its instructions in this particular.

Since transportation contracts have been approved for the current school year, which has more than half expired, it is not advisable to require further changes in the route at this time. If the Board of Education of Little Egg Harbor Township desires State funds for a part of the cost of the transportation of pupils in this section of the district for the ensuing school year, it should submit to the County Superintendent of Schools, for his approval, a revised route providing proper facilities with due consideration to the time and cost of such transportation. The appeal is dismissed.

March 21, 1935.

TRANSPORTATION WHICH REQUIRES EARLY LEAVING OF AND LATE ARRIVAL AT HOME MAY CONSTITUTE SUITABLE FACILITIES DURING SPRING AND FALL BUT NOT DURING WINTER

GRACE SHOEMAKER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LIBERTY, WARREN COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Commissioner on March 17, 1930, dismissed a former petition of Grace Shoemaker for the provision of transportation facilities for her daughter who was attending an elementary school in the Township of Liberty for the reason that the child lived within two miles of the school building, that the road was of the average unimproved type of that section of the State, and that no proof was established to show that the child was not of normal health.

This same pupil is now attending high school and meets the bus at the elementary school she was attending at the time of the former case. It would,

therefore, appear that with her increased age and physical development, the distance from her home to the school building, which did not constitute remoteness at that time, could not do so now.

There is, however, one factor which was not present in the former case. It is alleged by the petitioner and admitted by respondent that the pupil must meet the bus at the above designated elementary school at 7:45 A. M., and that on the return trip in the afternoon the bus does not reach the school building until between 4:30 and 4:45. It is, therefore, evident that during the winter months petitioner's daughter must leave home about sunrise in the morning and arrive home after dark.

It is the opinion of the Commissioner that the Liberty Township Board of Education should submit a revision of the route to the County Superintendent of Schools for his approval so as to make it possible for this pupil to leave home later in the morning and to arrive home earlier in the evening during the winter months. Unless changes are made in the present route to accomplish the foregoing, the Board of Education is directed to provide transportation for petitioner's daughter between her home and the transportation route for at least the months of December, January, and February.

April 15, 1936.

PERIODIC ILLNESS OF PUPIL DOES NOT ESTABLISH RIGHT TO TRANSPORTATION FACILITIES

CHARLES BUELOW and WARREN A. JILLSON,

Petitioners,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR, IN THE COUNTY OF OCEAN,

Respondent.

For the Petitioners, **David A. Veeder.**
For the Respondent, Percy Camp.

DECISION OF THE COMMISSIONER OF EDUCATION

On February 11, 1935, the petitioners in this case and others contending that the respondent Board of Education was discriminatory in providing transportation facilities, petitioned the Commissioner of Education to require the school bus to come from the main highway to their homes so that their children would not be required to walk distances of from one-half to one mile to meet the bus. The Commissioner held that there was evidence of discrimination, but since on March 21, the date of the decision, there were only a few months left before the expiration of the contract, no change would be required in the route, but for the ensuing year the Board was directed to submit to the County Superintendent of Schools a revised route eliminating the former discriminations.

On November 10, 1935, Charles Buelow and Warren A. Jillson filed a new petition alleging that discriminations still exist, that the Board of Education illegally paid counsel fees for the preceding hearing, and that in addition to the facts previously presented, the health of the daughter of Mr. Buelow is such as to make her unable to walk nine-tenths of a mile from her home to the bus route and necessitates the route being extended to Mr. Buelow's home.

While at the time of the hearing in this case the bus was traversing the same route as last spring, there had been communications and conferences between the Board of Education and the County Superintendent of Schools in reference to a revision of the route, and on or about December 20 the County Superintendent approved a route which complies with the revision required in the decision of the Commissioner in the former case, and is as follows:

> "Beginning at the Burk Farm, thence to Beyenheimers, thence to Jillson's Corner on Radio Road, continuing on Radio Road to Rogers' Corner, thence to Gifford Schoolhouse, thence over road west to Gifford School, over to Gifford Dam to Frazier's Corner, over new bridge to Green Street and direct to the Tuckerton High School, returning by the same route."

Unless children are remote from the main artery of travel, the County Superintendent is correct in requiring the elimination of side trips as one of the conditions for the approval of a transportation route. The extension of routes into by-ways not only increases the transportation time for pupils more remote from the school, but adds to the transportation cost. Both of these conditions must be considered by the County Superintendent of Schools in approving routes. Since the present route eliminates the discriminatory features of the preceding one, there remains to be decided whether the health of Mr. Buelow's daughter is such as to entitle her to additional transportation, and the right of the Board of Education to pay counsel fees for the previous case.

The testimony shows that Mr. Buelow's eighteen-year-old daughter suffers from periodic illness common to her age and sex which is aggravated by abnormal organic conditions, and that such illness frequently confines her to bed for two or three days. The medical inspector of the schools, who was the only expert witness to testify, held that the girl's condition is not affected by the walk of nine-tenths of a mile. Since the testimony shows that additional transportation would not alleviate the physical condition of Miss Buelow, she is not to be considered "remote" as contemplated by the statute and is, accordingly, not entitled to further transportation at the expense of the Little Egg Harbor Township Board of Education.

The allegation that counsel in the preceding case was paid illegally for his service appears to be without merit. Prior to the hearing, the Board of Education held a special meeting to consider the petition of Mr. Buelow, notice of which was sent to all but one member. As a result of this meeting several members of the Board were to go to the law office of Mr. Percy Camp to have him answer the petition and represent the Board. At least two members went to Mr. Camp's office and as a result he answered the petition, attended the hearing before the Assistant Commissioner, and represented the Board and also the driver of the bus. After the hearing Mr. Camp presented his bill to the

Board in the amount of $50. The district clerk was instructed to write the Department of Public Instruction to ask whether the Board should pay the bill and in reply the Department expressed the opinion that Mr. Camp was entitled to his fee. By subsequent action of the Board the bill was paid. While there may be some question as to the legality of the special meeting, of which one Board member was not notified, the fact remains that the attorney was dealing with representatives of the Board whom he would naturally consider to be legally authorized to secure his services. Under these conditions and with the later official recognition of his services in making payment therefor, the action of the Little Egg Harbor Township Board of Education is legal.

The appeal is dismissed.

January 14, 1936.

BOARDS OF EDUCATION MAY RESCIND AN OFFER PRIOR TO ITS ACCEPTANCE

JOHN KIVET,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On June 2, 1930, the appellant submitted an application to the Board of Education of the Township of Wycoff, Bergen County, for the position of school bus driver for the term 1930-31. He appeared at the regular meeting of the Board held on October 14, 1930, at which the Board by action elected him "to fill the vacancy of Peter Van Houten beginning November 1, 1930, at the same salary now being paid." The Board adjourned and the district clerk notified the appellant of his appointment by the following letter:

"October 17, 1930.

Mr. John Kivet,
Sicomac Road,
Midland Park,
New Jersey.

Dear Sir:

At a meeting of the Board of Education held Tuesday, October 14, you were appointed bus driver at the salary of $25 per week and Assistant Janitor at the salary of $20 per week from November 1, 1930, to June 30, 1931.

Yours truly,
HAROLD QUACKENBUSH,
District Clerk."

A special meeting to be held on October 20 was called by the Board of Education for the purpose of hearing the report of the Building Committee, at which meeting all members of the Board were present. After the business was transacted for which the meeting had been called there was presented to the Board of Education a petition signed by 348 citizens of Wyckoff Township requesting the Board to reconsider the action taken at the meeting of October 14, 1930, with reference to the appointment of a school bus driver and assistant janitor. The Board by motion accepted the petition. The appellant, who evidently had heard that a petition was to be presented, was also present at the special meeting and upon acceptance of the petition by the Board asked for an opportunity to speak so that, according to his testimony, he could object to the reconsideration of his employment by the Board on October 14 and make known his acceptance of the position. The president of the Board refused to hear him and then entertained a motion annulling the employment of John Kivet and appointing Lester Van Houten to the position of assistant janitor and bus driver from October 20, 1930, to June 30, 1931, at the salary previously authorized for Mr. Kivet. The president declared the motion carried, four having voted in the affirmative, three in the negative, and one member and the president not voting. Subsequent to this meeting the following letter was received by the appellant:

"October 22, 1930.

Mr. John Kivet,
Midland Park,
New Jersey.

Dear Sir:

At a meeting of the Board of Education held Monday evening, October 20, 1930, the action of the Board at their meeting held Tuesday, October 14, 1930, on the appointment of a bus driver and assistant janitor was annuled. Do not report for work November 1, 1930.

Yours truly,
HAROLD QUACKENBUSH,
District Clerk."

It is admitted by counsel for respondent that appellant served with the United States forces in the World War, from which service he was honorably discharged.

It is contended by appellant's counsel that the employment of Mr. Kivet on October 14, 1930, was legal, and that he is protected during the term for which he was employed by the Veterans' Act, Chapter 29, P. L. 1929, and the Janitors' Tenure Act, Chapter 44, P. L. 1911, and that the motion to rescind the employment on October 20, 1930, was accordingly null and void.

If the offer of employment to Mr. Kivet was legally accepted, then the Commissioner is of the opinion that he is protected as janitor by both of the above statutes and is protected under the Veterans' Act in his employment as a bus driver. It appears that the case rests entirely upon whether a contract of employment was consummated.

When appellant on June 2, 1930, made application for the position of bus driver, he did not state the conditions upon which he would accept the position. The Board of Education offered him on October 17 a dual position of janitor and bus driver with specific salaries for each position. This action by the Board of Education could not be held to be an acceptance of an offer by the appellant and, therefore, binding upon him, since it included conditions not present in his offer or application. The action of the Board on October 14 and the letter of the 17th must, therefore, be considered an offer of employment to appellant.

The testimony indicates that appellant at the meeting of October 20 desired to notify the Board orally of his acceptance of its offer to him, but discloses that he only requested the privilege of speaking and did not intimate the purpose of his request.

Anson, in "Principles of the Law on Contract," 4th American Edition, says on page 34:

> "Acceptance means communicated acceptance. * * * It is enough to say here that acceptance must be something more than a mere mental assent." And again: "This dictum was quoted with approval by Lord Blackburn in the House of Lords in support of the rule that a contract is formed when the acceptor *has done something* to signify his intention to accept, not when he has made up his mind to do so." And on page 47 says: "Acceptance is to offer what a lighted match is to a train of gun powder. It produces something which cannot be recalled or undone. But the powder may have lain until it has become damp, or the man may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance."

The Supreme Court in the case of Hallock *vs.* Insurance Company, 26 N. J. L. 280, in reference to acceptance says:

> "First comes the mental resolve to accept the proposition; but the law can only recognize an overt act." And again, page 281: "The meeting of two minds, *aggregatio mentium,* necessary to the constitution of every contract, must take place *co instanti* with the doing of any *overt* act intended to signify to the other party the acceptance of the proposition." And also on page 282: "There is in fact no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case, it is articulate sounds carried by the ear, in the other, written signs carried by the mail or by telegram. The vital question is, was the intention manifested by an overt act, not by what kind of messenger it was sent."

If appellant had laid a written acceptance on the table before the Board of Education voted to rescind its action appointing him, or if he had stated orally to the Board when denied the right to speak, that he accepted the offer made to him, or if he had actually mailed the letter accepting the position prior to

being informed by the Board that the offer was withdrawn, the Commissioner is of the opinion that the contract would have been completed and the withdrawal of the offer would then have been accordingly illegal.

Since a board of education may deny the request of a citizen to speak during its sessions, no legal right was denied appellant when the Board refused to allow him to talk at the meeting of October 20. The alleged intention of appellant to accept the position if he had been given opportunity to speak cannot, in view of the authorities above quoted, be considered an acceptance.

The offer by the Board of Education to appellant was revoked and he was duly notified of such revocation prior to any overt act of acceptance on his part. Therefore, a legal contract does not exist between the Board of Education of Wyckoff Township and John Kivet.

The petition is denied.

January 13, 1931.

DECISION OF THE STATE BOARD OF EDUCATION

After taking testimony in the case of John Kivet *vs.* the Board of Education of the Township of Wyckoff the Commissioner of Education has held that no contract existed between the appellant and the Board and has dismissed the petition. After examining the records and briefs we agree with his conclusion and recommend that his decision be affirmed.

March 14, 1931.

RESOLUTION PASSED AND RECONSIDERED AT SAME MEETING OF A BOARD IS VALID

H. P. TUNISON,

Appellant,

vs.

BOARD OF EDUCATION OF WARREN TOWNSHIP, SOMERSET COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant in this action claims that a school transportation contract was legally awarded to him by action of the Warren Township, Somerset County, Board of Education at a meeting held on July 27, and that the subsequent action of the Board at the same meeting in awarding the contract to Fred W. Dealaman was contrary to law and therefore void.

A hearing was conducted by the Assistant Commissioner of Education at Somerville on October 8 and the testimony thereat reveals the following facts:

On July 10, 1929, the Warren Township Board of Education made public advertisement for the submission on July 27 of sealed bids for furnishing

school transportation over six different routes. On July 27 accordingly the bids were received and considered and the Board proceeded on motion of Mr. Crabb, seconded by Mr. Ralph, to award the contract for Route No. 1 to the appellant for the sum of $4 per day. Later when the proposals for Route No. 2 were opened a bid of $13 per day submitted by F. W. Dealaman was found to cover both Routes Nos. 1 and 2 and to comprise what the Board considered to be a more advantageous proposal than that submitted by the appellant for Route No. 1 alone. Thereupon Mr. Crabb moved to withdraw his motion for awarding the contract for Route No. 1 to appellant, but Mr. Ralph, the member who had seconded the original motion, refused to withdraw his action. Mr. Mundy, another member, then moved to award the contract for Routes Nos. 1 and 2 to Mr. Dealaman and his motion was seconded by Mr. Crabb and duly carried. It is from the latter action of the Board of Education that Mr. Tunison appeals.

The State School Law contains no requirement that school transportation contracts be awarded to the lowest bidder and it was decided by the Commissioner of Education in the case of Mendham Garage Company *vs.* Mendham Township Board of Education that there is no obligation on the part of a Board to the low bidder in the absence of statutory provision and in the absence of any promise in the advertisement to award the contract to such low bidder. The decision went on to hold that the Board, unless there was abuse of discretion, might proceed to treat the proposals received as information only and to award the contract independently of them. The Commissioner in arriving at this conclusion followed numerous Court decisions such as Oakley et al. *vs.* Atlantic City et al., 34 Vroom 127, and Murray et al. *vs.* Bayonne, 44 Vroom 313, etc.

In the particular case under consideration it is true that Mr .Dealaman can hardly be given the status of low bidder on Route No. 1 in view of the fact that his bid did not correspond with the specifications in the advertisement. However, as indicated by the decisions above referred to, the Board was under no obligation to the low bidder either by statute or by the terms of its advertisement and in the Commissioner's opinion was therefore free, since there was no evidence of any abuse of discretion and Mr. Dealaman's proposal seemed especially advantageous, to award the contract to the latter.

The only question remaining to be considered, therefore, is whether the Board of Education of Warren Township, having actually awarded the contract for Route No. 1 to Mr. Tunison, could legally proceed at the same meeting to adopt another resolution awarding the contract for the same route to another, namely, Mr. Dealaman. In the case of State *vs.* Foster, 7 N. J. L. 107, the Court held that

> "All deliberative assemblies during their session have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done. In this case, so long as the joint meeting were in session, they had a right to reconsider any question which had been before them, or any vote which they had made." And in the case of Whitney *vs.* VanBuskirk, 11 Vroom 467 the Court held that the action taken is to be considered the final determination of a public body when such final

determination is "evinced by a public promulgation of the result, or by subsequent action inconsistent with the purpose of further review."

In the case under consideration the appellant was not officially informed by the Board of Education that the contract had been awarded to him and there was no public promulgation of such action. Moreover, the Board took no action inconsistent with a further review of the award to appellant, but at the same meeting proceeded to reconsider its original action by adopting an inconsistent resolution awarding the contract to Mr. Dealaman.

It is, therefore, the opinion of the Commissioner that the Warren Township Board of Education was not only within its rights in awarding the transportation contract for Route No. 1 to other than the lowest bidder, but that such action was legally accomplished as a reconsideration at the same meeting of its original action in awarding the contract to appellant.

The appeal is accordingly hereby dismissed.

October 21, 1929.

Decision of the State Board of Education

On July 10, 1929, the Warren Township Board of Education advertised for bids for furnishing school transportation over several different routes. On opening the bids it was found that the appellant was the lowest bidder for Route No. 1, and on motion the Board awarded the contract for that route to him. Later on in the meeting when the bids for Route No. 2 were opened, it was found that one of them covered both Routes Nos. 1 and 2 and offered what the Board considered a better proposal. This bid was made by a Mr. Dealaman and a motion was passed to award the contracts for Routes Nos. 1 and 2 to him. The appellant appealed to the Commissioner on the ground that he was the lowest bidder and that the Board having passed a resolution accepting his bid it could not award the contract to another. The Commissioner, after taking testimony, decided that the contract was properly awarded by the Board and dismissed the appeal.

First: The advertisement for bids did not state that the contracts would be awarded to the lowest bidder and there is no provision of law requiring that they shall be so awarded. Under such circumstances, the Board had "a large measure of discretion," and in reviewing its action only its good faith and honesty in the exercise of that discretion will be inquired into. (Murray *vs.* Mayor and Common Council of Bayonne, 44 Vroom, 313; Oakley *vs.* Atlantic City, 34 Vroom, 127.)

The evidence shows that the Board exercised its discretion fairly and honestly.

Second: In our opinion, the Board was within its rights in reversing its first action and awarding the contract to Mr. Dealaman. So long as their meeting was in session, they "had a right to reconsider any question which had been before them, or in fact which they had made." (State *vs.* Foster, 2 Halst, 101.)

It is true that the resolution awarding the contract to the appellant was not formally rescinded, but the subsequent resolution awarding the contract for

Route No. 1 to Dealaman was directly contrary to and inconsistent with the earlier resolution, and was in effect a revocation of it.

The record shows that the bids were under consideration by the Board until it finally awarded the contract to Dealaman, and that it regarded that action as its final determination.

> "It is clear that while the manner of acceptance was under consideration by the Board * * * it was the right of that body to reconsider its vote, and vote as often as it saw fit upon the question, up to the time when, by a conclusive vote, accepted as such by itself, determination was reached. * * * Such final determination may be evinced by a public promulgation of the result, or by subsequent action inconsistent with the purpose of further review." (Whitney *vs.* VanBuskirk, 11 Vroom, at 467.)

It is evident that the Board did not regard its resolution awarding the contract to the appellant as a final determination, but that it did so regard its subsequent action giving it to Dealaman.

We therefore agree with the Commissioner in his conclusion that the Board of Education was within its rights in awarding the contract to another than the lowest bidder and in rescinding its first action in the manner it adopted, and recommend that his opinion be affirmed.

Dated, February 1, 1930.

LEGALITY OF THE AWARD OF TRANSPORTATION CONTRACT

JOSEPH ENGEL,

Appellant,

vs.

PASSAIC TOWNSHIP BOARD OF EDUCATION AND WALTER SWENSON,

Respondents.

Gilbert M. Cornish, for Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant asks in his petition of appeal that a transportation contract awarded on November 15, 1923, by the Passaic Township Board of Education to Walter Swenson upon advertisement for and receipt of bids be set aside as illegal on the ground that a violation of the School Law is involved in the award by the Board of Education of a contract to a person whose wife is a member of such board.

Respondent defends the action on the ground that Mrs. Swenson, the wife of the party receiving the contract in question, took no official part in the

award of such contract but on the other hand refrained from voting whenever the question came before the Board.

In view of the fact that questions not of fact but solely of law are involved in the case under consideration, it was agreed by both sides that the matter be submitted for decision upon the pleadings and upon written argument.

Section 117, Article VII of the School Law, reads in part as follows:

> "He (a board of education member) shall not be interested, directly or indirectly, in any contract with or claim against said board."

According to the legal authorities and previous ruling of this department a board of education member who has a financial interest in a contract with the Board of which he is a member will be deemed to be indirectly interested and thus to come within the prohibition of the statute even though such contract be actually between the board of education and a party other than himself.

In the case under consideration, therefore, Mrs. Swenson, a member of the Passaic Township Board of Education and the wife of the party with whom such board of education has contracted, must be presumed to have a financial interest in such contract and consequently an indirect interest in the agreement even though she be not actually one of the contracting parties.

Not only has it been decided in Equity cases that there cannot legally be a conflict between public duty and private interest in the case of a person occupying a position of public trust, but the section of the School Law above quoted explicitly prohibits a member of a board of education from being directly or indirectly interested in a contract with the Board of which he or she is a member.

It must also be observed from the phraseology of the statute that the prohibition contained therein extends not only to cases where the board member has actively participated in the official award by the Board of the contract in which he or she is directly or indirectly interested, but even to those cases in which the party interested in the contract is merely a member of the board of education making the award without regard to any participation in the official act.

In view of the phraseology of the statute therefore it is the opinion of the Commissioner of Education that Mrs. Swenson, the member of the Passaic Township Board of Education and the wife of Walter Swenson to whom the transportation contract was awarded, is financially and therefore indirectly interested within the prohibition of the statute; and that therefore such contract with Walter Swenson cannot legally be made by the Passaic Township Board of Education. Such contract is therefore in view of the existing facts hereby declared to be illegal and accordingly void and of no effect.

January 10, 1924.

LEGALITY OF AWARD OF TRANSPORTATION CONTRACT TO OTHER THAN LOWEST BIDDER

MENDHAM GARAGE COMPANY,

Appellant,

vs.

MENDHAM TOWNSHIP BOARD OF EDUCATION,

Respondent.

Herman M. Cone, for the Appellant.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought by the above named appellant to contest the legality of the award on August 13, 1923, of a transportation contract by the Mendham Township Board of Education to George C. Young. Both Mr. Young's bid of $110 per month and that of the appellant, the Mendham Garage Company, of $99 per month, were submitted in answer to the following advertisement of the above named Board of Education:

> "Sealed bids for transporting the high school pupils to Morristown High School will be received by the Mendham Township Board of Education at Brookside, August 13, 1923, at eight o'clock, new time."

There is no provision of law in this State by which a board of education is required to advertise for bids in the matter of awarding school transportation contracts or to award such contract to the lowest bidder even though such advertisement be made. It is apparent moreover that while no express reservation by the Mendham Township Board of Education of the right to reject any or all bids in the above quoted advertisement was made, neither was there any promise contained therein that the contract would be awarded to the lowest bidder.

The authorities in this State in matters of this kind hold that where there is no statutory requirement that a contract be awarded by a municipality to the lowest bidder, a municipality after inviting bids or proposals may disregard the lowest bid and award the contract to a higher bidder, providing such action is taken in the exercise of a fair discretion and with a view to the welfare of the municipality.

In the case of James Oakley and the Electric Light Company of Atlantic City, Prosecutors, *vs.* the City of Atlantic City and John H. Rothermel, defendants, 34 Vroom 127, the opinion was in part as follows:

> "I think it has been quite clearly established in this Court that, under the statute of 1894, even where proposals more or less general in their character are advertised for and received, the municipality is not bound

> to award the contract to the lowest bidder or even to award the contract upon such bids. No statute has been cited applicable to Atlantic City which requires such a course, and in the absence of such restriction it cannot be imported into this statute by construction when the power to contract is so absolutely conferred. I can find no violation of any legal principle in awarding a contract if it be done according to other prescribed formalities, in a municipality taking advantage of the information received by such a course of proposals, and in awarding a contract quite independent of them if it be done in the exercise of an honest discretion and judgment, and without the abuse of the discretion vested in the municipal body possessed of authority."

Moreover in the case of Martin Murray et al., Prosecutors, *vs.* the Mayor and Common Council of the City of Bayonne et al., 44 Vroom 313, it is held in part as follows:

> "There is no requirement in the charter of the defendant or any general law to which our attention has been called, requiring that contracts for street paving in Bayonne shall be let to the lowest bidder only. Under such circumstances, in awarding contracts, the municipal body has a large measure of discretion, and in the absence of fraud or the palpable abuse of such discretion on the part of the municipal authorities the Courts will not set aside their action. In reviewing such action the Court will only inquire into the good faith and honesty of the exercise of discretion."

In the case under consideration the Mendham Township Board of Education was under no statutory obligation to award the contract to the lowest bidder, namely, the Mendham Garage Company; and while there was no reservation in the advertisement of the right to reject bids, neither was there any promise to award the contract to the lowest bidder. In view of these facts it is the opinion of the Commissioner that the Board had the right to treat the proposals it had advertised for and received as merely information for its guidance and consequently to award the contract without regard to the lowest bidder.

Moreover in awarding the contract to Mr. George C. Young, whose reliability as a transportation contractor had been tested and proved by previous employment, there was in the Commissioner's opinion no evidence of abuse of discretion or evidence that anything but the welfare of the schools had been considered.

The action therefore of the Mendham Township Board of Education in awarding the transportation contract as aforesaid on August 13, 1923, to George C. Young is hereby sustained, and the appeal is accordingly hereby dismissed.

October 10, 1923.

LEGALITY OF AWARD OF TRANSPORTATION CONTRACT TO OTHER THAN LOWEST BIDDER

SAMUEL SUTTON,

Appellant,

vs.

BOARD OF EDUCATION OF DENNIS TOWNSHIP,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is presented by Samuel Sutton to contest the legality of the action of the Dennis Township Board of Education on July 18, 1927, in awarding a School Transportation Contract to Charles Noon, whose bid of $2,000 was the highest, while that of appellant of $1,890 was the lowest, of three bids received by the Board on that date in response to its public advertisement of July 8, 1927. It was agreed by counsel for both appellant and respondent to submit this controversy for decision upon a stipulation of facts and briefs upon the legal points involved.

The following are the terms of the advertisement for transportation bids published by the Dennis Township Board of Education on July 8:

> "Sealed bids will be received by the Board of Education of Dennis Township at the office of the district clerk, South Seaville, until twelve o'clock noon (Standard Time), on Monday, July 18, 1927. All bids to be plainly marked 'Bids for the Transporting of pupils'. Car to have ordinary sized glass windows. All bids to specify make and type of car to be used. Bus to be properly heated and each bid to state manner in which said will be done. The Board reserves the right to reject any or all bids. For further information inquire of the district clerk, South Seaville, liability insurance covering said transportation to be included in all bids.
>
> By order of the Board.
>
> A. B. CORSON, *District Clerk.*"

The Commissioner cannot agree with appellant's contention that Boards of Education are bound by statutory provision to award transportation contracts to the lowest bidder. The statutes which he cites and upon which he relies for the requirement of such procedure in the award of such contracts enumerate specifically the types of municipality to which they are intended to apply, namely, "city, town, township, village, borough and any municipality governed by a board of commissioners or improvement commission." A school district is a political sub-division of limited powers dealing with school government only and can in no way be deemed to be affected by general municipality legislation, such as above referred to, in which it is not specifically named. It is true that

there is a statutory provision expressly applicable to school districts which requires that city boards of education, for instance, advertise for bids in the purchase of school supplies costing more than $250 and award the contract to the lowest responsible bidder, and another which requires that all school boards so advertise and award to the lowest responsible bidder school building construction or repair contracts amounting to more than $1,000, but there is no such statutory provision regulating the award of school transportation contracts by boards of education of any type.

In fact, the case under consideration appears to be identical both as to law and the facts with that of the Mendham Garage Company *vs.* Mendham Township Board of Education, decided by the Commissioner of Education on October 10, 1923, and reported on page 646 of 1925 Compilation of the School Law. In that case under the authority of such Supreme Court cases as Oakley and the Electric Light Company of Atlantic City *vs.* The City of Atlantic City, etc. (34 Vroom, 127, and Martin Murray et al. *vs.* the Mayor and Common Council of the City of Bayonne, 44 Vroom 313), it was held that in the absence of any statutory requirement or any promise in the advertisement for bids that the transportation contract be awarded to the lowest bidder, and in the absence of any evidence of abuse of discretion on the part of the Board of Education, the Board was legally justified in awarding the contract to other than the lowest bidder.

The case under consideration is governed by the same statutory provisions which make no requirement that school transportation contracts be awarded to the lowest bidder, nor does it appear from the above quoted advertisement that the Board was bound by any promise to such low bidder. Moreover, there is no evidence before the Commissioner of any abuse of discretion on the part of the Board.

It is therefore the opinion of the Commissioner of Education that there was no illegality involved in the award by the Dennis Township Board of Education on July 18, 1927, of a transportation contract to Charles Noon, even though his bid of $2,000 was the highest of the three bids received by the Board in response to its advertisement. The action of the Board is therefore sustained and the appeal accordingly hereby dismissed.

October 4, 1927.

Decision of the State Board of Education

The Dennis Township Board of Education advertised for bids for transportation of pupils but did not award the contract to the lowest bidder who appealed to the Commissioner on the ground that the law required that it be awarded to him. The Commissioner decided to the contrary and it is now asserted that he did not consider the statute invoked by the appellant, viz., Chapter 152 of the laws of 1917, as amended by an Act of 1920, page 572.

This amendment provides as follows:

> "No municipality shall enter into any contract for the doing of any work or for furnishing of any materials, supplies or labor, the hire of teams

or vehicles, where the sum to be expended exceeds the sum of $500, unless the governing body shall first advertise for bids therefor, and shall award the said contract for the doing of said work or the furnishing of such materials, supplies or labor, to the lowest responsible bidder; * * *"

Appellant claims that "municipality," as used in this act includes school districts, but the Act of 1917 itself defines the term to mean "city," "town," "township," "village," "borough," "and any municipality governed by a board of commissioners." School districts are not mentioned, do not come within any of these definitions, and cannot be deemed to be subject to the Act.

In the absence of statutory requirement, the Board had the right to award the contract according to its discretion so long as it acted honestly and in good faith. Oakley *vs.* Atlantic City, 63 N. J. L. 127; Murray *vs.* Mayor of Bayonne, 73 N. J. L. 313. There is no showing that it acted otherwise.

It is therefore recommended that the Commissioner's decision be affirmed.

February 4, 1928.

ONLY PERSONS DIRECTLY EFFECTED OR CITIZENS OF THE DISTRICT ARE ELIGIBLE TO CONTEST THE AWARD OF A TRANSPORTATION CONTRACT

FRED C. BURD,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY,

Respondent.

For the Petitioner, Gebhardt & Gebhardt.
For the Respondent, Anthony M. Hauck, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of Tewksbury Township, upon advertisement, received bids for transporting pupils from Bissell and Oldwick to the Somerville High School as follows:

Clifford Bunn	$1,400
John Reed	1,760
Fred C. Burd	1,790

Mr. Bunn, the lowest bidder, was awarded the contract, which he practically transferred to his brother-in-law, Mr. Emmett Lindabury, a member of the Board of Education. Prior to the opening of the schools in September,

the latter purchased a bus and has since personally transported the pupils. Mr. Bunn, the contractor, has been paid by the Board of Education for the transportation service and has given to Mr. Lindabury the warrants, or checks, received by him.

The testimony shows that at the time the contract was awarded to Mr. Bunn there was no agreement or understanding between him and Mr. Lindabury as to its transfer, nor knowledge on the part of the board members that such a transfer was contemplated.

The appellant, who is not a resident of the school district, asks to have the contract set aside and a new one awarded to him as the next lowest bidder.

Chapter 262, P. L. 1933, provides in part as follows:

> "No contract for the transportation of pupils to and from school shall be made unless the board of education making such contract shall have first publicly advertised for bids therefor * * * and shall have awarded the contract to the lowest responsible bidder."

The testimony discloses that Mr. Burd was not the next lowest bidder and, therefore, as a non-resident, he is ineligible to prosecute this petition. However, since this case involves the legality of a contract in which a board member is interested, it appears advisable to indicate to the Board the legal status of its transaction.

Counsel for respondent contends, and the Commissioner agrees, that this case is practically on all fours with that of Fredericks *vs.* Borough of Wanaque, 95 N. J. L. 165, which holds that in the absence of a corrupt understanding or agreement between a contractor and a member of a municipal governing body voting for the contract, a resolution of the municipality, otherwise legal, is not rendered illegal by the subsequent action of the contractor in purchasing his material from a recognized source of supply, the proprietor of which happens to be a member of such governing body. Justice Minturn in delivering the opinion of the Court said:

> "* * * the test of the legality of the contract must be determined as of the time when the resolution was passed, and not by the free act of the plaintiff in purchasing materials. If it was free of criminal taint, at its inception, the subsequent action of the contractor in executing the contract cannot relate back so as to invalidate it unless such *ex post facto* action can be connected with a prior corrupt agreement or understanding with a member of the governing body, in pursuance of which the resolution was passed."

In the instant case there is no evidence of prior agreement or collusion in the award of the contract either on the part of Mr. Lindabury, or any other board member. The contract could not, therefore, be held to be void at its inception; and if Mr. Lindabury, after apparently having the contract assigned to him, had resigned from the board of education, it could not thereafter be voided on that ground. The evidence indicates that the Board has paid Mr.

Lindabury, directly or indirectly, for transportation services for which he may be liable in the civil courts under Chapters 235, P. L. 1898, or Chapter 219, P. L. 1914. There is, however, another statute which affects the transaction, namely, Section 83, Chapter 1, P. L. 1903, S. S. In enumerating the qualifications of a member of a board of education, this law provides:

> "He shall not be interested, directly or indirectly, in any contract with nor claim against said board."

It is, therefore, the opinion of the Commissioner that if Mr. Lindabury continues as a member of the Tewksbury Township Board of Education, it may not legally make further direct or indirect payments to him upon the transportation contract, and that his continued receipt of such payments, as a member of the board, makes him answerable in the civil courts. The case is, however, dismissed on the ground that the appellant is not qualified as a prosecutor.

March 21, 1934.

BOARDS OF EDUCATION MAY NOT RESTRICT TRANSPORTATION BIDS TO RESIDENTS OF DISTRICT

ELMER CHAPLIN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

Respondent.

For the Petitioner, Harold B. Domb.
For the Respondent, King & Vogt, Robert H. Schenck, of Counsel.

DECISION OF THE COMMISSIONER OF EDUCATION

Under the provisions of Chapter 262, P. L. 1933, the respondent board advertised for proposals for transporting certain pupils, residents of Jefferson Township, to the Roxbury High School on the route designated as No. 7. In response to such advertisement, petitioner submitted a sealed envelope which he alleges contained his bid in the amount of $890.00 together with a certified check for 5% of that amount. Other proposals were also received on the same route.

Before the opening of bids, it was decided by the Board of Education to exclude all bids submitted by persons who at that time were not residents of

Jefferson Township. Inquiries were made as to who outside of the township had submitted bids and the petitioner made known that he had submitted a bid and that he lived in an adjoining township, whereupon the envelope purporting to contain his bid was rejected and relayed to the seat which he occupied. Shortly thereafter the bids that had been submitted by the residents of the township were opened and the contract on Route No. 7 was awarded to Albert Dew in the amount of $945.00 annually.

While there is considerable variation in the testimony of witnesses about the return of the bid, it appears that after the award of the contract to Mr. Dew, Mr. Chaplin asked to have the amount of his bid noted on the blackboard where the other bids had been recorded. Whether he or a teacher who was recording bids at the blackboard opened the bid is not very clear, but after the recording, the bid was evidently returned to Mr. Chaplin, since at the time of the hearing he testified that the bid and certified check were in his possession. He further testified that he made some objection at the close of the meeting to the rejection of his bid, but the weight of evidence indicates that the objection was made the following day. Petitioner subsequently secured counsel and appealed to the Commissioner, asking that the Board of Education be required to rescind its action awarding the contract to Albert Dew and directing it to award said contract to the petitioner in the amount of $890.00.

Chapter 262, P. L. 1933, provides that transportation contracts shall be awarded to the lowest responsible bidder. There is no authority for a board of education to deny to a person living in another school district the right to bid. The purpose of the act is to secure approved transportation at a minimum cost. If a board of education may restrict the area from which residents may submit bids, it can, by extreme restriction, nullify the statute. Even in this case, the Board by excluding bids of nonresidents has evaded it.

While petitioner's right to the contract may be affected by his acceptance of the bid when it was returned, together with the fact that the bid was not read by the Board nor the certified check held by it in accordance with the statute, the Board of Education illegally rejected Mr. Chaplin's bid which invalidates the contract awarded to Albert Dew. The Board of Education of the Township of Jefferson is accordingly directed to immediately cause re-advertisement to be made for new proposals on Route No. 7 and to award a contract thereon in accordance with the statute.

October 5, 1936.

BOARD OF EDUCATION NOT REQUIRED TO AWARD CONTRACT FOR SCHOOL BUS TO LOWEST BIDDER

CAMDEN MOTOR TRUCK COMPANY,
Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY, AND JOSEPH H. HAINES & SONS,

Respondents.

For Petitioner, Leonard H. Savadove.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent Board of Education advertised for proposals for furnishing a new bus for the transportation of pupils of the School District of the Township of Shamong, Burlington County. Petitioner submitted a bid of $1,998 for a G.M.C. bus and Joseph H. Haines & Sons submitted a bid of $2,379.60 for an International bus. After a lengthy discussion by the Board as to the mechanical features of these buses, the Board voted to award the contract to Joseph H. Haines & Sons on the bid of $2,379.60. Petitioner contends that he was the lowest responsible bidder and asks that the award of the contract to Joseph H. Haines & Sons be declared null and void and that the Board be required to accept petitioner's bid.

The testimony indicates that the Board used an honest discretion in arriving at the conclusion that the proposal of Joseph H. Haines & Sons was more advantageous than that of the petitioner.

This case appears to be on all fours with that of Camden Motor Truck Company *vs.* Board of Education of the Town of Hammonton, decided by the Commissioner on October 23, 1934, in which the Commissioner held as follows:

> "Counsel for the appellant fails to show any statute applicable to boards of education which requires that body to award such contract to the lowest responsible bidder.
>
> "The Commissioner of Education in the case of Mendham Garage Company *vs.* The Mendham Township Board of Education held:
>
> " 'The authorities in this case in matters of this kind hold that where there is no statutory requirement that a contract be awarded by a municipality to the lowest bidder, a municipality after inviting bids or proposals may disregard the lowest bid and award the contract to a higher bidder, providing such action is taken in the exercise of a fair discretion and with a view to the welfare of the municipality.'

"In the case of James Oakley and the Electric Light Company of Atlantic City, Prosecutors, *vs.* the City of Atlantic City and John H. Rothermel, defendants, 34 Vroom 127, the Supreme Court ruled on the same point as follows:

" 'I think it has been quite clearly established in this court that, under the statute of 1894, even where proposals more or less general in their character are advertised for and received, the municipality is not bound to award the contract to the lowest bidder or even to award the contract upon such bids. No statute has been cited applicable to Atlantic City which requires such a course, and in the absence of such restriction it cannot be imported into this statute by construction when the power to contract is so absolutely conferred. I can find no violation of any legal principle in awarding a contract if it be done according to other prescribed formalities, in a municipality taking advantage of the information received by such a course of proposals, and in awarding a contract quite independent of them if it be done in the exercise of an honest discretion and judgment, and without the abuse of the discretion vested in the municipal body possessed of authority.'

"There is no evidence submitted to show that the Board fraudulently awarded the contract, or reached its conclusion except by honest discretion as to which bus was the better value in relation to the price. Even if the statute had required a contract for such school equipment to be awarded to the lowest responsible bidder, the Board had the legal right to use its discretion in determining which of the two automobiles would be the better value at the bids quoted, but in the absence of such statutory requirement, and without evidence of bad faith, the Board of Education of Hammonton, in accordance with the above cited authorities, legally awarded the contract to the Hammonton Auto Station."

The Supreme Court in the case of Hammonton *vs.* Elvins, 101 L. 38, in ruling upon the purchase of a fire engine, held as follows:

"Our examination of the specifications of the respective bidders, which are quite voluminous, satisfied us that the council was justified in concluding that the town would get both better engines and better service from the LaFrance Company, and that all things considered, its bid was the lowest. It was an honest exercise of the discretion vested in the council. The purpose of competitive bidding is to prevent dishonesty, chicanery and fraud. It was never intended that such a course of procedure would throttle the exercise of an honest judgment within prescribed limits."

In accordance with the foregoing citations, the Board of Education of the Township of Shamong legally awarded the contract for its school bus to Joseph H. Haines & Sons. The petition is accordingly dismissed.

August 19, 1936.

FAILURE OF BIDDER TO PROVIDE BUS COMPLYING WITH REQUIREMENT OF RULES OF STATE BOARD OF EDUCATION SUFFICIENT GROUNDS FOR AWARD OF CONTRACT TO NEXT LOWEST BIDDER

WILLIAM CARLL,

Appellant,

vs.

BOARD OF EDUCATION OF WEYMOUTH TOWNSHIP, ATLANTIC COUNTY,

Respondent.

For the Petitioner, Samuel Morris.
For the Respondent, Ralph Harcourt.

DECISION OF THE COMMISSIONER OF EDUCATION

On August 7, 1934, respondent Board advertised for sealed proposals for the transportation of certain pupils of Weymouth Township, and specifications for bidders were provided at the office of the Board's secretary. These specifications read in part as follows: "The contractor must furnish a good motor bus to comply with all requirements of the State and liability insurance, to be inspected and approved by the County Superintendent of Schools and the Board of Education." Bids were received in compliance with the advertisement on August 17, 1934, at which time a tentative award of the contract was made to appellant who was the lowest bidder.

Under date of August 27, 1934, the district clerk wrote to Mr. Carll as follows:

> "The Board of Education of Weymouth Township requests that you have your bus inspected by Mr. Cressman (County Superintendent of Schools) and secure the necessary liability insurance and bond for the amount of the contract, the Board must have this information not later than August 31, 1934. P.S. The closing date, August 31, 1934."

The president of the Board inspected appellant's bus prior to August 31, and orally advised Mr. Carll to secure the County Superintendent's approval. At the request of appellant, the County Superintendent, on August 31, made the inspection and told Mr. Carll that he would not approve the bus because it did not meet the specifications for buses prescribed by the State Board of Education. Appellant testified that Mr. Cressman advised him not to proceed with the alterations which were necessary to make the bus conform to the specifications prescribed by the State Board and because of this advice, the bus alterations were not made in time for it to meet the State requirements

on the day the schools were opened in that district. Appellant testified that he arranged for the liability insurance, but there is no evidence of the submission of a bond by him to the Board of Education for the faithful performance of the contract. After the County Superintendent inspected the bus, he also notified the Board of Education that he would not approve it, whereupon the Board called a special meeting on September 4 and rescinded the tentative award of the contract to Mr. Carll and awarded it to one, Charles Applegate.

Appellant asks the Commissioner to declare illegal the rescission of the resolution awarding the contract to him and the subsequent award of the contract to Mr. Applegate. Counsel for the appellant contends that the specifications did not set up exact requirements for the bus nor the time limit when the bus was to be ready for the transportation of pupils. The specifications state that the bus must meet the requirements of the State. Appellant admits that he knew of the State Board specifications; but even if he did not, it was his duty to know what the State requirements are since his bid was upon a bus which was to comply therewith. The State Board specifications for school transportation buses are very definite and being made under statutory authority, become in fact a part of the School Law, which appellant is presumed to know.

Counsel further holds that the Board never notified Mr. Carll that unless his bus was ready for final approval by a certain date, that the contract would be rescinded. The letter to Mr. Carll under date of August 27, appears to be very definite. He was notified in it that the Board must have the approval of Mr. Cressman, the liability insurance, and the bond not later than August 31, 1934, and it reiterates this in the postscript when it says: "The closing date, August 31, 1934." It is not the duty of the County Superintendent of Schools to inspect a bus in order that he may recommend the changes necessary for it to meet the specifications prescribed by the State Board of Education, but his inspection is to determine whether or not a certain bus meets the State requirements. Mr. Cressman told appellant that he would not approve his bus. If he advised Mr. Carll not to proceed further with the alterations, it appears to be for the reason that August 31 was the final date fixed by the Board of Education for appellant to comply with the specifications of the Board of Education. If his bus could have been approved by the County Superintendent of Schools on the opening day of school, he delayed the alterations at his peril. The bus was not presented for service on the opening day of school and he cannot, therefore, claim any contractual rights.

There is no evidence in this case of bad faith on the part of the Board of Education. It awarded the contract to Mr. Carll and urged him to have his bus approved. He failed to meet the requirements of the Board of Education within what it considered to be a reasonable time. There is every indication that Mr. Carll would have received the contract if he had acted promptly. With the opening of the schools in about a week, the Board considered it unwise to further delay its arrangements for the transportation of pupils and awarded the contract to Mr. Applegate.

Appellant having failed to comply with the reasonable requirements of the Board of Education, and having failed to present an approved bus on the open-

ing day of school, is without legal right to the award of the contract and his petition is accordingly herewith dismissed.

November 26, 1934.

DECISION OF THE STATE BOARD OF EDUCATION

This appeal brings up for review a decision of the Commissioner of Education wherein he sustains the action of respondent in cancelling a tentative award of contract to appellant to furnish pupil transportation and the award of such contract to another. Respondent had advertised for bids to furnish transportation during the then next school year or three years. Bids were to be opened at a meeting to be held on August 17, 1934. Busses of bidders were required to conform to certain specifications. Appellant was the low bidder and the contract was tentatively awarded him, subject to approval of his bus by the County Superintendent and the Board of Education and his compliance with State requirements. Appellant was present at this meeting and was instructed by the Board or some of its members to comply at once with these requirements. On August 27, he was notified to have the bus he purposed to use inspected not later than August 31, and to secure the necessary liability insurance and bond that day. The bus was inspected by the County Superintendent on August 31, and disapproved. No liability policy or bond was tendered to the Board of Education. The president of respondent several times inspected the bus and informed appellant it did not conform to specifications or to State requirements. On September 4, respondent being concerned about the transportation contract, as schools were to open on September 10, called a special meeting on that day, appellant being present, at which the tentative award to appellant was rescinded and the contract awarded to the next lowest bidder. Appellant complains he was not definitely advised that the contract was awarded to him, that he was misled as to making alterations on his bus to meet specified requirements by a statement of the County Superintendent; that a member of the Board of Education had requested the County Superintendnt not to approve the bus, and that he had provided for insurance and bond, although neither was delivered to respondent. He contends the respondent was not justified in depriving him of the contract, and asks that the award to the next bidder be set aside and the Board required to enter into the contract with him.

The Commissioner of Education in his decision has dealt with these and other claims of appellant, and found them to be without merit. We agree with his conclusions and his decision should be affirmed.

May 11, 1935.

IRRESPONSIBILITY OF TRANSPORTATION BIDDER CAN BE DETERMINED ONLY AFTER HEARING

ARTHUR H. BRELSFORD,

Appellant,

vs.

BOARD OF EDUCATION OF LAWRENCE TOWNSHIP, CUMBERLAND COUNTY,

Respondent.

For the Appellant, M. J. Greenblatt.
For the Respondent, Francis A. Stanger, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

In response to advertisement for transporation bids under the provisions of Chapter 383, P. L. 1933, the respondent on June 3, 1935, received sealed bids for Routes 1 and 5 as follows:

Route 1. E. M. Davis, $6.50 per actual day
Erwin Husted, $6.50 per actual day
Arthur H. Brelsford, $6.00 per actual day

Route 5. Leon Spencer, $4.75 per actual day
Arthur H. Brelsford, $3.90 per actual day.

After reading the bids the Board voted to award a contract for Route 1 to E. M. Davis at $6.50 per actual school day, and another for Route 5 to Leon Spencer at $4.75 per actual school day.

At a regular meeting of the Board of Education on July 15, 1935, the appellant protested the action of the respondent in voting to award the contracts to Mr. Davis and Mr. Spencer and called the Board's attention to the fact that he was the lowest responsible bidder. Respondent then rescinded the motion and thereupon voted to award the contracts for Routes 1 and 5 to appellant at $6.00 and $3.90 per actual school day, respectively.

At a special meeting on August 5 the Board rescinded the award of the contracts to the appellant and set August 9 for a hearing in the matter and for the submission of transportation equipment by the various bidders.

The respondent at the August 9 meeting casually inspected the busses and discussed at some length the transportation bids after which, as disclosed by the minutes, the Board by a vote of 3 to 2 adopted the following motion:

> "Moved and seconded that the contracts for transporting pupils on Route 1 be awarded to E. M. Davis at $6.50 per actual school day, and on Route 5 be awarded to Leon Spencer at $4.75 per actual school day for

the following reasons; that both E. M. Davis and Leon Spencer accepted an approximate cut of 20% on their three years contract after it had run only one year and because of the fact that they both were local men and were heavy taxpayers."

From this action Mr. Brelsford appeals to the Commissioner and asks that the Board be directed to award the contracts to him as the lowest responsible bidder.

Respondent attempts to establish a legal award of the contracts to other than the lowest bidder by submitting evidence as follows:

1. Appellant did not produce evidence of willingness to file a bond.
2. Appellant was not the owner of the equipment he proposed to use.
3. The recorded motion in the minutes of August 9 did not include all the reasons for awarding the bids as stated by the maker of the motion and in the minds of the members of the Board.

1. Neither the advertisement nor the specifications required the bidder to submit a bond with his bid or to give evidence of ability or willingness to do so. Accordingly, in the absence of such provision, the bid of appellant was not affected.

2. While it was shown at the hearing conducted by the Assistant Commissioner on August 29 that Mr. Brelsford is not the sole owner of all the busses he uses in the transportation of pupils, there is nothing to indicate that the Board objected to this at its meeting on August 9 or that it was considered as justifying the award of the contracts to Mr. Davis and Mr. Spencer.

3. The testimony presented at the hearing does not discredit the resolution of August 9 as recorded by the district clerk. In fact, the maker of the motion testified that it is in accordance with his statement as he remembers it. Other witnesses state that it did not include all the reasons they had in their minds, but there was no positive testimony by them that the minutes incorrectly recorded the motion.

The testimony clearly shows that the Board desired to award the contracts to Mr. Davis and Mr. Spencer for the reasons set forth in the resolution. It appears that these two men have for several years provided transportation in the township to the satisfaction of the Board and the parents, and without legally being required to do so they accepted a cut of 20% in the amount of their contracts for the last two years. In appreciation of their excellent services and the reduction of the cost of transportation, the Board wanted to have their services continued. In the absence of a statute requiring the Board to award the contract to the lowest responsible bidder, the Board might have been justified in awarding the contract to its former employees for the reasons set forth in the resolution even though their bids were slightly higher than those of Mr. Brelsford, but the Legislature by Chapter 383, P. L. 1933, required the Board to award the contracts to the lowest responsible bidder. Since the bid of Mr. Brelsford was not set aside on the ground of his irresponsibility

or for other just cause, the Board of Education had no legal right to pass a resolution awarding the contract to others and the resolution of August 9 is, therefore, invalid. Jacobson, et als. *vs.* Board of Education of the City of Elizabeth, et als., 64 N. J. L. 609; Faist *vs.* Hoboken, 72 N. J. L. 361.

Counsel for appellant asks that the Commissioner require the Board of Education to award the contract to his client. The Board of Education may for good cause reject all bids in accordance with the advertisement, but unless they are so rejected, the contract must be awarded to the lowest responsible bidder. The Board of Education and not the Commissioner has discretion in making this choice.

In the case of Kelly *vs.* Board of Freeholders of Essex County, 90 N. J. L. 411, in which it was held that the Board did not comply with the law requiring the contract to be awarded to the lowest responsible bidder, the Court said:

> "It is to be regretted that the municipality *may* be put to the additional expense in readvertising and awarding another contract, but we can find no way to avoid it. The responsibility for it rests with the public board which disregarded a settled rule of law, by action, which, if approved, would nullify the statute and permit its willful voidance by the arbitrary action of municipal bodies * * * and permit favoritism in the awarding of all contracts."

Since the resolution of the Lawrence Township Board of Education on August 9 is invalid and the irresponsibility of the appellant is not established, the contract must be awarded to Mr. Brelsford unless for good reasons all bids are rejected.

September 17, 1935.

IRRESPONSIBILITY OF LOW BIDDER MUST BE ESTABLISHED AT HEARING BEFORE CONTRACT CAN BE AWARDED TO ANOTHER

GEORGE S. MORRIS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMPTON, SUSSEX COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

In response to an advertisement for sealed transportation bids by the Board of Education of Hampton Township, Sussex County, eight were received

for Route No. 1. The lowest bid of $989 was submitted by the appellant and the next lowest bid of $990 was submitted by William Parragino. At a meeting of the respondent board held July 20 the contract was awarded to Mr. Parragino. The Board called another meeting for August 16, when a number of questions were submitted to Mr. Morris and Mr. Parragino. In replying to the questions the appellant admitted that his limbs are afflicted due to an attack of infantile paralysis about twenty-six years ago, but stated he has driven cars for the last twenty-four years without an accident. At the conclusion of the questioning, the Board again voted to award the contract to Mr. Parragino, which contract the appellant petitions the Commissioner to set aside.

The meeting of August 16 was evidently called upon advice that the contract could not be awarded to other than the lowest bidder, except after a hearing upon his responsibility, but the reason for awarding the contract to Mr. Parragino at this meeting was not due to the slight affliction of Mr. Morris nor his irresponsibility. At the original meeting the Board apparently considered the difference of $1.00 as insignificant and without affect on the award, and since Mr. Parragino had purchased a bus for the transportation, the Board felt it would be an injustice to then award the contract to another person.

Chapter 383, P. L. 1933, provides that contracts for transportation in excess of $300 may be awarded only to the lowest responsible bidder after due advertisement for bids by the Board of Education. The Supreme Court in the case of Jacobson, et al. *vs.* Board of Education of the City of Elizabeth, 64 Atl. Rep. 609, held that the irresponsibility of a bidder is a judicial matter requiring notice to him and a hearing. In the present case, the hearing before the Board did not establish the irresponsibility of Mr. Morris and the testimony of board members definitely shows other reasons for the award of the contract.

The Board of Education of the Township of Hampton accordingly illegally awarded the contract to Mr. Parragino, and such contract is, therefore, void. Kelly *vs.* Freeholders of Essex, 90 N. J. L. 411; McDermott *vs.* Board of Street and Water Commissioners of Jersey City, 56 N. J. L. 273; Faist *vs.* Hoboken, 72 N. J. L. 361; Armitage *vs.* Newark, 86 N. J. L. 5.

September 26, 1934.

IRRESPONSIBILITY OF LOW BIDDER CANNOT BE DETERMINED WITHOUT GIVING HIM OPPORTUNITY TO BE HEARD

KENNETH C. MASSEY,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF LAMBERTVILLE,

Respondent.

For the Respondent, J. Conner French.

DECISION OF THE COMMISSIONER OF EDUCATION

On May 3, 1934, the respondent advertised for proposals to be submitted on May 18 for the furnishing of coal for the schools of the City of Lambertville. Upon receipt of bids, it is shown that while the petitioner's was the lowest on certain types of coal, he did not submit bids on all types specified in the advertisement. The Board found all prices to be in excess of those of the preceding year, and no action was taken upon the purchase of coal on May 18.

Members of the Board then consulted coal dealers about the use of semi-bituminous coal and received information that ultimate economy would be effected by the purchase of high grade bituminous coal. The Board, therefore, decided to substitute bituminous for anthracite coal in the Third Ward School. It did not re-advertise for bids following its decision, but requested prices of one or two dealers and purchased from Louis Rooks approximately forty-eight tons of the semi-bituminous coal and subsequently, without advertising, ordered from him about fifty tons of Big Vein Georgia Creek coal.

While the Board might have legally rejected appellant's bid on the ground that he did not quote on all types of coal in accordance with the specifications, it attempts to justify the indirect rejection of his bid on two grounds: (1) It was not satisfied with the service rendered by Mr. Massey during the preceding year; (2) The cost price of the coal purchased without advertisement resulted in a saving to the Board of several hundred dollars.

A board of education has no authority to declare a bidder irresponsible because of previous experiences with him, without giving him an opportunity to be heard. In Faist *vs.* Hoboken, 72 N. J. L. 361, Justice Port, in expressing the opinion of the Court, said:

> "If there be an allegation that a bidder is not responsible, he has a right to be heard upon the question, *and there must be a distinct finding against him upon proper facts to justify it.*"

While it is probably true that the respondent saved a few hundred dollars by purchasing a different type of coal from that originally specified, there is no justification for its doing so without advertising in accordance with the law.

In the case of Kelly *vs.* Board of Freeholders of Essex County, 90 N. J. L. 411, in which it was held that the Board did not comply with the law requiring the award of a contract to the lowest responsible bidder, the Court said:

> "It is to be regretted that the municipality may be put to additional expense in re-advertising and awarding another contract, but we can find no way to avoid it. The responsibility for it rests with the public Board which disregarded a settled rule of law, by action, which, if approved, would nullify the statute and permit its willful voidance by the arbitrary action of municipal bodies * * * and permit favoritism in the awarding of all contracts."

Under the conditions in the instant case, the proper legal procedure was for the Lambertville Board of Education to reject the bids received under the advertisement of May 3, and to re-advertise for the other kinds of coal. While it was indicated by representatives of the Board present at the hearing that coal would hereafter be purchased in strict conformity with the law, the evidence is very clear that the purchases already made were definitely illegal.

December 18, 1934.

AWARD OF CONTRACT TO OTHER THAN LOWEST BIDDER WITHOUT AFFORDING LOWEST BIDDER OPPORTUNITY TO BE HEARD IS ILLEGAL

CLIFFORD LAWRENCE,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY,

Respondent.

For the Appellant, Herbert S. Killie.
For the Respondent, Jay B. Tomlinson.

DECISION OF THE COMMISSIONER OF EDUCATION

The respondent Board of Education on July 28, 1933, received bids for the transportation of pupils on Route No. 1, as follows:

Daniel Johnson	$12.25
Allen Stevens	6.40
Russell Fow	5.90
Clifford Lawrence	5.85

Under a resolution setting forth that Allen Stevens had given satisfaction on this route for the past twelve years, the Board awarded the contract to him even though he was fifty-five cents per day higher than the lowest bidder. Upon the contention that the resolution of the Board constituted a violation of the provisions of Chapter 262, P. L. 1933, Clifford Lawrence, the lowest bidder, appeals to have the action of the Board set aside and the contract awarded to him.

It is admitted by the Board that no hearing was given to the appellant to determine his responsibility.

The Supreme Court in deciding cases brought under similar statutes held:

> "If there be an allegation that a bidder is not responsible, he has a right to be heard upon that question and there must be a distinct finding against him, upon proper facts, to justify it." McGovern *vs.* Board of Works, 28 Vroom 580.
>
> "A determination against the responsibility of a bidder is a judicial matter requiring notice to him." Jacobsin et al. *vs.* Board of Education of the City of Elizabeth, 64 Atl. 609.
>
> "That a party whose rights are to be directly affected by judicial action is entitled to have an opportunity afforded him of being heard in relation thereto before action is taken, whenever such action is judicial in its character is entirely settled in this Court." Stanley *vs.* Passaic, 60 N. J. L. 392.

Since appellant was not given an opportunity to be heard, the contract for the transportation of children on Route No. 1 was illegally awarded to Allen Stevens and such award is accordingly void. The Board of Education of the Township of North Hanover is therefore directed to award the contract to the lowest responsible bidder.

September 26, 1933.

ALLOWANCE FOR TRANSPORTATION AND TUITION

C. W. BLUE,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,

Respondent.

For the Appellant, *pro se.*
For the Respondent, John F. Kelly, District Clerk.

DECISION OF THE COMMISSIONER OF EDUCATION

In this case it appears that the School District of the Borough of Cliffside Park had no high school up to the year 1913, the course of study in this district including only the eighth grade. The pupils, after completing the course of study prescribed up to and through the eighth grade, were permitted to attend the Englewood High School, and the Board of Education of the Borough of Cliffside Park paid for their tuition and transportation to the high school grades of the Englewood district. In September, 1912, the Borough of Cliffside Park established a one-year high school course in its own district, with the understanding that the Board would ultimately provide for a full four-year high school course of study.

The appellant in this case had a son, Robert E. Blue, who in June, 1912, completed the eighth year course of study in Cliffside Park, of which borough he is a resident. Robert E. Blue, instead of attending the first year high school in his own district, entered the high school of the City of Englewood, and there pursued his studies in the first year high school. The said Robert E. Blue has continued to pursue his studies in the Englewood high school through the second and third years. In the meantime, Cliffside Park had established a second and third year high school course in its district. The first year high school course in the Cliffside Park school was regularly registered as of one year's work, during the year 1913. In April, 1915, the school was approved as doing three years of high school work.

The rules of the State Board of Education require, before approval can be had of a three-year high school, that there shall be carried on in the district an actual three years of work; that is to say, it is not an approval of a three-year course of study, but an approval of three years of work actually done. It thus appears that Cliffside Park has established an approved three-year high school, the first year of which began in September, 1912. The law provides that any child who shall have completed the course of study pursued in the schools of the district in which he or she shall reside may, with the consent of the Board of Education of such district, have his or her education completed in another district.

The claim made by the appellant is that the cost of transportation and tuition in the case of Robert E. Blue should be paid by the Borough of Cliffside Park, because the school was not an approved school until April, 1915.

It is shown above that the school, under the rules of the State Board of Education, could not be approved until after the actual three-year school had existed. The approval in April, 1915, is evidence that the school in the Borough of Cliffside Park had been maintained as a three-year high school since the year 1912. It therefore follows that Robert E. Blue did not complete the course of study in his own district and, because of this fact, he cannot claim under the law to have the tuition and transportation paid by the district in which he resides for his education in an adjoining district.

The appeal, therefore, is dismissed.

July 28, 1915.

ALLOWANCE FOR TRANSPORTATION OF PUPILS

ELSEY C. POLK,

Appellant,

vs.

BOARD OF EDUCATION OF CENTRE TOWNSHIP,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Charles C. Polk, son of the appellant, completed the grammar school course pursued in the schools under the care of the respondent in June, 1909, and application was made to the respondent that the said Charles C. Polk be assigned to a high school, there being no high school in Centre Township. The respondent assigned him to the high school at Haddon Heights, said high school being the most convenient high school he could attend. He was denied admission to said high school for the reason that the school was full and could not accommodate him. Thereupon, the appellant laid the matter before the respondent at a meeting held September 14, 1909, and at said meeting a resolution was adopted that "Charles C. Polk should attend the Camden High School at the expense of the Board of Education of Centre Township." In pursuance of said resolution, the said Charles C. Polk attended the Camden High School from September, 1909, until June, 1913. It appears that the respondent has paid the entire cost of tuition of Charles C. Polk in the Camden High School, and that the appellant has paid the entire cost of his transportation, amounting to $139.

The appellant presented to the respondent a bill for this amount and payment was refused. The reason assigned for such refusal was that at a meeting held September 22, 1909, the respondent rescinded its action taken on September 14, and adopted another resolution "permitting Elsey C. Polk to send his

son to Camden High School provided he pay the difference in tuition and transportation." In explanation of its action of September 22, the respondent states that the cost of tuition in the Camden High School is $70 per year, and the cost of transportation $40 per year, while the cost of tuition in the Haddon Heights School is $40 per year, and the cost of transportation $20 per year, and claims that the respondent cannot be compelled to pay more for tuition and transportation than is necessary to send a pupil to the nearest high school, and that when a pupil attends a high school other than the one nearest his residence, the difference in cost must be paid by the parents of the pupil.

The appellant prays that the action of the respondent on September 22, 1909, be declared to be null and void, and that the respondent be directed to pay to him the amount expended by him for the transportation of his son to the Camden High School.

The law provides that a board of education shall provide suitable school facilities and accommodations for all children of school age residing in the district and desiring to attend school. It further provides that such facilities and accommodations may be provided in schools within the district, or by the payment of the cost of tuition for a child assigned to a school in another district, and that the district shall also pay the cost of transporting the pupil to and from school, if transportation is necessary.

It is admitted that there is no high school in Centre Township, and that transportation was necessary whether the son of the appellant attended the Camden High School or whether he attended the Haddon Heights High School.

The questions to be decided are:

First. Is the liability of the respondent to be measured by the cost of sending a pupil to the nearest high school, and

Second. Is the appellant bound by the action of the respondent at its meeting on September 22, 1909?

If a district does not maintain a course of study suited to the age and attainments of a pupil it must send such pupil to a school in another district and must pay the entire cost of tuition and transportation. In selecting the school a pupil is to attend, the board should usually select the school most convenient of access by the pupil; provided it has the proper course of study, and a parent has no right to insist that his child shall be sent to another school simply because he happens to prefer it. He may, however ,with the consent of the board of education, send his child to the school he prefers, provided he agrees to pay the difference in the cost of tuition and transportation.

If there had been room in the Haddon Heights school, and the appellant had sent his son to Camden, the respondent would not have been liable for any expense incurred beyond the cost of sending him to the Haddon Heights School.

It appears that the appellant was willing that his son should attend the Haddon Heights School, and that he sent him there, and that he was refused admission by reason of the lack of room. The Haddon Heights School being full, the respondent was compelled to assign the son of the appellant to another school, and, in fact, did so by its resolution of September 14, 1909. The

appellant certainly cannot, under such conditions, be held liable for the increased cost of sending his son to the Camden school. The appellant is not bound by the action of the respondent taken September 22, 1909.

As hereinbefore stated, it was the duty of the respondent to assign the son of the appellant to a convenient high school, and that in pursuance thereof it did actually assign him to the Camden High School. The appellant could not be held liable, except by agreement, for any portion of the expense. There is no evidence that he ever entered into such an agreement.

A board of education cannot compel a parent to pay for the transportation of his child to and from school even though the board agrees to reimburse him. A parent may legally make such an agreement, and such is the general practice, particularly when the transportation is by trolley, but if the parent refuses, the board must purchase the transportation.

If the appellant had not applied to the respondent for tuition and transportation for his son, but had sent him to the Camden school without its knowledge or consent, he would have no claim for the amount expended by him.

If the action of the respondent on September 22 were sustained, the appellant would be compelled to pay a portion of the cost of providing his son with suitable school facilities, or if he refused to advance the cost of transportation, his son would have been deprived of an education to which he legally was entitled.

The appellant performed his full duty when he made the application in 1909, and he was justified in sending his son to the Camden school. He is entitled to be reimbursed by the respondent to the full amount expended by him for the transportation of his son.

May 12, 1914.

ALLOWANCE FOR TUITION AND TRANSPORTATION

WILLIAM W. WALTERS,
Appellant,
vs.
THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,
Respondent.

William W. Giddes, for the Appellant.
A. J. Hamley, District Clerk, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Leslie Vale was suspended from the Dunellen grammar school by the principal on February 28, 1912. His grandfather, William W. Walters, is the appellant in this case.

The reason given for the suspension was that the boy had been continuously disobedient and troublesome in his classes. He had been reported to the principal on several occasions. The principal had visited his mother and tried in various ways to have the boy behave himself properly in school. His suspension was reported to the Board of Education which met on March 5, 1912. The Board at this meeting, by resolution, agreed to hold a special meeting on March 12, in order to give a hearing in the case of the suspension. The boy's mother, Mrs. Lydia Vail, and his grandfather, William W. Walters, were notified of this meeting. The boy appeared at the meeting with his mother, but refused to promise that he would behave himself, whereupon the Board continued his suspension indefinitely. His grandfather, Mr. Walters, entered the boy in the Plainfield school as a tuition pupil in the latter part of March, 1912. The boy has remained in the Plainfield school ever since, and his tuition and transportation have been paid by the appellant. The boy's conduct in the Plainfield school, as reported by the teachers, is greatly improved. No fault has been found with him in this respect. The conditions upon which he was accepted at the Plainfield school were that he must be obedient and respectful to his teachers or he would not be permitted to remain.

This appeal is made to compel the Board of Education of Dunellen to reimburse Mr. Walters for the amount of tuition which he has paid the Plainfield Board of Education and for the amount expended for transportation to the Plainfield school. There has been no request by either the mother of the boy or his grandfather to have him reinstated in the school at Dunellen. The appeal that is made asks not for reinstatement now, but, as stated, for reimbursement for the amount expended for tuition and transportation. At the hearing in the case evidence was given that the boy had been troublesome, and that only as a last resort was he suspended from school. There was no evidence given that there had ever been any attempt on the part of his mother or grandmother to have the boy return to the Dunellen school. It would have been entirely legitimate to have made an appeal to the Commissioner to have the boy reinstated in his own school at Dunellen. Instead, a choice was made of a school in another district, and tuition and transportation were paid by Mr. Walters.

Reimbursement for tuition and transportation paid for attendance in the Plainfield school for an education in the grammar grades which is furnished in the Dunellen school is out of the question. It cannot be done and should not be done. If this could be legally claimed suspension would be inadequate as a punishment and as a thing that would tend to maintain the discipline of the school. The appellant, therefore, has no claim for the payment of tuition and transportation on the Board of Education of the Borough of Dunellen.

The appeal is dismissed.

December 22, 1915.

Decision of the State Board of Education

Appellant's grandson was suspended in March, 1912, from a school in Dunellen, in which place he was a resident. Thereafter he attended a school in Plainfield, and appellant, with whom he resided and by whom he was supported,

seeks an order directing the Board of Education of Dunellen to reimburse him for tuition and transportation charges thereby incurred. From a decision of the Commissioner denying the application this appeal is taken.

For some years prior to March, 1912, the boy was continuously and wilfully disobedient to his teachers and principal.

At a special meeting of the Board of Education of Dunellen held in March, 1912, of which notice was given to the appellant and also to his daughter, the mother of the boy, and at which all three were present, the boy was suspended. No appeal was taken from the suspension and no application was made for reinstatement.

To support his application that he be reimbursed for tuition and transportation charges appellant cites no authority. We know of none. It seems to us that the application is entirely without merit, and to grant it, we believe, would be destructive to school discipline.

In our opinion the Commissioner of Education properly denied it and his decision therefore is affirmed.

April 1, 1916.

APPORTIONMENT FOR TRANSPORTATION

BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH,
Appellant,
vs.
COUNTY SUPERINTENDENT OF SCHOOLS OF MONMOUTH COUNTY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

West Long Branch school district is a borough which was formerly a part of Eatontown Township. While it was a part of the latter township there was a school located in the village of West Long Branch, consisting of two rooms, and a school at Kensington Park consisting of one room. After a portion of Eatontown Township became the Borough of West Long Branch the school located in the borough was enlarged by the addition of two or three rooms, and after the enlargment of the West Long Branch school the primary school at Kensington Park was closed and the children brought from that section to the West Long Branch school.

Allowance for transportation was made by the County Superintendent at first in his apportionment of school moneys, but in the year 1918-19 the County Superintendent refused to allow three-fourths of the cost of such transportation to the district. West Long Branch Board of Education appealed the case to the Commissioner of Education in May, 1919, and decision was rendered on August 8, 1919, by the Commissioner sustaining the County Superintendent in his refusal to apportion the allowance for transportation. Appeal was then

taken from the Commissioner's decision to the State Board of Education, and the State Board in April, 1920, remanded the case to the Commissioner for hearing, instructing him to secure evidence by way of affidavit or oral testimony to determine whether the children now required to attend the school at West Long Branch are so remote as to call for vehicular transportation from their homes in the Kensington Park section. The State Board of Education incidentally advised that the County Superintendent and the local Board of Education consider together whether the increase in the number of pupils in the primary grades warrants a reopening of the Kensington Park school, which was closed some years ago.

A hearing was accordingly held by the Commissioner of Education on November 9, 1920, in the Town Hall at Long Branch, at which the exact conditions were brought out. The testimony of a number of witnesses was taken. First, it was found that there were some ninety-odd children transported from the Kensington Park section to the West Long Branch school, the greater part of whom were in the primary department. At the hearing there were present about forty of these children, ranging in age from five to nine years, all of whom were in the primary grade at the West Long Branch school. Many witnesses, who were parents of children in the West Long Branch school and residents of the Kensington Park section, were called to give testimony as to the necessity for transportation. All of these witnesses testified to the effect that transportation was demanded for their children, and some of the witnesses stated that if their children were to be compelled to walk to the West Long Branch school they would feel obliged to send them to the adjoining school district of Long Branch and pay their tuition themselves.

Much testimony was taken as to the bad condition of the road over which it would be necessary for the children to travel if there were no means of transportation afforded. It was generally testified that a piece of this road extending for about seven-eighths of a mile was bad in the winter time.

The counsel for the School Board showed through the principal that better school facilities could be provided at the West Long Branch school than would be provided if the Kensington school were kept open. These better facilities consisted mainly of playground facilities and supervision. The principal of the West Long Branch school testified that there were 57 children on the roll in one room and that the first and second grades were in that room with one licensed teacher in charge of them, assisted by an unlicensed teacher or monitor.

The question also of reopening the school at Kensington Park was taken up and some of the witnesses stated that they preferred to have the latter school reopened if a good teacher could be obtained.

As a result of all the testimony taken there is but one conclusion that can be reached as to the existing conditions, and that is that these children are because of their ages certainly remote from the school at West Long Branch; and that, if no other school facilities are available in the district, transportation should be furnished.

The other question involved is one of considerable gravity and should be considered from the standpoint of the whole system of education as provided

in the county unit, so far as finances are concerned. The provisions of our school law are such in the matter of financing the schools as to make the county the unit from the standpoint of the public moneys apportioned to the school districts.

The law pertaining to schoolhouses is found in Article X of the School Law (Edition of 1918) and provides in part as follows:

> "Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred and seventeen, one hundred and eighteen and one hundred and nineteen of the act to which this act is an amendment."

Section 117 of the School Law referred to in this quotation provides that:

> "Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school."

Thus it will be seen by the above quoted law that the thing that is mandatory upon a board of education is the furnishing of proper school facilities including schoolhouses convenient of access. When this cannot be done, then the Board must resort to the alternative of furnishing transportation in lieu of the schoolhouses convenient of access.

The schoolhouse in the Borough of West Long Branch is not convenient of access to the children of Kensington Park, and it can only be made convenient of access by means of transportation, which to conform with the law a board of education can be compelled to furnish. Under the existing conditions, therefore, the children residing in the Kensington Park section, and ranging in age between five and nine years, are in the judgment of the Commissioner of Education remote from the West Long Branch school, and under such existing conditions transportation must necessarily be furnished.

Whether the County Superintendent, however, should apportion to the West Long Branch school district three-fourths of the cost of such transportation is altogether a different question. It is for the County Superintendent in his discretion to determine whether there is necessity for such transportation such as to justify him in apportioning three-fourths of the cost thereof.

There is a school at Kensington Park, a primary school, erected for the very purpose of accommodating the children of that section when it was a part of Eatontown Township. It was provided because this section was a center of population and because it was remote from other schools in Eatontown

Township. When the borough was formed Kensington Park still remained a growing center of population, so that according to the records there are ninety or more pupils transported from this section to the West Long Branch school.

The question then, though apparently involved, is really a simple one. It is this: When a school is closed in a center of population and the children are transported to a school two miles more or less distant, shall the County Superintendent apportion the county school moneys to such school district, when it chooses to close a school at a point where many children reside? There is no question as to the right of a board of education to close a school and have the children transported to another school; it is thus furnishing, as the law commands, school facilities by taking the children to a distant school rather than having the school placed so as to be convenient of access to the children. When the county funds are apportioned, however, the question arises immediately as to the right of the county to furnish proper school facilities in such cases.

At the hearing before the Commissioner of Education the County Superintendent of Schools plainly gave it as his opinion that the school at Kensington Park should be reopened for the primary children, thus obviating the necessity of transportation to the West Long Branch school. This, it appears to the Commissioner, is sound administrative judgment. If a board of education chooses to locate its schools in such places as to make transportation of pupils necessary, then such board should provide the transportation itself, which would be carrying out the general provisions of law which require the furnishing of proper school facilities either by bringing the school to the children or the children to the school.

With this view of the case, it is the judgment of the Commission of Education that the County Superintendent of Schools of Monmouth County acted with sound discretion in concluding that the necessity for transportation was of the Board's creation and was not such necessity as the law contemplated when it provided for apportionment of school moneys in part payment of transportation. The Commissioner therefore concurs in the conclusion reached by the County Superintendent in his refusal to apportion three-fourths of the cost of transportation to the school district of the Borough of West Long Branch.

December 22, 1920.

BOARD OF EDUCATION MAY FIX RATE OF HIGH SCHOOL TUITION PROVIDED IT DOES NOT EXCEED ACTUAL COST

DELRAN TOWNSHIP BOARD OF EDUCATION ET AL.,

Appellants,

vs.

MOORESTOWN TOWNSHIP BOARD OF EDUCATION,

Respondents.

For the Appellants, Herbert S. Killie.
For the Respondent, Walter G. Carson.

DECISION OF THE COMMISSIONER OF EDUCATION

Chapter 301, P. L. 1933, provides that when pupils living in a district which lacks high school facilities are sent to a district having such facilities, "* * * the board of education of a district containing such high schools shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto; provided, however, that such amount shall in no case exceed the actual cost per pupil * * *" Under this provision the Board of Education of Moorestown fixed a tuition rate of $118 for pupils attending Moorestown High School during the school year 1932-1933.

Each school district maintaining a high school is required to make a report upon forms in accordance with rules prescribed by the State Board of Education, setting forth the various items of expense incurred in the maintenance of such school. The Commissioner of Education requires the county superintendent of the county in which the high school is located to audit these reports. The report filed by the Board of Education of Moorestown for the year ending June 30, 1933, shows a per capita cost for tuition purposes of $117.69. The County Superintendent of Schools of Burlington County, in auditing it, decided that the cost had not been determined in accordance with the rules. He, therefore, refused to approve it and submitted a separate report which established the cost at $101.25.

The Moorestown High School building also houses pupils below the high school grades and the application of certain rules in reference to the division of costs between the high and elementary grades has caused most of the differences in these two reports. Since the statute above quoted provides that a board of education may not charge a tuition rate in excess of the actual cost and respondents' report has not been approved, the appellant Boards have petitioned the Commissioner to determine to what extent the cost reported by the Moorestown Board of Education exceeds the actual cost of education for tuition purposes.

At a hearing of the case in the Mount Holly Court House on June 28 and 29, 1934, counsel for appellants made special objection to the Board's method of computing the cost in the following items:

1. Agricultural courses
2. Salaries of high school principal and clerical assistant
3. Salaries of the supervisory and special teachers
4. Salary of school nurse
5. Library operation
6. Manual training and domestic science instruction
7. Rent

1. Objection is made to the inclusion of the agricultural teacher's salary because the district received both Federal and State contributions for the major part of it. It is admitted that the agricultural course is for high school pupils only. The Commissioner of Education, in the case of Ventnor City Board of Education *vs.* Atlantic City Board of Education, page 1025, 1932 Compilation of School Law Decisions, held that high school costs are to be determined by the gross cost of education without regard to the source of revenue. This decision was affirmed by the State Board of Education. Moreover, Rule No. 1 reads as follows: "All expenditures for each item specified shall be charged regardless of source of revenue." The cost of agricultural instruction was therefore legally included in determining the tuition rate.

2. Appellants content that the salaries of the high school principal and her clerical assistant were not properly allocated. The testimony clearly shows that the high school principal devotes her entire time to high school administration and supervision. Her salary is, therefore, properly included as a high school cost. The time of the high school clerk is not divided between high and elementary school duties, but a part of it is devoted to work of the Board of Education and there is charged to high school costs only that part of her salary that the time she devotes to the high school bears to the total time of her employment. This is a proper charge.

3. Counsel for petitioners holds that salaries of teachers whose time is divided between teaching in the high school and supervision in the grades should be apportioned between high and elementary costs in accordance with Rules 2-B and 2-C and not as charged by the Board of Education on the time basis. Rule 2-B provides for the division of the salary of a supervisor and Rule 2-C provides for the division of the salary of a teacher. There is no rule which states how the salary shall be divided when a person teaches in the high school and supervises in the grades. It must be readily seen that Rule 2-B or 2-C does not apply to the conditions existing at Moorestown and, furthermore, there is no other rule applying to this situation. The application of Rule 2-B or 2-C would be unfair; for example, a person teaching in a high school any period each day of a week would come into contact with approximately twenty-five pupils, whereas, by supervising for a like period during a week in the elementary grades she would meet 150 pupils. Her salary, therefore, could not be justly allocated in proportion to the number of pupils taught and supervised. In the absence of a rule, the salaries of those

employees were apportioned on the time basis, and this appears to be the only reasonable course to be followed. Exception was also made to the fact that the Board in determining the daily employment of teachers, included in some instances certain assignments outside the regular school hours. It, however, did not include the time which teachers use at their own discretion for the aid of pupils or work at the school, but only that time specifically required by the Board of Education or by the supervising principal with the acquiescence of the Board. Such required working hours of a teacher may be used in determining the part of her salary to be included in the high school costs when some of her time is devoted to elementary school work.

4. Counsel for appellants objects to the inclusion of a part of the nurse's salary as a high school teacher because she teaches certain subjects in the high school. The salary of the nurse is included among other items under "co-ordinate activities" and apportioned to high and elementary school costs on the pupil basis. Since more of the time of a medical inspector, dentist, and nurse is usually devoted to elementary pupils, counsel's objection is sustained and, accordingly, the extra allowance for teaching in the high school is denied.

5. Petitioners maintain that since the library is used by both high school and elementary pupils, the cost of it should be allocated upon the basis of high and elementary pupils enrolled in the high school building. The Moorestown Board employs a librarian solely on account of high school needs and does not employ one in any of its grade schools. The testimony shows that the time of the librarian is devoted almost entirely to the high school and only a small part of it is devoted to pupils of the grades. Eleven per cent of the books used outside of the library were taken out by grade children. The library is necessary for the approval of the high school by the State Board of Education, is maintained for high school purposes, and renders only incidental service to the other school pupils. It should, therefore, be classified as a high school library. However, the Board charged fifteen per cent of the librarian's salary to the elementary school, which is a liberal allowance for the use of it by grade pupils. Accordingly, no change is made in the library cost included under "auxiliary agencies."

6. The district clerk determined the high school cost of manual training and domestic science under the provisions of Rule 3, which appellants hold to be in error. This cost should have been fixed under Rule 2-C on the basis of pupils taught rather than proportionate time. This change reduces the high school cost in this item by $600.42 or $.83 per capita.

7. Rent is also held to exceed a legal charge. It appears that a few years ago the County Superintendent and the Moorestown Board of Education agreed upon $220,530.38 as representing the value of the property used for high school purposes. The testimony, however, shows the original cost of the buildings and improvements to be in excess of $245,781.23. While the Board adopted the former amount for the basis of the rental charge, it is legally permitted to use the total cost. In determining the floor space chargeable to the high school there were included, on a percentage basis, several rooms that were used by both high and elementary pupils, contrary to Rule 4-A. This rule, however, classifies auditoriums and libraries as common service rooms

whereas the testimony in this case shows that the auditorium and library are substantially high school rooms. Appellants' counsel opposes the inclusion of the rent for the community house, but his argument appears to be upon matters not set forth in the testimony. This building is used for school purposes exclusively by high school pupils and the rental cost was erroneously divided in the Board's report between the high and the elementary grades. The entire rent for this building is a legitimate high school cost. There must be deducted from the rental computation the rooms used more or less in common; but in view of the cost of the high school property, the almost exclusive use of the auditorium and the library by high school pupils, and the rent paid for the high school use of the community building, it is evident that the rental charge fixed by the Board of Education was considerably less than that permitted by the rules.

The County Superintendent of Schools, believing it to be his duty to use only the rules prescribed by the State Board of Education and to appliy them strictly, reduced the Board's high school costs in several of the above mentioned items. Some of these reductions are at variance with the above rulings of the Commissioner. This is largely due to different interpretations of the rules. When a rule has application technically, but not practically, it should be very liberally construed to reach a just determination, and where there is no rule definitely applying to an existing condition a reasonable one should be adopted.

There is not the slightest evidence of intention on the part of the Moorestown Board of Education to take advantage of the sending district in determining the tuition cost. In one or more instances the proper rule is not followed by the Board but in such cases the method used to determine the cost was reasonable and just. The computations under such rules have, however, been corrected to comply with those of the State Board of Education. In several instances the computations were in favor of the sending district rather than the Moorestown Board.

It is argued that tuition pupils are not able to benefit by some of the after-school activities and services because of the early departure of the transportation buses. Sending boards control the time that their pupils are required to leave, but even if they could not determine the bus schedules, the district maintaining the high school has a right to control its program which is offered tuition pupils. The charge for a pupil is not determined by the course the pupil takes, but by the per capita cost of the high school with the course of study approved by the State Board of Education and the extra curricular activities provided by the board maintaining the school.

The overcharge by the Moorestown Board of Education in fixing the high school costs for manual training and domestic science is fully offset by the undercharge in the amount for rent. The rules of the State Board of Education for the determination of high school tuition costs appear to have been equitably applied in determining the tuition rate for the school year 1932-1933. The Board of Education of Moorestown is, therefore, entitled to the tuition fee established in its report which is $117.69. The appeal is accordingly hereby dismissed.

November 30, 1934.

ESTOPPEL FOR DISTRICT'S CLAIM OF HIGHER TUITION IN ABSENCE OF CHANGE IN TERMS

BOARD OF EDUCATION OF THE BOROUGH OF LODI,

Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF GARFIELD,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

This case, a hearing in which was conducted by the Assistant Commissioner on April 21, 1927, in the City of Hackensack, reveals the following facts:

The School District of the Borough of Lodi, which has grammar schools of its own but no high school, has for a number of years been sending its high school pupils to other districts including the City of Garfield at an annual tuition charge, which up to and including the school year 1925-26 was fixed by the Board of Education of the latter district at $100 per student, payable quarterly at the rate of $25 per pupil. On September 7 at the opening of the school year 1926-27 there were presented for enrollment in the Garfield High School approximately 123 pupils from the Borough of Lodi, who were accordingly accepted and enrolled by the former district. On or about September 9 the Lodi Board of Education received a letter from the secretary of the Garfield Board to the effect that the tuition rate for high school students for the year 1926-27 would be $130 per annum representing the actual cost per pupil of maintaining the high school. There then arose a dispute between the two districts as to whether the Lodi Board was legally bound to pay $100 or $130 as a tuition charge per pupil, but on January 25, 1927, the clerk of the Lodi Board was informed by letter by the secretary of the Garfield district that payment for the Lodi pupils would be accepted at the $100 rate until decision in the controversy be rendered by the Commissioner of Education, with the understanding that the excess be paid by the Lodi district should the decision be adverse to its claim.

There appears to have been no dispute between the two districts in question as to whether the $130 rate was a just one but only as to whether or not an argreement was already entered into for the school year 1926-27 at the lower rate of $100. Hence the controversy is one to be determined by the Commissioner rather than by the State Board of Education in the first instance.

In the Commissioner's opinion the matter is entirely what Ansen in his work on Contracts describes as "a tacit contract" between the two districts for the school year 1926-27, a contract in which "conduct may take the place of written or spoken words, in offer, acceptance, or in both * * * the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case."

The Lodi Board of Education offered approximately 123 pupils on September 7, 1926, for enrollment in the Garfield High School and the pupils in question were accordingly accepted and enrolled by the latter district, thus constituting a tacit contract between the two districts for the year 1926-27. In determining what were the terms of that contract including the rate of tuition, etc., an analogy may be drawn from contracts of employment described in 26 Cyc. 967, in which it was held that "When one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract." Likewise it is a well recognized legal principle that "An existing state is presumed to continue" (Stevens' Digest of the Law of Evidence, page 477). From the continuance on September 7, 1926, after the expiration of the preceding school year, of the arrangement or contract relationship between the two districts as to high school pupils, with no stipulation at that time of any new or different terms there arises a presumption that the terms of the original contract including the $100 per pupil tuition rate were intended by the contracting parties to continue for the school year 1926-27. The Equitable doctrine of estoppel by conduct may also be invoked in a case of this kind since, as it was held in the case of Church *vs.* Florence Iron Works, 45 N. J. L. 153, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

It is therefore the opinion of the Commissioner that the acceptance and enrollment by the Garfield Board of Education on September 7, 1926, of the high school pupils from Lodi, with an entire absence of any specified change of conditions or terms from those of the preceding year, raised a conclusive presumption of a continuance of the terms of the original agreement including the $100 per pupil tuition rate, upon which continuance of terms the Lodi Board of Education was justified in relying and which the Garfield Board is accordingly estopped from denying.

It is also the Commissioner's opinion that while the Garfield Board was not legally bound to notify the Lodi Board of any change in the tuition rate in time for the making up of the annual budget by the Lodi district in February but only in time for the enrollment of pupils in September, it should nevertheless be made a practice by receiving districts to notify the sending districts of any change in the terms of admission of tuition pupils, if not in time for the making up of the annual budget, at least as early as it is possible to do so.

The appeal is accordingly hereby sustained and the Garfield Board of Education is ordered to accept for the year 1926-27 the $100 per pupil tuition rate offered by the Lodi Board of Education.

April 27, 1927.

DECISION OF THE STATE BOARD OF EDUCATION

The Lodi school district for a number of years has sent some of its high school pupils to Garfield at an annual tuition charge which, up to and including the school year beginning in September, 1925, was $100 per student. On September 7, 1926, one hundred and twenty-three of these pupils from Lodi were accepted and enrolled by the Garfield Board of Education. On September 9, the Lodi Board received a letter from the secretary of the Garfield Board, stating that the tuition for the current year would be $130 per pupil. After some argument between the two Boards, the Garfield Board agreed to accept payment at the rate of $100 per pupil until the Commissioner of Education could decide the controversy with the understanding that if the decision should be in favor of Garfield, the Lodi district would pay the excess of $30.

The dispute is not whether the $130 rate was just but simply whether or not, on September 9, a contract had been consummated at the rate of $100 per pupil which the Garfield Board did not have the right to cancel or amend. The Commissioner has held that although there was no written agreement, there was a "tacit contract" existing by reason of the course of conduct of the two districts, particularly including the acceptance and enrollment of the Lodi pupils on September 7, 1926, and that by reason of the continuance of the former arrangement with no stipulation of any new or different terms, there arose a presumption that the terms of the original contract, including the $100 per pupil, were intended to continue for the school year 1926-27, so that the Lodi Board was justified in relying upon that agreement and the Garfield Board was estopped from denying it.

Counsel for both Boards were given the opportunity to be heard and to file briefs but they rested the case on the papers and proceedings before the Commissioner so that this Committee has not had the benefit of briefs or argument.

After careful consideration of the appellant's grounds for appeal, we can find no error in the Commissioner's decision but on the contrary agree with his conclusions and therefore recommend that the decision be affirmed.

November 5, 1927.

STATE BOARD OF EDUCATION MAY FIX TUITION COSTS FOR PUPILS IN ELEMENTARY SCHOOLS

BOARD OF EDUCATION OF THE DISTRICT OF SOMERDALE,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE DISTRICT OF HI NELLA,

Respondent.

BEFORE THE STATE BOARD OF EDUCATION

DECISION OF THE STATE BOARD OF EDUCATION

This is a dispute between two districts as to what is a proper rate for tuition for elementary school pupils from Hi Nella who are to attend the school in Somerdale and, pursuant to statute, application has been made to the State Board of Education to fix the rate.

It appears that some time ago the two districts were one. A new district was created. Somerdale District, in which the school is located, is practically surrounded by Hi Nella. The latter district has no school of its own and has hitherto sent its pupils to Somerdale.

Tuition charges by Somerdale to Hi Nella were $70 per pupil in 1934-1935. In 1935-1936 the rate fixed by Somerdale and apparently acquiesced in by Hi Nella was $68 for each pupil.

For the ensuing school year Somerdale demands $65 per pupil which sum Hi Nella deems excessive and threatens, unless a rate satisfactory to it is established, to withdraw its pupils and send them to another district. To do this it would have to transport its pupils about two and one-half miles, while the Somerdale school is within a few hundred feet. Under these conditions we would deprecate the approval by the State Department of such transportation and casting 75% of its cost upon the State. The rate of $65 is based upon a computation of costs to Somerdale by the County Superintendent.

If the State apportionments to each district are considered, the net cost to each district is about equal, namely, a little more than $50.

In determining the "actual cost" of high school tuition the State apportionments are not considered. See Board of Education of Ventnor City *vs.* Board of Education of Atlantic City, School Law Decisions (1932), page 1025. We see no reason why a different method should be applied in ascertaining actual cost in elementary schools. At the hearing accorded the parties to this controversy Hi Nella district was not represented. It appeared from the statements adduced by Somerdale that the cost of tuition for the year 1936-1937 would be substantially the same as during the previous year. We recommend that the Board fix the tuition for pupils from the district of Hi Nella attend-

ing the elementary school in Somerdale during the year 1936-1937 at $65 per annum, per pupil.

September 12, 1936.

ACTUAL COST OF HIGH SCHOOL TUITION IS DETERMINED TO BE GROSS COST

BOARD OF EDUCATION OF VENTNOR CITY,
ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF ATLANTIC CITY,
Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

On June 30 ,1931, the Board of Education of Atlantic City adopted the following resolution:

> *"Be It Resolved,* That the tuition fee for non-resident pupils for the school year 1931-32 be and the same is hereby fixed as follows:
> "For high school and elementary school students, $225 per pupil.
> "For boys and girls vocational school students, $175 per pupil."

Appeals contesting the right of the Atlantic City Board of Education to charge a high school tuition fee of $225 per pupil were brought by the school districts of Ventnor City, Margate City, Northfield City, Absecon City, Linwood Borough, Galloway Township, and Weymouth Township. At the hearing in the case conducted in the Administration Building of the Board of Education, Atlantic City, on July 17, 1931, the School District of Weymouth Township withdrew its appeal and it was agreed that the remaining appellants submit their synonymous appeals as one case.

The testimony discloses that for some time prior to the resolution of June 30, 1931, the Board of Education of Atlantic City had charged a tuition fee of $175, and, therefore, this action of the Board increased the per capita cost $50. It is the contention of the appellants that the charge of $225 exceeds the actual cost per pupil and is a violation of the provisions of Chapter 281, P. L. 1929, which reads in part as follows:

> "The Board of Education of districts containing such high school shall determine the tuition rate to be paid by the Boards of Education of districts sending pupils thereto; provided, however, that such amount shall in no case exceed the actual cost per pupil."

Since it is impossible to determine the actual cost per pupil for the school year 1931-32 in advance of June 30, 1932, the closing date of that fiscal year, it was agreed by counsel that the statistical report for the school year 1930-31 should be used to determine the actual cost per pupil for that year and the method of arriving at the actual cost per pupil, and that the findings in relation to 1930-31 should thereupon be applied to the costs for 1931-32.

Under the method of determining the cost of education for tuition purposes under Form No. 11 of the State Department of Public Instruction, the per capita cost of education in the Atlantic City High school for the year 1930-31 was shown to be $244.98. Counsel for appellants contends that the form does not disclose the "actual cost per pupil," but shows the gross cost per pupil, including a rental charge, which he asserts should not be included, and that it makes no provision for the deduction of State high school apportionments. He maintains that the "actual cost" means net cost to the district exclusive of State apportionments and that the five per cent rental charge is an arbitrary amount which should be borne entirely by the local district.

The points to be considered in this case are:

1. Is the five per cent rental based upon the actual cost of the school plant a legitimate part of tuition costs?
2. Does "actual cost" mean the entire cost for tuition purposes as determined by the forms used by the State Department of Public Instruction, or the net cost which the local district pays in excess of any funds received by it from the State for high school education?

The opinions of some authorities on school administration, in reviewing New Jersey's formula for determining high school costs for tuition purposes in relation to rental charges, are as follows:

M. L. Englehardt, Teachers College, Columbia University—

"Tuition should be computed upon real cost. The cost of education should include with current expense a charge for the use of the school plant."

John K. Norton, Director, Research Division, National Education Association—

"Use a rental charge of five per cent on building for twenty years after erection, then calculate rental charge on the basis of a reasonable rate on the appraised value of the building thereafter."

H. P. Rainey, Supervisor of Education, University of Oregon—

"Increase five per cent rental charge to seven per cent. The rental charge should be computed upon the basis of replacement cost of building rather than upon the original cost of the building."

C. M. Reinoehl, Supervisor of School Administration, College of Education, University of Arkansas—

"In addition to the five per cent rental charge the interest on any outstanding bonds should be computed and pro-rated. Maintenance cost should also be included."

The State Board of Education in determining the cost of education under acts in effect prior to the passage of Chapter 281, P. L. 1929, has consistently used the five per cent rental charge. The Commissioner of Education in discussing the rental charge in the case of Boards of Education of the School Districts of the Borough of Alpha et als. *vs.* Board of Education of Phillipsburg held:

"The Commissioner considers that the five per cent rental charge is fair to both the sending and receiving districts. A fireproof building may be bonded for a period of forty years and the building should render service for at least a period of fifty years. If the district borrows its money at 4¾% and pays the bonds in equal annual installments over the period of forty years with an allowance of 1% for the upkeep of the building, it will cost the district maintaining the school annually 4.95% of the original cost.

"As an illustration of the percentage cost under the conditions set forth, an original cost of $100,000 for a school plant would itemize as follows:

Land, building, and equipment	$100,000	
Interest over a 40-year period	97,375	
Repairs and upkeep during 50 years	50,000	
Total cost to the district for a period of 50 years	$247,375	
Annual cost during 50 years	4,951	
Annual percentage on the original cost	4.95	= 4.95%
The annual percentage cost of a building when the bonds bear interest at 5% under the same conditions as above would be	5.05	= 5.05%

"While a higher percentage may be allowed for the upkeep of the building through a fifty-year period, it is fair to assume that the value of the building at the close of the fifty-year period would at least be equal to the additional upkeep cost. * * *

If rental charges were not used rather than the amortization and interest payments, a district which has paid all the bonds and interest upon its building could not charge a sending district more than the maintenance cost. Such a method would be unfair to the receiving district. On the other hand, a school district with the aid of sending districts could pay for a school building during a short term which would make a high annual cost to the sending district and, when all bonds were paid, it might show an enrollment in excess of the capacity of the building and accordingly exclude pupils from other districts so that the sending district which had contributed largely to the cost of the building, would be denied its use after the cost of the building had been paid. The rental charge eliminates the cost of repairs, replacements, interest on bonds, and annual bond payments, and overcomes the fluctuating charges and by overcoming the fluctuating charges provides a more stable annual cost."

The statement in the argument of counsel for appellants that boards erect high schools for the pupils of their respective local districts only, is true in very few places in the entire State. Nearly all receiving districts when planning high school facilities take into consideration the needs of neighboring districts which do not maintain high schools. The sending districts are required to pay only their proportionate share of the rental charge. A reasonable rental charge is legitimately a part of the cost of tuition.

The State apportionments for schools differ in this case from those in the Phillipsburg case. Because of the valuable seashore property in Atlantic County a greater sum is paid by it into the State School Tax, and as 90% of the amount raised is returned to the county, this amount makes for the small school population of that county a higher per diem apportionment for the attendance of pupils. Atlantic County's apportionment for each day of school attendance is higher than that of any other county, more than double the apportionment of most other counties, and about eight times the apportionment of most of the rural counties. The effect of interpreting "actual cost" as net cost in relation to Atlantic City can, therefore, best be shown by comparing it with other high schools of that county.

The high school cost for tuition purposes in the City of Pleasantville for the year 1928-29 (which was before the erection of the present new high school) including the rental charge of 5% was $92.78. If the cost of education in that district is to be determined by deducting the State apportionments, Pleasantville could have charged only $35.80; and since districts sending puplis to Pleasantville High School during that year received a State apportionment of $40 per capita, the State apportionment would have exceeded the tuition charge, and, therefore, the sending districts could not only have paid the entire tuition charge from the State apportionment, but would have had remaining ($40.00 — $35.80) $4.20 for each pupil sent.

In Egg Harbor City, the cost of tuition in the high school for the year 1930-31 was $162.03. Deducting the State aid, the net cost to the district would be $101.52. If the sending district could be required to pay only the net cost of $101.52, the cost to the sending district would be $101.52 less $60.00 (the State apportionment to the sending district for each high school pupil) or $41.52. Therefore the net cost for each pupil living in Egg Harbor City would be $101.52 and the net cost to the sending district would be only $41.52.

Practically the same situation would be found in Hammonton. The high school tuition cost for 1930-31 as determined by the State Department form is $165.65, but if State high school apportionment received by Hammonton is deducted, the per capita would be $112.09. The sending districts would, therefore, pay under the net cost plan $112.09 less $60.00 or $52.09.

In the tuition costs of Atlantic City for the year 1930-31, upon which facts this case is to be decided, the high school tuition cost in accordance with the State form is $244.98. If the State apportionments were deducted, the net pupil cost would be $187.92. The sending district would, therefore, pay the net sum of $187.92 less $60.00 or $127.92. It is evident in a study of the apportionment of school moneys of this State that the Legislature provided a per capita apportionment to sending districts to offset the apportionment for

teachers and days' attendance made to receiving districts, and it was not the intention of the Legislature to deduct State apportionments in order to arrive at the "actual cost" of education. If we were to go into the sources of revenue for the school district, we might go back further to the sources of revenue to the State, which would show that Atlantic City actually pays to the State more than two-thirds of the State School Tax for Atlanic County. This tax makes possible a large per diem apportionment for attendance in Atlantic County for both elementary and high schools.

High school education costs a certain amount regardless of the source of revenue. The amount the district expends is the actual cost. The Legislature gives districts power to fix the tuition rate, but in order that they might not make an arbitrary charge and approximate the probable cost, it limited their maximum charge to the actual cost. The Commissioner in reviewing the "actual cost" in the Phillipsburg case held:

> "Chapter 281, P. L. 1929, states that the board of education shall determine the tuition charge provided it does not exceed 'the actual cost per pupil.' Whether the State contributes some of the funds or whether there are private contributions to the school funds cannot be considered unless the low provides that the charge shall not exceed the net cost to the district after deducting State or other appropriations. The act says 'actual cost per pupil.' It does not say 'actual cost to the district.' If the Legislature had intended the rate to be the net cost, it would have made such intention clear by saying 'net cost' or 'the cost to the district after deducting appropriations received for high school purposes from the State appropriations.' It is the Commissioner's opinion that actual cost does not contemplate any deduction from the per capita cost as determined in accordance with the forms prescribed by the Commissioner of Education. It would be unfair to the receiving district to deduct State appropriations from its costs and fix the tuition fee at a net cost when there is no method by which a deduction can be made from the direct State appropriation of $60 to the sending district for each pupil attending high school in another district."

Since the tuition fee for the year 1930-31 fixed by the Atlantic City Board of Education for high school pupils does not exceed the "actual cost" as determined in accordance with the form provided by the State Department of Public Instruction, the charge is legal and binding upon all boards sending pupils to the Atlantic City High School. The appeals in this case are, therefore, hereby dismissed.

September 30, 1931.

Affirmed by the State Board of Education without written opinion March 5, 1932.

INADEQUATE ACCOMMODATIONS GOOD GROUNDS FOR EXCLUSION OF TUITION PUPILS

BOARD OF EDUCATION, TOWNSHIP OF EVESHAM,

Appellant,

vs.

BOARD OF EDUCATION, TOWNSHIP OF MOORESTOWN,

Respondent.

For the Petitioner, Herbert S. Killie.

BEFORE THE STATE BOARD OF EDUCATION

DECISION OF THE STATE BOARD OF EDUCATION

The Township of Evesham, in the County of Burlington, has no high school within the school district comprising the township. Since some years before 1929, it has been sending its high school pupils to the high school in the Township of Moorestown. On May 17, 1934, the Board of Education of Moorestown notified the Board of Education of Evesham that after the end of the school year 1933-1934, it would no longer accept high school pupils from the School District of Evesham. Thereupon the Board of Education of Evesham filed its petition with this Board, setting up, among other things, that such conclusive action by the Board of Education of the Township of Moorestown was taken without good and sufficient reason, and without the approval of the Commissioner of Education or, otherwise, the State Board of Education, and that by reason of the threatened action on the part of the Board of Education of the Township of Moorestown, the students of the Township of Evesham may be wholly without high school facilities for the school year 1934-1935, and the petition requested a hearing.

The Board of Education of the Township of Moorestown filed no formal answer, but appeared at a hearing before the Law Committee of this Board, at which evidence was submitted by both parties.

It appears conclusively that the high school at Moorestown is overcrowded; that the attendance during the past year was 830, whereas there is accommodation for not more than 650; that the average teacher load is considerably in excess of what is deemed the standard, and the average teacher pupil hour load per week is also greatly excessive; that in order to relieve this situation, the Board of Education at Moorestown determined to reduce the number of non-resident pupils and to that end notified three school districts to that effect. These facts were corroborated by Assistant Commissioner White, who after a survey of the Moorestown High School in February, called attention

to the overcrowded condition and its tendency to impair the quality of administration and instruction in the school. These facts were not controverted by the Board of Education of Evesham, and it bases its claim for relief upon the assumption that it will have difficulty in placing its high school pupils in other districts. It also calls attention to Chapter 301 of the Laws of 1933, which is a supplement to Chapter 281 of the Laws of 1929, which act provides that a school district which lacks or shall lack high school facilities for its children may designate any high school or schools of this State as the school or schools which the children of such district are to attend, and that after such designation, such district may not change the designation unless the Commissioner of Education approves. The act further provides that in the event the Commissioner shall refuse such approval of a district to make a new designation, the district may appeal to the State Board of Education. It further provides that where the Commissioner of Education shall approve such new designation, the receiving district may appeal from such determination to the State Board of Education. The act, however, in Section 1, excepts from its operation school districts which have "heretofore designated high schools located outside said districts for the children thereof to attend, and which school districts are referred to and are regulated in this particular in and by the act to which this act is a supplement." By this exception it would seem we are relegated to the act of 1929 (Chapter 281). But this act has been declared unconstitutional by the Supreme Court (Hazleton Custodian, etc., *vs.* Cranmer, Collector, etc., 11 Misc. 744).

We are of the opinion that neither the 1929 or the 1933 acts are applicable to the present controversy.

By paragraph IV of Article One of the School Law, the State Board of Education is given power to "require any district having the necessary accommodations to receive pupils from other districts at rates agreed upon or which it may fix in the event of disagreement." After careful consideration of the evidence submitted, we conclude that the School District of Moorestown has not adequate accommodations to receive pupils from the School District of Evesham, and that its action in declining to accept such pupils after June 30, 1934, is justified. We recommend that the appeal of the Board of Education of Evesham be **dismissed.**

August **7, 1935.**

BOARD CANNOT BE REQUIRED TO RECEIVE TUITION PUPILS FOR ANY YEAR WHEN TUITION FOR PRECEDING YEAR IS UNPAID

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT,
Appellant,
vs.
BOARD OF EDUCATION OF ATLANTIC CITY,
Respondent.

For Appellant, E. A. Higbee, Jr.
For Respondent, Ralph Harcourt.

DECISION OF THE COMMISSIONER OF EDUCATION

A stipulation entered into by attorneys for appellant and respondent shows that for a number of years the Board of Education of the City of Somers Point has sent tuition pupils to the Atlantic City High School and Vocational School and that at the close of the last school year on June 30, 1935, the appellant owed the respondent $990 for such tuition which is still owing and unpaid. Respondent notified the appellant that it would not accept pupils at the opening of school on September 11 unless prior thereto the tuition fees for the preceding year were paid; whereupon, the Somers Point Board on that date delivered a warrant in the amount of $990 payable to the Atlantic City Board of Education with interest at 6% until such time as funds were available for its redemption. It is admitted that sufficient funds are not now available for this purpose. Respondent refused to accept the warrant and continued its refusal to admit the pupils under a new contract until the obligation for the preceding year was paid in cash.

It is contended by appellant that Chapter 261, P. L. 1935, prohibits a board of education from excluding pupils if an interest bearing warrant has been issued to the receiving board. This statute refers only to those cases where pupils have been received by a board of education and has no application in the instant case in which the pupils have been refused admission.

While the State Board of Education may under Chapter 46, P. L. 1922, Section 2, Article IV, require a board of education having the necessary accommodations to receive pupils from other districts, it is the opinion of the Commissioner that unless the admission of the pupils is made mandatory under this statutory provision, the Atlantic City Board of Education cannot otherwise be required to accept tuition pupils from the School District of Somers Point.

September 18, 1935.

SALUTE TO THE FLAG AT THE OPENING EXERCISES OF A SCHOOL

FRED TEMPLE,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE,

Respondent.

Fred Temple, *pro se.*
The Respondent, Mr. Jacobus, President of the Board.

DECISION OF THE COMMISSIONER OF EDUCATION

The only questions before me for decision are the resolutions adopted by the Board of Education of Cedar Grove Township, prescribing the pledge to be used at the morning exercises in a salute to the flag, and the suspension of the son of the appellant for failure to repeat this pledge.

A board of education has the right, under the law, to make rules and regulations for the government of the school, to prescribe the course of study, and, when it deems advisable, the character of the opening exercises. Its action, however, must be reasonable, and must not impose an undue hardship on any pupil.

The respondent in this case has evidently adopted the rule relating to a salute to the flag in accordance with a suggestion made some time ago by County Superintendent Meredith, which suggestion was in compliance with a rule of the State Board of Education. The rule directed the County Superintendent to see that the law requiring the display of the flag during school hours was observed, and further to recommend to the schools, wherever advisable, that a salute to the flag be made at the opening exercises. The latter part of the rule of the State Board of Education is not mandatory, and, therefore, has no force of law.

I think if a pupil is present at the opening exercises, it is his duty to salute the flag. It is a mark of respect that any decent man or boy would use, no matter what country he was in. But I think that this goes further. It reads:

> "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice to all."

That is certainly a pledge of allegiance to the United States. The son of the appellant is not a citizen of the United States. His citizenship must follow the citizenship of his parents until he becomes of age, when he may choose his own; but until that time his citizenship must follow that of his parents. I think, therefore, that if the child salutes the flag, and does not repeat this pledge, that he is doing all that can reasonably be expected of him; and that

a board of education has no right to ask a child to pledge allegiance to the flag of a country of which he is not a citizen.

The appeal is sustained, and the son of the appellant must be admitted to the school.

November 8, 1912.

PUPILS WHO REFUSE TO SALUTE FLAG AS REQUIRED BY STATUTE MAY BE LEGALLY EXPELLED

JOHN HERING and ELLA HERING AS PARENTS AND GUARDIANS OF ALMA HERING and VIVIAN HERING, MINORS, and JOHN HERING and ELLA HERING, INDIVIDUALLY, and ALMA HERING and VIVIAN HERING, INDIVIDUALLY,

Petitioners,

vs.

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,

Respondent.

Isserman & Isserman, for Petitioners.
George W. King, Jr., for Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The stipulation of facts in this cause shows: All of the petitioners are citizens of the United States and residents of the Town of Secaucus; Alma and Vivian Hering are between the ages of 7 and sixteen and 5 and 7, respectively; prior to the first day of November, 1935, Alma and Vivian were enrolled in the free public schools of Secaucus under the jurisdiction of the respondent Board of Education; said Hering children were expelled from school on November 15, 1935, for refusal to salute the flag and pledge allegiance when requested to do so by their respective teachers; as a result of such expulsion they have been unable to attend classes in the public schools of Secaucus; John and Ella Hering are financially unable to have their children attend a private day school in which instruction is given equivalent to that provided in the public schools or to obtain for them equivalent instruction elsewhere as required by Chapter 307, P. L. 1931; the following pledge of allegiance is required in the Secaucus schools:

> "I pledge allegiance to the Flag of the United States and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all;"

and the said Alma and Vivian Hering as members of the company of Jehovah's Witnesses were unable to salute the flag and take the aforesaid pledge of allegiance because of conscientious objections, their religious beliefs and principles, and their manner of religious worship.

Chapter 145, P. L. 1932, reads in part as follows:

> "* * * the board of education shall require the pupils in each school district to salute the Flag of the United States and repeat the oath of allegiance on each school day: * * *"

Neither this statute nor any other of this State sets forth what shall constitue "*the* oath of allegiance for pupils in the public schools." It is contended by counsel for respondent that "the oath of allegiance" set forth in 3 C. S., page 3768, Section 1, is contemplated by Chapter 145, P. L. 1932, and reads as follows:

> "I * * * do sincerely profess and swear that I do and will bear true faith and allegiance to the government established in this State under the authority of the people. So help me God."

With this contention, the Commissioner cannot agree, since Chapter 145, above quoted, does not indicate that the person is to take an oath of allegiance to New Jersey, but is "to salute the flag of the United States and repeat the oath of allegiance." In 1924, the Commissioner of Education sent a bulletin to each school district in the State recommending the use of the pledge of allegiance adopted by the National Flag Conference during that year. This pledge is the same as that used in the public schools of Secaucus as well as in all other public schools throughout the United States. In the Commissioner's opinion this pledge was contemplated by the Legislature in the passage of Chapter 145, P. L. 1932, and accordingly was authorized and required to be repeated by the pupils in this case. This statute is a legislative mandate and gives no discretion to the board of education.

Chapter 1, P. L. 1903, S. S., Section 86, reads in part as follows:

> "The board of education shall have power:
> * * *
> VIII. To suspend or expel pupils from school"

and Section 120 reads in part:

> "Pupils in the public schools shall comply with the regulations established in the pursuance of law for the government of such schools; shall pursue the prescribed course of study and shall submit to the authority of the teacher. Continued and willful disobedience, upon defiance of the authority of the teacher, use of habitual profanity or obscene language shall be good cause for suspension or expulsion from school."

The refusal of the pupils in this case to obey the statutes in saluting the flag and repeating the oath of allegiance, constituted grounds for their suspension at the discretion of the principal and their expulsion by the Board.

Counsel for the petitioners holds that Chapter 145, P. L. 1932, is unconstitutional and that it is in violation of certain provisions of the Constitution of this State which read:

> "Rights and Privileges. No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience * * *" (Article I, Section 3) "* * * no person shall be denied the enjoyment of any civil right merely on account of his religious principles." (Article I, Section 4).

In the case of Lucy Askam et als. *vs.* Board of Education of the Town of West New York, decided by the State Board of Education February 9, 1935, in which there was raised the constitutionality of the act of the Legislature authorizing the reduction of salaries of teachers protected by the Tenure of Office Act, the State Board said:

> "It is true that in some courts, and by some writers on the subject, it has been said that where a judge of an inferior court believes that a statute is without doubt contrary to the Constitution, he should so hold and act accordingly * * *"

but points out that where the unconstitutionality is not clearly apparent, the decision should be left to the higher courts and further says:

> "One of the most eminent and scholarly judges who ever sat in the Surrogate's Courts of New York State, and whose opinions commanded the highest respect, once declared himself as follows:
>
> " 'The transcendant power of declaring an act of the Legislature unconstitutional should never in my opinion be assumed by a court of first instance, except possibly in rare cases involving life or liberty, and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the Legislature void should, I think, be reserved to the graver courts of the State in solemn session *in banc*, or held for the final review of such great questions.' In re Thornburgh, 72 Misc. Rep. 619.
>
> * * * * *
>
> "We are convinced that even should the high courts of the State instruct this Board that it has the power, in the exercise of its judicial functions, to pass on the constitutionality of acts of the Legislature, that power should never be exercised unless the violation of the Constitution is clear and beyond question. In our opinion, this is not such a case and we therefore believe that this Board should decline to pass on the constitutional questions raised by the appellants."

It is the opinion of the Commissioner that in accordance with the foregoing, the determination of the constitutionality of Chapter 145, P. L. 1932, should be left to the higher courts.

Because of the financial inability of the parents in this case to pay for their children's private instruction, the cost of which is now being paid by interested people or organizations, their counsel asks that the Commissioner require the Board of Education of Secaucus to reinstate the pupils in the public schools until the case is finally adjudicated. The Commissioner is without authority to grant this request.

The Legislature of this State imposed upon the Board of Education of Secaucus the duty of requiring pupils to "salute the flag of the United States and repeat the oath of allegiance." When the pupils refused to obey, they were expelled under authority given to boards of education by the Legislature. The Board of Education having acted in accordance with the statutes, the expulsion is valid and the petition is accordingly dismissed.

May 21, 1936.

DECISION OF THE STATE BOARD OF EDUCATION

The appellants are the parents of Alma Hering and Vivian Hering (joined as petitioners) who prior to November 1, 1935, were pupils in the Lincoln Public School in Secaucus. They are members of "Jehovah's Witnesses." On November 15, 1935, they were expelled from the school for refusal to salute the flag and pledge allegiance when required to do so by their teachers, and as a result of such expulsion have been unable to attend their classes. Their parents do not possess the means to send them to a private school and brought this proceeding to compel the Board of Education to reinstate them and relieve them from saluting the flag or taking a pledge or oath of allegiance. The petition contains ninety-one paragraphs setting forth various grounds for the relief prayed for, but it will be unnecessary to refer to them in detail. Neither side desired oral argument and the case was submitted upon the record and the briefs of counsel. The Commissioner has disposed of the case correctly, in our opinion, and it is unnecessary to do more than refer to two principal points:

First: The Hering children were required to recite with their classmates the "pledge of allegiance" which for many years has been recited in all the schools of the State. It is as follows:

> "I pledge allegiance to the Flag of the United States and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all."

Chapter 145 of the Laws of 1932 provides that boards of education shall require pupils on every school day to salute the flag of the United States and repeat "the oath of allegiance." The laws of New Jersey contain the following provision:

> "I * * * do sincerely profess and swear that I do and will bear true faith and allegiance to the government *established in this State* under the authority of the people. So help me God."

The appellants contend that the Chapter 145 of the Laws of 1932 does not apply to their case because the pledge required of the Hering children was not the "oath" which that statute requires, but that such oath is the one above quoted from the Act Prescribing Certain Oaths (3 C. S., page 3768).

It is true that the required pledge is not an oath, but we agree with the Commissioner that it was the thing contemplated by the Legislature in Chapter 145 of the Laws of 1932. The particular pledge of allegiance recited by the pupils of the schools is to the Nation and to its flag, and Chapter 145 requires the salute to the "Flag of the United States." The statute says nothing about allegiance to New Jersey and we agree with the Commissioner that while it used the word "oath" the familiar pledge was intended, and not the oath of allegiance to the government of the State, which its officials must sign as required by the "Act prescribing certain oaths."

Second: The appellants contend that Chapter 145 of the Laws of 1932 is unconstitutional, that it violates certain provisions of our State Constitution:

> "Rights and Privileges. No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience * * *" (Article I, Section 3) "* * * no person shall be denied the enjoyment of any civil right merely on account of his religious principles." (Article I, Section 4).

Relying upon and following the decision of this Board in the case of Askam et als. *vs.* the West New York Board of Education, dated February 9, 1935, in which we declined to pass upon the constitutionality of an act of the Legislature there in question, the Commissioner has declined to pass upon the constitutionality of the statute requiring the pledge of allegiance. In this we think he is right. We will say however that after examination of the briefs of counsel, we can see no reason for holding that the statute is in violation of the Constitution. We fail to see that these pupils were deprived of their privilege of worship according to the dictates of their consciences, or that they were denied the enjoyment of a civil right merely on account of their religious principles.

The Act of 1932 was compulsory. It left the Board of Education no alternative but to expel the pupils. Since the Board complied with the statute its action was valid and we therefore agree with the Commissioner in his conclusion that the petition should be dismissed.

August 1, 1936.

DECISION OF THE SUPREME COURT
No. 207, January Term, 1937

Argued January 20, 1937; Decided February 5, 1937.

On *Certiorari*.

For Prosecutors, Isserman & Isserman, Abraham J. Isserman, Carol King.
For Defendant, George W. King, Jr.
Before Justices Trenchard, Bodine and Heher.

BODINE, J. By Chapter 145, P. L. 1932, page 260, every board of education in this State is obliged to procure a United States flag for each school in the district; the flag is to be displayed upon or near the public school building during school hours. It is also necessary to procure for each assembly room another flag which shall be displayed, and the pupils are required to salute the flag and repeat the oath of allegiance every school day. The precise language exacted in the school in question was as follows:

> "I pledge allegiance to the flag of the United States and to the republic for which it stands, one nation, indivisible, with liberty and justice for all."

Prosecutors seek to review the expulsion of their children, ages 5 and 7, because of their refusal to salute the flag of the United States and pledge allegiance to the flag and republic when required so to do.

It is argued that the statute is invalid as infringing the constitutional and statutory guarantees of equal free schools for all people. We think not. Those who resort to educational institutions maintained with the State's money are subject to the commands of the State. Hamilton *vs.* Regents of California, 293 U. S. 245. The performance of the command of the statute in question could, in no sense, interfere with religious freedom. It is little enough to expect of those who seek the benefits of the education offered in the public schools of this State that they pledge their allegiance to the nation and the nation's flag. The pledge of allegiance is, by no stretch of the imagination, a religious rite. It is a patriotic ceremony which the Legislature has the power to require of those attending schools established at public expense. A child of school age is not required to attend the institutions maintained by the public, but is required to attend a suitable school. Those who do not desire to conform with the commands of the statute can seek their schooling elsewhere.

The order of expulsion under review is affirmed and the writ is dismissed.

REGIONAL BOARD OF EDUCATION AND NOT CONSTITUENT BOARDS ENTITLED TO HIGH SCHOOL APPORTIONMENT

BOARD OF EDUCATION OF LUMBERTON TOWNSHIP AND EASTAMPTON TOWNSHIP, BURLINGTON COUNTY,

Petitioners,

vs.

LOUIS J. KASER, COUNTY SUPERINTENDENT OF SCHOOLS AND REGIONAL BOARD OF EDUCATION OF THE SCHOOL DISTRICTS OF EASTAMPTON, LUMBERTON, HAINESPORT, MOUNT HOLLY AND WESTAMPTON,

Respondent.

For the Petitioners, Jay B. Tomlinson.
For the Respondent, Stanley K. Heilbron.

DECISION OF THE COMMISSIONER OF EDUCATION

At elections held on or prior to January 7, 1935, the School Districts of the Township of Eastampton, Lumberton, Hainesport, Mount Holly, and Westampton, voted to form the Regional Board of Education of the Township of Eastampton, Lumberton, Hainesport, Mount Holly, and Westampton to provide high school facilities for the pupils included within the boundaries of such districts (Chap. 275, P. L. 1931). On January 15, 1935, the County Superintendent of Schools of Burlington County appointed members who, upon organization on January 21, constituted said Regional Board of Education. Under the provision of Chapter 40, P. L. 1935, the corporate name of the district was changed on June 8, 1935, to that of "Rancocas Valley Regional High School." The County Superintendent made his apportionment of school moneys for the school year 1935-1936 as of April 1, 1935, and under the direction of the Commissioner of Education and in compliance with Chapter 408, P. L. 1932, apportioned to the regional board (Section 182, sub-section (h), Chapter 1, P. L. 1903, S. S.,) the amounts for high school pupils that would have been apportioned to the respective districts for the current year if the Regional Board of Education had not been created. From this action, the Boards of Education of the Township of Lumberton and Eastampton appealed to the Commissioner on April 9, 1936, alleging that the apportionment for high school pupils was illegally made to the Regional Board of Education, and petitioning that the Commissioner require the County Superintendent to reapportion the State school moneys so that Lumberton and Eastampton will receive $60 for each pupil attending high school from those townships during the preceding year.

It is the contention of petitioners in this case that the amount apportioned from State funds by the County Superintendent in any year is in fact a reimbursement for the moneys expended by such district for the preceding year, and since tuition was paid by them for these pupils for the year 1934-1935, they are entitled to the apportionment for the school year 1935-1936. With this contention, the Commission cannot agree. The State School Fund was established in 1818 and the income from the fund was first apportioned to school districts under the provision of an act entitled "An act to establish common schools, * * *" approved February 24, 1828. Section 2 of this act reads in part:

> "That since the said appropriation shall be made, it shall be the duty of the said trustees of the school fund to apportion the same among the several counties of this State in the ratio that taxes for the support of the government of this State are paid by the respective counties; * * *"

Clearly, the Legislature in making this provision was not thinking of reimbursing districts for any phase of the preceding year's expenditures, but was establishing an apportionment basis for the moneys to be made available for school purposes for the then current year.

From 1829 until 1867 the Trustees of the School Fund apportioned the income of that fund to the various counties on the basis of the amount raised by the districts or upon the census statistics. (Under an act approved March 14, 1851, the apportionment was made "* * * among the several counties in the ratio of the population thereof as ascertained by *the last preceding census.*")

In 1867, the first State School Tax was levied and this was apportioned together with the income from the State School Fund by the County Superintendents of Schools whose offices were created by Chapter 179, P. L. 1867. Section 21 of this statute provides:

> "That the county superintendent shall apportion annually among the several townships of his county and to the city or cities therein not included in such townships under the board of chosen freeholders, the money belonging to such county in the ratio of the number of children between the ages of five and eighteen as ascertained by *the last preceding annual report* of the State Superintendent of Public Instruction."

Since 1867, various educational statistics of the preceding year have been used to determine the amount of money to be received by school districts for the then current year, and Chapter 1, P. L. 1903, S. S., as amended and supplemented each year has determined the method of apportioning State school moneys since 1903. Under these statutes, the county superintendent is directed to make his apportionment of school moneys on or before April 1 of each year for the ensuing year, based upon the statistics of the then current year. It is very clear that the Legislature intended that the money so apportioned should be used during the ensuing year and that it did not consider it as a reimbursement; since it provides under Section 183 of the act that any balance of the State apportionment remaining in a district at the end of any year

shall be reapportioned among the districts of the county for the next ensuing year, unless the county superintendent for good cause permits such balance to remain in the hands of the custodian of the district having the balance.

Under the contention of the petitioners, if a large borough were formed out of an existing township so that there would be school buildings with 90 teachers in the new district and a building with 10 teachers in the township, the total apportionment of State moneys would go to the township district which would have only one-tenth of its former responsibility, while the new district with nine-tenths of the educational program would receive no money for that year. Chapter 1, P. L. 1903, S. S., Section 33 provides that when a new school district shall have been created during any school year any balance of State apportionments at the close of such year shall be divided between the new district and the district of which it was formerly a part "* * * on the basis of the aggregate number of days attendance of pupils in the public schools as ascertained from the last published report of the Commissioner of Education, * * *" If the new district in such case is to share in the balance of State money at the end of the year, surely it must be expected to equitably share in the apportionment for the succeeding year. Apportionments of State money have been and still are made for use during a certain year, but the proportionate amounts to which districts are entitled for any year are determined by their respective needs as indicated by the statistics of the preceding year.

Traced from the beginning, the right to an apportionment of State school moneys has been established by the district paying the entire cost of the added service during the first year, and the apportionment has been made for the succeeding year because of the indicated need shown by the fact that the service for which the apportionment was made was in effect during the preceding year.

While a district formed prior to the apportionment of moneys by the county superintendent has been legally entitled to a share of the apportionment for the ensuing year, such right has been denied to districts created after the apportionment was made, until the passage of Chapter 136, P. L. 1935, when the Legislature provided as follows:

> "1. When the apportionment of State school moneys shall have been made in any year by the county superintendent and a part of any district becomes a new school district, or a part of another school district, or comes partly under the authority of a regional board of education, the county superintendent, with the approval of the Commissioner of Education, shall reapportion such moneys among the districts affected; or between the district and the regional board, as the case may be, on an equitable basis according to the needs of such districts."

It is urged by the petitioner that Chapter 136, P. L. 1935, was ineffective in the present case because in February, 1935, boards of education had voted moneys for the ensuing year on the belief that they would receive an apportionment similar to that of the previous year, regardless of the creation of the regional board of education.

In the instant case, the Board of Education of the Regional High School District was organized and began to function on January 21, 1935. The county superintendent had not made his apportionments for the year 1935-1936 on the 26th day of March, 1935, the date of the approval of Chapter 136, but even if it were after April 1, and the apportionment had been made, the very purpose of the act was to require reapportionment regardless of whether additional taxes might be necessary in those districts which would receive less State support than that anticipated.

Chapter 408, P. L. 1931, reads as follows:

> "When any school district which has heretofore adopted or may hereafter adopt the provisions of Article XI, Chapter 1, P. L. 1903, Special Session (Union-Graded School), or Chapter 275, P. L. 1931 (Regional Board of Education Act), for the purpose of establishing a high school and such district has prior to the formation of such union-graded school been apportioned by the County Superintendent of Schools sixty dollars ($60.00) for each high school pupil attending school in another district, the county superintendent shall hereafter make such apportionment for the high school pupils of that district to the board of education of the union-graded school or the regional board of education."

The above statute is clear and definite. Under its provision the County Superintendent of Schools of Burlington County had no legal right to apportion to any district other than the Rancocas Valley High School the $60 for each Lumberton and Eastampton Township pupil who attended a high school in another district during the school year 1934-1935. Moreover, the County Superintendent consulted the Commissioner of Education in reference to the apportionment for high school pupils living in the regional district, and he was advised by the Commissioner to make the apportionment to the Regional Board of Education for all such pupils for whom tuition to other high schools had been paid the previous year.

Since the apportionments contested by the petitioners in this case were made by the County Superintendent of Schools to the Board of Education of the Rancocas Valley Regional High School in accordance with the statutes, the petition is dismissed.

June 15, 1936.

Decision of the State Board of Education

This is an appeal from a decision of the Commissioner of Education in which he sustains an apportionment of school moneys by the County Superintendent of Burlington County to the Rancocas Valley Regional High School, for the school year 1935-1936. The apportionment was made as of April 1, 1935.

On January 7, 1935, the legal voters of the school district of Lumberton voted to become part of a regional high school district composed of the school districts of the townships of Eastampton, Lumberton, Hainesport,

Mount Holly and Westampton, which is now known as the Rancocas Valley Regional High School District.

The same evening appellant formulated its budget for the school year 1935-1936, and included therein as anticipated revenue $60 for each of the 45 high school pupils who were then attending the Mount Holly High School from Lumberton. The voters of appellant adopted the budget on February 13, 1935.

On January 15, 1935, the various districts which comprised the newly created regional high school district were notified by the county superintendent, by letter, to elect members of the regional high school board of education, specifying the number of members each district should elect and their term. Said letter also contained the following statement:

> "The local boards of education will make no provisions in their budgets for the coming year for the cost of high school pupils. This applies to both tuition and transportation."

Although the clerk of appellant says he must have got the letter, no change was made in the proposed local budget, although it was not submitted to the voters until February 13.

As of April 1, 1935, although actually at a much later date, the county superintendent apportioned the State school moneys for high school pupils of appellant who had theretofore attended high school at Mount Holly, to the Rancocas Valley Regional High School. The result is appellant is deprived of $60 of anticipated revenue for each of 45 high school pupils, making a total sum of $2,700.

Appellant filed its petition to the Commissioner of Education, maintaining such apportionment is illegal, praying that the county superintendent be directed to make a reapportionment to the end that it be paid said sum of $2,700, in reimbursement, as it claims, of the tuition paid by it to Mount Holly for the year 1934-1935.

The county superintendent justifies his apportionment by referring to Chapter 408, P. L. 1931, which provides:

> "When any school district which has heretofore adopted or may hereafter adopt the provisions of Article XI, Chapter 1, P. L. 1903, Special Session (Union-Graded School), or Chapter 275, P. L. 1931 (Regional Board of Education Act), for the purpose of establishing a high school and such district has prior to the formation of such union-graded school been apportioned by the county superintendent of schools sixty dollars ($60) for each high school pupil attending school in another district, the county superintendent shall hereafter make such apportionment for the high school pupils of that district to the board of education of the union-graded school or the regional board of education."

The foregoing statute is clear and unambiguous and unless it is shown that for any reason it is not applicable to the situation existing in this case, ap-

pellant's case must fail. The Commissioner of Education deemed appellant's contentions were without merit and dismissed the appeal.

Appellant contends that the apportionment of school money as directed by the statute (Sec. 182, Paragraph (h) Compilation of School Laws 1931, page 191) is a reimbursement to the school district for tuition expense incurred during the year past. The apportionment is that of the reserve fund consisting of ten per centum of the State school tax. It includes allotments to school districts for many other purposes than on account of high school tuition for pupils attending in districts other than in which they reside.

The method of ascertaining the amount of the reserve fund to be allotted to each school district and the respective sums to be allotted for each purpose and the mechanics of collection and distribution are set out in Article XVII of the School Law. While the amount of allotment is based on statistics of the current school year, required to be furnished by the county superintendent, the disbursement is contemplated as being made in the future. The whole scheme indicates that the school tax is levied and collected for the year ensuing the assessment and not for the preceding year.

Appellant further contends it has a vested interest in the allotment for high school tuition for the year 1935-1936, because as it says, when it makes a contract with the receiving district for the education of its high school pupils, a contract arises between the sending district and the State for a share of the State School Fund. The amount of allotment of school money and the purpose thereof are matters wholly in the control of the Legislature, which it can modify or even abolish at its pleasure. No contract, either express or implied, is created between the State and the various school districts by the Legislative scheme contained in the school law for the assessment, collection, and distribution of the State school tax or any part thereof.

Reference is also made to Chapter 136, P. L. 1935. This act provides that if, after the apportionment of school moneys shall have been made, a part of any district becomes a new school district or part of another district, or comes partly under the authority of a regional board of education, the county superintendent, with the approval of the Commissioner of Education, shall make a reapportionment. In our opinion this act is not applicable to this case.

We conclude the decision of the Commissioner of Education should be affirmed and it is so recommended.

January 9, 1937.

LIABILITY OF NEW DISTRICT FOR SHARE OF DEFICIT OF OLD DISTRICT

THE BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FALLS,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON,

Respondent.

J. W. DeYoe, for the Appellant .
Jacob Veenstra, for the Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

By an act of the Legislature in 1914 the Borough of West Paterson was created out of a part of the Township of Little Falls, in Passaic County. The territory comprising the Borough of West Paterson contained three schools known under the old school district as No. 3, No. 5 and No. 6. Under the law the Board of Education of Little Falls Township continued in control of the schools up to June 30, 1914.

All claims against the Board of Education of the Little Falls school district, as it existed before the separation, had to be paid by the Board out of funds belonging to the old district. It was found by Mr. Hopkins, the inspector of accounts of the State Board of Education, that on June 30, 1914, after meeting all the claims against the old district, there was a deficit of $3,227.62. In addition to this, on July 1, there came due semi-annual interest on a bond issue of $26,000 covering the cost of building a school within the territory of West Paterson Borough, amounting to $585. This was paid by the Board of Education of the old district. After this payment there would thus be a total deficit of $3,812.62.

Claim is made by the Board of Education of the Township of Little Falls that the new borough should pay its proportionate share in this indebtedness. This proportionate share is based upon the ratables in the two districts as they now exist. It is agreed by the two municipalities that the ratio of ratables is as 30 is to 70, the West Paterson district having 30 per cent of the ratables and the Little Falls district having 70 per cent of the ratables.

This appeal is taken by the Board of Education of the Township of Little Falls for the purpose of compelling the Board of Education of the Borough of West Paterson to pay 30 per cent indebtedness existing at the time of the separation.

If, instead of a deficit, there had been a surplus, then it would be quite clear that West Paterson would be entitled to 30 per cent of such surplus. It does not change the justice of the matter that instead of a surplus there is an indebtedness. In my opinion, the West Paterson Board of Education should pay its just share of an indebtedness for which it had a benefit before the separation.

The amount of indebtedness was plainly set forth in the examination of the accounts by Mr. Hopkins. This indebtedness, with the $585 interest on the bonds paid by the old Board, amounting all told to $3,812.62, is the total amount of indebtedness, 30 per cent of which is justly owed by the Board of Education of the Borough of West Paterson.

February 28, 1917.

Decision of the State Board of Education

In 1914, by legislative act, the Borough of West Paterson was created and set off from the Township of Little Falls, Passaic County. The new Board of Education of West Paterson, under the law, took over in its district three schoolhouses and grounds formerly under the control of the Board of Education of Little Falls, and also assumed a bond issue of $26,000, which money had been raised and expended in building one of the three schoolhouses taken over by the new Board.

The transfer took place July 1, 1914. On that date the old district of Little Falls paid $585, interest due on the $26,000, which it now seeks to recover. On that date, also, according to the audit of the inspector of accounts of the State Board of Education, there was a general unpaid indebtedness of the Board of Education of Little Falls amounting to $3,227.62. The Board of Education of Little Falls contends that the new district of West Paterson, being a portion of Little Falls at the time the indebtedness was incurred, benefited by the expenditure of the money, and is, therefore, liable now for its share of that money indebtedness. The parties agree that according to the ratables the proportion of West Paterson was and is 30 per cent of the whole, and that percentage of the indebtedness is now claimed by the Board of Education of Little Falls as due from the new Board of Education of West Paterson.

The respondent, the Board of Education of West Paterson, denies that it is responsible for any *general deficiency* under the law, and denies its obligation to pay any portion of the $585 interest due on the $26,000 bonded debt. The issue thus joined was duly heard before the Commissioner of Education and a decision reached. The appeal is now from that decision to the State Board of Education.

1. In the matter of the interest on the $26,000 of bonds it was an indebtedness incurred by the old Board of Education of Little Falls during the six months just before the West Paterson district was formed. As an obligation of the old Board it was shared in by the whole district, as were also the benefits resulting from it. It should be added to the general indebtedness of

the Little Falls district of $3,227.62. The total indebtedness thus amounts to $3,812.62.

2. As regards this general indebtedness of $3,812.62 it is ingeniously argued by the counsel for the Board of Education of West Paterson that the State School Law makes no provision for sharing a deficit. But they do make provision (Article V, section 40) for sharing a surplus, and the lack of such provision for an indebtedness seems to have been a mere oversight. At any rate, it is a reasonable contention that where a school district in a division of territory profits by acquiring school property it should also share in the expense formerly incurred in maintaining and administering that property. The learned counsel for the respondent cites numerous cases in corporation law upholding the contention that when a new corporation breaks away from an old corporation all liabilities are assumed by the old corporation. The citations are just a little beside the mark. They state that the old corporation also assumes *all of the assets.* That is quite different from the present case because here the new West Paterson district shares in the division, takes over property belonging to the old Little Falls district, and should, therefore, pay its proportionate share of the indebtedness of the old district. It cannot share in the assets and go scot-free of the liabilities. It is responsible to the Board of Education of Little Falls for 30 per cent of the deficit of $3,812.62, or the sum of $1,143.78.

With these emendations the decision of the Commissioner of Education is affirmed.

June 2, 1917.

ILLEGAL USE OF SCHOOL FUNDS FOLLOWING DIVISION OF DISTRICT

UPPER DEERFIELD TOWNSHIP BOARD OF EDUCATION,

Appellant,

vs.

DEERFIELD TOWNSHIP BOARD OF EDUCATION

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The Upper Deerfield Township Board of Education appeals from the action of the Deerfield Township Board of Education in expending money for extraordinary repairs upon the schools of Deerfield Township after December, 1925, when a section of Deerfield Township School District became a part of the School District of Upper Deerfield Township.

Appellant asks that respondent be directed to pay to the Board of Education of Upper Deerfield Township the just proportion of the amount so expended

which it contends should have been included in the balance on hand at the close of the school year.

A hearing in this case was conducted by the Assistant Commissioner at Bridgeton on Friday, November 19, 1926.

The following appears from the testimony:

The section which became annexed to Upper Deerfield Township School District includes the school buildings of Friendship, Loder and Woodruff. The buildings which are located in what is now Deerfield Township are Rosenhayn, Carmel and Carton Road.

The following expenditures for repairs were made during the school year:

Friendship	$19.80
Loder	1,262.74
Woodruff	1,573.75
Total	$2,656.29
Rosenhayn	$2,308.13
($1,752.47 being for extraordinary repairs.)	
Carmel	2,548.42
($1,613.50 being for extraordinary repairs.)	
Carton Road	814.31
Total	$5,670.86

All building improvements not including incidental repairs were authorized prior to the division of the district in December, 1925, except the extraordinary repairs on the Rosenhayn and Carmel Schools which amounted to $3,365.97. The repairs on these schools were authorized by the Board March 13, 1926, and obligations of the Board under the contracts were paid on or before June 30.

Section 43, page 28 of the 1925 Compilation of the School Law provides as follows:

> "Whenever a new school district shall be created, the children residing in said new district shall continue to attend the schools in which they shall be enrolled until the end of the then current school year. In case there shall be a schoolhouse in such new district in which school shall be then maintained the board of education of the school district from which such new district shall have been set off shall have charge and control of such school until the end of the then current school year, and shall pay the salaries of the teachers, janitors and other persons employed in such school until the end of said year. In case there shall be any balance at the end of said school year in the hands of the custodian of the school moneys of the school district to the credit of the school district from

which said new district shall have been set off, said custodian shall certify to the county superintendent of schools the amount of such balance, and what portion of such balance was received from State appropriations, State school tax and interest of the surplus revenue, and what portion was received from district school tax. Said county superintendent of schools, upon receipt of such notice, shall divide between said districts that portion of the balance arising from the State appropriation, State school tax and interest of the surplus revenue on the basis of the aggregate number of days attendance of pupils in the public schools as ascertained from the last published report of the Commissioner of Education, and shall divide between said districts that portion of said balance arising from district school tax on the basis of the respective ratables of said districts, and shall issue an order in favor of the custodian of the school moneys of such new district for that portion of said balance found to be due said district from the district from which it shall have been set off."

It is the opinion of the Commissioner that the above section applies to parts of districts set off which are annexed to other districts as it does to parts of districts set off which become separate school districts.

What expenditures may be legally made by a board of education after a portion of the school district has become another district or is annexed to another district? The law above quoted provides that the schools which are included in the district set off shall be in charge and control of the board of education of the district from which such new district shall have been set off until the end of the then current school year and said board shall pay the salaries of the teachers, janitors and other persons employed in such schools until the end of said year, and that the balance on hand at the end of the school year shall be divided between the two districts. This clearly implies the same conduct of the schools remaining in the district in order that balances to be divided shall be just and equitable.

When a portion of a district becomes a new district or a portion of another district, the members residing in the section set off cease to be residents of the district and vacancies thus created are filled by residents of the remaining territory, and thereafter the section which was set off is not represented on the board. If all remaining funds could be used at the discretion of the board without regard to the rights of the section set off, it could use up all current expense money by buying for future years books, supplies, fuel, etc., so that no balance would remain in the current expense account, and it could likewise make repairs which would use all funds in the building and repair account. If amounts on hand were sufficiently large, it could by authority of the voters of the district exclusive of the section set off vote to use the balance for a new school building.

It is the opinion of the Commissioner that the Legislature intended to confer on the board having charge of the schools no authority to make extraordinary repairs after a section of a district had been set off. Extraordinary expenditures not required because of emergencies for which contracts are made after the separation of the district cannot deprive the district which includes the

section set off from receiving its proportional share of moneys which should have remained as balances.

The County Superintendent is therefore directed to apportion the sum of $3,365.97 between the districts of Deerfield Township and Upper Deerfield Township according to their respective ratables, and the Board of Education of Deerfield Township is hereby ordered to pay to the Board of Education of Upper Deerfield Township the amount apportioned to it.

December 7, 1926.

CLASSIFICATION OF TEACHERS BY COUNTY SUPERINTENDENT FOR APPORTIONMENT PURPOSES INCONTESTABLE AFTER STATE MONEYS HAVE BEEN DISBURSED

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,
Appellant,

vs.

WALTER B. DAVIS, SUPERINTENDENT OF SCHOOLS OF MORRIS COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

The records in this case show that for a number of years the appellant has employed special instructors as follows: One in music, one in art, two in physical education (one for girls and the other for boys). All of these persons taught classes in the high school and devoted some time to supervision or teaching in the elementary grades.

Section 182, Chapter 1, P. L. 1903, S. S., provides an apportionment of $400 for a supervisor or a permanent teacher in a high school, and $200 for a permanent teacher in the elementary school.

The Superintendents of Schools of Morris County have always considered that the work of the above mentioned employees constituted both supervision and teaching. They, therefore, apportioned $400 for each of two of the teachers, and $200 for each of the others. Apportionment sheets, setting forth the number of supervisors and teachers for which apportionments were made, have been sent each year to appellant, and prior to September 19, 1933, no objection was raised by the Board. On that date a formal decision was rendered in a case then before the Commissioner (Williams *vs.* Madison) in which it was held that the work performed by the special instructor in music classified her as a supervisor, which entitled the Board to an apportionment of $400. The Madison Board then felt aggrieved that throughout the time of employment of this instructor it had not received the $400 annual apportionment and accordingly filed a formal petition with the Commissioner under date

of December 8, 1933, in which it asked that he direct the County Superintendent to make an apportionment for the annual deficiency of $200 since 1918.

The respondent contends that for apportionment purposes the classification of an instructor as a teacher or supervisor is discretionary with him until his rulings are reversed by the Commissioner of Education or an appellate court, and that after State moneys have been apportioned by him and paid to the school districts of his county, such apportionments may not thereafter be legally contested. He sets forth that in accordance with the decision of September 19, 1933, he has apportioned $400 for the supervisor of music for the school year 1933-34.

The Commissioner concurs in the contention of the respondent in that for apportionment purposes the classification of employees of a board of education is discretionary with the county superintendent until formally reversed by a decision under the School Law, and that the apportionments are incontestable after all State moneys have been disbursed by him for any school year and the financial records of such year are closed.

Since the Madison Board of Education has annually received a statement of the apportionment of school moneys made by the County Superintendents, setting forth the classification of the educational employees of the district, including the special instructor in music, and during the past fifteen years has entered no formal protests, the apportionments made prior to the current year are finalities and are, therefore, now incontestable. The appeal is accordingly dismissed.

April 26, 1934.

BOARD OF COMMISSIONERS MUST APPROPRIATE MONEY LEGALLY CERTIFIED BY BOARD OF SCHOOL ESTIMATE

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Appellant,

vs.

BOARD OF COMMISSIONERS OF THE CITY OF BAYONNE,

Respondent.

For the Appellant, Daniel J. Murray.
For the Respondent, Alfred Brenner.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the City of Bayonne at a meeting held October 19, 1933, adopted a resolution setting forth the necessity of erecting a new senior high school building and the preparation of plans, specifications and borings for said building. It determined $15,000 to be necessary in addi-

tion to a previous appropriation of $20,000, and directed that a statement thereof be delivered to each member of the Board of School Estimate. The resolution was sent to each member of said board on October 20, 1933, and at a meeting on November 21 it fixed and determined the sum of $15,000 to be necessary and two certificates of such amount were ordered to be made; one to be delivered to the Board of Education, and the other to the Board of Commissioners of the City of Bayonne. Such certificates were forwarded by the Secretary of the Board of School Estimate on November 21, 1933. At a meeting on December 5, 1933, the City Commissioners introduced and approved on first reading an ordinance authorizing the issuing of temporary notes or bonds of the City of Bayonne for $15,000 as certified by the Board of School Estimate. On December 19, 1933, the ordinance was given a second reading, and thereafter at the same meeting a resolution for its final adoption was declared lost. The Board of Commissioners on January 2, 1934, refused to pass a resolution to readvertise the ordinance, and on January 16, 1934, a similar resolution was likewise defeated.

In a petition dated March 1, the Board of Education of the City of Bayonne asks that the Commissioner of Education issue an order to require the Commissioners of the City of Bayonne to make the appropriation in compliance with the provisions of Section 76, Chapter 1, P. L. 1903, S. S.

Counsel for respondent contends that the Commissioner of Education is without jurisdiction in this case, that the demand upon them to appropriate $15,000 is premature because such sum is to make payment upon a bill for plans and specifications which should not become due until the cost of the proposed building is known, and that since an application has been made for Federal Public Works Administration funds, no appropriation by the Board of Commissioners is necessary at this time.

Counsel for appellant holds that this case is controlled by that of Montclair *vs.* Baxter, 76 N. J. L., p. 68, with which contention of the Commissioner agrees. The syllabus of that decision is as follows:

> "1. Under section 76 of the School Law (Pamphlet Laws 1903, Second Special Session), when the Board of School estimate have fixed and determined the amount necessary for the purchase of land and erection of a schoolhouse, it is mandatory upon the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax, or to borrow the same and secure its repayment by the issue of bonds.
>
> "2. When the body having power to make appropriations of money raised by tax fails to provide for the amount fixed and determined by the Board of School Estimate, a controversy has arisen under the school laws, and the remedies by appeal to the State Superintendent of Public Instruction and the State Board of Education must be exhausted before recourse is had to the Courts."

The present case constitutes a controversy and dispute under the School Law. The City Commissioners cannot set up as a reason for failing to make

an appropriation that moneys are not yet due or may be derived from other sources. The Board of Commissioners is not clothed with authority to determine the necessity of an appropriation since that function is vested in a Board of School Estimate. After a Board of School Estimate has fixed and determined an amount necessary for the purposes enumerated in Section 76, Chapter 1, P. L. 1903, S. S., the Board of Commissioners is required to appropriate such amount. The Board of Commissioners of the City of Bayonne is, accordingly, directed to forthwith appropriate the amount certified by the Board of School Estimate under its resolution adopted May 21, 1933, and to make available the amount therein certified to the Board of Education of the City of Bayonne.

April 2, 1934.

MUNICIPAL OFFICIALS MUST PAY TO SCHOOL CUSTODIAN MONEYS APPROPRIATED FOR CURRENT EXPENSES WHEN LEGALLY REQUISITIONED BY BOARD OF EDUCATION

HELEN GERBA, ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF THE CITY OF GARFIELD, ET ALS.,
Respondents.

For the Appellants, Merritt Lane.
For the Respondent, Richard J. Baker.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners, including approximately 116 teachers employed by the Board of Education of the City of Garfield, set forth in their petition: That their salaries remain unpaid since October 15, 1932, to the close of the school year in June, 1933; the amount owing them is approximately $360,000, and they have received no salary payments since October 15 except an installment in March, 1933, for services rendered prior to October 15. They pray that the Commissioner of Education shall direct the Mayor and Common Council of the City of Garfield to cause to be paid to the Custodian of the School District of the City of Garfield moneys for their salaries in accordance with the appropriations made by the Board of School Estimate, and that the Board of Education of the City of Garfield upon receipt of such moneys, by its custodian, be directed to cause payments to be made of the amounts respectively due petitioners.

Chapter 1, P. L. 1903, Section 75, provides for the raising of moneys for the current expenses incident to the maintenance of public schools, including the salaries of teachers. Section 76 of this act sets forth the procedure of

providing funds for the erection of school buildings. These sections are practically synonymous in the method of fixing the responsibility for raising moneys for school purposes, except that the latter permits the issuance of bonds which are subsequently redeemed by the same method of taxation.

The Supreme Court in the case of Montclair *vs.* Baxter, 76 N. J. L. 68, held that under Section 76, when a Board of School Estimate has fixed and determined the amount necessary for the purchase of land and the erection of a building, it is mandatory upon the body having the power to make appropriation of money raised by tax, to cause the amount to be raised, or to borrow the same and secure its repayment by the issuance of bonds. This ruling of the Court in relation to Section 76 definitely applies to Section 75 wherein it holds that it is mandatory upon the body having the power to make appropriations to raise the money by taxation.

In the instant case the evidence shows that the amount of money believed to be necessary for current expenses of the school was certified to the council, taxes were assessed for that purpose, and requisitions for such funds have been made to the mayor and council by the board of education. The mayor and members of the council testified: The financial condition affecting the entire country during the present and two preceding years has been severely felt in the City of Garfield due to the closing of a number of factories upon which many of the families have depended for a livelihood; council has been unable to secure the necessary funds either through the payment of taxes, borrowing from banks or by the sale of tax lien securities, and money of the city was desopited in a bank which was subsequently closed by State or national authority, which money has been and is unavailable to the city officials.

It was, however, shown by counsel for appellants that the mayor and council directed that an unjust proportion of the taxes collected be used for the payment of bonds and interest, thus depriving the board of education of a proportionate part of the revenue collected. It is not necessary in this case to determine what part of the amount collected from taxes should have been paid to the custodian of the district.

Under the provisions of Chapter 1, P. L. 1903, S. S., Section 75, taxes have been assessed by the officials of the City of Garfield for the purpose of providing funds for the payment of the teachers of the school district. Therefore, in accordance with the decision of the Supreme Court and the statutes above cited, the Mayor and Council, the Collector, and the Treasurer of the City of Garfield, acting in accordance with their respective legal functions, are hereby directed to raise and to pay to the Custodian of School Moneys of said district such part of the amount appropriated for current expenses as has been requisitioned by the board of education, and upon receipt thereof by the custodian, the board of education is directed to pay to the petitioner the moneys thus made available for that purpose.

July 17, 1933.

TOWNSHIP OFFICIALS MUST CAUSE PAYMENT TO BE MADE OF AMOUNTS OWED BY THEM TO A SCHOOL DISTRICT

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,

Appellants,

vs.

WEST DEPTFORD TOWNSHIP COMMITTEE AND CHARLES B. LEONARD, TREASURER, WEST DEPTFORD TOWNSHIP,

Respondents.

For the Appellants, Daniel W. Beckley.
For the Respondents, James Boyd Avis.

DECISION OF THE COMMISSIONER OF EDUCATION

The district school taxes levied in the Township of West Deptford and the amounts paid to the Board of Education for the past three years are as follows:

Year	*Levied*	*Paid to Board of Education*
1930-31	$84,335.00	$49,000.00
1931-32	74,625.00	72,836.00
1932-33	64,600.00	38,265.00

making a total balance due the Board of Education for that period as of June 30, 1933, $63,460. The municipal officers have paid all State school taxes which are due, and have transmitted to the Custodian of School Moneys an amount in excess of what would have been paid if the collected taxes had been proportionately distributed for the purposes for which they were levied. The evidence indicates that the moneys paid during the latter part of the school year 1932-33 upon requisitions for that year were derived from taxes collected upon the levy for the succeeding year. Counsel for respondent contends that this case is not properly before the Commissioner because the statutes relative to the duties of the township committee and treasurer are to be found in Chapter 236, P. L. 1918, entitled "An act for the assessment and collection of taxes." If there were no provisions in the School Law for the payment of taxes by municipal officers, the Commissioner would agree with this contention. In the statutes relating to public schools, Section 185, Chapter 1, P. L. 1903, S. S., reads as follows:

> "The person designated by law as the custodian of the moneys belonging to the municipality in which the school district shall be situate, or the collector when designated by such board of education, shall be the custodian of the school moneys of such district."

and Section 186 of the same act provides:

> "The collector or treasurer of each municipality in which a school district shall be situate, shall pay to the custodian of the school moneys of such school district the amount ordered to be assessed, levied and collected in such municipality for the use of the public schools therein, exclusive of the State School Tax on the requisition or requisitions of the board of education."

The above school statutes are not inconsistent with and are not repealed by Chapter 236, P. L. 1918, to which appellant refers. In Section 605 of the latter act it is provided that the *governing body shall cause the treasurer to pay to the custodian of the board of education the moneys due the school district as requisitioned by the board;* while Section 186, above quoted, provides that the *collector or treasurer shall pay upon the requisitions of the board of education the amounts due the board of education by the municipality.* Under similar statutes relating to school districts governed by Article VI of Chapter 1, P. L. 1903, S. S., the Supreme Court has ruled that the Commissioner not only may hear such controversies, but that he has original jurisdiction, and the remedies of his Court, which is a special tribunal, must first be exhausted before recourse may be had to the civil courts. (Montclair *vs.* Baxter, 76 N. J. L. 68; Thompson *vs.* Board of Education, 57 N. J. L. 628.)

The Commissioner, in ruling upon the payment of requisitions of one year with taxes collected for a succeeding year, in the case of Sich, et al. *vs.* The Collector, The Treasurer, The Township Committee, and the Board of Education of Woodbridge Township, decided during December, 1933, said:

> "The testimony supports the contention of respondents' counsel that the Board of Education for the year 1932-33 received a larger proportion of its appropriation than did the municipality, but the evidence indicates that in paying this larger proportion, the municipal officers used moneys collected on the 1933 tax levy which was appropriated for the use of the schools during the year 1933-34. If 1933 taxes were paid to the Board of Education upon the requisitions of the preceding year, the treasurer did not state to the custodian the source of such revenue. When requisitions are made by a board of education for the expenses of the current year and money is paid upon such requisitions by the municipal treasurer without designation of its source, it must naturally be assumed by the custodian that such funds are legally applicable to the current bills. It is the opinion of the Commissioner that a treasurer may not legally pay moneys to a custodian for the obligations of a current year with receipts from taxes levied for a subsequent year.

While the municipal officers of the Township of West Deptford have paid their State School Tax and have paid to the Board of Education an amount at least equivalent to its proportionate share of the taxes collected, the fact remains that as of June 30, 1933, it was obligated to the Board of Education in the amount of $63,460. The committee and treasurer of the Township of

West Deptford, acting within the authority conferred upon them, are directed to cause payment to be made to the custodian of the school district of the Township of West Deptford of the sum of $63,460, which was the amount due and remaining unpaid on June 30, 1933.

December 30, 1933.

MUNICIPAL OFFICERS ARE REQUIRED TO PAY BOARDS OF EDUCATION PROPORTIONATE SHARE OF COLLECTED TAXES

FRANK E. SIEH AND RUTH A. NUMBERS, TRUSTEES FOR THE TEACHERS OF THE SCHOOL DISTRICT OF WOODBRIDGE TOWNSHIP,

Appellants,

vs.

THE COLLECTOR, THE TREASURER, THE TOWNSHIP COMMITTEE, AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,

Respondents.

For the Appellants, Kass & Kass.

For the Respondents, Henry St. C. Lavin for Township, J. H. Thayer Martin for Board of Education.

DECISION OF THE COMMISSIONER OF EDUCATION

The appellants, trustees for 180 teachers employed by the Board of Education of the Township of Woodbridge, petition the Commissioner to require the Board of Education to pay their salaries as money is made available for that purpose by the municipal officials and to direct the tax collector, the treasurer, and the township committee, acting within their legal authority, to cause to be paid to the Board of Education the sums levied by taxation for educational purposes for the school year 1932-1933.

Section 185, Chapter 1, P. L. 1903, S. S., provides:

> "The person designated by law as the custodian of the moneys belonging to the municipality in which the school district shall be situate, or the collector when designated by such board of education, shall be the custodian of the school moneys of such district."

Section 186 of the same act reads:

> "The collector or treasurer of each municipality in which a school district shall be situate, shall pay to the custodian of the school moneys of such

school district the amount ordered to be assessed, levied and collected in such municipality for the use of the public schools therein, exclusive of the State School Tax on the requisition or requisitions of the board of education."

Section 605 of "An act for the assessment and collection of taxes" approved March fourth, one thousand nine hundred and eighteen, is not inconsistent with the provisions of the School Law above cited. Section 186 of the School Act states that *the collector or treasurer shall pay upon requisitions of the board of education, the amounts due the board of education by the municipality,* while Section 605 of the Tax Act provides that *the governing body shall cause the treasurer to pay to the custodian of the board of education the moneys due the school district as requisitioned by the board.*

This case comes to the Commissioner for adjudication under Sections 178, 185, and 186 of Chapter 1, P. L. 1903, S. S., as amended and supplemented.

The tax levy for local school purposes in Woodbridge Township for the school year 1932-33 was $551,459.58, and for the State School Tax $57,535.28. The latter amount has not been paid in full or in part, and accordingly the Board of Education has been deprived of all the State School Tax apportionments. The State apportionments still due the school district and largely dependent upon the payments of the State School Tax by the municipal officials amount to $82,692.89. Of the $551,459.58 of local school taxes levied there were paid to the custodian up to September 30, 1933, the sums of $357,644.00 in cash and $45,125.00 in baby bonds, leaving a balance due to the Board of Education of $148,689.59.

The testimony supports the contention of respondents' counsel that the Board of Education for the year 1932-33 received a larger proportion of its appropriation than did the municipality, but the evidence indicates that in paying this larger proportion, the municipal officers used moneys collected on the 1933 tax levy which was for the use of the schools during the year 1933-34. If the 1933 taxes were paid to the Board of Education upon the requisitions of the preceding year, the treasurer did not state to the custodian the source of such revenue. When requisitions are made by a board of education for the expense of a current year and money is paid upon such requisitions by the municipal treasurer without designation of its source, it must naturally be assumed by the custodian that such funds are legally applicable to the current bills. It is the opinion of the Commissioner that a treasurer may not legally pay moneys to a custodian for the obligations of a current year with receipts from taxes levied for a subsequent year.

Section 178, Chapter 1, P. L. 1903, S. S., provides that in case any collector or other officer having the custody of collected taxes shall fail or neglect to pay to the county collector the full amount of the State School Tax due from his taxing district on or before the 22nd day of December, the county superintendent shall withhold from the co-extensive school district the full amount apportioned out of the reserve fund, and the body having control of the finances of any such municipality "shall forthwith appropriate to said school district, out of any funds under its control, a sum equal to the amount so withheld,

and in case there shall be no funds available for such purpose the body having control of the finances of such municipality shall borrow and appropriate a sum sufficient for such purpose and shall place the amount so borrowed in the next annual tax levy."

Counsel for the township officials submits evidence to show that they were unable to borrow money with which to meet in full their obligations to the school district or with which to pay the State School Tax. The local tax levy in Woodbridge Township was allocated as follows:

State and county taxes	$276,791.02	
Local school	551,459.58	
Township	352,379.02	
Total		$1,180,629.62
The tax collections on this budget as of September 30, 1933, were		
In cash	640,112.36	
In baby bonds	56,105.00	
Total		$696,217.36

With a total cash collection in taxes in excess of $640,000, there would appear to be no legal justification for the failure to pay the State School Tax, since the Supreme Court in the case of Tipping *vs.* Dougherty et al. decided December 5, 1933, in ruling upon the priority of State and county tax payments, held:

> "We think that the obvious answer to all that is this: The city treasurer clearly disregarded the ministerial duty imposed upon him by statute, to make payments of State and county taxes annually out of the first moneys received by him, and that he disregarded such duty by diverting the money to sinking funds and other purposes.
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> * * * * *
>
> "'No excuse for failure to perform the duty imposed by statute can avail if the local collector has received from the general taxation in the municipality sufficient to pay such county taxes. They must be paid as fast as collected, as the law appropriates all the moneys collected until they are all paid and until the primary obligation to the county is discharged.'"

Since there is due to the Board of Education of the Township of Woodbridge from the treasurer and township officials the sum of $148,689.59 from district school taxes levied for the school year 1932-33, the township committee, collector, and treasurer, acting within their respective legal functions, are hereby directed to raise and to pay to the Custodian of School Moneys of the District of the Township of Woodbridge said amount of $148,689.59; and if the reserve fund due to the Board of Education from the State School Tax has been re-apportioned to other districts by the County Superintendent of Schools of

Middlesex County, then the municipal officers are directed to borrow a sum sufficient for that purpose and to place such amount in the next annual tax levy. Upon receipt by the custodian of any moneys from the township treasurer or from State apportionments, the Board of Education is directed to cause payment to be made to appellants of at least that proportion of the receipts which the amount due to them bears to the outstanding obligations of the Board for which such funds may be legally used.

December 30, 1933.

LEGALITY OF TRANSFER BY CITY BOARD OF APPROPRIATION IN BULK

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Appellant,

vs.

JOHN J. RYAN, CUSTODIAN OF SCHOOL MONEYS,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Only issues of law are involved in the case under consideration, and it was accordingly agreed by both appellant and respondent that decision be rendered on the pleadings and briefs of counsel without the necessity of a formal hearing.

It appears that on September 9, 1926, the Board of Education of the City of Bayonne adopted a resolution providing for the transfer of the sum of $25,000 from the current expense to the building and repair account of the district, and that accordingly a warrant duly signed by the president and secretary of the Board of Education was forwarded to the Custodian of School Moneys together with a copy of the resolution above referred to for the purpose of effecting the transfer. On September 16 the respondent informed the Board of Education that he could not make the transfer of funds ordered by the Board without the consent of the Board of School Estimate, which in this case had not been asked or given.

The respondent in answering the petition of appeal defends his refusal to obey the order of the Bayonne Board of Education on the ground that he is acting in accordance with the rule of the State Board of Education adopted June 7, 1924, which reads as follows:

> "The district and State appropriation amounts are not subject to transfer from one account to another by resolution of the board of education. A transfer of any part of the district appropriation can be made only by resolution of the Board of School Estimate in Article VI districts and by vote at a regular or special district meeting in Article VII districts. Subdivisions of an 'account' or 'item' may be transferred by the board."

Article VIII of the 1925 Compilation of the School Law provides that all school moneys shall be held in trust by the custodian of school moneys and requires him to pay out such moneys on orders legally issued and signed by the president and district clerk or secretary of the board of education. In the case of The Board of Education of the City of Bayonne against the same respondent, namely, John J. Ryan, Custodian, and Stephen J. Evans, School Auditor, decided by the Commissioner of Education on May 13, 1926, it was held that:

> "Of all school funds, except the proceeds of a bond issue, the custodian of school moneys is according to Section 274, Article XVIII of the School Law, merely a custodian in the most literal sense of the term and must pay out the school moneys held in trust by him by order of the board of Education and on duly executed warrants without any exercise of discretion whatever on his part, and the responsibility is on the board of education alone for any illegal expenditure of school moneys made by it."

In the case under consideration therefore which does not involve the disposition of the proceeds of a bond issue but merely the transfer of annual appropriation funds from one account to another it is the opinion of the Commissioner that the respondent has no choice but to transfer the $25,000 from the current expense to the building and repairs account as ordered by the Board of Education by resolution and by a duly executed warrant, and that the responsibility therefor rests not with the custodian but entirely with the Bayonne Board of Education.

Moreover, it is the opinion of the Commissioner that the Bayonne Board of Education was entirely within its legal rights in ordering the transfer of the $25,000 in question without the consent of the Board of School Estimate even though under the rule of the State Board of Education above referred to the Board of School Estimate had divided the annual appropriation for school purposes into separate items for current expense and building and repairs.

Section 94, of the 1925 Compilation of the School Law, provides that a city board of education shall prepare and deliver to each member of the Board of School Estimate an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools for the ensuing school year, but Section 95 provides that between February 1 and 15 of each year "said Board of School Estimate shall fix and determine the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the county superintendent of schools."

In construing the above law the Commissioner of Education in the case of Hayes *vs.* Townsend, Comptroller, etc. (sustained by the State Board and reported on page 671, 1925 Comp. School Law), held that

> "The language used clearly shows that it was the intent of the Legislature that the annual appropriation should be in bulk and not a separate appropriation for each purpose specified in the itemized statement received

> from the board of education. Had it been the intent of the Legislature that the appropriation should be itemized, the appropriate language would have been 'to fix and determine the several amounts needed for the several purposes specified in the certificate.' "

The Supreme Court also, when the above case reached it on appeal, followed the same line of reasoning:

> "The certificate (of the Board of School Estimate) is not part of the return, and we are therefore not informed whether it simply called for a lump sum or specified the items, but under Section 75 a certificate of a lump sum is plainly sufficient for all that the board of estimate has to determine is 'the amount of money necessary to be appropriated for the use of the public schools in such district for the ensuing school year * * *.' In our view, it became the duty of the Board of Estimate to go over the itemized statement of the Board of Education, and using it as a basis, determine the total amount necessary for the use of the schools. It could reach this result by striking out items or reducing them, but the result reached became a total and it is such total as modified by county appropriation that the board of estimate is to certify and the city council provide in the tax levy."

The above quoted provisions of the School Law upon the subject of the annual appropriation of the Board of School Estimate and as interpreted by the decision of the Commissioner and of the Supreme Court make it evident that after consideration of the itemized statement of the board of education the board of estimate must appropriate in bulk and that any attempt on the part of the latter body through its method of appropriation to control the exact disposition of school funds is a usurpation of the statutory powers of the board of education.

It is further the opinion of the Commissioner that the above quoted rule of the State Board of Education supporting the right of the Board of School Estimate to itemize the annual appropriation for school purposes and thus making the consent of the estimate board necessary to transfer from one item to the other is ineffective. Article I, Section 3 of the 1925 Compilation of the School Law, provides that the State Board of Education shall have power "to prescribe and enforce rules and regulations necessary to carry into effect the schools laws of the State." Any rule of the State Board of Education enlarging or extending the power of a city Board of School Estimate beyond its statutory function of appropriating in bulk the money necessary annually for school purposes is in the Commissioner's opinion inconsistent with the School Law, and hence also an ineffective enlargement of its own powers, namely, "to make rules and regulations necessary to carry into effect the school laws of the State." Appellant cites many convincing authorities, among them Dillon on Municipal Corporations, to the effect that any rule or by-law of a public board or body "which is in conflict with the organic law of the State, or antagonistic to the general law, or inconsistent with the powers conferred upon the board adopting it is invalid."

In view of all the facts in the case it is therefore the opinion of the Commissioner of Education that the Bayonne Board of Education was entirely within its legal rights in ordering the transfer without the consent of the Board of School Estimate of $25,000 from the current expense to the building and repairs account of the district, and that it was the duty of the Custodian of School Moneys to make such transfer upon receipt of a warrant duly executed as required by law. The appeal is accordingly hereby sustained and the respondent, the Custodian of School Moneys, is directed to make the transfer of funds as directed by the Bayonne Board of Education.

December, 1926.

INDEX TO DECISIONS

PARTIES

SUBJECTS